



ISSUE: REVERSE BIFURCATION OF TRIALS IN LEGAL MALPRACTICE CASES
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RISK MANAGEMENT NOTE: There is a growing public perception that attorneys should be infallible. This unreasonable expectation creates a bias against attorneys when a case ends with an undesirable outcome, regardless of whether the attorney made any errors in judgment. In a departure from a traditional bifurcation approach, the use of reverse bifurcation forces a plaintiff to prove the validity of their underlying claim before standard of care issues are reached, thereby maintaining the presumption of competent representation and promoting an unbiased jury.

ARTICLE:

Generally, for a plaintiff to prevail in a legal malpractice action, certain elements must be proven. They include: (1) an attorney-client relationship giving rise to a duty; (2) a breach of that duty either by an act or a failure to act; (3) the breach of duty proximately causing injury to the client; and (4) the client sustaining an actual injury, loss or damage.¹

While these are essentially the same elements in a basic negligence action, in at least certain legal malpractice actions, the element of proximate cause requires a plaintiff to prove they would have prevailed in the underlying action that gives rise to the malpractice suit.² In addition to proving the negligence of the attorney, a plaintiff can only recover when they can show that their injury or loss would not have occurred “but for” the negligence of the attorney. This “suit within a suit” doctrine addresses the causation element of a plaintiff’s malpractice claim. For a plaintiff to prove they would have been successful in the underlying litigation in addition to proving the negligence of their attorney is like having to try two cases within a case.³

This case within a case method of resolving legal malpractice claims is the best way to determine a plaintiff’s loss. By litigating the underlying claim as part of the malpractice action against the attorney, the plaintiff meets the proximate cause burden by showing that “but for” the negligence of the defendant, plaintiff would have suffered no loss. This method is applied so the plaintiff cannot recover for legal malpractice in cases where even if the plaintiff had been competently represented, they would have lost the underlying claim anyway.⁴ In cases where the client was a plaintiff in the underlying claim, the burden is to show they had a valid claim in which they had a greater than fifty percent chance of prevailing “but for” their attorneys’ negligence. If the client was a defendant in the underlying claim, the burden is to show they would have had a meritorious defense that would have either precluded recovery or reduced the amount of the judgment “but for” the attorney’s negligence.⁵

While the “suit within a suit” doctrine is widely accepted as the most credible way to determine whether a plaintiff has a viable malpractice claim, it does open the door for juror confusion.⁶ The jury has to

¹ See *Streber v. Hunter*, 221 F.3d 701, 722 (5th Cir. 2000).

² See *Godbout v. Norton*, 262 N.W.2d 374, 376 (Minn. 1977); *Haberer v. Rice*, 511 N.W.2d 279, 285 (S.D. 1994).

³ *Haberer*, 511 N.W.2d at 284.

⁴ See *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267 (7th Cir. 1994).

⁵ See *Harline v. Barke,r* 912 P.2d 433, 439-40 (Utah 1996).

⁶ The “suit within a suit” doctrine does receive criticism when considering its broad application. Some courts have held the doctrine should only be applied in limited situations. Other state courts, namely Michigan, believe it is

consider the merits of two cases and must determine the liability of those who are not parties to the malpractice action. In addition, the element of juror bias is still present. While the case within a case method is essential to determining whether the underlying claim has merit regardless of possible attorney error, additional forms of protection are needed to prevent a jury from holding attorneys liable for undesirable outcomes of underlying claims. Bifurcation and reverse bifurcation are possible solutions to this issue.

Federal and state rules of civil procedure allow for bifurcation of trials. Specifically, Rule 42(b) of the Federal Rules of Civil Procedure provides for the bifurcation, or separate trial, of any claim or issue in furtherance of judicial economy, convenience or to avoid prejudice.⁷ Bifurcating the causation portion of the legal malpractice case accomplishes all of these goals. By separating the case within the case, litigation can be expedited and cases can be disposed of at an earlier state. Further, the underlying claim is separate and distinct from the malpractice action in that there are different witnesses, legal theories and evidentiary issues. Having a separate trial for the underlying claim aids in simplifying these issues for a jury.

