RESEARCH PORTFOLIO

CALIFORNIA CRIMINAL MALPRACTICE RESEARCH

TODD CARPENTER | PLA 3108-23SPRING 0W61 |APRIL 2, 2023

ISSUES

Under the law of California, can a criminal defense attorney be sued for the tort of malpractice or negligence by a client? Does it matter if the attorney is a public defender appointed by the court or privately retained and paid by the client? Does a public defender enjoy immunity or qualified immunity as a state employee? Lastly, can a third party pay the retainer, and would that make a difference to the malpractice suit?

ANALYSIS

The criminal defense attorney, particularly the public or court-appointed defender, usually has a heavy caseload and strict budget constraints. They must deliver a competent and effective defense on a consistent basis despite the lack of resources and time, but what happens when they fail to meet that objective and defendants want to pursue remedies for that failure? This paper provides a superficial examination of the current position for the issues listed in California Law.

The term ineffective assistance of counsel (IAC) is frequently used by criminal defense attorneys to refer to the failure to meet the obligations and duties an attorney owes the defendant. Defendants frequently use IAC as the basis for a writ of habeas corpus petitions made postconviction.

The standard defining case of IAC is the landmark case *Strickland v. Washington,* 466 U.S. 668 (1984). In this case, the defendant had received the death penalty and filed a writ of habeas corpus. The defendant had pleaded guilty to three murders. Defense counsel did not bring character witnesses to speak at sentencing or psychiatric evaluations. Counsel did not even request presentencing reports, a recognized standard practice. On sentencing, the Judge found had little to nothing other than the Defendants statement in mitigations. The client received three death sentences. The client appealed, and the Florida Supreme court upheld the conviction. The client then filed the habeas writ with Federal District Court citing IAC violating his Sixth Amendment rights, which ultimately arrived in the Supreme Court. Joseph H. Ricks, *Raising the Bar: Establishing an Effective Remedy against Ineffective Counsel*, B.Y.U. L. Rev 1115 (2015).

The Court stated that the standard for determining IAC is twofold "the defendant must show that counsel's representation fell below an objective standard of reasonableness." and "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, (1984). The Court deemed that the Defense counsel acted unreasonably, and the Defendant was executed months later.

A defendant seeking civil remedies in California must meet the standards set forth in *Wiley v. County of San Diego* (1998) 19 Cal.4th 532. There a Defendant was accused and charged with burglary and various assaults. The Defendant maintained he was not present at the crime scene on the day in question even though an eyewitness stated he was at the scene. The victim and witness testified against the Defendant. He was convicted and sentenced to four years. He filed a writ of habeas corpus due to his counsel's failure to investigate, as multiple neighbors claimed they saw the Defendant at home during the assault. The key witness also recanted, so the court deemed that this evidence would have affected his trial. The Defendant brought an action to sue the Attorney for malpractice.

The Court stated, "In civil malpractice cases, the elements of a cause of action for professional negligence are: "(1) the duty of the attorney to use such skill, prudence, and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage." *Wiley v. County of San Diego* (1998) 19 Cal.4th 532.

The court then went to great lengths to discuss the distinction between civil claims of malpractice and criminal claims before arriving at the fifth and fundamental element required for a successful criminal malpractice claim. The court deemed that actual innocence is a necessary element for a cause of action for a criminal malpractice claim. The

reasoning of the court in *Wiley* was primarily based on two points. Firstly, it is contrary to public policy to allow convicted criminals to pursue malpractice claims without requiring proof of innocence, as criminals should not profit from their own wrongs. Secondly, the defendant's criminal acts are the ultimate causation of any damage done to them.

The courts in California have made the actual innocence standard a high bar going so far as to say, "however, a finding of "not guilty" is insufficient. What a plaintiff such as McNamara is required to prove—by a preponderance of the evidence—is that he is factually innocent of the crime with which he was charged." *Tibor v. Superior Court* (1997) 52 Cal. App.4th 1359

In both *Wiley* and *Tibor,* the attorneys were court-appointed public defenders. So a public defender may be sued for malpractice provided the defendant plaintiff can demonstrate the five causes of action. Attorneys owe multiple duties to clients, as stated in Cort Thomas, *Criminal Malpractice: Avoiding the Chutes and Using the Ladders*, 37 Am. J. Crim. L. 331 (2010), so a breach of those duties exposes them, but the requirement for factual innocence sets a high standard and a low likelihood of success, as indicated by David A. Sadoff, The Public Defender as Private Offender: A Retreat from Evolving Malpractice Liability Standards for Public Defenders, 32 Am.Crim.L.Rev. 883, 887–894. (1995).

An outstanding issue was postconviction relief; the court in *Wiley v. County of San Diego* (1998) 19 Cal.4th 532 commented on the fact that criminal defendants have substantive postconviction remedies available to them. Additionally they have the ability to bring civil actions for criminal malpractice, whereas civil litigant's only have a single cause of action. A civil litigant's claim dies forever with their case, so the adverse effect of attorney misconduct is more damaging. When the opportunity arose to clarify this matter, the court claimed, "Unless a person convicted of a criminal offense is successful in obtaining postconviction relief, the policies reviewed in Wiley preclude recovery in a legal malpractice action." *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194. This decision added the requirement that criminal litigants exhaust and obtain all postconviction remedies and prove factual innocence to make a successful claim of criminal malpractice.

Does the requirement for factual innocence apply to the felony or charge or to lessor-included charges? In *Sangha v. LaBarbera* (2006) 146 Cal. App. 4th 79 this question is addressed. In *Sangha* the defendant had a felony plea withdrawn, and new counsel negotiated a misdemeanor plea based on the offense being a "wobbler" either a felony or misdemeanor, depending on the value of the damage. The decision again was clear that the California judicial system would not aid criminal defendants pursuing malpractice claims. The court opined, "Applying the policy factors discussed in Wiley and Coscia, we conclude that "Sangha must show actual innocence on the misdemeanor vandalism offense, even though Sangha limited his malpractice claim to the representation he received on the felony vandalism charge." *Sangha v. LaBarbera* (2006) 146 Cal. App. 4th 79.

Notably, the Attorney accused of negligence in *Sangha* was privately retained, so the requirements are clearly applied to both public defenders and privately retained criminal defense attorneys.

There are some limitations on how far the courts will go in protecting the position of criminal defense attorneys. One clear line is the question of immunity. The California Supreme Court declined the opportunity to end all hope of a malpractice claim by declining to include public defenders as public employees who are entitled to immunity for discretionary actions under Cal. Gov't Code § 820.2. The Court considered the matter in *Barner v. Leeds* (2000) 24 Cal. 4th 676 and declared, "Resolving the competing policy considerations regarding immunity for deputy public defenders is not a judicial task, however. We have concluded that the immunity conferred by section 820.2 does not extend to the acts of a deputy public defender in representing a criminal defendant."

Finally, can a third party pay the retainer, and would that make a difference to the malpractice suit?

An Attorney licensed in California may take payment from someone other than the client for legal service subject to California Rules of Professional Conduct 1.8.6 (2018). There is no verifiable case of a third party bringing an action for malpractice. It is not hard to see why, as the attorney would unlikely owe a duty of care and fiduciary duties to the third party.

One other consideration for a criminal malpractice litigant is Ca. Civ. Proc. Code § 340.6 places a toll on attorneys' wrongful professional acts or omissions. This is an effective statute of limitations providing that other than for actual fraud arising in the performance of professional services shall be commenced within one year after the plaintiff discovers,

or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.

Returning to our original issues:

Under the law of California, a criminal defense attorney can be sued for the tort of malpractice or negligence by a client if the client can prove factual innocence and has obtained postconviction relief in addition to establishing all the elements of negligence and meeting the statute of limitations requirements listed in Ca. Civ. Proc. Code § 340.6.

It does not matter if the attorney is a public defender appointed by the court or privately retained and paid by the client.

A public defender does not enjoy any immunity as a state employee.

Finally, a third party can pay the retainer or fees on behalf of a criminal defendant subject to rules, and it is doubtful that would make any difference to the malpractice suit.

SECONDARY SOURCE SUMMARY

Nicholas Van Cleve, Amending the Peeler Doctrine: How to Provide Convicted Plaintiffs An Equitable Opportunity To Pursue Legal Malpractice Claims, 56 Hous. L. Rev. 927 (2019)

This article discusses the landmark Texas case *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497 (Tex. 1995), which gave rise to the "Peeler doctrine," The Peeler doctrine is the nickname for the Texas requirement that a criminal defendant must establish legal innocence via proof of exoneration or other post-conviction relief before suing their criminal defense attorneys for malpractice. The author discusses the current position of the doctrine in Texas and the most recent cases.

The article reviews the underlying reasons for the court's decision to create the Peeler doctrine and the ills it was designed to address. Helpfully, the author creates ten categories of criminal malpractice laws and places each state in a category. It provides an excellent overview of claims. This information demonstrates that other jurisdictions have found different solutions to the same ills.

Van Cleve is apparent in his desire to reform or repeal the Peeler doctrine and suggests multiple alternatives to redress the current law. His principal issue seems to be that the Peeler doctrine pardons a criminal defense attorney for their own negligence due to the insurmountable requirements for a criminal defendant to sue for malpractice or negligence.

David A. Sadoff, The Public Defender as Private Offender: A Retreat from Evolving Malpractice Liability Standards for Public Defenders, 32 Am.Crim.L.Rev. 883, 887–894. (1995)

Mr. Sadoff considers the position and job of the public defender and addresses the issues and potential remedies facing malpractice liability. His treatment breaks down into five sections.

In the first section, he highlights and examines the pressures and inherent conflict of the public defender's role. Sadoff clearly identifies the conflict the public defender faces in being remunerated by the state, sometimes by the very judges he argues before, and the fiduciary obligation to represent the interests of a client that does not pay him. The public defender is under pressure from a volume of cases and must take his cases as they are presented. The public defender and client relationship can be as adversarial as the one with the prosecution.

Secondly, Sadoff reviews the legal roadblocks a criminal defendant faces when filing and winning a malpractice case against public defenders. He approaches the task from the viewpoint of the incarcerated defendant and confronts the difficulties of establishing a claim. He questions the ability of a defendant to obtain and pay for outside counsel, experts, filing fees, etc. He acknowledges the reticence of attorneys to testify against a public defender or any attorney.

In the third section, he contemplates the positive and negative consequences of a public defender immunity rule. He weighs the proponents' argument for an immunity rule and outlines how immunity could be provided. He then addresses each argument systematically, pointing out why immunity is unwarranted or how immunity creates inequalities in other areas.

In the fourth section, Sadoff finally arrives at the destination he has hinted at throughout the paper. He states that a liability standard is necessary, and his overall argument can be synthesized as "liability creates responsibility." Sadoff makes it clear that he favors the adoption of a standard of ordinary negligence for public defenders. It should be a universal standard based on the specifics of a public defender i.e., what a public defender, with a public defender's workload, budget limitations, working in their location, and specializing in criminal defense would do in the same situation.

In his conclusion, Sadoff concedes one circumstance when a public defender should be shielded from liability. If a public defender is limited or constrained by budget from hiring investigators, experts, specialists, or translators, then the public defender should not be liable for negligence arising from that failure.

Anita Bernstein, Pitfalls Ahead: A Manifesto for the Training of Lawyers, 94 Cornell L. Rev. 479 (2009)

The article argues for including a "pitfalls" course as a mandatory part of legal education and law school. It identifies the various threats to a license, such as Civil, Criminal, and Regulatory Liabilities. It dedicates space to being deemed incompetent or giving ineffective assistance of counsel. The essay explores the powers of judges and the practicalities of their powers when a lawyer's arguments go badly wrong and warrant sanctions.

Bernstein argues that including these topics will create a newly minted lawyer with a practical understanding of the downsides of being an attorney and give them a fighting chance of avoiding potential issues. Bernstein contends that this approach will be superior to the current practice of learning the Model Rules of Professional Conduct of the American Bar Association without real practicality and specificity. Bernstein maintains that a pitfall approach exchanges a base doctrine for a "what would you do" approach and a review of the pitfalls of that decision. This approach reflects the actual minefield that is a lawyer's daily existence. Bernstein espouses that this will achieve the goal of instructing law students about the profession, not the concept of the profession.

It is noteworthy that Bernstein points out in detail the powers that a state bar has beyond the ultimate sanction of disbarment. The threat of disbarment leads lawyers to enter into agreements with regulators. These agreements can carry whatever conditions or interventions the regulator deems necessary to protect the clients and the profession. Bernstein contends that the marketplace regulates attorney activity as wealthy clients control firms with the threat of moving their work. Large and medium firms control young lawyers and limit their discretionary powers or divest the young lawyers they cannot control.

Acknowledgment is made of the lack of discussion in law school about legal malpractice, going so far as to label it a taboo. New lawyers assume employers and others will guide and shelter them from this without realizing the potential of civil and criminal liabilities they might face.

Addressing the question of competency, Bernstein recognizes that the lack of competency is a disciplinary offense in the Model Rules. However, she states that the client's cries of ineffective assistance will ultimately fail, and those that do succeed will still have to succeed with a malpractice claim for it to be of consequence to the attorney.

Law schools do little to prepare lawyers for appearing before judges. The study of reported case law decided by higher courts is distinct from the day-to-day judge in a court of first instance with 500 cases on their docket. A trial judge is an antagonist in a lawyer's daily life and has many sanctions that can be imposed on an attorney.

Bernstein argues that the pitfall focus in law school education will produce law students who understand the problems that arise from being an attorney and have practice at solving them.

Joseph H. Ricks, Raising the Bar: Establishing an Effective Remedy against Ineffective Counsel, B.Y.U. L. Rev 1115 (2015)

This article by Joseph H. Ricks delves into the problem of defining ineffective counsel (IAC) and recommending a workable and feasible solution consistent with the public policy argument.

Ricks introduces us to the issue of ineffective assistance of counsel by submitting the facts of Aldrich *v. State*, 296 S.W.3d 225 (Tex. App. 2009) and the attorney's conduct. It reads like a criminal defendant's nightmare in terms of attorney conduct. Ricks neatly segways his opening into the meat of his essay by establishing the bar in the form of *Strickland v. Washington,* 466 U.S. 668 (1984). He then discusses the lack of repercussions for attorneys that provide ineffective counsel, presents an argument on the nexus between case law and the Model Rules of Professional Conduct of the American Bar Association, and submits his remedy.

Strickland v. Washington, 466 U.S. 668 (1984) establishes a two-part test for determining IAC. The defendant must show that the counsel's representation fell below objective standards of reasonableness and that the performance prejudiced

the defense. This is problematic as both conditions must be met, and the attorney may have been below the standards, but if those shortcomings would not alter the evidence or the jury's decision, then it does not matter. It also does not address the attorney's malfeasance.

This launches Ricks into developing his case by demonstrating the lack of repercussions or reprisal for the attorney guilty of IAC. Civil malpractice suits have significant barriers and are likely to fail or be dismissed. Judges and fellow attorneys are reluctant to report offenders to the state bar, and reports are a rarity. Judges do not exercise the sanction power available to them. Ricks points out an increasing rise in the number of successful IAC claims. He attributes this not to a decline in the actual practice of law but more likely to an alteration in what judges deem acceptable as a reasonable standard and other factors.

Ricks proceeds to tie *Strickland v. Washington* to the Model Rules, pointing out that any conduct that meets the tests outlined in *Strickland* violates the Model Rules. He contends that the Model Rules set the standard for "professional norms" under *Strickland.* He submits that the courts already use the Model Rules as standards in other areas of law and on other topics. This relationship brings forth his proposed solution for IAC.

A requirement of mandatory reporting to the state bar by any IAC that meets the standard set by *Strickland* would ensure some consequence for attorneys without placing an undue burden on the state bar or the judiciary. Ultimately, Ricks believes this simple measure would restore some faith in the system.

Cort Thomas, Criminal Malpractice: Avoiding the Chutes and Using the Ladders, 37 Am. J. Crim. L. 331 (2010)

Thomas states that his goal is not to focus on the inadequacies of the current system but examine the practical consequences of the various positions the courts currently adopt concerning criminal malpractice. He acknowledged two malpractice claims: negligence and breach of fiduciary duty. The article relies heavily on Martyn, Fox & Wendel, *Restatement (Third) of the Law Governing Lawyers* (2000).

Claims based on negligence must demonstrate four elements, a duty, a breach of that duty, causation, and damages. Thomas states that attorneys owe the defendant four duties: to advance the client's lawful objectives after consultation, to act with reasonable competence and diligence, to comply with obligations concerning the client's confidence and property, to avoid impermissible conflicts of interest, to deal honestly with the client and not employ any advantages arising out of the relationship in a manner adverse to the client. The final duty is to fulfill valid contractual obligations to the client.

Similarly, there are five fiduciary duties the attorney owes to a defendant starting with "comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client." The final fiduciary duty is to follow the client's instructions.

Thomas outlines the various defenses available to the attorney against malpractice claims, namely the requirement of the defendant's factual or legal innocence, collateral estoppel, acting within the attorney's discretion, and the statute of limitations. Thomas develops and examines each defense in detail with authorities and examples.

The article discusses the ethical issues that might arise from each fiduciary responsibility. He emphasizes the areas of conflict of interest and fees and property issues.

Having pointed out the liabilities and obligations, Thomas proceeds to guide an attorney on navigating the potential liabilities. He advises attorneys to adopt an effective, modern risk management system and institute stringent administrative standards. He advises that a modern risk management system entails maintaining a conflict database of all clients, witnesses, co-defendants, and victims. The system will account for confidential information and a host of other issues. The second step is instituting better administrative procedures. He emphasizes the need to calendar accurately

and apply better documentation standards, particularly in communication. Lastly, he advised an attorney to secure malpractice insurance against potential claims.

PRIMARY SOURCE BRIEFS

Wiley v. County of San Diego (1998) 19 Cal.4th 532

FACTS:

A Client conviction was overturned on a petition of habeas corpus. The Client sued the Defense Attorney, a court-appointed public defender, for malpractice along with the county of San Diego public defender's office.

