Proving the 'Case Within a Case'

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As a fundamental premise of any legal malpractice claim, the claimant must prove that the negligence of the lawyer caused actual damages and not just speculative harm. In malpractice claims involving litigation, this requires proof that the claimant would have prevailed in the underlying matter but for his or her lawyer's negligence — traditionally referenced as proof of the "case within a case" or "suit within a suit." But what is the quantum of proof required so that the fact-finder can make a determination that the claimant would have prevailed? Typically defense lawyers have argued that claimants must offer only evidence that would have been admissible in the underlying matter. What little relevant Pennsylvania state case law exists is mostly at the trial level, and it is conflicting.

For example, in *Barcola v. Hourigan, Kluger & Quinn P.C.,* 82 Pa.D.&C.4th 394 (Lack. Co. 2006), a legal malpractice action, the court refused the introduction of statements made by the defendant lawyer in his role as an advocate for his clients in the underlying matter. In doing so the court noted that only evidence that would have been admissible in the underlying action would be admissible in the malpractice action to satisfy the "case within a case" requirement.

In contrast, in *Rice v. Saltzberg, Trichon, Kogan & Wertheimer, P.C.,* 2006 Phila. Ct. Com. Pl. LEXIS 35 (affirmed by the Superior Court without an opinion), the court relied upon Pennsylvania Rule of Evidence 702 and allowed expert testimony from an experienced New York personal injury lawyer on the settlement, verdict values and other matters with respect to a personal injury action that would have been brought in New York. From the reported opinion it does not appear that the expert testified as to whether the jury would have found for the putative plaintiff in what would have been the underlying action.

In an earlier case, a federal district court (later affirmed by the 3rd Circuit) found that the prior trial does not have to be "re-created" to prove proximate cause. *Honeywell, Inc. v. American Standards Testing Bureau, Inc.,* 851 F.2d 652 (3d Cir. 1988). Although *Honeywell* is not technically a legal malpractice case — it involved "a negligence action arising out of appellant's failure to provide an expert witness for appellee corporation in a state court personal injury action" — it applies by analogy. In both *Rice* and *Honeywell* the plaintiffs contended that the defendant's negligence caused the loss in the underlying litigation. In *Honeywell* both the district court and the 3rd Circuit agreed that what the jury in the underlying matter would have decided, in the absence of defendant's negligence, could properly be proved by the testimony of an expert witness.

Specifically, in *Honeywell* an experienced trial attorney testified that, based upon his review of the trial record in the underlying matter and his years of experience, the case would have been successful but for the defendant's negligence. Although he acknowledged "that … nobody could be certain" what a jury would have decided, he could say "within legal certainty" that the jury would have rendered a favorable verdict. Such testimony was justified based upon the premise that "[t]rial courts have broad discretion to admit evidence over the objection that it invades the province of the jury, and the [Federal] Rule [of Evidence] 702 standard usually favors admissibility."

The Supreme Court of Georgia has recently weighed in on this thorny issue. In *Leibel v. Johnson,* ___ S.E.2d ___, 2012 WL 2203069 (Ga.), just as in *Honeywell,* the trial court allowed the testimony of an expert to prove proximate causation, " 'i.e., whether or not the plaintiff would have prevailed in the underlying action.' " In *Leibel* the lawyer witness for the plaintiff was permitted to testify that had the underlying discrimination case been properly tried, the evidence presented to the jury would have " 'tipped the balance' in [the plaintiff's] favor." The court of appeals affirmed, concluding that "expert testimony is 'admissible to prove proximate cause in those legal malpractice cases in which a layperson could not competently determine whether or not the negligence of the attorney proximately caused the plaintiff's damages.' "

In a unanimous decision, the Supreme Court of Georgia reversed. It recognized the propriety and necessity of expert testimony " 'except in clear and palpable cases … to establish the parameters of acceptable professional conduct [for an attorney], a significant deviation from which would constitute malpractice.' " The court rejected the notion "that expert testimony would also be appropriate with respect to the third and final element of the test, causation." It found as "inappropriate" this expert's opinion concerning "tip[ping] the balance" as "clearly testimony that went directly to the issue of what the first jury in the underlying case allegedly would have done."

In this court's view, the goal of the jury in the malpractice action is to decide what " 'a *reasonable* jury would have done if the case had been tried differently. Thus, the jury in the malpractice action is permitted to substitute its own judgment for that of the jury in the underlying action.' " According to this court, this is accomplished by the second jury "independently evaluating the evidence in the underlying case as it should have been presented to determine whether it believes that the plaintiff has a winning case, not by deciding whether some prior jury may or may not have believed that the plaintiff had a winning case."

Based upon this premise, the Supreme Court of Georgia reasoned that expert testimony to prove what the jury in the underlying matter would have decided if that case had been correctly presented is not relevant. Instead the jury in the malpractice action is "merely being asked to do exactly what any jury in [the underlying] lawsuit would do, which is evaluate the evidence in the case and decide the case on the merits."

As you can see there is a dispute with respect to the appropriate proof for demonstrating causation by application of the "case within a case" concept, particularly by using expert testimony. It presents just one of potentially many areas of dispute in the course of litigating a legal malpractice action and, until binding precedent is provided, it creates unpredictability.