Bifurcation is routinely utilized in malpractice actions.⁸ Cases utilizing this method reiterate that bifurcation is the most appropriate method to resolve the issues unique to legal malpractice cases. As before stated, since the underlying claim involves separate legal issues and legal standards than those in a malpractice claim, separate trials provide a clearer evidentiary process and minimize the risk of juror confusion.⁹

While bifurcation assists with efficiency of the litigation process and aids in reducing juror confusion, there are still elements to the case within a case method that are not addressed by traditional bifurcation. One of the main concerns is that juror prejudice is still present. If a trial is bifurcated and the claim regarding attorney negligence is tried first, it is still possible for the jury to be biased against the attorney and assume attorney negligence when contemplating the merits of the underlying claim. In another example, if attorney liability is established before the merits of the underlying claim are decided, it eliminates the potential for settlement negotiations.

An additional criticism of the traditional bifurcation method is that it does not actually address the causation issue of plaintiff's malpractice claim. In theory, in the first trial the jury decides whether an attorney-client relationship exists and whether the attorney has breached any duty to his client. In the second trial, the merits of the underlying claim are evaluated and attorney negligence is, for the most part, presumed.¹⁰ While traditional bifurcation promotes judicial economy and simplifies legal issues for the jury, it does not adequately resolve the issues of juror bias and the presumption of attorney negligence and raises other concerns as well. Reverse bifurcation addresses the concerns of the case within a case method as well as the shortcomings of the traditional bifurcation approach.

Reverse bifurcation is most commonly used in asbestos and Fen-phen litigation.¹¹ Traditionally, in a reverse bifurcation trial a jury determines damages before determining liability. In a legal malpractice context, the underlying claim is litigated first, and then the issues of attorney negligence and liability are decided in the second trial. As in a bifurcated trial, the reverse bifurcation or trials is efficient and simplifies issues for the jury. For example, if a jury determined the underlying claim was without merit, there would be no need for a second trial on the issue of attorney liability.

harsh to require plaintiff to prove two lawsuits to recover in one, though the doctrine is still applied. See Noreen L. Slank, *Suit Within a Suit; A Doctrine Michigan Courts Hate to Love*, 72 Mich. B.J. 1174 (1993).

⁷ Fed. R. Civ. P. 42(b).

⁸ There are several decisions that affirm the use of bifurcation in malpractice actions. See *Nika v. Danz*, 556 N.E.2d 873, 876 (Ill. App. Ct. 1990); *Haberer* 511 N.W.2d at 284-285; *Cook v. Cont'l Cas. Co.*, 509 N.W.2d 100, 104-105 (Wis. Ct. App. 1993); *Terrain Enters., Inc. v. Mockbee*, 654 So.2d 1122, 1123 (Miss. 1995).

⁹ *Id.*

¹⁰ See David J. Meiselman, *Attorney Malpractice: Law and Procedure* §3:10, 49 (1980).

¹¹ See Molly McDonough, *Going Forward with Reverse Bifurcation* 3 No.48 A.B.A. J.E-Report 4 (2004)

Further, if the merit of the underlying claim is established first, a settlement of the malpractice action is more likely.¹² Last, and most important, if the issue of attorney negligence is not litigated first, there remains a presumption of attorney competence. Any potential bias a jury would have from a finding of attorney negligence would not be an issue in the determination of whether the underlying claim has merit.

It is more effective for a jury to determine the issues of the underlying claim before it determines attorney liability.¹³ Once the plaintiff establishes that the claim giving rise to the malpractice action has merit, then it is appropriate to decide whether any loss would have occurred “but for” the actions of their attorney. In addition to being a logical approach to the unique aspects of the legal malpractice case, the advantages of judicial economy and an unbiased jury weigh heavily in favor of the use of reverse bifurcation of trials.

For a complete and further detailed discussion of the fundamentals of the legal malpractice claim and the use of bifurcation and reverse bifurcation in legal malpractice trials, please see: Dwayne J. Hermes, Jeffrey W. Kemp & Paul B. Moore, *Leveling the Legal Malpractice Playing Field: Reverse Bifurcation of Trials*, 36 St. Mary’s L.J. 879 (2005).

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¹² See John C. Nemeth, *Legal Malpractice in Ohio*, 40 Clev. St. L. Rev. 143, 167-68 (1992).

¹³ Examples of cases that have considered the effectiveness of reverse bifurcation in the legal malpractice context include *Kearns v. Horsley*, 552 S.E.2d 1 (N.C. App. 2001); *Bowen v. Hunter, Maclean, Exley & Dunn*, 525 S.E.2d 744 (Ga. Ct. App. 1999).