

William Thompson
 Monitor Liability Managers
 2850 West Golf Road, # 800
 Rolling Meadows, IL 60008
wthompson@monitorliability.com
 847-806-6590, ext. 597

Donna Livingston
 Zurich Insurance Company
 1878 Canoe Ridge N.W.
 Kennesaw, GA 30152
donna.livingston@zurichna.com
 404-851-3319

Gregory S. Hyman, Esq.
 Kaufman, Dolowich, Voluck & Gonzo, LLP
 1777 Sentry Park West, #301
 Blue Bell, PA 19422
ghyman@kdvglaw.com
 215-461-1100

Robert L. Craig, Esq.
 Craig, Terrill, Hale & Grantham, LLP
 First Bank Centre
 9816 Slide Road, # 201
 Lubbock, TX 79424
bobc@cthglawfirm.com
 806-744-3232

John P. Nahra, Esq.
 Baker, Keener & Nahra, LLP
 633 West 5th Street, # 5400
 Los Angeles, CA 90071
jnabra@bknlawyers.com
 213-241-0900

Stephen C. Barton, Esq.
 Thomason, Hendrix, Harvey, Johnson & Mitchell, PLLC
 40 South Main, 29th Floor
 Memphis, TN 38103
bartons@thomasonlaw.com
 901-577-6106

Marylou Foley
 ProMutual Group
 P.O. Box 55178
 Boston, MA 02205
mfoley@promutualgroup.com
 617-526-0327

Brian Kern
 Argent Professional Insurance Agency
 30 Technology Drive
 Warren, NJ 07059
bsk@insuranceagent.com
 908-642-4454

Gawain Charlton-Perrin
 CNA Global Specialty Lines
 333 South Wabash Avenue, # 39S
 Chicago, IL 60604
gawain.charlton-perrin@cna.com
 312-822-2033

PROFESSIONAL LIABILITY
 DEFENSE QUARTERLY

WINTER 2011

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Peter Akmajian, Esq.



Janet Linton, Esq.

WHEN MALPRACTICE BECOMES MANSLAUGHTER, OR WORSE

BY: MICHAEL J. KHOURI AND DONALD C. STASTNY

"I know who killed him!" the patient screams as the doctor begins to make the initial incision. "I know who killed him! Get away from him!" the patient screams again. The doctor tries to calm the patient, holding him down on top of the surgical bed. The patient begins to tremble and kick at the air in panic. Seconds later, silence. All that is heard is the vital signs monitor giving the constant tone indicating that the patient has flat-lined.

The doctor and his three medical assistants jump into action. They immediately begin CPR – 30 compressions, 2 breaths, 30 compressions, 2 breaths. Meanwhile, one of the assistants prepares the AED (Automatic External Defibrillator) and connects it to the patient's bare chest. The AED is equipped with voice command technology that automatically analyzes the condition of the patient and instructs the user with spoken prompts. The AED prompts: "No shock advised. Continue CPR." CPR is

continued for another two minutes. Again, the AED advises: "No shock advised." CPR continues – 30 compressions, 2 breaths. After two more cycles of CPR, the AED instructs: "Shock advised. Stay clear of patient. Press flashing orange button." The AED display reads: "Shock delivered," as the doctor presses the orange flashing button. No response. The patient remains flat-lined on the monitor. CPR continues.

This cycle continues for another three hours until the doctor eventually surrenders and pronounces the patient dead.

What went wrong? A week before the surgery the patient had walked into the doctor's office, which is a converted single family home located in a residential neighborhood. The patient complained of abdominal pain and was diagnosed as needing his gallbladder removed. The patient agreed to have what is called a mini-open cholecystectomy using local

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THE CASE FOR AND AGAINST THE "CASE-WITHIN-THE-CASE"

BY: PETER AKMAJIAN AND JANET LINTON

Years ago, I tried a fascinating legal malpractice case in which my client was accused of failing to sue the proper parties in a diving accident case that resulted in catastrophic quadriplegic injuries. The accident occurred in a local community that had a man-made pond. Plaintiff was attending a party on the shores of the pond. After drinking quite a bit, he decided to run and dive into the pond, not bothering to check on the

safety of doing so.

As the result of his injury, he retained my client, who seemingly sued everyone in sight—the sponsors of the parties, the property owners, the hired life-guard and the person who designed the pond. He even sued the DJ! My client litigated the case for several years and settled with a couple of minor players. But on the eve of trial, the plaintiff for some reason

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Michael J. Khouri, Esq.



Douglas C. Stastny, Esq.

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WHEN MALPRACTICE BECOMES MANSLAUGHTER, OR WORSE

anesthesia.

In the U.S., cholecystectomy, or surgical removal of the gallbladder, is considered major surgery and is done in hospitals or out-patient surgery facilities. Most cholecystectomies are done laparoscopically, or with the aid of a camera. While recovery is quicker, the equipment, supplies and training are more expensive with laparoscopy. Open cholecystectomy is done when there are complications during laparoscopy, or if the gallbladder is infected, or is the site of cancer. General anesthesia is the standard for both operations. The mini-open cholecystectomy combines the patient-benefits of laparoscopy (smaller incision and shorter recovery time) with the cost-benefits of open cholecystectomy. Studies show that the mini-open procedure has been performed under both local and general anesthesia.

On the day of the surgery, the patient appeared in the doctor's office. He was prepped for surgery and signed the appropriate medical consent forms. An I.V. was drawn in the patient's arm and the doctor administered an antibiotic, an anti-inflammatory, and a mild sedative. The doctor then administered the local anesthetic lidocaine to the patient's stomach area using a series of shots. He placed the scalpel on the patient's skin. That's when the patient's heart stopped.

After the patient was pronounced dead, the doctor had his staff notify the patient's family. Staff clothed the patient and cleaned the surgical room out of respect for the patient and his family. When the family arrived, they suspected something went wrong and called the police. The room was soon turned into a crime scene and the doctor was left wondering, what went wrong?