The Client was charged with felony battery, and the Attorney was appointed to defend him. The case went to trial, and the Client was convicted by a jury and sentenced to four years in prison.

The Client's conviction was overturned on appeal when a witness recanted his trial testimony. The Client subsequently sued the Attorney for malpractice, claiming the conviction resulted from the Attorney's negligent representation. A jury found in favor of the Client and awarded damages the Attorney appealed.

The Court of Appeal reversed the judgment due to the erroneous handling of evidence ; however, in the process, opined that proof of innocence was not required for a malpractice claim against the Attorney. The California Supreme court chose to review.

PROCEDURAL POSTURE:

This case is in the California Supreme Court after an appeal in the Court of Appeal Fourth District and a first-instance trial in the San Diego County Superior Court.

ISSUE(S):

Is proof of innocence required for a malpractice claim brought against a publicly appointed defense attorney?

HOLDING:

Yes.

REASONING:

I. It is contrary to public policy to allow convicted criminals to pursue malpractice claims without requiring proof of innocence, as criminals should not profit from their own wrongs.

II. Allowing criminals to pursue malpractice claims without evidence of innocence would ignore that the causation arises from the criminal's wrongdoing.

III. Criminal defendants have post-conviction remedies available to them for ineffective assistance of counsel.

DISPOSITION:

Affirmed and Remanded to the Court of Appeal for remand to the superior court.

SHEPERDIZING SUMMARY

This case was cited in 203 cases. It has nine cases of negative treatments. Three of those are in California cases, all of which were distinctions. This case is good law in California.

Tibor v. Superior Court (1997) 52 Cal. App.4th 1359

FACTS:

The Client was accused of rape and appointed a public Attorney. The Client was held without bail for 655 days awaiting trial. On appointment, the Client requested the Attorney obtain DNA test evidence that he felt would exonerate him. The Attorney did not order the DNA test until two years later when the Attorney handed the case off to another attorney. The Client also claimed the Attorney failed to contact witnesses that would provide an alibi. The Client's rape charges were dismissed at trial, and the Client sued Attorney and others.

The Attorney and others applied for summary judgment citing deficiencies in the Client's pleading as no evidence of a breach of duty or causation is provided. The Superior Court denied the Attorney's motion but granted it to codefendants on the grounds that it found a triable issue of material fact that the Attorney was negligent. The Attorney filed a writ of mandate with the Court of Appeals. The Court of Appeals denied the petition, and the Attorney sought review by the California Supreme Court. The Supreme Court issued an order instructing the Court of Appeals to vacate the order denying the Attorneys mandamus petition and hear the matter.

PROCEDURAL POSTURE:

This case is in the Second District Court of Appeal after being heard by the Supreme Court on appeal from the Second District Court of Appeal after hearing the first instance in the Superior Court of Los Angeles County.

ISSUE(S):

Are public defenders entitled to some form of protection when sued for malpractice by former clients?

HOLDING:

Yes.

REASONING:

I. It is a sound matter of public policy that to establish proximate cause, a criminal defendant must establish that not only was his attorney negligent but that the defendant was innocent of the criminal charges filed.

II. The Client's evidence does not demonstrate his factual innocence, it may have led to a not-guilty verdict, but that is insufficient.

DISPOSITION:

The writ is granted, and the superior court is directed to grant summary judgment to the Attorney.

SHEPERDIZING SUMMARY

This case was cited in 22 cases. It has three cases of negative treatments. Two of those are in California cases, one was a declination to extend, and the other was a declination to follow (subsequently overturned by Ca supreme court). This case is good law in California.

Coscia v. McKenna & Cuneo (2001) 25 Cal.4th 1194

FACTS:

An Attorney is charged with securities fraud and hires a Firm to represent him in the criminal proceedings. The Attorney enters a plea deal with federal prosecutors negotiated with the Firm. The Attorney pleads guilty on the record in exchange for a two-year prison sentence and fines. A year later, the Attorney sued the Firm for malpractice. The Firm files a demurrer without leave to amend as the statute of limitations and collateral estoppel bars the action. The court sustains the demurrer, and the Attorney appeals.

On appeal, the Attorney asserts he would amend the complaint to include facts of the Firm's negligence and entered the plea despite his innocence. The Court of Appeal reversed the judgment because a plaintiff in a criminal malpractice action who pleads guilty to the underlying offense is not collaterally estopped from proving actual innocence, and there is a reasonable possibility the Attorney could cure the defects in his pleading.

The California Supreme Court reviews.

PROCEDURAL POSTURE:

This case is in review by the California Supreme Court, being considered in the Court of Appeal Fourth District and initially heard in the Superior Court of San Diego County.

ISSUE(S):

Is exoneration by postconviction relief required before a plaintiff can prove actual innocence for the purposes of a malpractice action?

HOLDING:

Yes.

REASONING:

I. Unless a person convicted of a criminal offense successfully obtains postconviction relief without exoneration, the illegal acts remain the sole proximate, and producing cause and proof of innocence is not possible.

II. Criminal defendants do not come to court with just the guidance of counsel but with rights, powers, and privileges. They have multiple opportunities to ensure that an injustice has not been committed.

III. This prevents inconsistent verdicts whereby a defendant would be successful in a malpractice suit, but the criminal conviction remains intact.

IV. Distinguishing between convictions obtained by trial and plea would adversely effect the judicial system and encourage attorneys to go to trial rather than negotiate pleas to avoid potential claims.

DISPOSITION:

Affirmed, and the trial court instructed to hear according to instructions.

SHEPERDIZING SUMMARY

This case was cited in 367 cases. It has 13 cases of negative treatments. Five of those are California cases, two of which were distinctions and three that have been overturned. This case is good law in California.

Sangha v. LaBarbera (2006) 146 Cal. App. 4th 79

FACTS:

A Boyfriend is charged with making felony criminal threats and misdemeanor vandalism and petty theft for acts committed during a domestic dispute. The Boyfriend retains an Attorney to represent him through the preliminary hearing. The prosecution offered to reduce the charges to "wobbler," a felony or misdemeanor, for vandalism of more than $400 in exchange for a guilty plea and probation terms. The Boyfriend agreed to take the plea and entered freely.

Later the Boyfriend retained new counsel to set aside the plea agreement. The court agreed to do so based on the prosecution's stipulation, and the crimes fall within Cal. Penal Code

§ 17(b) reducing the felony to a misdemeanor.

The Boyfriend then sued the Attorney for legal malpractice, alleging negligence and asserting that he was factually innocent of the felony charges.

The Attorney made a motion for summary judgment. The trial court granted it because the Boyfriend failed to demonstrate postconviction exoneration and that actual innocence could not be established. The Boyfriend appealed.

PROCEDURAL POSTURE:

After a hearing in the Superior Court of Orange County, this case is in the Fourth District Court of Appeal.

ISSUE(S):

Does the plaintiff have to demonstrate actual innocence of only the specific offenses that are the subject of the malpractice action, or does it apply to lesser-included offenses?

HOLDING:

Yes

REASONING:

I. No evidence is presented of the actual innocence of the felony vandalism. The Boyfriend offers no evidence that the value of the damage is less than $400.

II. The Boyfriend does not dispute he is guilty of misdemeanor vandalism, and any harm suffered is primarily a result of the Boyfriend's criminal acts.

III. Allowing the Boyfriend relief in this instance would violate Cal. Civ. Code § 3517 "No one can take advantage of his own wrong."

DISPOSITION:

Affirmed and cost awarded.

SHEPERDIZING SUMMARY

This case was cited in 17 cases. It has zero cases of negative treatments. This case is good law in California.

Barner v. Leeds (2000) 24 Cal. 4th 676

FACTS:

The Defendant was arrested and charged with bank robbery. The Public Defender (PD) was appointed to represent the defendant. The Defendant was positively identified by a confidential informant from surveillance video and picked out of six packs by multiple witnesses. The PD had a copy of an FBI report suggesting another confidential informant identified a different suspect from the surveillance video. The PD assumed it was the same informant and did not file a motion requesting the confidential informant's identity before trial and ignored the report at trial.

The Defendant was convicted at trial and sentenced to sixteen years in prison. Later the prosecution informed the PD that the FBI report was from a second informant and that the FBI believed a different suspect had committed the bank robbery. The PD brought the FBI report to the attention of the Defendant's appellate counsel and, with the prosecutor, testified to the new evidence. The court set aside judgment pending a new trial.

The Defendant retained private counsel who motioned to disclose the confidential informant's identity; the FBI declined to identify the informant, and the court granted dismissal.

The second suspect was arrested for other bank robberies and, as part of a plea agreement, confessed to the robbery alleged against the Defendant. Defendant petitioned for a finding of factual innocence, which was granted.

Defendant filed suit for malpractice against the PD and others. The PD moved for summary judgment contending that Cal. Gov't Code § 820.2 granted immunity from liability for a public employee's discretionary acts. The trial court granted the motion concluding that the PD activity is quasi-legislative.

The Defendant appealed, and the Court of Appeals reversed, contending that the standard for publicly appointed and privately retained counsel is the same.

PROCEDURAL POSTURE:

This case is in review by the California Supreme Court, being considered in the Court of Appeal Second District and initially heard in the Superior Court of Los Angeles County.

ISSUE(S):

Is a public defender immune from liability under Cal. Gov't Code § 820.2?

HOLDING:

No.

REASONING:

I. The court's previous decisions established that public defenders owe the same duty of care as privately retained counsel to their clients.

II. The California Torts Act establishes that public employees are liable for tortious acts except those that fall within Cal's scope. Gov't Code § 820.2.

III. Cal. Gov't Code § 820.2 immunity is reserved for "basic policy decisions, not lower-level decisions that implement formulated policy.

IV. Once a public employee undertakes to render services, he or she is not immune from the negligent performance of those duties that do not amount to policy or planning decisions.

DISPOSITION:

Affirmed

SHEPERDIZING SUMMARY

This case was cited in 184 cases. It has seven cases of negative treatments. Five of those are California cases, all of which were distinctions and two that have been overturned. This case is good law in California.

19 Cal.4th 532
Supreme Court of California

Kelvin Eugene **WILEY**,
Plaintiff and Respondent,
v.
COUNTY OF SAN DIEGO et al., Defendants and Appellants.

No. S066034.
|
Nov. 23, 1998.

Synopsis

After client's conviction for battery was overturned on petition for habeas corpus, client brought legal malpractice action against public defender, **county**, and public defender's office. The Superior Court, San Diego **County**, No. 659219, James R. Milliken and G. Dennis Adams, JJ., entered judgment on jury verdict awarding client $162,500. **County** appealed. The Court of Appeal reversed and remanded. Review was granted. The Supreme Court, Brown, J., held that client was required to prove that he was actually innocent of charge on which he was convicted.

Court of Appeal's judgment affirmed, case remanded with directions.

Werdegar, J., issued concurring opinion.

Mosk, J., issued dissenting opinion.

Opinion, 68 Cal.Rptr.2d 193, vacated.

West Headnotes (2)

[1] **Attorneys and Legal Services** Malpractice or negligence in general; nature and elements

In civil malpractice cases, the elements of a cause of action for professional negligence are: (1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage.

117 Cases that cite this headnote

[2] **Attorneys and Legal Services** Criminal practice

When a former criminal defendant sues for legal malpractice, actual innocence is a necessary element of his cause of action.

150 Cases that cite this headnote

Attorneys and Law Firms

***672** *533** **983** Lloyd M. Harmon, Jr. and John J. Sansone, **County** Counsel, Diane Bardsley, Chief Deputy **County** Counsel, and William A. Johnson, Jr., Deputy **County** Counsel, for Defendants and Appellants.

Ault, Davis & Schonfeld, Thomas H. Ault, Cecilia P. Ruby, San Diego and Rosary C. Hernandez as Amici Curiae on behalf of Defendants and Appellants.

Kozel, Rady & Brack, Kozel & Rady and Timothy J. Kozel, San Diego, for Plaintiff and Respondent.

Opinion

***534** BROWN, Justice.

When a former criminal defendant sues for legal malpractice, is actual innocence a necessary element of the cause of action? For reasons of policy and pragmatism, we conclude the answer is yes.

factual and Procedural Background

Because a full recital of the underlying facts is not pertinent to resolution of the question presented, we relate them only in brief: In September 1990, plaintiff Kelvin Eugene **Wiley** (**Wiley**) was arrested and charged with burglary and various assaultive crimes against Toni DiGiovanni, a former girlfriend with whom he had a stormy relationship. At arraignment, he denied the charges and Deputy Public

Defender John Jimenez was appointed to represent him. **Wiley** claimed he had been at his apartment at the time of the alleged crimes, and Jimenez arranged for an investigator to contact witnesses and prepare a report. The investigator had only limited success in finding anyone to establish an alibi. In the meantime, **Wiley** took a polygraph test, which Jimenez was informed he "had not passed."

At trial, DiGiovanni, the only percipient witness, testified that after **Wiley** entered her condominium in a rage, he hit her repeatedly ***673 **984 with a wrench, threatened to kill her, and strangled her with a belt until she lost consciousness. Her 11–year–old son, Eric, testified that he found his mother lying on the floor and that **Wiley** had physically abused her on prior occasions. He also stated he saw **Wiley's** truck drive into the cul-de-sac where they lived the morning of the alleged attack. Taking the stand in his own behalf, **Wiley** denied attacking DiGiovanni and said she had been following and harassing him because he wanted to break off their relationship. According to his landlord, **Wiley's** truck was parked outside his duplex early on the morning of the alleged assault, and he did not see **Wiley** enter or leave his residence. Numerous character witnesses also attacked DiGiovanni's credibility.

A jury convicted **Wiley** of battery causing serious bodily injury, but could not reach verdicts on the remaining counts, which the prosecutor dismissed. **Wiley** was sentenced to four years in state prison. While his appeal was pending, he filed a petition for writ of habeas corpus challenging Jimenez's representation as ineffective due to his inadequate investigation of the defense. In support of the petition, he submitted declarations from several of DiGiovanni's neighbors, none of whom had been contacted by the defense investigator. In sum, they stated they had seen DiGiovanni driving away from her residence early on the morning in question and later saw a man other than **Wiley** banging on her door and shouting, "Let me in." They *535 noticed no signs of injury in the days following the incident. The trial court denied the petition, finding **Wiley** had failed to establish the investigation, preparation, or trial strategy had been inadequate.

A year later, **Wiley** filed a second habeas corpus petition. In addition to the previous declarations, he submitted evidence DiGiovanni's son had recanted his statement that **Wiley's** truck was at the condominium the morning of the alleged attack. The court granted the petition, finding that the son had lied at trial and that his testimony was crucial to the conviction. As a second basis for granting relief, the court determined Jimenez's inadequate investigation had deprived **Wiley** of exculpatory witnesses. The prosecutor later dismissed the case.

Wiley then filed the present legal malpractice action against Jimenez and the **County** of San Diego (defendants). Prior to trial, the court determined **Wiley's** innocence was not an issue and refused to require proof on the matter or submit the question to the jury. The jury found in favor of **Wiley** and awarded him $162,500. On appeal, defendants challenged, inter alia, the trial court's ruling on the issue of actual innocence. In support of their argument, they cited *Tibor v. Superior Court* (1997) 52 Cal.App.4th 1359, 61 Cal.Rptr.2d 326, in which the appellate court "concluded that, as a matter of sound public policy, a former criminal defendant, in order to establish proximate cause [in a legal malpractice action], must prove, by a preponderance of the evidence, not only that his former attorney was negligent in his representation, but that he (the plaintiff) was innocent of the criminal charges filed against him." (*Id.* at p. 1373, 61 Cal.Rptr.2d 326.)

The Court of Appeal reversed the judgment because the trial court erroneously admitted the transcript of the second habeas corpus hearing and erroneously excluded certain evidence on which Jimenez based his trial strategy: the polygraph examination, a psychological evaluation of **Wiley**, and a prior domestic violence incident. Defendants' arguments on the question of actual innocence were rejected, however. The court acknowledged the "visceral appeal" of imposing such a requirement, but declined to do so for several reasons. First, "it is 'difficult to defend logically a rule that requires proof of innocence as a condition of recovery, especially if a clear act of negligence of defense counsel was obviously the cause of the defendant's conviction of a crime.' (*Glenn* [*v. Aiken* (1991)] 409 Mass. 699, 569 N.E.2d [783,] 787, fn. omitted.)" Second, creating a separate standard for clients represented in a criminal setting is "fundamentally incompatible" with the constitutional guaranty of effective assistance of counsel. Third, no empirical evidence supported the rationale, advanced by some courts, that the threat of malpractice claims would discourage representation of criminal *536 defendants, particularly ***674 **985 those who are indigent. Finally, an actual innocence requirement would create "rather artificial distinctions" between criminal defense attorneys and civil attorneys.

We granted review to resolve the conflict in the Courts of Appeal and settle an important issue of state law.

discussion

In their seminal commentary, Justice Otto Kaus and Ronald Mallen remarked on the "dearth of criminal malpractice litigation," noting only a handful of reported cases nationwide as of 1974. (Kaus & Mallen, *The Misguiding Hand of Counsel —Reflections on "Criminal Malpractice"* (1974) 21 UCLA L.Rev. 1191, 1193 (Kaus & Mallen).)[1] Today by contrast, they would find a plethora of decisions, generated by the ever-rising tide of professional negligence actions generally. (See, e.g., Annot., *Legal Malpractice in Defense of Criminal Prosecution* (1992) 4 A.L.R.5th 273; see also 3 Mallen & Smith, Legal Malpractice (4th ed. 1996) § 25.1, p. 226.) Nevertheless, this court has yet to address any aspect of criminal malpractice, including the relevance of the plaintiff's actual innocence.

