Avoiding Liability

What the Attorney Says in the Underlying Action Is Not an Admission in the Subsequent Malpractice Action

By Jeffrey P. Lewis

Under Pennsylvania case law, an attorney does not stand in privity with his or her client. As a result, when the court finds in the underlying matter that an attorney has waived a legal issue, even if that ruling is later affirmed on appeal, it does not constitute collateral estoppel or any other form of issue preclusion against the lawyer in the resulting legal malpractice action. See, e.g., *Ammon v. McCloskey,* 655 A.2d 549 (PA Super. 1995). Moreover, for the same reason, any statement made by the attorney in the underlying matter as advocacy made on behalf of his or her client, whether made on or off the record, does not constitute evidence of malpractice in the subsequent malpractice action. Nor is it considered proof in the subsequent malpractice action that the client would have prevailed in the underlying action — referred to as "the case-within-a-case" — if the lawyer had not acted negligently.

In *Ammon*, for example, a three-judge panel of the Superior Court reversed a trial court finding that a trial court's ruling that a criminal defense counsel's waiver of a legal issue has no preclusive effect in the resulting legal malpractice case. The court there found that the attorney could defend against the legal malpractice claim on the basis that he was not negligent because his conduct met the standard of care. This is notwithstanding that the criminal trial court in the underlying matter had found that he had waived this issue. The court further held that expert testimony could support the defense that the attorney was not negligent in the underlying matter, notwithstanding the trial court there had found that he had waived the issue.

A Kansas appellate court most recently addressed the concept that an attorney and his or her client do not stand in privity and, as a consequence, an adverse ruling to the client in the underlying matter has no preclusive effect in the subsequent malpractice action. In *Power Control Devices, Inc. v. Lerner,* 437 P.3d 66 (Ct. of App. Kansas 2019), clients had brought a legal malpractice claim against their lawyer sounding in breach of contract alleging failure to timely file suit in the underlying matter to avoid application of the statute of limitations defense. Overturning a jury verdict in the clients' favor in the underlying action, the trial court there found that the "clock" had begun to "tick" with respect to the applicable statute of limitations sooner than the defendant lawyer in the subsequent malpractice action had thought and, therefore, the clients' claim was time barred because the defendant lawyer had not timely filed suit.

In the subsequent malpractice action, clients did not offer expert testimony to prove the "case-within-a-case," which proof was required in the underlying action to establish that there had been a breach of contract. Instead, clients relied upon pleadings in the underlying matter, which were prepared and submitted by the defendant attorney, and by statements made by the defendant attorney to his clients during the course of litigating the underlying matter. The averments made in these pleadings and statements made by the defendant attorney were submitted as proof of the "case-within-a-case" instead of submitting the same quantum of proof for this claim as had been submitted in the underlying matter.

Eventually, the judge in the malpractice action granted the defendant attorney's motion to dismiss based upon the proposition that clients had failed to adequately prove the "case-within-a-case" because they had failed to introduce the same quantum of proof to establish that claim as had been introduced in the underlying matter. The clients appealed to the Kansas Court of Appeals.

In opposition to the motion to dismiss, clients argued that "[b]ecause [the defendant lawyer as their] counsel argued strenuously in pleadings and in meeting with [the clients] and others that he could prove [that the defendant in the underlying matter] violated the terms of the contract, then all of [defendant attorney's] pleadings and statements were evidence that [defendant in the underlying matter] breached the contract." Clients contended that, in effect, all of defendant attorney's statements about the merits of the "case-within-a-case" constitute admissions.

The Court of Appeals affirmed. It agreed with the trial court that because the attorney's statements are not admissible in the underlying matter, they would not be admissible in the subsequent malpractice action. The appellate court noted that the approach suggested by clients "is a dangerous path and one that the district judge repeatedly and properly criticized. An attorney is an advocate for his or her client and is always trying to put the best case forward. But in a legal malpractice action, an attorney's opinion of the case, the attorney's pleadings or filings in the case, or even the attorney's puffing about his or her abilities to prevail, is not evidence of any of the claims made in the underlying lawsuit."

The appellate court agreed with Idaho case law — *Heinze v. Bauer*, 178 P.3d 597 (Id. 2008) — that "statements made on behalf of a client in the course of representation are not personal admissions that may be used against the attorney in subsequent litigation." The court cited a Pennsylvania case, *Barcola v. Hourigan, Kluger & Quinn P.C.,* 82 Pa. D. & C.4th 397, 411 (1006), for the proposition that "[i]f statements and arguments made by counsel in furtherance of a client's claim were routinely deemed to constitute binding admissions against a lawyer in a subsequent legal malpractice action, it could conceivably have a chilling impact upon the vigor and resulting effectiveness of counsel's advocacy."

The appellate court agreed with the trial court that clients must prove their "case-within-a-case" using the same evidence as would be admissible to prove the underlying case in the underlying action. Therefore, because expert testimony was required in the underlying case to prove breach of contract, expert testimony was required to prove the breach of contract claim constituting the "case-within-a-case" in the malpractice action. Because clients did not present expert testimony in their malpractice case to prove their "case-with-a-case," the appellate court affirmed the trial court's grant of a motion to dismiss.

The lesson learned in this case is that any statement made by counsel in the underlying matter concerning the merits of the underlying matter, regardless of whether made on or off the record, cannot later be submitted by the client as a substitute for the same quantum of proof as required in the underlying action to prove the "case-within-a-case."

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