The narrative above describes a real-life scenario and the real-life battle one doctor is fighting to protect his professional name, his professional career, and his personal liberty. This article aims to show how a minimally invasive procedure performed by a skilled surgeon can escalate into criminal charges of involuntary manslaughter, or worse. This article is also meant to advise attorneys who represent health care providers on what they need to do should it ever happen to one of their clients.

The Criminal Case

In this case, the district attorney's office is trying to extend its authority to the practice of medicine. Initially, the coroner's office ruled the death an accident caused by lidocaine intoxication. The coroner made this initial determination with full knowledge of all of the circumstances surrounding the patient's death, including the doctor's office setting. After the coro-

ner's report was finished, the Medical Board performed a thorough investigation into the matter and ultimately issued an Interim Suspension Order against the doctor. The Interim Suspension Order allowed the doctor to continue practicing medicine without restriction, other than the requirement that he not perform or assist in any surgery unless performed in a hospital or surgical center. The doctor thought the matter was settled.

The Prosecution

Months later, the DA charged the doctor with involuntary manslaughter after the manner of death on the coroner's report was changed to read "homicide." The coroner's report was changed after a supplemental report was prepared by an anesthesiologist consultant retained by the coroner's office, the Medical Board, the Attorney General's Office, and/or the DA's office. The involuntary manslaughter charge was based largely on the consultant's opinion that the setting of the doctor's office was improper and the doctor's actions after the patient began to go into cardiac arrest on the surgical bed fell below the standard of care. Specifically, the DA alleged that:

- (1) the doctor failed to provide adequate respiratory support because the patient was not intubated with a plastic tube in his windpipe after going into cardiac arrest;
- (2) the doctor's converted single family home office was not a proper setting for the surgery because of the high risk of infection;
- (3) the doctor failed to timely call 911 or make any request for emergency services;
- (4) the doctor attempted to perform open gallbladder surgery outside a hospital or certified surgical facility under local anesthesia; and
- (5) the doctor's actions of clothing the patient, cleaning the operating room, and calling a funeral home were done to cover up his wrongdoing.

After the preliminary hearing, the DA added a formal charge of murder to the criminal information. However, after the doctor filed a California Penal Code §995 motion, the Court dismissed the murder charge entirely after finding insufficient evidence to support a charge of murder.

Involuntary Manslaughter – The Law

In California, the crime of manslaughter is defined as "the unlawful killing of a human being without malice." Penal Code §192. Involuntary manslaughter



"The narrative ... describes ... a real-life battle one doctor is fighting to protect his ... personal liberty."

John T. Maloney, Esq.
Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C.
20 Corporate Woods Blvd.
Albany, NY 12211
jmaloney@carterconboy.com
518-465-3484

Stuart T. O'Neal, Esq.
McCumber, Daniels, Buntz, Hartig & Puig P.A.
1400 South Trooper Road, # 102
Eagleville, PA 19403
soNeal@mccumberdaniels.com
610-650-0871

Charles E. Moody, Esq.
Hall, Booth, Smith & Slover
611 Commerce Street, # 3000
Nashville, TN 37203
cmoody@hbss.net
615-277-5003

Edward T. Hinchey, Esq.
Sloane and Walsh, LLP
3 Center Plaza
Boston, MA 02108
ehinchey@sloanewalsh.com
617-523-6010

George R. Hardin, Esq.
Hardin, Kundla, McKeon & Poletto
673 Morris Avenue
Springfield, NJ 07081
ghardin@hkmpp.com
973-912-5222

Thomas D. Flinn, Esq.
Garrity, Graham, Murphy, Garofalo & Flinn, P.C.
72 Eagle Rock Avenue
East Hanover, NJ 07936
tdf@garritygraham.com
973-509-7500, ext. 2223

Samuel K. Anderson, Esq.
Davis, Rothwell, Earle & Xochihua, P.C.
111 S.W. 5th Avenue, # 2700
Portland, OR 97204-3650
sanderson@davisrothwell.com
503-222-4422

Rudolph A. Peckinpaugh, Jr., Esq.
Eastman & Smith, Ltd.
One Seagate, 24th Floor
Toledo, OH 43699-0032
rapeckinpaugh@eastmansmith.com
419-247-1653

John F. McKeon, Esq.
Hardin Kundla, McKeon & Poletto
673 Morris Avenue
Springfield, NJ 07081
jmckeon@hkmpp.com
973-912-5222

Janet L. Poletto, Esq.
Hardin, Kundla, McKeon & Poletto
673 Morris Avenue
Springfield, NJ 07081-0730
jpoletto@hkmpp.com
973-912-5222

Mark S. Kundla, Esq.
Hardin, Kundla, McKeon & Poletto
673 Morris Avenue
Springfield, NJ 07081
mkundla@hkmpp.com
973-912-5222

Brett C. Perry, Esq.
Bonezzi Switzer, Murphy, Polito & Hupp
1300 East 9th Street
Cleveland, OH 44114
bperry@bsmph.com
216-875-2056

Erin K. Dragann, Esq.
McQuaide Blasko, Inc.
600 Centerview Drive, # 5103
Hershey, PA 17033
ekdragann@mqblaw.com
717-531-1199

Adam Butera
Chubb Group of Insurance Companies
82 Hopmeadow Street
Simsbury, CT 06070
adsbutera@gmail.com
860-408-2348

James Adams
Zurich North America
3003 Summit Blvd.
Atlanta, GA 30319
jamesadams.email@gmail.com
678-231-9412

Sharon M. Woods, Esq.
Barris, Sott, Denn & Driker, PLLC
211 West Fort Street, 15th Floor
Detroit, MI 48226
swoods@bsdd.com
313-965-9725

Cheryl DeKleine
ProMutual Group
161 Madison Avenue, 3rd Floor
Morristown, NJ 07960
cdekline@promutualgroup.com
973-993-1224