[1] **[2]** In civil malpractice cases, the elements of a cause of action for professional negligence are: "(1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage. [Citations.]" (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1621, 33 Cal.Rptr.2d 276.) In criminal malpractice cases, the clear majority of courts that have considered the question also require proof of actual innocence as an additional element.[2] (See *Kramer v. Dirksen* (Ill.App.Ct.1998) 296 Ill.App.3d 819, 231 Ill.Dec. 169, 695 N.E.2d 1288, 1290; ***537** *Ray v. Stone* (Ky.Ct.App.1997) 952 S.W.2d 220, 224; *Glenn v. Aiken* (1991) 409 Mass. 699, 569 N.E.2d 783, 785; *Morgano v. Smith, supra,* 879 P.2d at pp. 737–738; *Carmel v. Lunney* (1987) 70 N.Y.2d 169, 173, 518 N.Y.S.2d 605, 607, 511 N.E.2d 1126; *Stevens v. Bispham, supra,* 851 P.2d at p. 566; *Bailey v. Tucker* (1993) 533 Pa. 237, 247, 621 A.2d 108, 113; *Peeler v. Hughes & Luce, supra,* 909 S.W.2d at p. 497; *Levine v. Kling* (7th Cir.1997) 123 F.3d 580, 582 [construing Illinois law]; see also *Lamb v. Manweiler* (Idaho 1996) 129 Idaho 269, 923 P.2d 976, 978 [noting plaintiff did not dispute proposition that actual innocence was "additional element" of criminal malpractice cause of action]; *State ex rel. O'Blennis v. Adolf* (Mo.Ct.App.1985) 691 S.W.2d 498, 503 [plaintiff's guilty plea precluded criminal malpractice action on principles of collateral estoppel]; cf. *Weiner v. Mitchell, Silberberg & Knupp, supra,* 114 Cal.App.3d at p. 48, 170 Cal.Rptr. 533 [plaintiff's guilt was proximate cause of conviction]; *Adkins v. Dixon* (1997) 253 Va. 275, 282 [482 S.E.2d 797, 802] ["actual *****675** guilt" is ****986** material consideration on issue of proximate cause].)

Common to all these decisions are considerations of public policy: " '[P]ermitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit by his own fraud, or to take advantage of his own wrong, or to found [a] claim upon his iniquity, or to acquire property by his own crime. As such, it is against public policy for the suit to continue in that it "would indeed shock the public conscience, engender disrespect for courts and generally discredit the administration of justice." ' [Citations.]" *(Peeler v. Hughes & Luce, supra,* 909 S.W.2d at p. 497; *State ex rel. O'Blennis v. Adolf, supra,* 691 S.W.2d at p. 504.) " '[C]ourts will not assist the participant in an illegal act who seeks to profit from the act's commission.' " (*Adkins v. Dixon, supra,* 482 S.E.2d at p. 801.)

Additionally, "allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict. This opportunity to shift much, if not all, of the punishment assessed against convicts for their criminal acts to their former attorneys, drastically diminishes the consequences of the convicts' criminal conduct and seriously undermines our system of criminal justice. [Citation.]" (*Peeler v. Hughes & Luce, supra,* 909 S.W.2d at p. 498; see also *Levine v. Kling, supra,* 123 F.3d at p. 582.) "[I]f ***538** plaintiffs engaged in the criminal conduct they are accused of, then they alone should bear full responsibility for the consequences of their acts, including imprisonment. Any subsequent negligent conduct by a plaintiff's attorney is superseded by the greater culpability of the plaintiff's criminal conduct. [Citation.]" (*Shaw v. State, Dept. of Admin.* (Alaska 1993) 861 P.2d 566, 572.) Accordingly, "[t]hese cases treat a defendant attorney's negligence as not the cause of the former client's injury as a matter of law, unless the plaintiff former client proves that he did not commit the crime." (*Glenn v. Aiken, supra,* 569 N.E.2d at p. 786; *Ray v. Stone, supra,* 952 S.W.2d at p. 224; *Bailey v. Tucker, supra,* 621 A.2d at p. 113; *Peeler v. Hughes & Luce, supra,* 909 S.W.2d at p. 498.)

Notwithstanding these policy considerations, actual innocence is not a universal requirement. (See *Gebhardt v. O'Rourke* (1994) 444 Mich. 535, 510 N.W.2d 900; *Krahn v. Kinney* (1989) 43 Ohio St.3d 103, 538 N.E.2d 1058; see also *Silvers v. Brodeur* (Ind.Ct.App.1997) 682 N.E.2d 811.)[3] Those courts declining to require such proof generally do not discuss the public policy implications but simply consider criminal malpractice as indistinguishable from civil

malpractice. For example, in *Krahn v. Kinney, supra,* 43 Ohio St.3d 103, 538 N.E.2d 1058, defense counsel failed to convey a plea bargain offer and his client ultimately pled guilty to a more serious charge than offered. The reviewing court allowed the client's subsequent criminal malpractice action to proceed without proof of innocence, analogizing to what it considered comparable negligence in a civil context. "The situation is like that in a civil action where the attorney fails to disclose a settlement offer. Such failure [exposes] the attorney to a claim of legal malpractice. [Citations.]" (*Id.* at p. 1061; see *Mylar v. Wilkinson, supra,* 435 So.2d at p. 1239; *Jepson v. Stubbs, supra,* 555 S.W.2d at pp. 313–314; see also Kaus & Mallen, *supra,* 21 UCLA L.Rev. at p. 1205.)

We find these latter decisions unpersuasive. To begin, the public policy reasons articulated in favor of requiring proof of actual innocence are compelling. Our legal system is premised in part on the maxim, "No one can take advantage of his own wrong." (Civ.Code, § 3517; see ****987 ***676 *539** Prob.Code, § 250 et seq. [prohibiting financial gain by one who feloniously and intentionally kills]; *Whitfield v. Flaherty* (1964) 228 Cal.App.2d 753, 758, 39 Cal.Rptr. 857; cf. Civ.Code, § 3333.3 [no tort recovery if plaintiff's injury caused by own commission of felony].) Regardless of the attorney's negligence, a guilty defendant's conviction and sentence are the direct consequence of his own perfidy. The fact that nonnegligent counsel "could have done better" may warrant postconviction relief, but it does not translate into civil damages, which are intended to make the plaintiff whole. (See *post,* 79 Cal.Rptr.2d at pp. 677–679, 966 P.2d at pp. 988–990.) While a conviction predicated on incompetence may be erroneous, it is not unjust. "Arguably, ... the values which favor the accused in the context of the criminal process lose their validity when that process comes to its end. For example, what would be the result of a public opinion poll which asks this question: 'Should a lawyer have to pay damages to a guilty client because he negligently fails to secure an acquittal?' Surely a very substantial percentage of those polled would say that the guilty client is not entitled to damages since—God works in mysterious ways—'justice' was done." (Kaus & Mallen, *supra,* 21 UCLA L.Rev. at p. 1203.)

Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss. (See *Bailey v. Tucker, supra,* 621 A.2d at p. 113.) In sum, "the notion of paying damages to a plaintiff who actually committed the criminal offense solely because a lawyer negligently failed to secure an acquittal is of questionable public policy and is contrary to the intuitive response that damages should only be awarded to a person who is truly free from any criminal involvement." (*Holliday v. Jones* (1989) 215 Cal.App.3d 102, 115, fn. 7, 264 Cal.Rptr. 448.) We therefore decline to permit such an action where the plaintiff cannot establish actual innocence. (Cf. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments* (1970) 38 U. Chi. L.Rev. 142.)

The public policy rationale is strongest when the malpractice plaintiff claims that some species of trial-related error resulted in a conviction. In other circumstances, where guilt is conceded or undeniable, it admittedly gives rise to a certain tension if counsel's negligence nonetheless caused a less favorable outcome. Kaus and Mallen anticipated this conflict: "Paradoxically, perhaps, the temptation to urge the relevance of actual guilt is strongest in situations in which the malpractice may be the least excusable, such as the lawyer's failure to raise a defense available to the client which would have prevented the prosecution from even going to trial. Thus, if the lawyer failed to make a motion to suppress a balloon of heroin which had been stomach-pumped from the client after he swallowed it when threatened ***540** by an illegal arrest, the client should be entitled to a directed verdict on the issues of malpractice and causation; yet if actual guilt is relevant, he should be nonsuited. The paradox arises, of course, from the fact that the malpractice is liable to be most obvious where it consists of a failure to raise what, for want of a better word, we may call a 'technical' defense—one which would result in a favorable disposition of the criminal proceedings without the issue of the client's guilt ever being submitted to a jury. In many cases the 'technical' defense will be the only one the client has: if not asserted, a conviction is a foregone conclusion." (Kaus & Mallen, *supra,* 21 UCLA L.Rev. at p. 1205; *Glenn v. Aiken, supra,* 569 N.E.2d at p. 787; see also *Silvers v. Brodeur, supra,* 682 N.E.2d at p. 818 ["[C]riminal defendants who are harmed by their attorneys' negligence in ways other than conviction, such as by the imposition of lengthier sentences, will be completely without relief."].)

Even courts adopting an actual innocence prerequisite have noted this quandary. "[A] requirement that a plaintiff, the former criminal defendant, must prove his innocence of the crime with which he was charged may relieve the defendant attorney, his former counsel, of liability for harm that the plaintiff suffered only because of his defense counsel's negligence. For example, if a defendant attorney failed to

assert a clearly valid defense of the statute of limitations, a client who did ***677 **988 commit the crime, but should not have been convicted of it, sustained a real loss, but he may not recover against the attorney defendant.... [¶] ... [¶] It may be difficult to defend logically a rule that requires proof of innocence as a condition of recovery, especially if a clear act of negligence of defense counsel was obviously the cause of the defendant's conviction of a crime." (*Glenn v. Aiken, supra,* 569 N.E.2d at p. 787, fn. omitted; see *Carmel v. Lunney, supra,* 518 N.Y.S.2d at p. 607, 511 N.E.2d 1126.)

This theoretical dilemma is predicated in part on too literal a translation of the civil malpractice model, which operates on strict "but for" principles of causation. In a civil malpractice action, the focus is solely on the defendant attorney's alleged error or omission; the plaintiff's conduct is irrelevant. (See Kaus & Mallen, *supra,* 21 UCLA L.Rev. at p. 1203.) In the criminal malpractice context by contrast, a defendant's own criminal act remains the ultimate source of his predicament irrespective of counsel's subsequent negligence. Any harm suffered is *not* "only because of" attorney error but principally due to the client's antecedent criminality. Thus, it is not at all difficult to defend a different rule because criminal prosecution takes place in a significantly different procedural context, "and as a result the elements to sustain such a cause of action must likewise differ." (*Bailey v. Tucker, supra,* 621 A.2d at p. 114; *Carmel v. Lunney, supra,* 518 N.Y.S.2d at p. 607, 511 N.E.2d 1126; see *Holliday v. Jones, supra,* 215 Cal.App.3d at p. 115, fn. 7, 264 Cal.Rptr. 448; see also Kaus & Mallen, *supra,* 21 UCLA L.Rev. at p. 1203.)

*541 In larger part, the expressed concern fails to account for the nature and function of the constitutional substructure of our criminal justice system. For example, "it is clear that our society has willingly chosen to bear a substantial burden [by requiring proof beyond a reasonable doubt] in order to protect the innocent...." (*Patterson v. New York* (1977) 432 U.S. 197, 208, 97 S.Ct. 2319, 53 L.Ed.2d 281.) "The standard provides concrete substance for the presumption of innocence —that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' [Citation.]" (*In re Winship* (1970) 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368.) Indeed, "[c]ompliance with the standard of proof beyond a reasonable doubt is the defining, central feature in criminal adjudication, unique to the criminal law. [Citation.] Its effect is at once both symbolic and practical, as a statement of values about respect and confidence in the criminal law, [citation], and an apportionment of risk in favor of the accused [citation]." (*Foucha v. Louisiana* (1992) 504 U.S. 71, 93, 112 S.Ct. 1780, 118 L.Ed.2d 437 (dis. opn. of Kennedy, J.).) Simply put, it is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." (*In re Winship, supra,* 397 U.S. at p. 372, 90 S.Ct. 1068 (conc. opn. of Harlan, J.); see *Speiser v. Randall* (1958) 357 U.S. 513, 525–526, 78 S.Ct. 1332, 2 L.Ed.2d 1460; cf. *Abney v. United States* (1977) 431 U.S. 651, 661, 97 S.Ct. 2034, 52 L.Ed.2d 651 [The prohibition against double jeopardy "protects interests wholly unrelated to the propriety of any subsequent conviction."].)

The exclusionary rule allows "[t]he criminal ... to go free because the constable has blundered." (*People v. Defore* (1926) 242 N.Y. 13, 21 [150 N.E. 585, 587].) Nevertheless, irrespective of the cost " 'there is another consideration—the imperative of judicial integrity.' [Citation.] The criminal goes free, if he must, but it is the law that sets him free." (*Mapp v. Ohio* (1961) 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed.2d 1081; see also *Arizona v. Hicks* (1987) 480 U.S. 321, 329, 107 S.Ct. 1149, 94 L.Ed.2d 347; *Miller v. United States* (1958) 357 U.S. 301, 313, 78 S.Ct. 1190, 2 L.Ed.2d 1332.) "[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' [Citation.]" (*Mapp v. Ohio, supra,* 367 U.S. at p. 656, 81 S.Ct. 1684.)

These and other constitutional protections are to safeguard against conviction of the wrongly accused and to vindicate fundamental values. They are not intended to confer any direct benefit outside the context of the ***678 **989 criminal justice system. Thus, defense counsel's negligent failure to utilize them to *542 secure an acquittal or dismissal for a guilty defendant does not give rise to civil liability. (Cf. *Levine v. Kling, supra,* 123 F.3d at p. 582.) Rather, the criminal justice system itself provides adequate redress for any error or omission and resolves the apparent paradox noted in case and commentary. All criminal defendants have a Sixth Amendment right to effective assistance of counsel, that is, counsel acting reasonably " 'within the range of competence demanded of attorneys in criminal cases.' [Citation.]" (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.) Not only does the Constitution guarantee this right, any lapse can be rectified through an array of postconviction remedies, including appeal and habeas corpus. Such relief is afforded even to those clearly guilty as long as they demonstrate incompetence and resulting prejudice, i.e., negligence and damages, under the same standard of professional care

applicable in civil malpractice actions. (See *McCord v. Bailey, supra,* 636 F.2d at p. 609.)

If, for example, counsel failed to move to suppress unlawfully obtained evidence dispositive of guilt or to raise a claim of double jeopardy or to interpose a meritorious defense, the defendant would not be denied the opportunity to prove he would have prevailed on such a motion or defense and avoided conviction notwithstanding incontrovertible proof he committed a crime. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267, 62 Cal.Rptr.2d 437, 933 P.2d 1134 [habeas corpus available for failure to bring suppression motion]; *People v. Belcher* (1974) 11 Cal.3d 91, 101, 113 Cal.Rptr. 1, 520 P.2d 385 [ineffective assistance of counsel for failure to assert former acquittal defense]; *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1203, 269 Cal.Rptr. 862 [appeal available for failure to bring suppression motion]; *People v. Farley* (1979) 90 Cal.App.3d 851, 868, 153 Cal.Rptr. 695 [conviction reversed for failure "to make the appropriate suppression-of-evidence motions"].) An attorney's dereliction concerning sentencing matters and plea bargaining is likewise subject to postconviction challenge. (See *In re Alvernaz* (1992) 2 Cal.4th 924, 934–935, 8 Cal.Rptr.2d 713, 830 P.2d 747 [ineffective assistance in conjunction with plea bargains]; *People v. Huynh* (1991) 229 Cal.App.3d 1067, 1083, 281 Cal.Rptr. 785 [same, counsel's misadvice regarding probable minimum prison term before parole eligibility]; *People v. Brown* (1986) 177 Cal.App.3d 537, 554, 223 Cal.Rptr. 66 [same, inadequately pursuing or perfecting plea negotiations]; *People v. Cropper* (1979) 89 Cal.App.3d 716, 721, 152 Cal.Rptr. 555 [same, arguing against defendant at sentencing]; *People v. McCary* (1985) 166 Cal.App.3d 1, 7–8, 212 Cal.Rptr. 114 [same, failure to object to inapplicable sentencing enhancement]; see also *Stevens v. Bispham, supra,* 851 P.2d at p. 565.)

In such instances of attorney negligence, postconviction relief will provide what competent representation should have afforded in the first instance: ***543** dismissal of the charges, a reduced sentence, an advantageous plea bargain. In the case of trial error, the remedy will be a new trial. If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies and considering the purpose and function of constitutional guaranties. (*Morgano v. Smith, supra,* 879 P.2d at p. 737, fn. 3; *Stevens v. Bispham, supra,* 851 P.2d at p. 563; *Bailey v. Tucker, supra,* 621 A.2d at p. 113; *Levine v. Kling, supra,* 123 F.3d at p. 582; cf. *Peeler v. Hughes & Luce, supra,* 909 S.W.2d at p. 498; cf. *Mylar v. Wilkinson, supra,* 435 So.2d at pp. 1238–1239.) Those courts analogizing to civil actions have not considered the implications of postconviction relief for ineffective assistance of counsel. (See *Stevens v. Bispham, supra,* 851 P.2d at p. 565.) Given that availability, it is inimical to sound public policy to afford a civil remedy, which in some cases would provide a further boon to defendants already evading just punishment on "legal technicalities." (Cf. *Stone v. Powell* (1976) 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 [no federal habeas corpus relief for Fourth Amendment violation fully and fairly litigated in state court].)

In contrast to the postconviction relief available to a criminal defendant, a civil matter lost through an attorney's negligence is lost forever. The litigant has no recourse *****679 **990** other than a malpractice claim. The superficial comparison between civil and criminal malpractice is also faulty in other crucial respects. (See Kaus & Mallen, *supra,* 21 UCLA L.Rev. at pp. 1203–1204; Mallen, *Legal Malpractice and the Criminal Defense Lawyer* (Fall 1994) 9 Crim. Justice J. 2, 6, 54–55.) Tort damages are in most cases fungible in the sense that the plaintiff seeks in a malpractice action exactly what was lost through counsel's negligence: money. "Damages" in criminal malpractice are difficult to quantify under any circumstances. Calculating them when, for example, counsel's incompetence causes a longer sentence would be all the more perplexing. (See generally, Kaus & Mallen, *supra,* 21 UCLA L.Rev. at pp. 1221–1224.)