Drake A. Hood, Esq.
Brisbee and Stockton, LLC
P.O. Box 567
Hillsboro, OR 97123
dah@brisbeeandstockton.com
503-648-6677

James Moody
ProMutual Group
161 Madison Avenue
Morristown, NJ 07960
jmoody@promutualgroup.com
973-993-1222

Henry Kane
Argent
30 Technology Drive
Warren, NJ 07059
kane@insuranceagent.com
908-769-7400

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LAWYER LIABILITY TO CLIENT’S ADVERSARY

A middle ground focuses on the closeness of the attorney-client relationship in question. In *Weinberger v. Tucker*, 510 F.3d 486, 493 (4th Cir. 2007) the court held that privity does not exist as a result of every attorney-client interaction. Rather the court examined whether the lawyer’s interests were so identified with the client’s that the client “effectively represented” the lawyer’s legal rights in the underlying action. *Id.* Because Weinberger attacked the validity of his personal guaranty – drafted by Tucker – in the underlying action, Tucker’s interests were effectively represented below. Had the guaranty been ruled unenforceable, Tucker would have faced a malpractice claim by his client. And mutuality would have existed because such a ruling would have bound Tucker in the malpractice suit. *Id.* at 495. Thus the *Weinberger* court found that the lawyer’s and client’s “alignment of interests” was “close enough” to trigger the preclusion doctrine. *Id.* at 492.

Rucker Fallout

Lawyers involved in litigation in which client fraud or other malfeasance is alleged should take notice of the *Rucker* opinion. A client’s adversary may succeed against the client in one completed action, and then the adversary may succeed in a second action on the same facts against the lawyer. For lawyers practicing

in most states that have not considered the question, *Rucker* will reverberate. It is easy to imagine subsequent fraud claims being brought against counsel following acrimonious litigation involving marital dissolution, close corporation shareholder actions, covenants not to compete, partnership disputes, financing transactions, and the like. Questions may also be raised as to whether the lawyer’s insurance coverage providing indemnity and a defense will be triggered by such claims, or whether exclusions may operate to preclude coverage.

A question may also be fairly raised as to whether enhanced damages may be claimed against a lawyer when a claim is brought by a non-client. The Minnesota statute referenced in *Rucker* (Minn. Stat. §481.071) allows for treble damages when the lawyer acts to deceive “the court or any party.” Whether a distinction may fairly be drawn between a lawyer’s exposure to the client, and the lawyer’s exposure to the client’s adversary for purposes of enhanced damages, is worthy of discussion. Lawyers may start out behind in jury trials when it is alleged the lawyer engaged in deceit. If that stereotype is compounded by the threat of enhanced, and potentially not insured, damages, the significance of *Rucker* should not be underestimated.

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“A question may also be fairly raised as to whether enhanced damages may be claimed against a lawyer when a claim is brought by a non-client.”

**PROFESSIONAL LIABILITY
DEFENSE FEDERATION
WELCOMES ITS NEW MEMBERS:**

Pamela Chesnut, Esq.
Green & Chesnut, PLLC
201 East Main Street, # 1250
Lexington, KY 40502
pchesnut@greenandchesnut.com
859-475-1471

Gary R. Shendell, Esq.
Shendell & Pollock, P.L.
621 N.W. 53rd Street, # 310
Boca Raton, FL 33487
gary@shendellpollock.com
561-241-2323

Timothy E. Burke, Esq.
Garrity, Graham, Murphy, Garofalo & Flinn P.C.
72 Eagle Rock Avenue, # 350
East Hanover, NJ 07936
teb@garritygraham.com
973-576-8022

James E. Looper, Jr., Esq.
Hall, Booth, Smith & Slover, PC
611 Commerce Street
Nashville, TN 37203
jlooper@hbss.net
615-313-9911

George W. Burbidge, II, Esq.
Christensen & Jensen, P.C.
15 West South Temple, # 800
Salt Lake City, UT 84101
george.burbidge@chrisjen.com
801-323-5000

Richard V. Mack, Esq.
Mack, Drucker & Watson, PLC
3200 North Central Avenue, # 1200
Phoenix, AZ 85012
rmack@mackazlaw.com
602-778-9900

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is committed “in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” Penal Code §192(b). The DA alleged here that the doctor was involved in the latter, *the commission of an otherwise lawful act which might produce death, in an unlawful manner, and without due caution and circumspection.*

“Without due caution or circumspection” is equivalent to “criminal negligence,” as expressed in *People v. Penny*, 44 Cal. 2d 861, 869, 285 P.2d 926 (1955). Criminal negligence is further defined by Judicial Counsel of California Criminal Jury Instruction No. 581:

“Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; and
2. A reasonable person would have known that acting in that way would create such a risk.

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinary careful person would act in the same situation that his or her act accounts to disregard for human life or indifference to the consequences of that act.”

We would expect other states have similar criminal negligence instructions.

Avoiding Liability When There Is An Adverse Medical Outcome

In some instances, there is little a physician can do to avoid an adverse medical outcome. Even after a physician’s best efforts, patients die. There are, however, steps a physician can take to limit his or her liability if such an outcome occurs.

The Setting

Even though a physician may be fully qualified and

his or her office properly licensed for standard medical procedures, all invasive and even minimally invasive procedures should be performed in a hospital or certified surgical center setting. This policy will serve to preempt any presumption of an improper setting and will controvert allegations of criminal negligence related to an allegation of improper setting for a medical procedure.

Emergency Services

Call 9-1-1. This case stands for the proposition that the Medical Board and law enforcement trust paramedics more so than doctors of medicine. In their eyes, a medical doctor and a full staff trained and certified in CPR are a “reckless and inherent danger” to a patient in cardiac arrest. Therefore, if a physician finds himself or herself with a patient in cardiac arrest, outside of a hospital or surgical center setting, they are best advised to immediately contact emergency services and begin performing CPR until relieved by paramedics.