Tort law also operates on very different legal principles from the constitutionally reinforced and insulated criminal justice system. "Tort law provides damages only for harms to the plaintiff's legally protected interests, [citation], and the liberty of a guilty criminal is not one of them. The guilty criminal may be able to obtain an acquittal if he is skillfully represented, but he has no right to that result (just as he has no *right* to have the jury nullify the law, though juries sometimes do that), and the law provides no relief if the 'right' is denied him." (*Levine v. Kling, supra,* 123 F.3d at p. 582.) Moreover, "[t]he underpinnings of common law tort liability, compensation and deterrence, do not support a rule that allows recovery to one who is guilty of the underlying criminal charge. A person who is guilty need not be ***544** compensated for what happened to him as a result of his former attorney's negligence. There is no reason to compensate such a person, rewarding him indirectly for his crime." (*Glenn v. Aiken, supra,* 569 N.E.2d at p. 788.)

Reinforcing this conclusion are the pragmatic difficulties that would arise from simply overlaying criminal malpractice

actions with the civil malpractice template. In civil actions, carrying the burden on causation is relatively straightforward and comprehensible for the jury, even if it necessitates a "trial within a trial." The factual issues in the underlying action are resolved according to the same burden of proof, and the same evidentiary rules apply. Thus, it is reasonably possible for the malpractice jury to assess whether and to what extent counsel's professional lapse compromised a meritorious claim or defense. (See *Glenn v. Aiken, supra,* 569 N.E.2d at p. 787.)

By contrast, "the prospect of retrying a criminal prosecution [is] 'something one would not contemplate with equanimity....' " (Kaus & Mallen, *supra,* 21 UCLA L.Rev. at p. 1202, fn. 30, quoting Lord Reid in *Rondel v. Worsley* (1969) 1 A.C. 191, 230.) The procedure outlined in *Shaw v. State, Dept. of Admin., supra,* 861 P.2d at page 573, suggests this estimation is not exaggerated: "[T]he standard of proof will be a complex one, in essence, a standard within a standard. [Plaintiff] must prove by a preponderance of the evidence that, but for the negligence of his attorney, the jury could not have found him guilty beyond a reasonable doubt." (See also *Fantazia v. **County** of Stanislaus* (1996) 41 Cal.App.4th 1444, 1454, 49 Cal.Rptr.2d 177; *Glenn v. Aiken, supra,* 569 N.E.2d at pp. 787–788 [applying civil malpractice analogy, "defendant attorney would have to prove that his former client was guilty beyond a reasonable doubt"]; Kaus & Mallen, *supra,* 21 UCLA L.Rev. at p. 1202, fn. 30.) Moreover, while the plaintiff would be limited to evidence admissible in the criminal trial, the defendant attorney could introduce additional evidence, including "any and all confidential communications, as well as otherwise suppressible evidence of factual guilt." (*Bailey v. Tucker, supra,* 621 A.2d at p. 115, fn. 12; *Shaw v. State Dept. of Admin., supra,* 861 P.2d at p. 573.) The mental gymnastics required to reach an intelligent verdict would be difficult to comprehend much less execute. (See also *Glenn v. Aiken, supra,* 569 N.E.2d at p. 788, fn. 8; Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel* (1981) 1981 Duke L.J. 542, 561–562.) Avoiding such a procedure is also consistent with " 'a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.' [Citation.]" (*Heck v. Humphrey* (1994) 512 U.S. 477, 484, 114 S.Ct. 2364, 129 L.Ed.2d 383 [holding malicious prosecution action requires termination ***680 **991 of prior criminal proceeding in favor of accused].)

We would also anticipate attorneys might practice "defensive" law more frequently to insulate their trial court decisions. "[I]n our already overburdened system it behooves no one to encourage the additional expenditure *545 [of] resources merely to build a record against a potential malpractice claim." (*Bailey v. Tucker, supra,* 621 A.2d at p. 114.)

For the foregoing reasons, we hold that in a criminal malpractice action actual innocence is a necessary element of the plaintiff's cause of action. Therefore, on retrial **Wiley** will have to prove by a preponderance of the evidence that he did not commit battery with serious bodily injury.[4]

disposition

We affirm the judgment of the Court of Appeal and remand to that court with directions to remand the cause to the superior court for further proceedings not inconsistent with this opinion.

GEORGE, C.J., and KENNARD, J., BAXTER, J., and CHIN, J., concur.

Concurring Opinion of WERDEGAR, J.

I agree with the majority that plaintiff's guilt or innocence of the 1990 battery is relevant to his malpractice claim and that the case must therefore be remanded for further proceedings. Accordingly, I concur in the judgment. I do not, however, agree with the majority's decision to add a new element to the tort of malpractice, nor do I agree with the method by which the majority reaches that decision.

The majority expresses concern that convicted criminals not be permitted to avoid the consequences of their crimes by recovering damages for legal malpractice. While the concern appears valid, for a court therefore simply to declare, as does the majority, that "[f]or reasons of policy and pragmatism" (maj. opn., *ante,* 79 Cal.Rptr.2d at p. 672, 966 P.2d at p. 983), the law will now be changed, seems inappropriate. Society respects its high courts' decisions because it understands that someone must have the last word on difficult questions of law. A judicial decision that explicitly presents itself as a policy decision, rather than as a neutral application of existing legal principles, risks forfeiting that respect. One need not demand that judges be entirely uninfluenced by their personal *546 views on good social policy. But one can, and should, ask that judges be mindful of their duty to strive constantly to subordinate such views to more objective sources of law.

In this case, fortunately, the impact of the majority's peremptory method is likely to be limited. This is because the ordinary principles of tort law typically offer other paths to the conclusion that persons found guilty of crimes may not obtain damages from their defense attorneys. The doctrine of proximate cause, for example, generally makes it difficult or impossible for a person guilty of intentional criminal wrongdoing to show that any ensuing consequences can fairly be attributed to an attorney's negligent legal representation. (See, e.g., *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal.App.3d 39, 48, 170 Cal.Rptr. 533, cited in maj. opn., *ante,* 79 Cal.Rptr.2d at p. 674, 966 P.2d at p. 985.) As the majority itself acknowledges, "[i]n the criminal malpractice context ... a defendant's own criminal act remains the ultimate source of his predicament...." (Maj. opn., *ante,* 79 Cal.Rptr.2d at p. 677, 966 P.2d at p. 988.) This being the case, it is unnecessary and, thus, all the more regrettable that ***681** the **992** majority has chosen to announce its decision as one of "policy and pragmatism" rather than of law.

One problem with announcing a new, policy-based rule is that unintended consequences invariably follow. So it is here. Our court has in recent cases made it abundantly clear that we will strictly follow the statute that governs the accrual and limitation of claims for attorney malpractice. (Code Civ. Proc., § 340.6; see *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 76 Cal.Rptr.2d 749, 958 P.2d 1062 (*Jordache*); *Adams v. Paul* (1995) 11 Cal.4th 583, 46 Cal.Rptr.2d 594, 904 P.2d 1205 (*Adams*).) Under this statute, an action against an attorney for a wrongful act or omission must ordinarily be commenced within one year after the plaintiff discovers, or should have discovered, the facts constituting the wrongful act or omission. In view of the time required to decide appeals and petitions for habeas corpus in criminal cases, the statute of limitations in most cases likely will run long before the convicted person has a chance to have the conviction set aside and, thus, remove the bar (collateral estoppel) to establishing his or her actual innocence. The majority alludes to this problem, but offers no solution. (Maj. opn., *ante,* 79 Cal.Rptr.2d at p. 674, fn. 2, 966 P.2d at p. 985, fn. 2.) Indeed, I see no ready solution, considering that we have soundly condemned all nonstatutory tolling rules (see *Jordache, supra,* 18 Cal.4th at pp. 755–758, 76 Cal.Rptr.2d 749, 958 P.2d 1062), including our own prior effort to redefine the element of "damages" so as to prevent the accrual of a cause of action for malpractice until all related lawsuits that might undo the harm caused by the malpractice have concluded (see *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245, 36 Cal.Rptr.2d 552, 885 P.2d 965, limited in *Adams, supra,* 11 Cal.4th at p. 588, 46 Cal.Rptr.2d 594, 904 P.2d 1205, and *547 overruled in *Jordache, supra,* 18 Cal.4th at p. 763, 76 Cal.Rptr.2d 749, 958 P.2d 1062). How, without undoing *Jordache* and *Adams,* might we hold that a cause of action for criminal malpractice does not accrue until the underlying conviction is set aside?

Another problem with rules of law that spring to life full-grown from the mind of policy, rather than by evolving through the ordinary process of the common law, is that they tend not to be well articulated. That is the case here. What, precisely, is "actual innocence"? The majority does not tell us. If a criminal defendant, for example, is convicted of two different crimes, must he or she prove innocence of both, even if the alleged legal malpractice affected only one of the convictions? Must a convicted malpractice plaintiff prove innocence of all related offenses that *might* have been charged, or only of those that were charged or necessarily included in those that were? Should the plaintiff's ability to recover for malpractice depend on the fortuities of prosecutorial charging discretion? The answer to these questions is far from obvious.

The common law of torts, as articulated by successive generations of judges, typically has enough depth and subtlety to do justice in unusual cases. To turn our backs on this collective wisdom by adopting a rule apparently designed to cut off whole categories of litigation seems ill advised. It is not beyond imagination that a particular defendant's offense might be so insignificant, and the attorney's malpractice so egregious, that reasonable jurors instructed on the relevant principles of tort law might well conclude the latter was in fact a proximate cause of some of the ensuing consequences. The majority's new rule seems to foreclose such possibilities.

In conclusion, although I share the majority's intuition that a guilty person ordinarily should not be able to recover damages based on a defense attorney's malpractice, I do not agree that it is either necessary or desirable to remake the law to conform to our own views of good policy. Rather, we would do better to ask whether any legitimate policy concerns already find expression in existing principles of tort law and, if so, to leave the law alone.

Dissenting Opinion by MOSK, J.

As the majority acknowledge, the usual elements of a legal malpractice cause of action are: "(1) the duty of the attorney

to use ***682 **993 such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage." (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1621, 33 Cal.Rptr.2d 276.) The majority add the element of "actual innocence" in criminal malpractice cases. In effect, the majority hold that a defense attorney owes no duty cognizable in tort to act competently toward a client he or she knows to be *548 guilty of a crime of which the client is charged. I decline to join the majority for reasons stated in the Court of Appeal opinion, set forth below.[1]

"First, as recognized by the court in [*Glenn v. Aiken* (1991) 409 Mass. 699, 569 N.E.2d 783, 787, fn. omitted], it is 'difficult to defend logically a rule that requires proof of innocence as a condition of recovery, especially if a clear act of negligence of defense counsel was obviously the cause of the defendant's conviction of a crime.' [Citation.] For example, where the attorney fails to seek to suppress evidence seized in clear violation of his client's constitutional rights, a bright line rule would preclude the guilty client from recovering damages for the malpractice. Similarly, the rule would preclude recovery where the client was incarcerated after his attorney failed to communicate the prosecutor's offer to dismiss charges against him in exchange for testimony against another of that attorney's clients. (Cf. *Krahn v. Kinney* [(1989) 43 Ohio St.3d 103] 538 N.E.2d 1058.) In such instances, requiring proof of innocence would have the effect of 'just about destroy[ing] criminal malpractice as an actionable tort in the very type of situation where the lawyer's incompetence is most flagrant and its consequences most easily demonstrable.' (Kaus & Mallen, *The Misguiding Hand of Counsel–Reflections on "Criminal Malpractice,"* [(1974)] 21 UCLA L.Rev. 1191, 1205.)

"Second, the rule is clearly intended to create a separate standard for clients represented in a criminal setting. However, it is precisely in this setting that the state and federal Constitutions guarantee *effective* assistance of counsel. (Cal. Const., art. I, § 15; U.S. Const., 6th Amend.; *People v. Ledesma* [(1987) 43 Cal.3d 171,] 215, 233 Cal.Rptr. 404, 729 P.2d 839; *Strickland v. Washington* [(1984)] 466 U.S. [668,] 684–685, 104 S.Ct. 2052, 80 L.Ed.2d 674.) A rule relieving criminal defense counsel from liability for harm resulting from his clear negligence is fundamentally incompatible with this constitutionally guaranteed right.

"While the court in *Glenn* believed that the possibility the client is innocent will act as a sufficient deterrent to negligent conduct by defense counsel in criminal cases, we are not aware of any evidence to support this proposition. Even if such a deterrent effect could be established, it is difficult to accept that the client who has suffered loss of personal liberty as a result of his counsel's negligence must make a more onerous showing to recover for those losses than his civil counterpart, whose losses are purely monetary.

*549 "Third, while [ ] the public has an interest in encouraging representation of criminal defendants, [ ] this [is not] a valid policy reason to support the imposition of an 'actual innocence' requirement in the absence of any empirical evidence suggesting that the threat of malpractice claims, as defined by the traditional elements, has deterred public defenders or retained counsel from representing criminal defendants.

"Finally, the rule creates rather artificial distinctions between public defenders and retained criminal defense attorneys, on one hand, and civil attorneys on the other. [ ]

"For these reasons, we [should not] alter the traditional elements of a malpractice cause of action for claims arising out of criminal proceedings."

To the analysis provided in the Court of Appeal opinion, I would add two additional reflections. First, since *Weiner v. Mitchell, Silberburg & Knupp* (1980) 114 Cal.App.3d 39, 170 Cal.Rptr. 533, it has been the rule in the state that a criminal defendant must obtain postconviction relief before pursuing **994 a ***683 malpractice action. It is also noteworthy that proving ineffective assistance of counsel in order to obtain such relief, and for purposes of proving criminal malpractice liability, is very difficult. When considering a trial counsel's performance in an ineffective assistance claim, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 689, 104 S.Ct. 2052.) This stringent rule will screen out frivolous malpractice claims. There is no need for the actual innocence requirement to further limit these claims.

Second, this case does not present the question whether public defenders should be immune from malpractice suits under Government Code section 820.2, which grants immunity to public officials for discretionary acts. Thus, I do not address

the appropriate outcome of this case were that question presented.

For all of the foregoing, I would affirm the judgment of the Court of Appeal.

All Citations

19 Cal.4th 532, 966 P.2d 983, 79 Cal.Rptr.2d 672, 98 Cal. Daily Op. Serv. 8567, 98 Daily Journal D.A.R. 11,985

Footnotes

1 As the authors explain, "[t]he term 'criminal malpractice' implies no criminality on the part of the attorney. We use it elliptically to mean 'legal malpractice in the course of defending a client accused of crime.' Its counterpart is, of course, civil malpractice." (Kaus & Mallen, *supra,* 21 UCLA L.Rev. at p. 1191, fn. 2.) For purposes of our discussion, we adopt the same terminology.

2 Many of these decisions further require that "the person's conviction has been reversed, ... on appeal or through post-conviction relief, or the person otherwise has been exonerated." (*Stevens v. Bispham* (1993) 316 Or. 221, 230, 851 P.2d 556, 561; see also, e.g., *Morgano v. Smith* (1994) 110 Nev. 1025, 1029, 879 P.2d 735, 737; *Peeler v. Hughes & Luce* (Tex.1995) 909 S.W.2d 494, 497.) In *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal.App.3d 39, 170 Cal.Rptr. 533, the Court of Appeal impliedly imposed such a requirement. In that case, the plaintiff remained convicted on charges of federal securities violations when he brought his malpractice action. (*Id.* at p. 48, 170 Cal.Rptr. 533.) The trial court sustained a demurrer, which the appellate court affirmed in part because the doctrine of collateral estoppel precluded relitigation of his guilt "and we must, therefore, accept as the proximate cause of his indictment, and of all the damages which occurred to him by reason of it, his guilt and his guilt alone." (*Ibid.*) Under our holding today, the decision in *Weiner* would be correct independent of any consideration of postconviction relief. Whether such relief is a prerequisite to maintaining a criminal malpractice action has significant implications, e.g., for determining statute of limitations and collateral estoppel issues. Since **Wiley's** conviction was overturned on habeas corpus and the charge was ultimately dismissed, we have no occasion on these facts to address this distinct question.

3 **Wiley** cites several other cases that assertedly stand for the proposition actual innocence is not required to maintain a criminal malpractice action. While it is possible to read into these decisions such an assumption, none actually addressed the precise issue. (See *Mylar v. Wilkinson* (Ala.1983) 435 So.2d 1237, 1239 [no discussion of actual innocence in finding plaintiff failed to establish causation]; *Bowman v. Doherty* (Kan.1984) 235 Kan. 870, 686 P.2d 112 [no consideration of plaintiff's guilt in discussing emotional distress action]; *Jepson v. Stubbs* (Mo.1977) 555 S.W.2d 307, 313 [postconviction relief not condition of maintaining criminal malpractice action, therefore statute of limitations does not extend to time when obtained]; *Duncan v. Campbell* (1997) 123 N.M. 181, 936 P.2d 863, 867–868 [same]; *McCord v. Bailey* (D.C.Cir.1980) 636 F.2d 606, 611–612 [no proximate injury because unasserted defense was not legally viable].)

4 **Wiley** contends he is entitled to a directed verdict on the question of innocence in light of his testimony he did not assault DiGiovanni and defendants' failure to present any contrary evidence. Although he alluded to it in his respondent's brief, the Court of Appeal did not address this contention; and the disposition was an unqualified reversal, which "ordinarily has the effect of remanding the cause for a new trial on all of the issues presented by the pleadings." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 759, p. 784; *id.,* § 758, p. 783 [unqualified reversal "leave[s] the case 'at large' for further proceedings as if it had never been tried"].) In his rehearing petition, **Wiley** did not request that the court either expressly resolve the matter or at least qualify the reversal. Under these circumstances, we decline to consider the matter further (see Cal. Rules of Court, rule 29(b)(2)), although we note the trial court only directed a verdict **Wiley** was not guilty. The record contains no finding of innocence.

1 Brackets together in this manner[ ], without enclosed material, are used to denote deletions from the opinion of the Court of Appeal; brackets enclosing material are used to denote additions. The Court of Appeal's footnotes are omitted.

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52 Cal.App.4th 1359
Court of Appeal, Second District, Division 2, California.

Thomas Laurence **TIBOR**, Petitioner,

v.

The **SUPERIOR COURT** of Los Angeles County, Respondent;

Gregg Daniel McNAMARA,

Real Party in Interest.

No. B099424
|
Feb. 25, 1997.
|
Rehearing Denied March 14, 1997.
|
Review Denied May 28, 1997.

Synopsis
Former client sued public defender, alleging that defender's delays in conducting rape defense had caused him to suffer unnecessary incarceration prior to his release. The **Superior Court**, No. PC011681, Jerold A. Krieger, J., denied defender's motion for summary judgment. Former client sought writ of mandamus to require court to set aside order. The Court of Appeal, Boren, P.J., held that: (1) defender's declaration that he had met standard for attorneys in area was required to be countered by declaration of expert; (2) attorney had not laid sufficient foundation for him to give expert opinion as to standard of care; (3) preliminary hearing testimony of police officers, as to details of rape, obtained from victim excused from having to testify under Proposition 115, could not be used to prove that rape had been committed; (4) material issues of fact, precluding summary judgment, existed as to whether defender had violated duty to client by delaying four months in obtaining test comparing deoxyribonucleic acid (DNA) found in vagina of victim with DNA of client; (5) as matter of sound public policy former criminal defendant suing counsel for malpractice, in order to establish proximate cause, must prove by preponderance of evidence not only that his former attorney was negligent in his representation, but that former client was innocent of criminal charges filed against him; and (6) former client had failed to establish innocence of rape charges, as dissimilarity of his DNA from that of perpetrator, found after test was completed, could be explained through testimony of victim that perpetrator had withdrawn prior to ejaculation and that victim had consensual sex with boyfriend prior to incident.

Writ granted.

West Headnotes (8)

[1] Attorneys and Legal Services Necessity of expert evidence

When malpractice action involves specialized area of law, and attorney has declared that his representation of client was done using skill, prudence and diligence consistent with attorneys in local county, it must be countered by declaration of expert as to whether legal standards were met.

1 Case that cites this headnote

[2] Evidence Attorneys and legal services; legal malpractice

Declaration by attorney defending malpractice claim, that he had utilized degree of skill, prudence and diligence consistent with attorneys in his local county, could not be taken as expert opinion as to whether standard of care had been met; attorney did not make showing of training, experience or skill allowing him to render opinion on matter in controversy.

3 Cases that cite this headnote

[3] Evidence Death or absence of person making memorandum or statement

Preliminary hearing testimony of police officers as to details of rape, as obtained from victim who was excused by Proposition 115 from giving evidence at hearing, was hearsay inadmissible to prove facts of rape; its use was limited to showing facts faced by defendant at time of hearing. West's Ann.Cal.Penal Code § 190.2.

[4] **Attorneys and Legal Services** Questions of law or fact

Summary Judgment Duties and liabilities of practitioners; negligence and malpractice

Material issues of fact, precluding summary judgment, existed as to whether attorney representing client accused of rape violated duty by delaying four months in having test performed to determine whether deoxyribonucleic acid (DNA) contained in semen removed from victim was that of defendant, even though attorney claimed certain amount of delay could be expected while competency of client was ascertained.

3 Cases that cite this headnote

[5] **Summary Judgment** Attorneys and Legal Services

Material issues of fact, precluding summary judgment, existed as to whether attorney's alleged breach of duty to client accused of rape, in not obtaining prompt determination of source of deoxyribonucleic acid (DNA) in perpetrator's sperm, caused client damage in form of protracted incarceration before client was finally released; victim had testified that rapist had withdrawn prior to ejaculation, and that presence of semen in her vagina was due to consensual sex with boyfriend shortly before alleged rape, and consequently earlier DNA testing would not necessarily have led to earlier release.

7 Cases that cite this headnote

[6] **Attorneys and Legal Services** Degree of proof

In order for former criminal defendant suing attorney for malpractice to establish proximate cause, he must prove by preponderance of evidence not only that his former attorney was negligent in his representation, but that former defendant was innocent of criminal charges filed against him.

4 Cases that cite this headnote

[7] **Attorneys and Legal Services** Degree of proof

When public defender wishes to avoid malpractice liability by showing that former client suing him can not satisfy burden of showing innocence of crime charged by preponderance of evidence, public defender is required to demonstrate that reasonable cause existed to believe former client committed offense for which arrest was made, after which burden shifts to former client to establish facts that would lead no person of ordinary care of prudence to believe or consciously entertain any honest and strong suspicion that former client was guilty of crime charged, and if trial court thereafter makes factual determination that reasonable cause existed to find former client guilty, former client will have failed to make showing of innocence.

7 Cases that cite this headnote

[8] **Attorneys and Legal Services** Weight and Sufficiency

Former client accused of rape failed to establish innocence of crime by preponderance of evidence, as required to maintain malpractice action against public defender seeking damages from delays extending period of incarceration preceding his release; there was reasonable cause to believe former client had committed rape, based upon testimony of victim, even though former client's deoxyribonucleic acid (DNA) was different from DNA contained in sperm found in victim, as victim had testified that perpetrator withdrew before ejaculation and that she had consensual sex with boyfriend shortly before incident.

6 Cases that cite this headnote

Attorneys and Law Firms

****328 *1362** DeWitt W. Clinton, County Counsel, Serritella & Paquette, Anthony P. Serritella, Dennis P. Riley, Los Angeles and Ken A. Levine, Claremont, for Petitioner.

No appearance for Respondent.

Albert I. Kaufman, Encino, for Real Party in Interest.

Opinion

***1363** BOREN, Presiding Justice.

Petitioner, Thomas Laurence **Tibor**, a Los Angeles County deputy public defender, seeks a writ of mandate directing the **superior court** to set aside its order denying his motion for summary judgment.

I. FACTUAL AND PROCEDURAL HISTORY

On November 12, 1991, real party in interest, Gregg Daniel McNamara, was charged with forcible rape with a deadly weapon. He was represented by **Tibor** from about November 22, 1991, to November 23, 1992. McNamara's defense was then turned over to another deputy public defender, Ramon Quintana. On March 15, 1993, McNamara sought and received permission to represent himself. During trial, the victim testified on direct examination but refused to be cross-examined. The case was dismissed, and in August 1993, McNamara was released from jail. McNamara then filed suit against Los Angeles County, Los Angeles County Public Defender Wilbur Littlefield, Quintana and **Tibor** for malpractice that he claims cost him 655 days of freedom.

McNamara alleged that he asked **Tibor** in November 1991 to obtain DNA testing because the results would show that he, McNamara, "was not the rapist." **Tibor**, however, failed to timely request the necessary court approval, obtain follow-up orders for appropriation of money to pay for the testing, and make certain the evidence was delivered to the DNA expert once he was appointed. As a result, it was "more than one year from the time of [McNamara's] arrest until the necessary evidence was obtained by the DNA expert so that he could commence testing." When the DNA analysis was finally completed in April 1993, the expert determined that "the samples produced for his testing excluded [McNamara] from the class of persons who could be the specimen donor." McNamara also claimed that **Tibor** "failed to timely locate and investigate alibi witnesses so that, in one case, a male witness" could not be located and a "female witness could not positively establish an alibi for [McNamara] which would have [led] to his exoneration."

Tibor and his codefendants moved for summary judgment. They characterized the pleadings as follows: "[McNamara] claims that if defendants had requested fewer continuances, [McNamara] would have gone to trial sooner and would have been acquitted of the charges and released at an earlier date." As to the breach of duty element, **Tibor** ****329** asserted that he was entitled to summary judgment because "there is no evidence that [he] committed legal malpractice." As to the element of causation, he claimed that McNamara, "[i]n order to show proximate cause in the context of a legal ***1364** malpractice claim" was required to "prove a nexus by showing that he would have received a better result *but for* the actions of the attorney."

Tibor's proposed statement of undisputed facts concerned the circumstances of the rape and McNamara's subsequent arrest. **Tibor** referenced McNamara's deposition testimony to prove that when McNamara was arrested on November 7, 1991 (two days after the rape), he was unable to provide the police with an alibi for two nights prior to the date of the rape. **Tibor** made no reference to his alleged negligence in failing to seek and pursue DNA testing or his alleged failure to locate and interview witnesses McNamara claimed could have provided him with an alibi had **Tibor** not delayed his investigation.

[1] **[2]** In addition to the foregoing evidence, **Tibor** submitted the following declaration: "I am an attorney duly licensed to practice law in the state of California. I presently work as a Deputy Public Defender for the Los Angeles County Public Defender's Office. From approximately late November 1991 until I left the Van Nuys branch in November or December 1992, I represented Gregg McNamara who was charged with committing rape with the use of a weapon. [¶] After receiving ... McNamara's file, I performed all work which in my opinion was necessary to prepare the matter for trial. [¶] The work I did on ... McNamara's behalf was done using the skill, prudence and diligence consistent with the members of my profession in the Los Angeles County legal community. None of the work I performed in providing legal services to ... McNamara was outside the standard of care in the Los Angeles County legal community."[1]

Tibor concluded that based on the evidence submitted it was clear that he did not breach his duty of care to McNamara, and that McNamara had no ***1365** evidence showing a breach. Alternatively, **Tibor** asserted that even if the evidence supported a finding of breach of duty, the evidence conclusively established that his negligence was not the cause of McNamara's damages.[2]

[3] In opposition to the defendants' motion for summary judgment, McNamara lodged an objection to the preliminary hearing testimony as inadmissible hearsay.[3] Attached ****330** to McNamara's opposition was his declaration and portions of the deposition testimony of the DNA expert who performed the tests on the evidence samples.

Tibor filed a reply, attached to which was an amended statement of facts. Many of the facts were essentially identical to those set forth in his moving papers. This time, however, they were supported by reference to the victim's trial testimony rather than to the preliminary hearing testimony. **Tibor** also submitted proposed facts concerning his reasons for failing to more timely request DNA testing. He cited the trial testimony of the rape victim who testified that, during the rape, her assailant withdrew before ejaculating.

Tibor also submitted excerpts from his deposition testimony wherein he stated his reasons for not requesting the DNA in a more timely fashion. He believed the case would turn on identification issues, and he did not believe the DNA evidence would be helpful since if the DNA evidence did not indicate the involvement of McNamara, this circumstance would be consistent with the victim's testimony that the rapist withdrew prior to ejaculation. **Tibor** also believed that in most cases DNA evidence ends up proving the criminal defendant guilty.

As to his alleged delay in locating and interviewing the purported alibi witnesses, **Tibor** cited his deposition testimony wherein he stated that when he initially interviewed McNamara, McNamara gave three different incompatible alibis. As a result, **Tibor** formed the opinion that the presentation of three different alibis would not be beneficial to the defense.

***1366** **Tibor** also cited his deposition testimony to explain that at least part of the delay in investigating the case and in requesting the DNA was due to the fact that in March 1992 he had become concerned with McNamara's mental health, and that as a result, a psychiatrist was appointed who declared McNamara incompetent to stand trial. The proceedings were halted until another psychiatrist declared McNamara competent.

Tibor also submitted excerpts from the deposition testimony of the DNA expert who performed the testing. **Tibor** claimed that the testimony supported the following facts: "DNA testing was completed and the evidence turned out to be damaging to McNamara. The DNA expert determined that the sperm was from [the rape victim's] boyfriend which was consistent with her boyfriend having had consensual intercourse. No other sperm was detected from inside [the rape victim] which was consistent with the rapist pulling out prior to ejaculation. The damaging evidence from the DNA expert was the DNA material present on one of [the rape victim's] pubic hairs was consistent with having come from McNamara."

In addition to introducing this new evidentiary material, **Tibor**, for the first time, cited authority for the proposition that in order for McNamara to prevail in his legal malpractice action, he would be required to prove, by a preponderance of the evidence, not only that **Tibor's** negligence caused him harm, but also that he is innocent of the crime charged.[4]

During the hearing, the court entertained argument primarily with respect to whether McNamara was required to submit an expert's declaration in opposition to **Tibor's** ****331** declaration. The court then denied **Tibor's** motion, finding that a triable issue of material fact existed as to whether **Tibor** had been negligent in his representation of McNamara. The court granted the motion as to **Tibor's** codefendants.[5]

***1367** **Tibor** then filed a petition for writ of mandate with this court. With no appropriate citation to the record,[6] he argued that he had met his burden on motion for summary judgment "by pointing to the absence of evidence necessary to prove all elements of [McNamara's] cause of action, shifting the burden to [McNamara] which he has failed to meet." He also reiterated his argument that in order to meet the burden of proving the element of causation, plaintiffs such as McNamara are required to prove their factual innocence of the crime charged.

When we denied the mandamus petition, **Tibor** sought review in the Supreme Court. There, for the first time, he asserted that "many jurisdictions have concluded that public defenders faced with substantial case loads, limited funding, restricted capacity to accept or reject cases, and clientele who are normally indigent and inordinately litigious, should be entitled to some form of immunity or legal protection from subsequent criminal malpractice lawsuits." Alternatively, he argued that even in the "absence of public defender immunity or protection" he was entitled to summary judgment as a matter of law.

The Supreme Court issued an order directing us to vacate our order denying **Tibor's** petition for writ of mandate and to set the matter for hearing. We did so.

II. ISSUES PRESENTED

The issues presented here are whether **Tibor** was entitled to summary judgment, and whether public defenders, in general, are entitled to some form of protection when sued in a legal malpractice action brought by their former clients.

III. DISCUSSION

A. Summary Judgment Rules

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. ***1368** c).)[7] Under the 1992 and 1993 amendments to section 437c, a defendant moving for summary judgment "has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the [plaintiff's] cause of action ... cannot be established ...." (§ 437c, subd. (*o*)(2).) Once the moving defendant has satisfied this obligation, the burden shifts to the plaintiff to demonstrate a triable issue of material fact as to the existence of the element or elements challenged by the defendant. (*Ibid.*) To do so, the plaintiff may not rely upon the "mere allegations ... of its pleadings" and instead must show by "specific facts" that the requisite triable issue of material fact is present. (*Ibid.*)

Section 437c, subdivision (*o*)(2) has been interpreted to mean that a defendant seeking a summary judgment now has two means by which to shift the burden of proof under subdivision (*o*)(2) to the plaintiff to produce evidence creating a triable issue of fact. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1598, 50 Cal.Rptr.2d 431 (*Brantley*).) "The defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon. [Citation.]" (*Ibid.*) Or, "the defendant may utilize the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action. [Citation.]" (*Ibid.*)

****332** "The task of resolving a defendant's motion for summary judgment will be facilitated by identifying at the outset the ground relied upon by the moving defendant. Is the defendant claiming the plaintiff cannot establish the cause of action pled (1) because the plaintiff's factually insufficient discovery responses demonstrate the plaintiff cannot prove an essential element of that cause of action; or (2) because the defendant's affirmative evidence discloses facts which negate the existence of an essential element of the plaintiff's claim by proving the contrary is true? If it is the latter, the court should evaluate defendant's evidence under the same strict standards which were held to apply to a defendant's attempt to disprove an element of the plaintiff's cause of action before the 1992 and 1993 amendments to section 437c, in order to avoid unjustly depriving the plaintiff of a trial. [Citations.]" (*Brantley, supra,* 42 Cal.App.4th at p. 1601, 50 Cal.Rptr.2d 431.)

B. Tibor's Motion for Summary Judgment

A review of **Tibor's** summary judgment motion reveals that he did not rely upon asserted factually insufficient discovery responses by McNamara to support the motion. Instead, he argued that McNamara's cause of ***1369** action for legal malpractice cannot be established as a matter of law (§ 437c, subd. (*o*)(2)) because the relevant undisputed facts prove that he, **Tibor**, did not breach his duty of care to McNamara. In the alternative, he argued that even if he did breach his duty of care, the relevant undisputed facts prove that the breach did not cause McNamara's damages. In other words, **Tibor** maintains that he has "disproved" two essential elements of McNamara's claim, i.e., breach of duty and causation.

C. Did Tibor Meet His Burden of Proof?

We next consider whether **Tibor** satisfied his burden of proof under amended section 437c, subdivision (*o*)(2). In making this determination, we decide "de novo whether an issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law. [Citation.] In other words, we must assume the role of the trial court and reassess the merits of the motion. [Citation.] In doing so, we will consider only the facts properly before the trial court at the time it ruled on the motion. [Citation.]" (*Brantley, supra,* 42 Cal.App.4th at p. 1601, 50 Cal.Rptr.2d 431.)

We carry out our appellate function by applying the same three-step analysis required of the trial court. We first identify the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has satisfied his burden of proof and justifies a judgment in movant's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition

demonstrates the existence of a triable issue of material fact. (*Brantley, supra,* 42 Cal.App.4th at p. 1602, 50 Cal.Rptr.2d 431.)

The issues framed by the pleadings are whether **Tibor** was negligent in failing to request the DNA testing in a more timely fashion, and whether he was negligent in failing to act more quickly in locating and interviewing witnesses McNamara claims would have provided him with an alibi.

1. Breach of Duty

[4] It is obvious that **Tibor**, in those papers initially filed with the court, failed to satisfy his burden of proof with respect to the breach of duty element since no evidence was presented concerning either the DNA testing or alibi witness issues. Although **Tibor** introduced additional evidence in explanation of his alleged negligence in connection with his reply papers, we believe a triable issue exists as to whether **Tibor** breached his duty of care to ***1370** McNamara. In other words, a triable issue exists as to whether **Tibor** should have moved in a more timely fashion to have the DNA analysis performed. **Tibor's** evidence merely shows that a certain amount of delay could be expected while the issue of McNamara's competency was settled, and while he, **Tibor**, secured court approval. However, the evidence submitted by McNamara shows that he asked **Tibor** in November 1991 to seek court approval for DNA testing, and that **Tibor** did not seek ****333** such approval for about four months. The evidence also indicates that after **Tibor** secured the necessary court order, a further delay in delivering the necessary samples to the DNA expert occurred.