Don’t Clean Up

The simplest act, such as cleaning and clothing the body of a deceased patient out of respect for the individual and for the family, can be misconstrued and exploited by law enforcement as showing the physician’s intent to perform a cover-up. Other acts, such as cleaning the surgery room, or attempting to call an inexpensive mortuary to aid the family in preparing for funeral services, can be similarly misconstrued and exploited. A physician is best advised to leave the scene unaltered until law enforcement has finished its on-site investigation.

Seek Legal Counsel

The physician’s next move should be to contact competent legal counsel. An adverse medical outcome clearly implicates a physician’s malpractice liability and a physician should always seek competent malpractice counsel. But what most health care providers do not realize is that their actions may also jeopardize their license and/or expose them to criminal charges. When a physician is faced with a patient death or charges of murder, manslaughter, fraud, sexual assault, or improper narcotics dispensing, seeking competent criminal and licensing counsel is imperative.

SAVE THE DATE!

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Call 1-888-627-8385 and refer to “PLDF” to secure your room reservation. *Our room block is limited to Thursday evening so call early to reserve a Wednesday night stay if you like.*

An exceptional program is being planned.

“But what most health care providers do not realize is that their actions may also ... expose them to criminal charges.”



Michael J. Khouri practices with **The Law Offices of Michael J. Khouri** in Irvine, California. After starting his career as a Deputy District Attorney, he has practiced law in Orange County for over 30 years. In private practice, Mr. Khouri developed a specialty representing health care providers in criminal and administrative cases such as medical billing fraud, narcotics cases, and sexual assault on patients. Recently also admitted to the State Bar of Texas, Mr. Khouri defends physicians across the country who face health care-related criminal charges and Medicare and Medicaid audits. He can be reached at mkhouri@khourilaw.com or at (949) 336-2433. **Douglas C. Stastny** recently graduated from Chapman University School of Law, and now assists Mr. Khouri in preserving the licenses of numerous health care providers. Mr. Stastny also specializes in handling Medicare/Medicaid audit and fraud cases. He can be reached at dstastny@khourilaw.com.

THE CASE FOR/AGAINST THE “CASE-WITHIN-THE-CASE”

lost confidence, fired my client and retained another lawyer. The second lawyer took the case to trial and settled during trial for a significant sum—essentially the limits of insurance of the remaining defendants.

However, the second lawyer then sued my client, alleging that he failed to sue governmental entities that were responsible for approving the design of the pond. The theory was that had my client sued these entities, the plaintiff could have recovered much more from deep governmental pockets.

The legal malpractice case that resulted was essentially two trials. One trial dealt with my client’s decision-making or lack of decision-making in not suing the governmental entities. The second trial dealt with the diving accident. The parties put on over 30 witnesses from eye-witnesses to pool experts to human factors experts to toxicologists. The jury was asked to decide whether the lawyer met the standard of care and whether plaintiff would have won the underlying case against the governmental entities. The jury rendered a defense verdict, but after I interviewed the jury, I learned how lucky we got. The jury had a low opinion of my client. They thought he failed to even consider the possibility of suing the government. Nevertheless, the jury felt compelled to decide in favor of the defense because they did not believe the underlying case had merit. In short, they believed plaintiff was drunk at the time of the accident and that but for his intoxication, he would not have attempted the risky dive.

This case taught a great lesson in the importance of the “case within the case”. It is not enough to prove the lawyer failed to meet the standard of care. Plaintiff must prove that but for that breach, plaintiff would have prevailed in the underlying case. Traditionally anyway, if the plaintiff cannot prove the “case within the case”, then the plaintiff cannot prevail in the legal malpractice case, no matter how bad the lawyer’s conduct.

The purpose of this article is to examine the “case within the case” concept and to discuss a trend we have seen recently to erode the requirement to prove the underlying case. More and more, courts are allowing expert testimony to assist the jury to determine whether but for the attorney’s alleged negligence, the plaintiff would have obtained a better result. In other words, courts are not requiring plaintiffs to put on the underlying case. They are letting plaintiffs put on experts to say the case was winnable and that it had a certain settlement value.

This erosion of the “case within the case” requirement is decidedly pro-plaintiff because it is always possible to find an expert to say a case would have

been won or that it had a certain value. In defending legal malpractice cases, one should be aware of the trend to erode the “case within the case” and to be ready to advocate for the “case within the case” format.

PROVING THE CASE-WITHIN-THE-CASE

The plaintiff in a legal malpractice action must establish: (1) the existence of an attorney-client relationship which imposes a duty on the attorney to exercise that degree of skill, care and knowledge commonly exercised by members of the legal profession; (2) breach of that duty; (3) that such negligence was a proximate cause of resulting injury; and (4) the fact and extent of injury. *Phillips v. Clancy*, 733 P.2d 300, 303 (Ariz. Ct. App. 1986); *Thomas v. Lusk*, 27 Cal. App. 4th 1709, 1716 (1994).

The causation element requires proof that the plaintiff would not have suffered harm or would have obtained a better result absent the alleged negligence of the attorney. *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 577 S.E.2d 918, 923 (N.C. Ct. App. 2003); *Fishman v. Brooks*, 487 N.E.2d 1377, 1380 (Mass. 1986); *Niehoff v. Shankman & Assocs. Legal Ctr., P.A.*, 763 A.2d 121, 124 (Me. 2000).

In a legal malpractice case involving litigation, the traditional and accepted method in which causation is established is through the presentation of the “case-within-the-case,” otherwise known as the “trial-within-the-trial.” See RONALD E. MALLEEN & JEFFREY M. SMITH, *Legal Malpractice* § 35:12 (2010 ed.) (“This is the accepted and traditional means of resolving the issues involved in the underlying proceeding in a legal malpractice action.”) and cases cited therein; *Piscitelli v. Fridenberg*, 87 Cal. App. 4th 953, 973 (2001); *Aquino v. Kuczinski, Vila & Assoc., P.C.*, 39 A.D.3d 216, 219 (N.Y. App. Div. 2007); *Garcia v. Kozlov, Seaton, Romanini & Brooks P.C.*, 845 A.2d 602, 611-12 (N.J. 2004) (recognizing the suit-within-the-suit format “is regularly employed in most jurisdictions.”).