2. Causation

[5] McNamara set forth two theories of his case. He claims that the DNA results conclusively established that he "was not the rapist," and that had **Tibor** obtained these results in a more timely fashion and presented them to the trial court in connection with a motion to dismiss, he, McNamara, would have been entitled to a dismissal as a matter of law, and would, therefore, have been released from custody much earlier. Alternatively, McNamara claims that had the DNA results, together with the alibi witnesses, been presented to a jury at an earlier date, a reasonable doubt would have been raised, he would have been found not guilty, and he would have been released much sooner.

Contained within this record is evidence which shows that the rape victim claimed that the rapist withdrew before he ejaculated, and that the victim had had sexual intercourse with her boyfriend sometime before the rape occurred. A review of the DNA expert's deposition testimony shows that when asked about the test results, the expert stated that he had excluded McNamara as a possible donor of the sperm detected on certain samples provided to the laboratory. As to the rape victim's boyfriend, the DNA expert opined, "[i]t could have been from him. In other words, he has alleles [telltale DNA markers] that could have been the alleles we detected."

Contrary to McNamara's contention, the DNA evidence does not "raise a reasonable doubt as a matter of law." Given the victim's testimony that the rapist withdrew before he ejaculated, the absence of McNamara's DNA would not have conclusively excluded him as the rapist. Nor would the fact that sperm traces were found on the samples which could not be traced to McNamara have assisted him in gaining a dismissal since the evidence was that the victim had had consensual sexual intercourse with her boyfriend sometime prior to the rape, and the boyfriend could not be excluded as the source of the sperm found on the sample. We conclude, therefore, that had ***1371** the DNA results been obtained at an earlier date and presented to the court in connection with a motion to dismiss, McNamara would not have been released because the motion to dismiss would have been denied.

We next consider McNamara's theory that, had the DNA results been presented to a jury at an earlier date, a reasonable doubt would have been raised and he would have been found not guilty. Had McNamara gone to trial earlier and presented the DNA evidence to the jury, his counsel would have argued that the absence of McNamara's DNA demonstrated that he was not the rapist. The prosecution would then, however, have argued that the results simply demonstrated the truth of the victim's assertion that the rapist withdrew before he ejaculated. It is far from certain that, had McNamara gone to trial with the DNA results, he would have been found not guilty. As we explain in the next part, however, a finding of "not guilty" is insufficient. What a plaintiff such as McNamara is required to prove—by a preponderance of the evidence—is that he is factually innocent of the crime with which he was charged. Moreover, it is for the judge, rather than the jury, to determine the issue of factual innocence.

D. McNamara's Burden of Proof

What does a plaintiff, formerly a criminal defendant, have to prove in a legal malpractice action filed against his former defense counsel?

"The elements of a cause of action for attorney malpractice are: (1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage. [Citations.]" (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1621, 33 Cal.Rptr.2d 276.)

[6] Courts that have considered the question have generally held that a former criminal defendant, in order to establish proximate ****334** cause, must prove, by a preponderance of the evidence, not only that his former attorney was negligent in his representation, but that he (the plaintiff) was innocent of the criminal charges filed against him. (See *Glenn v. Aiken* (1991) 409 Mass. 699, 702, 569 N.E.2d 783 (*Glenn*), and cases cited therein; see also *Morgano v. Smith* (1994) 110 Nev. 1025, 1028–1029, 879 P.2d 735 [holding that while private criminal defense attorneys are not entitled to either qualified or complete immunity, they are entitled to the protection afforded by the requirement that a former criminal defendant must demonstrate that he obtained post-conviction exoneration of the underlying offense and "prove actual innocence of the underlying charge"].)

***1372** *Glenn* is instructive. There, a criminal defendant was convicted of arson because of an error in the judge's charge. His trial counsel failed to properly preserve the issue for appellate review. The appellate court reversed the conviction because the error in the judge's charge created a substantial risk of a miscarriage of justice. A decision was made not to retry the defendant. He then filed suit against his former trial counsel for malpractice that he claimed cost him 14 months of freedom. The defendant attorney moved for summary judgment which was granted. (*Glenn, supra,* 409 Mass. at p. 700, 569 N.E.2d 783.) Although the summary judgment ruling was reversed on appeal, the court held that, in order to prevail in his legal malpractice action, the plaintiff would be required to prove, by a preponderance of the evidence, his innocence of the criminal charges filed against him. (*Id.* at p. 707, 569 N.E.2d at 788.)

We recognize that such a rule may relieve a criminal defense attorney of liability for harm that his client suffered only because of the defense counsel's negligence. However, we, like the *Glenn* court, believe that sound public policy reasons support such a rule. "Most criminal defendants ... are represented by counsel appointed at public expense or private counsel whose fees are not substantial. The public has a strong interest in encouraging the representation of criminal defendants, particularly those who are ruled to be indigent. The rule we favor helps to encourage that kind of legal representation by reducing the risk that malpractice claims will be asserted and, if asserted, will be successful." (*Glenn, supra,* 409 Mass. at pp. 707–708, 569 N.E.2d at 788.)

McNamara contends that a requirement that plaintiffs in a malpractice action prove by a preponderance of the evidence that they did not actually commit the crime with which they were charged, imposes upon such plaintiffs an unnecessary burden, which has no basis in tort law. We disagree. As the *Glenn* court stated: "There is good reason to place a greater burden on a guilty criminal defendant maintaining a claim of malpractice of the type involved in this case than is placed on a wronged civil defendant. The underpinnings of common law tort liability, compensation and deterrence, do not support a rule that allows recovery to one who is guilty of the underlying criminal charge. A person who is guilty need not be compensated for what happened to him as a result of his former attorney's negligence. There is no reason to compensate such a person, rewarding him indirectly for his crime. The possibility that a criminal defendant may not be guilty provides a sufficient, general deterrent against negligent conduct of defense counsel, without the need for providing a tort remedy for guilty former criminal defendants." ***1373** (*Glenn, supra,* 409 Mass. at p. 707, 569 N.E.2d at 788.)[8] Moreover, our system of criminal justice provides alternative malpractice relief to the aggrieved criminal defendant by allowing claims of ineffective assistance of counsel. (See *Younan v. Caruso* (1996) 51 Cal.App.4th 401, 408–409, 59 Cal.Rptr.2d 103.)

E. Trial Court's Duty

Where, as here, a public defender charged with legal malpractice by a former client ****335** brings a motion for summary judgment, and evidence is presented by both the plaintiff and defendant showing the circumstances surrounding the crime for which the plaintiff was arrested, we believe the court is required to consider as a threshold issue, the issue of factual innocence.

[7] We have concluded that, as a matter of sound public policy, a former criminal defendant, in order to establish proximate cause, must prove, by a preponderance of the evidence, not only that his former attorney was negligent in his representation, but that he (the plaintiff) was innocent of the criminal charges filed against him. The question,

of course, is what a public defender charged with legal malpractice is required to prove should he bring a motion for summary judgment in such a case. We are of the opinion that a public defender is required to demonstrate that a reasonable cause exists to believe that the plaintiff committed the offense for which the arrest was made. The burden then shifts to the plaintiff to "establish that facts exist which would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion" that he, plaintiff, is guilty of the crimes charged. (See *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1056, 9 Cal.Rptr.2d 348.) The court would then be required to make a finding, as a matter of law, as to the issue of factual innocence. Should the court find that a reasonable cause exists to believe that the plaintiff committed the offense for which the arrest was made, the court would be required to grant the public defender's motion for summary judgment since such a finding, in effect, means that the plaintiff cannot, as a matter of law, prove by a preponderance of the evidence that he is innocent of the criminal charges filed against him. Thus, the question of factual innocence is wholly one for the trial court and not for the jury.

Our conclusion, grounded as it is in public policy, finds some legislative support by reference to Penal Code section 851.8, which sets forth the ***1374** guidelines for sealing and destroying the arrest records of a person who is factually innocent. Where a person has been arrested and an accusatory pleading filed but no conviction has occurred, the defendant may "petition the court which dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made." (Pen.Code, § 851.8, subd. (c).) "A finding of factual innocence and an order for the sealing and destruction of records ... shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. In any court hearing to determine the factual innocence of a party, the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. If the court finds that this showing of no reasonable cause has been made by the petitioner, then the burden of proof shall shift to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made." (Pen.Code, § 851.8, subd. (b).)

[8] McNamara based his case upon two theories. The first was that the DNA test results conclusively demonstrated that he was not the rapist. As discussed, no such conclusion can be drawn given the facts of this case. His second theory was that, had the DNA results been obtained sooner and had the alibi witnesses been located, he could have presented the facts to a jury and the jury could have found a reasonable doubt and acquitted him. While the criminal jury could have done so, the court in the legal malpractice action would still have been required to determine whether a reasonable cause existed to believe that McNamara committed the rape for which he was arrested. Had the court been able to determine that McNamara was factually innocent (on this record no such determination is possible), the trial court could have then denied **Tibor's** summary judgment motion (assuming sufficient evidence of causation). A jury could have thereafter determined the remaining malpractice issues.

After reviewing the evidence submitted by McNamara in connection with this mandamus petition, we conclude, as a matter of law, that a reasonable cause exists to believe that ****336** McNamara committed the rape for which he was arrested.

IV. DISPOSITION

Accordingly, the writ is granted. The **superior court** is directed to set aside its order denying **Tibor's** motion for summary judgment, and to enter a new ***1375** and different order granting **Tibor's** motion. The temporary stay is vacated. The parties are to bear their own costs.

FUKUTO and NOTT, JJ., concur.

All Citations

52 Cal.App.4th 1359, 61 Cal.Rptr.2d 326, 97 Cal. Daily Op. Serv. 1388, 97 Daily Journal D.A.R. 1969

Footnotes

1 During the summary motion proceedings, two issues arose with respect to declarations filed in a legal malpractice case. The first was whether plaintiffs such as McNamara are required, when faced with a declaration such as the one **Tibor**

submitted, to refute the averments contained therein by submitting their own expert declaration. Where, as here, the issue involves a specialized area of the law, such a declaration should, in our opinion, be required. Here, for example, the case involved a public defender's alleged negligence in his representation of a criminal defendant charged with rape. A critical issue concerned the DNA testing. Questions to be answered included whether, under the circumstances of this case, DNA testing should have been requested, and if so, at what stage of the criminal proceeding court approval of an order appointing an expert should have been sought. Also at issue was whether, given the state of the law in 1991 and 1992, the DNA test results were likely to have been admitted. We do not mean to suggest that opposing expert declarations are required to be submitted in all cases of legal malpractice. However, the policy reasons for requiring such declarations in medical malpractice cases appear equally applicable in those cases involving the alleged malpractice of a criminal defense attorney. (See *Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432, 1438, 286 Cal.Rptr. 243.) The second issue which arose during the summary judgment proceedings was whether **Tibor's** declaration was sufficient. We conclude it was not since it did not meet the test set forth in *Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 385, 271 Cal.Rptr. 780, i.e., "whether the witness has sufficient skill or experience in the particular field so that his testimony would be likely to assist the jury in the search for the truth." **Tibor's** declaration contains no foundational facts showing that he has the training, experience or skill that would qualify him to render an opinion on the particular matters in controversy.

2 **Tibor** also claimed, without much discussion, that McNamara had suffered only "nominal" damages as a result of his incarceration.

3 The rape victim did not testify at the preliminary hearing. Instead, the investigating police officers, as they are allowed to do under Proposition 115, testified as to the victim's statements. Because **Tibor** and his codefendants referenced certain portions of the officers' testimony as proof of the facts concerning the rape, the hearsay objection was proper. Had **Tibor** cited the evidence for the limited purpose of showing that these were the facts he faced at the time of the preliminary hearing, the objection could have been overruled. The record reflects that the trial court did not specifically rule on McNamara's objection.

4 At the hearing on **Tibor's** motion for summary judgment, McNamara's counsel requested a continuance claiming it was necessary to enable McNamara to respond to the new evidentiary material submitted by **Tibor**; principally McNamara wanted time to counter the declaration submitted by **Tibor** should the court find that such a declaration was required. The court denied the continuance. We conclude that any error in denying the oral motion to continue was nonprejudicial. McNamara did not then and has not since pointed to an avenue of evidentiary discovery he could have successfully pursued. At the hearing, McNamara's counsel simply wanted an opportunity to provide an expert witness declaration to counter **Tibor's** regarding the standard of practice. Because our decision herein is grounded in lack of causation and failure to prove factual innocence, a continuance would not have materially assisted McNamara. (See *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 43 Cal.Rptr.2d 142.)

5 That portion of the court's ruling granting summary judgment to **Tibor's** codefendants is not before us.

6 California Rules of Court, rule 15(a) provides in pertinent part: "Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings need not be technical 'assignments of error' but should be concise headings which are generally descriptive of the subject matter covered. The statement of any matter in the record shall be supported by appropriate reference to the record."

7 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

8 **Tibor** invites this court to utilize certain sections of the Government Code as a basis for extending some form of immunity to public attorneys. Nothing contained within the statutes cited suggests the Legislature intended to afford such protection. We therefore decline the invitation. Nor are we willing to classify public defenders as a "special class of private attorneys" as a basis for a grant of some type of quasi-judicial immunity. Public defender immunity is an issue best addressed by the Legislature.

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146 Cal.App.4th 79
Court of Appeal, Fourth District, Division 3, California.

Roopinder Singh **SANGHA**,
Plaintiff and Appellant,
v.
Vincent LA BARBERA,
Defendant and Respondent.

No. G035195.
|
Dec. 26, 2006.

Synopsis

Background: Legal client brought legal malpractice action, alleging his former criminal defense attorney negligently advised him to plead guilty to felony vandalism. Client had retained new counsel, persuaded court to set aside his plea, and admitted guilt to misdemeanor vandalism. The Superior Court, Orange County, No. 04CC03857, Gail A. Andler, J., granted attorney summary judgment. Client appealed.

Holdings: The Court of Appeal, Aronson, J., held that:

[1] client failed to establish actual innocence of felony vandalism;

[2] client was required to show actual innocence of misdemeanor vandalism; and

[3] client failed to show postconviction exoneration.

Affirmed.

West Headnotes (9)

[1] Attorneys and Legal Services Malpractice or negligence in general; nature and elements

The elements of a legal malpractice action are: (1) a duty to use such skill, prudence, and diligence as are commonly exercised by other members of the legal profession, (2) breach of that duty, (3) a proximate causal connection between the breach and the resulting injury, and (4) actual loss or damage resulting from the attorney's negligence.

[2] Attorneys and Legal Services Criminal practice

A plaintiff in a legal malpractice action against a criminal defense attorney must show actual innocence of the criminal offense and must obtain postconviction exoneration as a prerequisite to showing actual innocence.

2 Cases that cite this headnote

[3] Attorneys and Legal Services Criminal practice

Requirements of actual innocence and postconviction relief for legal malpractice action against criminal defense lawyer are distinct, but related concepts; "actual innocence" refers to determination in civil trial that plaintiff has demonstrated innocence in fact by preponderance of evidence, but in contrast, plaintiff may satisfy postconviction exoneration requirement even if relief obtained is not based on plaintiff's innocence or his lawyer's incompetence.

2 Cases that cite this headnote

[4] Indictments and Charging Instruments Necessarily included offenses
Indictments and Charging Instruments Elements test

A lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.

[5] Indictments and Charging Instruments Arson and malicious mischief

Misdemeanor vandalism is a lesser included offense of felony vandalism, because a person cannot commit felony vandalism without also committing the lesser misdemeanor offense. West's Ann.Cal.Penal Code § 594.

7 Cases that cite this headnote

[6] **Attorneys and Legal Services** Criminal practice

Legal client, who alleged former criminal defense attorney negligently advised him to plead guilty to felony vandalism, and who with second attorney had felony vandalism conviction set aside and pleaded guilty to misdemeanor vandalism, failed to establish actual innocence of felony vandalism, so as to support legal malpractice claim, in absence of evidence that damaged property had value less than $400. West's Ann.Cal.Penal Code § 594.

See 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 334A; Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2006) ¶ 6:939 et seq. (CAPROFR Ch. 6-G); Cal. Jur. 3d, Attorneys at Law, § 586; Cal. Civil Practice (Thomson/West 2003) Torts, § 33:10.

6 Cases that cite this headnote

[7] **Attorneys and Legal Services** Criminal practice

To establish legal malpractice claim against criminal defense attorney who allegedly negligently advised client to plead guilty to felony vandalism, client was required to establish actual innocence not only of felony vandalism, but also of lesser included offense of misdemeanor vandalism. West's Ann.Cal.Penal Code § 594.

5 Cases that cite this headnote

[8] **Attorneys and Legal Services** Criminal practice

Legal client, who was placed on probation after he had felony vandalism conviction set aside and pleaded guilty to misdemeanor, failed to establish postconviction exoneration of misdemeanor offense necessary to establish legal malpractice claim against attorney who allegedly negligently advised client to plead guilty to felony; probation, however short, was not final disposition exonerating the criminal defendant.

1 Case that cites this headnote

[9] **Attorneys and Legal Services** Criminal practice

"Postconviction exoneration," as required for legal malpractice action against criminal defense attorney, is a final disposition of the underlying case.

Attorneys and Law Firms

****642** Day, Day & Brown, Christopher J. Day, Tustin; Law Office of William Kopeny and William Kopeny, Irvine, for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith and Gary M. Lape, Costa Mesa, for Defendant and Respondent.

OPINION

ARONSON, J.

***81** In an action for legal malpractice, Roopinder **Sangha** alleged his former criminal defense attorney, Vincent La Barbera, negligently advised him to plead guilty to felony vandalism (Pen.Code, § 594, subd. (a); all statutory citations are to this code unless noted) in exchange for dismissal of a pending criminal threats charge (§ 422). He later retained new counsel, persuaded the court to set aside his plea, and admitted guilt to a misdemeanor vandalism charge.

The trial court granted La Barbera's summary judgment motion, citing **Sangha's** failure to raise a triable issue of material fact on whether he had shown actual innocence and postconviction exoneration, necessary requirements for a legal malpractice action arising from the attorney's allegedly negligent representation in the earlier criminal case. **Sangha** contends these ***82** requirements apply only to the felony

vandalism offense, the crime to which La Barbera negligently advised **Sangha** to plead guilty. We conclude **Sangha** must show actual innocence and postconviction exoneration not only of felony vandalism, but also the lesser included offense of misdemeanor vandalism. Because **Sangha** failed to make the requisite showing, we affirm the judgment.

I

Facts and Procedural Background[1]

On June 24, 2001, **Sangha** and his girlfriend, Sasha Aggarwal, argued en route to Aggarwal's Lake Forest apartment. **Sangha** later drove to Aggarwal's parents' Irvine home to demand a key to the apartment. When she refused to turn over the key, **Sangha** stated loudly: "I'm going to burn down your house, kill you and your family." **Sangha** took Aggarwal's cell phone from the trunk of her car and threw it at her, breaking an adjacent bedroom window. During the argument, **Sangha** damaged Aggarwal's cell phone, dented her car, and took Aggarwal's change purse, containing her apartment key. In her application for a domestic violence restraining order filed a few days later, Aggarwal declared she feared for her life based on **Sangha's** previous threats and violence.

Sangha disputed some of these facts. He admitted he threatened to burn down the house, but denied threatening to kill Aggarwal or her family. He also claimed Aggarwal did not take his threat seriously and denied denting her car.

In July 2001, **Sangha** was charged with making a felony criminal threat and misdemeanor violations for vandalism and petty theft. **Sangha** hired La Barbera in late July and paid him $7,500 to represent him through the preliminary hearing phase of the proceedings. After several continuances, on March 11, 2002, the prosecutor offered to dismiss the criminal threats charge if **Sangha** would plead guilty to a vandalism "wobbler." **Sangha** would be placed on three years probation with no jail time if he agreed to take anger management classes and participate ****643** in a community service program. La Barbera recommended **Sangha** accept the plea bargain, explaining that if he successfully completed probation, the conviction would "wobble down" to a misdemeanor, which could then be expunged. **Sangha** reluctantly agreed ***83** and pleaded guilty to an amended complaint charging him with vandalizing property in excess of $400. He executed a *Tahl* waiver and guilty plea form, declaring under penalty of perjury he maliciously destroyed property worth more than $400. The court suspended imposition of sentence and placed **Sangha** on three years formal probation. Per the agreement, the prosecutor dismissed the criminal threat and theft charges.

Sangha later claimed he could not renew his license to deal securities because of his felony vandalism conviction. **Sangha** retained new counsel who, on March 2, 2004, persuaded the trial court to grant **Sangha's** writ of error *coram nobis* and set aside his guilty plea. The court's order noted that the prosecution stipulated to set aside **Sangha's** felony vandalism plea and agreed to order the clerk to destroy the plea forms dated March 11, 2002.[2] In its minute order, the court relied on section 17, subdivision (b), to "reduce" **Sangha's** felony vandalism offense under section 594, subdivision (b)(1), to a misdemeanor "at request of Defense."[3] **Sangha** then signed a waiver of rights form and pleaded guilty to a misdemeanor vandalism charge (§ 594, subd. (a)), a lesser included offense to felony vandalism, the crime to which **Sangha** had originally pleaded guilty. **Sangha** was placed on informal probation for 41 days. In April 2004, the court granted his petition to expunge (§ 1203.4) the misdemeanor conviction.

Ten days after the new plea, on March 12, 2004, **Sangha** sued La Barbera for legal malpractice, alleging he was "so negligent in [his] investigation, handling and prosecution of [the] action that plaintiff ended up with a felony conviction, all to [p]laintiff's damage...."[4] The complaint also alleged **Sangha** "was factually innocent of the felony charges against him, and of the felony charge he was convicted of."

The trial court granted La Barbera's summary judgment motion, ruling that **Sangha** failed to show postconviction exoneration, a prerequisite to obtaining relief for legal malpractice. (***84** *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1198, 1205, 108 Cal.Rptr.2d 471, 25 P.3d 670 (*Coscia*).) The court also concluded **Sangha** could not establish actual innocence, a necessary element to establish legal malpractice in a criminal case. (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 536, 79 Cal.Rptr.2d 672, 966 P.2d 983 (*Wiley*).)

II

Standard of Review

We review a grant of summary judgment de novo. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 612, 76 Cal.Rptr.2d 479, 957 P.2d 1313.) The court must grant summary judgment "if all the papers submitted ****644** show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

A defendant moving for summary judgment has the burden of showing "one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant satisfies this requirement, the burden then shifts to the plaintiff to show by admissible evidence that a triable issue of material fact exists. (*Ibid.*) To meet this burden, the plaintiff " ' "may not rely upon the mere allegations or denials of its pleadings ... but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action...." [Citations.]' " (*Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 35–36, 123 Cal.Rptr.2d 555.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. [Fn. omitted.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 107 Cal.Rptr.2d 841, 24 P.3d 493; see Evid.Code, § 115 [preponderance of evidence standard applies where, as here, no higher burden is specified by law].)

III

Discussion

A. *To Maintain a Legal Malpractice Action Against a Former Attorney in a Criminal Proceeding, Plaintiff Must Demonstrate Actual Innocence and Postconviction Relief*

[1] **[2]** The elements of a legal malpractice action are: (1) a duty to use such skill, prudence, and diligence as are commonly exercised by other members ***85** of the legal profession; (2) breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200, 98 Cal.Rptr. 849, 491 P.2d 433, superseded by statute on other grounds.) In *Wiley, supra,* 19 Cal.4th at page 536, 79 Cal.Rptr.2d 672, 966 P.2d 983, the California Supreme Court held that for public policy reasons a plaintiff in a criminal malpractice action also must show actual innocence of the criminal offense.

The court based its decision on several considerations. First, " ' "permitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit by his own fraud, or to take advantage of his own wrong, or to found [a] claim upon his iniquity, or to acquire property by his own crime...." ' " (*Wiley, supra,* 19 Cal.4th at p. 537, 79 Cal.Rptr.2d 672, 966 P.2d 983.)

Second, public policy requires a plaintiff to bear sole responsibility for the consequences of his or her criminal acts. Thus, " '[a]ny subsequent negligent conduct by a plaintiff's attorney is superseded by the greater culpability of the plaintiff's criminal conduct. [Citation.]' " (*Wiley, supra,* 19 Cal.4th at p. 538, 79 Cal.Rptr.2d 672, 966 P.2d 983.) "Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss." (*Id.* at p. 539, 79 Cal.Rptr.2d 672, 966 P.2d 983.)

Third, the criminal justice system provides postconviction procedural protections for all criminal defendants who suffer violations ****645** of their Sixth Amendment right to effective assistance of counsel. (*Wiley, supra,* 19 Cal.4th at p. 542, 79 Cal.Rptr.2d 672, 966 P.2d 983.) "If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies...." (*Id.* at p. 543, 79 Cal.Rptr.2d 672, 966 P.2d 983.) Requiring actual innocence also eliminates the risk " ' "of two conflicting resolutions arising out of the same or identical transaction." [Citation.]' " (*Id.* at p. 544, 79 Cal.Rptr.2d 672, 966 P.2d 983.)

[3] In *Coscia, supra,* 25 Cal.4th at page 1201, 108 Cal.Rptr.2d 471, 25 P.3d 670, the Supreme Court relied on these same policy reasons to require a former criminal defendant to obtain postconviction exoneration as a prerequisite to showing actual innocence in a legal malpractice action. The court defined postconviction relief as "a final disposition of the underlying criminal case—for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the

People's refusal to continue the prosecution, or a grant of habeas corpus relief....” (*Id.* at p. 1205, 108 Cal.Rptr.2d 471, 25 P.3d 670.) Thus, the requirements of actual innocence and postconviction relief are “distinct, but related” concepts. (***86** *Id.* at p. 1197, 108 Cal.Rptr.2d 471, 25 P.3d 670.) “Actual innocence” refers to a determination in a civil trial that a plaintiff has demonstrated innocence *in fact* by a preponderance of the evidence. (*Levine v. Kling* (7th Cir.1997) 123 F.3d 580, 582–583; *Shaw v. State, Dept. of Admin.* (Alaska 1993) 861 P.2d 566, 570, fn. 3 [distinguishing actual innocence from legal innocence, which may occur for reasons unrelated to actual guilt; e.g., a successful motion to suppress evidence of guilt].) In contrast, a plaintiff may satisfy the postconviction exoneration requirement even if the relief obtained is not based on the plaintiff's innocence or his lawyer's incompetence. (*Coscia, supra,* 25 Cal.4th at p. 1205, fn. 4, 108 Cal.Rptr.2d 471, 25 P.3d 670.)[5] For example, a plaintiff who obtains postconviction relief because defense counsel misled or coerced the client into an involuntary guilty plea satisfies the requirement. With these principles in mind, we turn to the merits of **Sangha's** appeal.

B. *No Triable Issue of Fact Exists on the Element of Actual Innocence*

The parties disagree on the scope of the actual innocence requirement. Does it apply only to specific offenses that are the subject of a plaintiff's malpractice action? Does this requirement encompass lesser included offenses? Or, more broadly, does it apply to all related offenses that were or might have been charged? (*Wiley, supra,* 19 Cal.4th at p. 547, 79 Cal.Rptr.2d 672, 966 P.2d 983 (conc. opn. of Werdegar, J.).) *Wiley* does not directly address these issues.

In *Wiley,* the plaintiff and former criminal defendant obtained postconviction relief when the trial court granted his habeas corpus petition and vacated the judgment. The district attorney abandoned the prosecution and Wiley sued for malpractice. (*Wiley, supra,* 19 Cal.4th at p. 535, 79 Cal.Rptr.2d 672, 966 P.2d 983.) Here, as in *Wiley,* **Sangha** obtained new counsel who persuaded the trial court to set aside his criminal conviction for felony vandalism. Here, however, the prosecution did not abandon **Sangha's** criminal case, but ****646** instead filed a misdemeanor vandalism charge in lieu of the felony, to which **Sangha** pleaded guilty. **Sangha's** subsequent malpractice complaint focused only on La Barbera's allegedly negligent representation on the original felony vandalism charge.

[4] **[5]** **Sangha** argues he need only show actual innocence of the *felony* vandalism charge. He contends “it is not innocence of any offense that must be pled and proved, but innocence of the crime, for which the attorney's legal malpractice ***87** led to the wrongful conviction.” Relying on the policy pronouncements of *Wiley* and *Coscia,* and cases from foreign jurisdictions, La Barbera contends **Sangha** must show actual innocence of misdemeanor vandalism, a lesser included offense to felony vandalism,[6] and any other transactionally related offenses.

Our analysis is two-fold: even assuming **Sangha** need only show actual innocence on the felony vandalism charge, his separate statement fails to demonstrate a triable issue of fact on this issue. And even if **Sangha** could surmount this obstacle, we conclude the rationale of *Wiley* and *Coscia* requires a plaintiff in a criminal legal malpractice case to show actual innocence and postconviction exoneration on any guilty finding for a lesser included offense, even though plaintiff alleges he received negligent representation only on the greater offense. Because **Sangha** fails to make this showing, he cannot prevail on appeal.

1. ***Sangha's*** *Actual Innocence Showing on Felony Vandalism*

[6] La Barbera had the initial burden of demonstrating **Sangha** could not establish one or more elements of his malpractice action. On the actual innocence element, La Barbera's separate statement claimed the following was an undisputed material fact: “The guilty plea [to felony vandalism] that **Sangha** initialed and specified was true and correct under penalty of perjury [and] further stated in relevant part: ‘That on 6/25/01 w/in OC[ ] I did maliciously destroy property belonging to Sasha Aggarwal in excess of $400.’ ” Because La Barbera supported this statement with evidence of **Sangha's** guilty plea form, the burden shifted to **Sangha** to raise a triable issue of fact on the actual innocence element.

Sangha's separate statement disputed La Barbera's assertion by citing his deposition testimony explaining he signed the guilty plea form because “his attorney said he had to, even though it was not accurate.” To support his claim that his admission on the plea form was inaccurate, **Sangha** referred to the investigative police report which listed the property damage as less than ***88** $400. These responses failed to establish a triable issue of fact on actual innocence. **Sangha's** explanation that his lawyer forced him to plead guilty does

not address whether the value of the property he admitted destroying exceeded $400. As to the value of the property, the trial court correctly sustained a hearsay ****647** objection to the police report and **Sangha** does not question that ruling on appeal. Because **Sangha** offered no other evidence to show the property damage was less than $400, the trial court did not err in granting summary judgment, even accepting **Sangha's** legal interpretation of the actual innocence requirement.

2. ***Sangha*** *Must Show Evidence of Actual Innocence on the Lesser Included Offense of Misdemeanor Vandalism*

[7] Applying the policy factors discussed in *Wiley* and *Coscia,* we conclude **Sangha** must show actual innocence on the misdemeanor vandalism offense, even though **Sangha** limited his malpractice claim to the representation he received on the felony vandalism charge.

Sangha concedes he maliciously destroyed the victim's property, and therefore does not claim actual innocence on the misdemeanor vandalism crime. He merely disputes the extent of the damage, arguing his criminal conduct fell short of the $400 threshold for felony vandalism. He contends a competent attorney would have negotiated a more favorable bargain, similar to the one he ultimately received, thereby avoiding the potential loss of his securities license for pleading guilty to the wrong crime.[7] But as *Wiley* instructs, "The fact that nonnegligent counsel 'could have done better' may warrant postconviction relief, but it does not translate into civil damages...." (*Wiley, supra,* 19 Cal.4th at p. 539, 79 Cal.Rptr.2d 672, 966 P.2d 983.) The court explained that for criminal malpractice "a defendant's own criminal act remains the ultimate source of his predicament irrespective of counsel's subsequent negligence. Any harm suffered is *not* 'only because of' attorney error but principally due to the client's antecedent criminality." (*Id.* at p. 540, 79 Cal.Rptr.2d 672, 966 P.2d 983; *Coscia, supra,* 25 Cal.4th p. 1203, 108 Cal.Rptr.2d 471, 25 P.3d 670 ["convicted criminal's conduct is deemed to be the sole cause of his or her indictment and conviction—either after trial or based on a guilty plea"].) It follows that " 'damages should only be awarded to a person who is truly free from *any* criminal involvement.' " (*Wiley* at p. 539, 79 Cal.Rptr.2d 672, 966 P.2d 983, italics added.) While **Sangha** minimizes his misconduct, it is undisputed he is not truly free from any criminal involvement.

***89** A comparison of the criminal acts constituting felony and misdemeanor vandalism demonstrates the necessity of applying the actual innocence requirement to lesser included offenses. Vandalism is an intentional and malicious act damaging or destroying property. Although the classification of the offense turns on the value of the property damaged or destroyed, the mental state and criminal acts for both felony and misdemeanor vandalism are identical. (See CALCRIM Nos. 2900, 2901 (2006).) The same policy considerations supporting the imposition of an actual innocence requirement for the originally charged offense apply with equal force to a lesser included crime. **Sangha's** interpretation of *Wiley* would allow him to shift responsibility for his own criminal act and alleviate the consequences of his conduct. It would also violate the statutory maxim, "[n]o one can take advantage of his ****648** own wrong" (Civ.Code, § 3517) by allowing him potentially to profit from his own criminal conduct. As *Wiley* observes, "[i]f the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies and considering the purpose and function of constitutional guaranties." (*Wiley, supra,* 19 Cal.4th at p. 543, 79 Cal.Rptr.2d 672, 966 P.2d 983.)

Redante v. Yockelson (2003) 112 Cal.App.4th 1351, 6 Cal.Rptr.3d 10 supports our view the actual innocence requirement applies to lesser included offenses. There, Redante was convicted of numerous sexual crimes with underage girls. After his convictions were affirmed on appeal, Redante sued his appellate lawyer for failing to challenge his convictions based on discrepancies concerning the victim's age. Redante argued he was wrongly convicted of crimes pertaining to minors under the age of 14 because the victim was older. Affirming an order granting summary judgment, the appellate court concluded Redante could not establish actual innocence "[e]ven if the victim were 14 years old, [because] Redante's conviction would have been for a different crime." (*Id.* at p. 1358, fn. 2, 6 Cal.Rptr.3d 10.)

Bailey v. Tucker (1993) 533 Pa. 237, 621 A.2d 108, offers a more extensive analysis than *Redante* and bolsters our view **Sangha** is not entitled to relief. There, the appellate court reversed Bailey's murder conviction because his trial counsel failed to investigate and pursue an intoxication defense. On retrial, a jury found Bailey guilty of the lesser crime of voluntary manslaughter. In the wake of this more favorable outcome, Bailey sued his original trial counsel. The Pennsylvania Supreme Court held that to prevent the "the possibility of a defendant actually profiting from his crime, we require that as an element to a cause of action in trespass against a defense attorney whose dereliction was the sole proximate cause of the defendant's unlawful conviction, *the defendant must prove that he is innocent of the crime or any*

lesser included offense. If a person is found guilty of a crime, *and that person* ***90** *is indeed innocent of any degree of that crime,* and it is established that the wrongful conviction was proximately caused by counsel's gross dereliction in his duty to represent the defendant, *only then will the defendant be able to collect monetary damages.* If a person is convicted of a crime because of the inadequacy of counsel's representation, justice is satisfied by the grant of a new trial. However, if an *innocent person* is wrongfully convicted due to the attorney's dereliction, justice requires that he be compensated for the wrong which has occurred." (*Id.*, 621 A.2d at p. 113, all italics added, except last italics in original; see also *id.* at p. 115, fn. 2.)