That is, the plaintiff must present evidence that should have been offered at the trial of the underlying action in order to convince the fact finder in the malpractice case that he or she would have prevailed in the underlying action absent the attorney’s alleged negligence. *Id.*; see also *Whitley v. Chamouris*, 574 S.E.2d 251, 252-53 (Va. 2003); *Bebo Constr. Co. v. Mattox & O’Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999); *Lewandowski v. Cont’l Cas. Co.*, 276 N.W.2d 284, 287 (Wis. 1979) (“The requirements of causation dictate that the merits of the malpractice action depend upon the merits of the original claim.”).

**Professional Liability
Defense Quarterly** is
published by:
Professional Liability
Defense Federation
150 South 5th Street
Suite 1750
Minneapolis, MN 55402
T: (612) 481-4169
E: editor@PLDF.org

“The erosion of the ‘case-within-the-case’ requirement is decidedly pro-plaintiff ...”



LAWYER LIABILITY TO CLIENT’S ADVERSARY

privity to trigger application of *res judicata*. Rejecting several cases holding that a judgment affecting a principal or agent “rendered upon a ground equally applicable to both” bars a claim against the other, the court held that the attorney-client relationship is insufficiently analogous to the principal-agent relationship as to allow for application of the rule. The difference, said the court, is that the attorney also has an obligation to the administration of justice, as quasi-judicial officers of the court. 2011 WL 13760 at *5. Those duties are owed to the public “as distinguished from the purely private duties owed to one’s client.” *Id.* Since there was no mutuality of interest with respect to the attorney’s duty to the public, the court held agency principles were insufficient to trigger application of the *res judicata* doctrine. 2011 WL 13760 at *6.

The *Rucker* majority opinion is now in the vanguard of the few courts that have rejected the “per se” rule of lawyer immunity from claims of this nature.

Most Courts Find Lawyer-Client Privilege

Many courts have held that the attorney-client relationship itself establishes privity for *res judicata* purposes. *E.g.*, *Vicanti v. Apothaker & Associates, P.C.*, 2010 WL 4702382 (E.D. Pa. 2010); *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1169 (10th Cir. 2000) (“The law firm defendants appear by virtue of their activities as representatives of Green and AT&T, also creating privity.”); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235 n.6 (7th Cir. 1986) (finding the bank’s attorneys in privity with the bank which was the party in the underlying action); *Fearing v. Lake St. Croix Homeowners Ass’n*, 2006 WL 3231970 at *9 (D. Minn. 2006); *Johnson v. U.S. Bank*, 2005 WL 1421461 (D. Minn. 2005); *Jayel Corp. v. Cochran*, 234 S.W.3d 278, 283-84 (Ark. 2006) (citing cases from Missouri, New Mexico and North Dakota); *Verhagen v. Arroyo*, 552 So. 2d 1162, 1164 (Fla. App. 1989) (finding attorney privity when the second suit against counsel arose from the same facts).

An interesting extension of the broad approach to lawyer privity is found in *Merchants State Bank v. Light*, 458 N.W.2d 792 (S.D. 1990), where the lawyer was barred from relitigating issues decided against his client in prior litigation. A lawyer’s client sold cattle believing they were not subject to the bank’s security interest. The lawyer received a \$10,000 retainer from a portion of the sale proceeds. In underlying litigation the lawyer defended the client on the bank’s effort to enforce the security agreement. The bank prevailed and then sued the lawyer for conversion to recover the retainer. In defense the lawyer claimed the cattle sale proceeds were not

subject to the security agreement. Held:

“Attorney represented wife in bankruptcy court, district court and before the court of appeals and therein litigated claims arising out of the same facts and conflicts as presented in this action. *Res judicata* bars Attorney, under the Facts presented in this case, from relitigating those issues which were or could have been litigated in the prior action.”

458 N.W.2d at 794-95. The retainer was given up.

Also contrary to *Rucker* is the domestic relations case of *Chara v. Lander*, 45 P.3d 895 (N.M. App. 2002). Husband sued wife’s attorney seeking recovery for the attorney’s “continuous violation of Court Orders and for her disregard for the Code of Professional Conduct and Ethics.” *Id.* at 898. The appeals court found without citation to authority that the wife and her counsel were in privity. *Id.* at 897. As for husband’s argument that counsel would go unpunished if his case could not go forward, the court replied that husband could report counsel to the disciplinary authorities, where sanctions can “include restitution.” *Id.* at 900.

Rucker Minority View Support

Very few courts disagree with the prevailing view that lawyers are in privity with clients for *res judicata* purposes. *E.g.*, *Colyer v. Colyer*, 1997 WL 33344973 at *2 (Mich. App. 1997) (noting that “a lawyer is not, in general, in privity with his client for purposes of *res judicata*.”) In a case similar to *Rucker (Cont’l Sav. Ass’n v. Collins*, 814 S.W.2d 829 (Tex. App. 1991)) a lawyer defended a bank’s claim urging privity existed with his former clients who were found liable for misrepresentation in a loan transaction. The court rejected the defense and found the lawyer amenable to suit after finding “no law ... to support [the lawyer’s] contention that an attorney is in privity with his client.” 814 S.W.3d at 832. The court continued:

“It would be a surprise to this court and to the lawyers of the state of Texas to learn that by virtue of mere representation a lawyer establishes privity with his client. ... [D]oes the [lawyer], by virtue of his implied claim of privity, accept responsibility for the money judgment rendered against his client in the prior lawsuit? It hardly seems likely.”

Id.



“Very few courts disagree with the prevailing view that lawyers are in privity with clients for *res judicata* purposes.”

LAWYER LIABILITY TO CLIENT'S ADVERSARY

If a client commits fraud or other malfeasance during litigation, resulting in the opposing party obtaining a judgment against the client, is the client's attorney immune from liability to the opposing party in a subsequent action for the same conduct? Many courts would hold the attorney – as agent for the client – immune from liability based on the attorney's "privity" with the client for *res judicata* purposes. A recent Minnesota Supreme Court decision casts doubt on that widely held view.

Rucker v. Schmidt

The case involved is *Rucker v. Schmidt*, ___ N.W.2d ___, 2011 WL 13760 (Minn., January 5, 2011). In the course of their marital dissolution proceeding Robert Rucker fraudulently represented the value of his 50% interest in a close corporation. He prepared two sets of financial projections for the business. One was used for actual business purposes. A lower projection was used for the dissolution proceeding. The parties signed a marital termination agreement in 2001 which included a property settlement award providing for an allocation of the corporation's [erroneous] value. Katherine Rucker subsequently discovered the fraud and sued her ex-husband. That claim was settled by payment to her of \$2,600,000.

In 2006 she sued her ex-husband's lawyer and law firm asserting fraud and deceit, fraud on the court, and aiding and abetting fraud. Treble damages were sought under a Minnesota statute allowing for such a recovery when counsel deceives "a court or a party to an action." Minn. Stat. §481.071. The trial court dismissed the claim on grounds counsel was in privity with the ex-husband client and thus another claim was barred by *res judicata*. In a 2-1 decision the appeals court reversed. The supreme court affirmed and remanded the case for trial.

The supreme court's decision is contrary to the weight of authority and potentially has far reaching consequences. Lawyers tend to accept client representations and they advocate in reliance on those representations. Ethics rules (e.g., Model Rule 3.3) forbid attorneys from offering false evidence at trial, a rule most lawyers follow. But lawyers do not temper their advocacy ordinarily out of fear of a fraud suit by the opposing party based upon a client's evidentiary representations. "I didn't know" of course is a fine defense, but a fact issue generally can be concocted by creative counsel. And lay stereotypes of lawyer honesty generally infuse the resulting trial.

A near unanimity of courts before *Rucker* held the action against the attorney was barred by the *res judicata* doctrine. Common elements of the doctrine are that a subsequent action is barred: (1) if it in-

volves the same set of factual circumstances, (2) if the prior action resulted in a final judgment on the merits, (3) if the party to be estopped had a full and fair opportunity to litigate the prior action, and (4) if the prior action involved the same parties "or their privies." *Minch Family LLLP v. Buffalo-Red River Watershed District*, ___ F.3d ___. 2010 WL 5093656 at *4 (8th Cir. 2010). The *Rucker* action satisfied the first three elements without question, and most of the fourth. But was the defendant lawyer in privity with the ex-client and ex-husband Rucker?

In evaluating the privity issue the *Rucker* court drew upon Minnesota precedents as well as general authorities. Quoting section 83 of the Restatement (First) of Judgments (1942), the court noted that privity "expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." 2011 WL 13760 at *3. Courts will find privity to exist for those "who control an action although not parties to it," "those whose interests are represented by a party to the action", and "successors in interest to those having derivative claims." *Id.* Quoting American Jurisprudence, *Judgments* §399 the court added that "[p]rivies to a judgment are those who are so connected with the parties in estate or in blood or in law as to be identified with them in interest, and consequently to be affected with them by the litigation." *Id.*

It would seem that these quotations would bring within their ambit counsel for parties in legal actions. But the *Rucker* court then added, also drawing upon Am. Jur., that privity may also be found when a person is "so identified in interest with another *that he represents the same legal right.*" *Id.* (emphasis added). This latter phrase was then used by the *Rucker* majority to pivot from the majority rule and allow the claim to proceed against the lawyer.

Schmidt's counsel argued that identity of interest was shown because his conduct in regard to the fraud facts arose from the attorney-client relationship in the underlying dissolution action. But the court countered that the proffered identity of interest was merely a common objective – to obtain a favorable outcome. Something more is necessary to establish identity of interest and hence privity. There simply was no "mutuality of legal interest in the outcome of the dissolution action" sufficient to establish privity. 2011 WL 13760 at *4.

Moreover, the court rejected Schmidt's alternative claim that agency principles established sufficient

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"A near unanimity of courts before *Rucker* held the action against the attorney was barred by the *res judicata* doctrine."



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The plaintiff must present virtually the same evidence that would have been presented in the underlying action, and the defendant attorney is entitled to present evidence and assert defenses that would have been presented in the underlying action. *Whitley*, 574 S.E.2d at 252-53; *Arciniaga v. Bank of San Bernardino*, 52 Cal. App. 4th 213, 230 (1997). The *Arciniaga* court observed that the "misperforming lawyer is deemed to constitute the same 'target,' legally speaking, as the original offending defendant. Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." 52 Cal. App. 4th at 231.

Indeed, the jury or fact finder in the malpractice action then determines the outcome of the underlying case and from that determination reaches a malpractice verdict. *Hummer*, 577 S.E.2d at 923; see *Phillips*, 733 P.2d at 307 ("Therefore, on remand, in the 'case within the case,' the jury should be instructed on the applicable Social Security law and regulations and be asked if, based on the facts presented, but for the alleged negligence, Phillips would have been entitled to disability benefits.").

The case-within-the-case employs an objective standard against which the impact of a lawyer's negligence in the underlying action is judged. *Phillips*, 733 P.2d at 303. It provides the objective mechanism for resolving the underlying case, as the malpractice jury must decide the underlying case as an independent fact finder, as opposed to determining what a particular judge or fact finder would have done. *Id.* It avoids speculation of what the particular fact finder in the underlying case would have done. *Thomas v. Bethea*, 718 A.2d 1187, 1197 (Md. 1998) (citations omitted).

The role of the malpractice jury and the case-within-the-case has been best explained as follows:

[E]ven when the alleged negligence concerns the conduct of a jury trial, the 'causation' issue [i.e. the case-within-the-case] does not call for reconstructing of the probable behavior of the actual jury in that trial. It does not call for bringing the jurors into court and subjecting them to examination and cross-examination to determine what they would have done if the case had been tried differently, nor does it call for expert testimony about the characteris-

tics or the apparent attitudes of those jurors. Although the issue is stated to be the probable outcome of the first case, the second jury is permitted to decide this by substituting its own judgment for that of the fact finder in the earlier case. Once it is accepted that this is what the malpractice jury does, there is no reason why the jury (or a court when sitting without a jury) should not do the same even when the earlier fact finder was a judge, an administrative hearing officer, an arbitrator, a court-martial, or any tribunal deciding on factual grounds.

Chocktoot v. Smith, 571 P.2d 1255, 1258 (Or. 1977).

Applying a subjective standard to the causation element in a legal malpractice case would open the door to speculation as to what a particular judge or jury would have found in the underlying case, and therefore, require the fact finder in the underlying matter to testify and answer the question of whether but for the attorney's alleged negligence, the result would have been different. This would mean that a judge, jurors, arbitrators and the like, would be called to testify and give their subjective opinion as to the effect of the attorney's alleged negligence in the underlying case. Courts have specifically held that expert opinion testimony "cannot be couched in legal conclusions that simply opine 'how juries should decide cases.'" *Webb v. Omni Block, Inc.*, 166 P.3d 140, 144 (Ariz. Ct. App. 2007); cf. *Shields v. Campbell*, 559 P.2d 1275, 1280 (Or. 1977) (opinions on the ultimate issue are admissible within the discretion of the trial judge).

In *Piscitelli*, the court held, in part, that the trial court improperly shifted the jury's responsibility to decide the issue by permitting the plaintiff's expert to testify that the fact finders in the underlying matter would have granted the plaintiff relief had the matter been presented. 87 Cal. App. 4th at 974. The court reasoned "[t]o entrust that ultimate determination to an expert, i.e. to allow the expert to reach the ultimate question of whether [plaintiff's] underlying arbitration would have been successful, invades the jury's function." *Id.*

Other courts have specifically rejected the use of expert testimony regarding the outcome of the underlying case, or what the result would have been, when employing the case-within-the-case method. (This is distinguishable from expert testimony which may be necessary to establish the causal link be-



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tween the alleged negligence and the alleged harm, i.e. expert testimony so as to what the attorney should have done. See Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* §35:20; see, e.g. *Alexander v. Tutur & Assoc., Inc.*, 146 S.W.3d 113, 118 (Tex. 2004).) In *Whitley*, the court held that expert testimony on the issue on causation was unnecessary, and would have been improper because it would have required either a prediction of what some other fact finder would have concluded or an evaluation of the legal merits of the underlying claims. 574 S.E.2d at 253. The court explained that no witness can predict the decision of a jury and an evaluation of the underlying claims would constitute an improper legal opinion. *Id.*

In *Cook v. Continental Casualty Co.*, 509 N.W.2d 100, 105 (Wis. Ct. App. 1993), the court held that expert testimony regarding what the original jury would have done was irrelevant. The court acknowledged that all the issues touching upon plaintiff’s underlying personal injury action would be submitted to the malpractice jury as matters of first impression. *Id.* Therefore, because the second jury was not being asked to decide what the original jury would have done, expert testimony on the behavior of that particular jury or any other jury was irrelevant. *Id.*

Plaintiffs in legal malpractice actions often attempt to present expert testimony regarding what the result should have been and the amount of damages in order to avoid the expense and effort in proving the underlying claim through the case-within-the-case method. Indeed, the plaintiff not only has the burden of proving negligence on the part of the attorney, but has the burden to show that he or she would have obtained a better result had the underlying case been properly tried, necessitating the plaintiff to essentially put on two cases – the malpractice case and the underlying case. Utilizing the case-within-the-case methodology, as seen above, courts have refused to admit or require this type of expert testimony. See also *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 330 (Fla. Dist. Ct. App. 1998) (what a reasonable judge should have done in the underlying matter was not a matter for expert testimony); *Worsham v. Nix*, 145 P.3d 1055, 1066-67 (Okla. 2006) (expert testimony cannot sidestep or bypass plaintiff’s burden of proof to show better outcome in underlying action and cannot be a substitute for necessary factual evidence).

Utilizing the case-within-the-case allows for an objective and uniform standard, and avoids a whole host of other concerns that arise with the subjective standard. If a judge were to testify, there may be the appearance of impropriety created as the judge

would, in effect, be testifying for one of the litigants in the malpractice case. *Phillips*, 733 P.2d at 305; see also *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W.2d 118, 125 (Wis. 1985) (citation omitted). The jury would undoubtedly attach undue weight to the judge’s testimony, so that such testimony would be prejudicial. *Helmbrecht*, 362 N.W.2d at 125. From a practical standpoint, allowing this kind of testimony would interfere with and disrupt the work of the judiciary. *Phillips*, 733 P.2d at 305. Moreover, if a subjective standard were implemented, the plaintiff would encounter serious problems if the original fact finder is unavailable or if the fact finder’s testimony is excluded as prejudicial. *Helmbrecht*, 362 N.W.2d at 125. Furthermore, if the original fact finder was a jury, this would place an undue burden on plaintiff to bring forth all the jurors to testify. *Id.* at 126.

CRITICISMS OF AND ALTERNATIVES TO THE CASE-WITHIN-THE-CASE APPROACH

Despite the accepted and recognized use of the case-within-the-case as the objective standard, courts have criticized the approach, and have attempted to develop alternatives for proving causation in a legal malpractice case, such as allowing expert testimony on the outcome of the underlying case. See, e.g., *Shields*, 559 P.2d at 1280; *Lieberman v. Emp’r Ins. of Wausau*, 419 A.2d 417, 427 (N.J. 1980); *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, 515 N.E.2d 891, 896 (Mass. 1987).

There are several criticisms of the case-within-the-case approach. In some situations, the case-within-the-case does not represent an accurate or complete reconstruction of the original lawsuit. *Garcia*, 845 A.2d at 612 (citing *Developments in the Law - Lawyers’ Responsibilities and Lawyers’ Responses*, 107 Harv. L. Rev. 1557, 1568-69 (1994) (discussing complications of reconstructing original lawsuit); Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice*, 61 Wash. L. Rev. 1479, 1482 (1986) (same)); *Thomas*, 78 A.2d at 1197. There is an artificiality to putting on the underlying case in the context of the malpractice case. *Thomas*, 718 A.2d at 1197.

Moreover, given the passage of time, the evidence may not be of the same quality as that which would have been offered in the underlying case, and the parties may not have the same access to evidence. *Garcia*, 845 A.2d at 612 (citing Paul Gary Kerkorian, Comment, *Negligent Spoliation of Evidence: Skirting the “Suit Within a Suit” Requirement of Legal Malpractice Actions*, 41 Hastings L.J. 1077 (1990)); *Thomas*, 718 A.2d at 1197. Indeed, because the original defendant is not a party to the malpractice suit, the plaintiff may not have the benefit of discovery

CONTACT PLDF

Christine S. Jensen
Managing Director
Professional Liability
Defense Federation
150 South Fifth Street
Suite 1750
Minneapolis, MN
55402
(612) 481-4169
cjensen@PLDF.org

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against that defendant to collect evidence in support of the underlying claim. *Thomas*, 718 A.2d at 1197.

The case-within-the-case method has been criticized for being unfair to plaintiffs who must litigate the underlying claim against the lawyer who originally prepared it. The lawyer has superior knowledge of the strength and weaknesses of the case, including knowledge obtained from the client’s own confidences. *Garcia*, 845 A.2d at 612 (citing John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 Rutgers L. Rev. 101, 148 (1995)); *Thomas*, 718 A.2d at 1197.

It has also been criticized as unfair to the plaintiff who, under the case-within-the-case format, has to prove to a “virtual certainty” that the plaintiff would have prevailed in the underlying action. *Vahila v. Hall*, 674 N.E.2d 1164, 1169 (Ohio 1977) (quoting Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 Cornell L. Rev. 666, 670-71 (1978)). Regardless of how outrageous or morally reprehensible the attorney’s actions were, if there is “minimal doubt” as to the outcome of the underlying action, the plaintiff would not prevail in the malpractice claim, thereby protecting attorneys from liability. *Id.*

Furthermore, the case-within-the-case ignores settlement opportunities, and instead focuses on whether the client would have won the underlying case. *Id.* Ultimately the cost and complexity, as well as the risk, of having to present the case-within-the-case may discourage plaintiffs to pursue claims of legal malpractice. *Id.*

Recognizing these problems with the case-within-the-case approach, the *Vahila* court held that the plaintiffs were not required to establish that they would have been successful in the underlying civil, criminal, and administrative matters giving rise to the malpractice action. *Id.* at 1171. The court reasoned that the plaintiffs arguably sustained damage regardless of the fact that they may have been unable to prove success in the underlying case. *Id.* at 1169. In that case, the plaintiffs alleged that the attorneys failed to properly disclose all matters and legal consequences regarding various plea bargains and settlements; that the pleas and settlement were obtained under duress and coercion; and that the attorneys failed to secure viable defenses on behalf of the plaintiffs. *Id.* The court refused to adopt the case-within-the-case format as “a rule of thumb” in order for the plaintiff to prove damage or loss. *Id.* at 1168.

Likewise, in *Lieberman* the court held that it was within the discretion of the trial judge as to the manner in which the plaintiff proves his claim for dam-

ages, which may include the case-within-the-case approach, any reasonable modification thereof, or even the use of expert testimony as to what as a matter of reasonable probability would have occurred in the underlying case. 419 A.2d at 427. The court pointed out the difficulties with the case-within-the-case method, as in that case, there was a “reversal of roles.” *Id.* at 426. The client was the plaintiff in the malpractice case but was a defendant in the original suit. The court reasoned that to require the client to proceed in the malpractice action “with direct proofs, as though he were the erstwhile claimant, would be awkward and impracticable.” *Id.*

CONCLUSION

Unquestionably, the “case-within-the-case” approach favors the defense in a legal malpractice case. As far as we are concerned, it is much better to permit the jury to analyze both the liability and damage claims of the plaintiff rather than to be spoon-fed by an expert. We advocate for this framework whenever possible. However, one should anticipate resistance from sophisticated plaintiffs’ counsel. We anticipate that plaintiffs’ counsel will increasingly oppose this framework and will attempt to convince courts that it is unfair and impractical.

Thus, in representing an attorney in legal malpractice cases arising out of litigation, it is vitally important to analyze the underlying case and to determine how it can be presented practically in the legal malpractice action. The arguments the plaintiff may present against using the framework must be considered and anticipated. The key is to convince the court that in your situation, the “case within the case” is the proper framework.

It is vital to conduct this analysis in the early stages of a legal malpractice case. It is wise to file a motion advocating utilization of the “case-within-the-case” framework as soon as possible so that no party is prejudiced and so that appropriate discovery may be conducted regarding the underlying case. As I learned years ago, the best defense to a legal malpractice case may have nothing to do with your client and everything to do with the merits of the case your client decided to take.

Peter Akmajian is a 1984 graduate of the University of Arizona College of Law. After clerking for one year for the Honorable Frank X. Gordon of the Arizona Supreme Court, Peter started his practice in Phoenix with the firm of O’Connor Cavanagh, where he began defending medical and legal malpractice cases. After moving to Tucson in 1989 with O’Connor Cavanagh, he became a partner with the **Udall Law Firm** in Tucson in 1999. Peter has tried approximately 40 jury trials to verdict, and has been a Fellow of the American College of Trial Lawyers since 2006. **Janet Linton** is a 2006 graduate of the University of Arizona College of Law. She is an associate with the **Udall Law Firm**, where she practices in the area of including medical and legal malpractice defense.

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