Sangha argues language in *Wiley* and other out-of-state decisions support his interpretation of the actual innocence requirement. For example, he cites *Wiley's* disapproval of damages for a plaintiff " 'who actually committed the criminal offense ...' " (*Wiley, supra,* 19 Cal.4th at p. 539, 79 Cal.Rptr.2d 672, 966 P.2d 983) to support his argument the actual innocence requirement applies only to the charged offense which is the subject of the malpractice claim. But the entire quote also includes the observation that " 'damages should only be awarded to a person who is truly free from *any* criminal involvement.' " (*Ibid.,* italics added.) In any event, the carefully selected snippets from *Wiley* and out-of-state decisions **Sangha** cites shed little light on the matter because none of them directly confronted the issue. More convincing is the public policy rationale underlying *Wiley,* which persuades us the actual innocence requirement does apply ****649** to lesser included offenses.[8] **Sangha** does not claim he can show actual innocence on the lesser offense of misdemeanor vandalism. Accordingly, the trial court did not err in granting summary judgment.

C. ***Sangha*** *Failed to Show Postconviction Exoneration on the Misdemeanor Vandalism Offense*

[8] **[9]** The same public policy considerations apply to the requirement plaintiff show postconviction exoneration. La Barbera shifted the burden to **Sangha** to show a triable issue of fact on this issue when he introduced evidence **Sangha** received probation after pleading guilty to misdemeanor vandalism. Postconviction exoneration is a "final disposition" of the underlying case. (*Coscia, supra,* 25 Cal.4th at p. 1205, 108 Cal.Rptr.2d 471, 25 P.3d 670.) Probation, however short, is not a final disposition exonerating the criminal defendant. Here, **Sangha** failed to introduce any evidence he received postconviction relief on his misdemeanor conviction. This serves as an additional ground supporting the grant of summary judgment.

***91** IV

Conclusion

The judgment is affirmed. Costs are awarded to respondent.

WE CONCUR: SILLS, P.J., and RYLAARSDAM, J.

All Citations

146 Cal.App.4th 79, 52 Cal.Rptr.3d 640, 06 Cal. Daily Op. Serv. 11,828, 06 Cal. Daily Op. Serv. 11,964, 2007 Daily Journal D.A.R. 16,809

Footnotes

1 The following summary is derived from the facts and supporting evidence cited by the parties in their separate statements presented at the summary judgment motion.

2 We have reviewed the superior court file. The clerk did not destroy **Sangha's** guilty plea form, which remains part of the record.

3 Section 17 does not authorize a court to "reduce" a charge from a felony/misdemeanor wobbler to a lesser included misdemeanor. The section provides that a wobbler is deemed a misdemeanor under certain circumstances, e.g., when the court imposes a punishment other than imprisonment or when the court grants probation without imposition of sentence and at the time of granting probation or thereafter declares the offense to be a misdemeanor.

4 Nothing in the complaint or in the record of the summary judgment motion discloses the nature of plaintiff's damages.

5 Outright rejection of a postconviction claim based on ineffective assistance of counsel "may preclude a criminal defendant from maintaining a malpractice action against trial counsel...." (*Coscia, supra,* 25 Cal.4th at p. 1205, fn. 4, 108 Cal.Rptr.2d 471, 25 P.3d 670.)

6 Felony vandalism prohibits the malicious destruction of property causing damage of $400 or more. Misdemeanor vandalism shares the same elements except it applies to property damage less than $400. "Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117, 77 Cal.Rptr.2d 848, 960 P.2d 1073.) Misdemeanor vandalism is therefore a lesser included offense because a person cannot commit felony vandalism without also committing the lesser misdemeanor offense.

7 Although **Sangha** emphasizes his innocence of the criminal threat charge because Aggarwal did not take his threat seriously, we note in passing the prosecution could have prosecuted him for attempted criminal threat, a strike under the Three Strikes law. (*People v. Toledo* (2001) 26 Cal.4th 221, 234, 109 Cal.Rptr.2d 315, 26 P.3d 1051 [attempted criminal threat committed if victim lacks sustained fear he or she reasonably could have entertained under the circumstances]; see also § 667, subd. (c); § 1170.12, subd. (a).) **Sangha's** acceptance of the felony vandalism plea bargain eliminated this possibility.

8 Because the issue has no bearing on our decision, we do not decide whether the actual innocence requirement applies to all transactionally related offenses.

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Disagreed With by Rantz v. Kaufman, Colo., February 28, 2005

25 Cal.4th 1194
Supreme Court of California

Nicholas F. **COSCIA**, Plaintiff and Appellant,
v.
McKENNA & CUNEO et al.,
Defendants and Respondents.

No. S089226.
|
July 2, 2001.

Synopsis

Former client brought legal malpractice claim against criminal defense counsel, alleging counsel's negligence resulted in his pleading guilty to a felony rather than a misdemeanor. The Superior Court, No. 709151, San Diego County, Ronald S. Prager, J., sustained defense counsel's demurrer without leave to amend. Client appealed. The Court of Appeal, McIntyre, J., reversed and remanded. The Supreme Court granted review, superseding the opinion of the Court of Appeal, and held in an opinion by George, C.J., that: (1) an individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action; and (2) client who seeks recovery for criminal malpractice must file that claim within applicable statute of limitations period, regardless of whether client has yet obtained postconviction exoneration, and court should stay malpractice action during period in which client timely and diligently pursues postconviction remedies; and (3) former client was entitled to amend complaint to allege his actual innocence.

Judgment of Court of Appeal affirmed.

Opinion, 95 Cal.Rptr.2d 368, superseded.

West Headnotes (6)

[1] **Attorneys and Legal Services** Criminal practice

In a legal malpractice case arising out of a criminal proceeding, proof of actual innocence is required.

102 Cases that cite this headnote

[2] **Res Judicata** Collateral estoppel and issue preclusion in general

Requirements for invoking collateral estoppel, so as to preclude party from relitigating in a second proceeding the matters litigated and determined in a prior proceeding, are the following: (1) the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding.

50 Cases that cite this headnote

[3] **Attorneys and Legal Services** Criminal practice

Attorneys and Legal Services Conditions precedent in general

An individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action.

110 Cases that cite this headnote

[4] **Attorneys and Legal Services** Criminal practice

An intact conviction precludes recovery in a legal malpractice action even when ordinary collateral estoppel principles otherwise are not controlling, for example because a conviction was based upon a plea of guilty that would not be conclusive in a subsequent civil action involving the same issues.

31 Cases that cite this headnote

[5] **Attorneys and Legal Services** Time for proceedings; limitations and laches

Client who seeks recovery against defense counsel for criminal malpractice must file action within the applicable statute of limitations period, regardless of whether client has yet obtained the postconviction exoneration that is prerequisite for relief on malpractice claim, and court should stay the malpractice action during the period in which client timely and diligently pursues postconviction remedies. West's Ann.Cal.C.C.P. § 340.6(a).

104 Cases that cite this headnote

[6] **Pleading** Defects amendable in general

Former client who sued defense counsel for criminal malpractice in connection with client's entry of guilty plea to a felony charge, alleging that defense counsel negligently failed to secure a "better deal," was entitled to amend complaint to allege client's actual innocence, as necessary element of malpractice claim; there was a reasonable possibility that defect in original complaint could be cured by amendment.

36 Cases that cite this headnote

Attorneys and Law Firms

***472 *1197 **671 Nicholas F. **Coscia**, in pro. per.; Milberg & De Phillips, Russell M. De Phillips and Roy L. Carlson, Jr., Cardiff By The Sea, for Plaintiff and Appellant.

Gene Moran as Amicus Curiae, on behalf of Plaintiff and Appellant.

Hinshaw & Culbertson, Ronald E. Mallen, San Francisco, Paul E. Vallone; **McKenna** & Cuneo, Michael H. Fish, and Ross H. Hyslop, San Diego, for Defendants and Respondents.

Hartley & Hartley, Joseph M. Hartley and Mary Kathleen Hartley, Santa Monica, as Amici Curiae, on behalf of Defendants and Respondents.

Cooley Godward, Jeffrey G. Randall, Palo Alto, Patrick C. Pope and Andrew C. Temkin as Amici Curiae, on behalf of Defendants and Respondents.

Opinion

GEORGE, C.J.

In ***473 *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 79 Cal.Rptr.2d 672, 966 P.2d 983, this court held that when a former criminal defendant sues his or her attorney for legal malpractice, the former client's actual innocence of the underlying criminal charges is a necessary element of the malpractice cause of action. We granted review in this matter to address a distinct, but related, question—whether a former criminal defendant must obtain exoneration by postconviction relief as a prerequisite to obtaining relief for legal malpractice. As we shall explain, we conclude that postconviction exoneration is a prerequisite to prevailing on a legal malpractice claim in this context.

***1198 I**

In October 1993, plaintiff Nicholas F. **Coscia**, an attorney, was indicted by the federal government for securities fraud and related offenses. He retained defendants **McKenna** & Cuneo, L.L.P., and Juanita R. Brooks (hereafter sometimes **McKenna** & Cuneo) to represent him.

In December 1994, **Coscia** pleaded guilty in the United States District Court for the District of Nevada to one felony count of conspiracy to violate federal securities laws. He admitted his guilt under oath and confirmed that his plea and his waiver of certain constitutional rights were made freely and voluntarily. He answered affirmatively in response to the court's question whether he "in fact knowingly participate[d] in the conspiracy charged." At the court's request, he summarized his role with regard to the conspiracy by admitting that, with the intent of obtaining financial profit, he purchased securities of the subject corporation knowing that there would be a corporate reorganization of that entity. He also signed a statement of offense acknowledging his criminal conduct.

In March 1996, **Coscia** was sentenced to two years' probation and a $5,000 fine.

In March 1997, **Coscia** commenced the present malpractice action against **McKenna** & Cuneo, alleging that he was

injured by the firm's negligent legal advice. McKenna & Cuneo demurred on the grounds that the **672 action was barred by the statute of limitations and by collateral estoppel. The superior court sustained the demurrer without leave to amend, concluding that Coscia's criminal conviction precluded relief in the present action under principles of collateral estoppel. The court entered judgment in favor of McKenna & Cuneo.

Coscia appealed from the judgment. He contended that the trial court should have permitted him to amend the complaint to allege that he had entered into a plea agreement despite his innocence of the criminal charges. Coscia asserted that he would allege the following facts. During the plea negotiations, he approached Attorney Brooks and informed her that he possessed information regarding another ongoing securities fraud, and that he would like to "trade" this information to the government in exchange for the prosecutor's agreement to a misdemeanor plea. Brooks advised Coscia not to do so, stating that in her opinion it would not be "worth her time" to present such facts to the federal prosecutor. Relying upon that advice, Coscia accepted the felony plea offer. As a consequence of the plea, he suffered economic and emotional damage, including suspension of his license to *1199 practice law in California. Coscia subsequently was informed, in meetings with a United States Attorney and an FBI agent, that it was a mistake for his attorney not to have presented the offer of information in the plea negotiations, and that favorable deals are struck "all the time" on that basis.

The Court of Appeal reversed the judgment of the superior court. It noted that a majority of out-of-state courts addressing ***474 the point have held that, in addition to proof of innocence, a further requirement in a criminal malpractice action is that the conviction have been set aside through appeal or other postconviction proceeding. The Court of Appeal determined, however, that it was precluded from adopting the majority rule, regardless of its substantive merits, because in California the application of such a rule would render most criminal malpractice actions untimely under Code of Civil Procedure section 340.6. Because of the effect of the statute of limitations, the Court of Appeal suggested that the propriety of a postconviction relief requirement in criminal malpractice actions may be determined only by this court or the Legislature. Citing *Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 25 Cal.Rptr. 559, 375 P.2d 439, the court concluded that a plaintiff in a criminal malpractice action who pleaded guilty to the underlying offense is not collaterally estopped from proving actual innocence. Because there was a reasonable possibility that Coscia could have cured the defects in his complaint, the Court of Appeal concluded that the superior court should have granted him leave to amend. Accordingly, it reversed the judgment of the superior court and remanded the matter for further proceedings consistent with its opinion.

We granted review. As will appear, we determine, contrary to the Court of Appeal, that exoneration by postconviction relief is a prerequisite to recovery for legal malpractice arising out of a criminal proceeding, but we nonetheless conclude that the matter should be remanded to the trial court for further proceedings consistent with this opinion.

II

[1] The failure to provide competent representation in a civil or criminal case may be the basis for civil liability under a theory of professional negligence. In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200, 98 Cal.Rptr. 849, 491 P.2d 433; *1200 *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1621, 33 Cal.Rptr.2d 276.) In a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence. (*Wiley v. County of San Diego, supra,* 19 Cal.4th at p. 545, 79 Cal.Rptr.2d 672, 966 P.2d 983.)

Our decision in *Wiley* explained that the addition of an actual innocence requirement **673 was required by several public policy considerations. (*Wiley v. County of San Diego, supra,* 19 Cal.4th 532, 79 Cal.Rptr.2d 672, 966 P.2d 983.) First, " ' "[p]ermitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit by his own fraud, or to take advantage of his own wrong, or to found [a] claim upon his iniquity, or to acquire property by his own crime." ' " (*Id.* at p. 537, 79 Cal.Rptr.2d 672, 966 P.2d 983.)

Second, " 'allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict.' " (*Wiley v. County of San Diego, supra,* 19 Cal.4th at p. 537,

79 Cal.Rptr.2d 672, 966 P.2d 983.) A plaintiff convicted of an offense should bear sole responsibility for the consequences of his or her criminal acts; " '[a]ny subsequent negligent conduct by a plaintiff's attorney is superseded by ***475 the greater culpability of the plaintiff's criminal conduct. [Citation.]' [Citation.]" (*Id.* at p. 538, 79 Cal.Rptr.2d 672, 966 P.2d 983.) "The fact that nonnegligent counsel 'could have done better' may warrant postconviction relief, but it does not translate into civil damages, which are intended to make the plaintiff whole." (*Id.* at p. 539, 79 Cal.Rptr.2d 672, 966 P.2d 983.) "Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss. [Citation.]" (*Ibid.*)

Third, guilty defendants have an adequate remedy in the form of postconviction relief for ineffective assistance of counsel. (*Wiley v. County of San Diego, supra,* 19 Cal.4th at pp. 542–543, 79 Cal.Rptr.2d 672, 966 P.2d 983.) "Not only does the [United States] Constitution guarantee this right [under the Sixth Amendment], any lapse can be rectified through an array of postconviction remedies, including appeal and habeas corpus." (*Id.* at p. 542, 79 Cal.Rptr.2d 672, 966 P.2d 983.) Moreover, avoiding a procedure that would involve retrying criminal prosecutions in tort actions for malpractice is consistent with " ' "a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." [Citation.]' [Citation.]" (*Id.* at p. 544, 79 Cal.Rptr.2d 672, 966 P.2d 983.)

[2] *Wiley* noted that many jurisdictions that require proof of actual innocence as an element of criminal malpractice also require that " 'the person's conviction has been reversed, ... on appeal or through post-conviction relief, or the person has otherwise been exonerated.' [Citations.]" (*Wiley v. County of San Diego, supra,* 19 Cal.4th at p. 536, fn. 2, 79 Cal.Rptr.2d 672, 966 P.2d 983.) Indeed, the Court of *1201 Appeal in *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal.App.3d 39, 48, 170 Cal.Rptr. 533, implicitly imposed such a requirement, holding that the doctrine of collateral estoppel precludes relitigation of guilt in a malpractice action when the plaintiff remains convicted on charges of federal securities law violations. (*Wiley v. County of San Diego, supra,* 19 Cal.4th at pp. 536–537, fn. 2, 79 Cal.Rptr.2d 672, 966 P.2d 983; see also *id.* at p. 549, 79 Cal.Rptr.2d 672, 966 P.2d 983 (dis. opn. of Mosk, J.) ["[S]ince *Weiner v. Mitchell, Silberberg & Knupp* [, *supra,*] 114 Cal.App.3d 39, 170 Cal.Rptr. 533, it has been the rule in the state that a criminal defendant must obtain postconviction relief before pursuing a malpractice action."].)[1]

Because we had no occasion in *Wiley* to do so, however, we did not address the question whether exoneration by postconviction relief is required before a plaintiff in a criminal malpractice action can prove actual innocence.

[3] That issue now is presented, and for the reasons cited in *Wiley* and the additional reasons set forth below, we hold that an **674 individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action. As discussed, public policy considerations ***476 require that only an innocent person wrongly convicted be deemed to have suffered a legally compensable harm. Unless a person convicted of a criminal offense is successful in obtaining postconviction relief, the policies reviewed in *Wiley* preclude recovery in a legal malpractice action.

In so concluding, we align ourselves with the numerous jurisdictions that have, on similar grounds, required appellate or other postconviction relief as a predicate to recovery in a criminal malpractice action. Thus, the Texas Supreme Court held in *Peeler v. Hughes & Luce* (Tex.1995) 909 S.W.2d 494, 498, that a client who had pleaded guilty to a federal crime could not sue her criminal defense counsel for malpractice until she obtained postconviction relief: "Since [the plaintiff] has not been exonerated, her illegal acts remain the sole proximate and producing causes of her indictment and conviction as a matter of law." Similarly, the Virginia Supreme Court in *Adkins v. Dixon* (1997) 253 Va. 275, 281 [482 S.E.2d 797, 801], required postconviction relief as a predicate to a malpractice action against criminal *1202 counsel on the basis that " 'courts will not assist the participant in an illegal act who seeks to profit from the act's commission.' "[2]

Significantly, most of the foregoing cases, like the present matter, involved convictions based upon guilty pleas or no contest pleas. (See *Gomez v. Peters, supra,* 470 S.E.2d at p. 695; *Hockett v. Breunig, supra,* 526 N.E.2d at p. 999; *Labovitz v. Feinberg, supra,* 713 N.E.2d at p. 381; ***477 *Schlumm v. O'Hagan, supra,* 433 N.W.2d at p. 847; *State ex rel. O'Blennis v. Adolf, supra,* 691 S.W.2d at p. 503; *Morgano v. Smith, supra,* 879 P.2d at p. 736; *Carmel v. Lunney, supra,* 518 N.Y.S.2d 605, 511 N.E.2d at p. 1128; *Stevens v. Bispham, supra,* 851 P.2d at p. 559; *Peeler v. Hughes & Luce, supra,*

909 S.W.2d at p. 496; *Harris v. Bowe, supra,* 505 N.W.2d at p. 162.) As the Oregon Supreme Court explained in *Stevens v. Bispham, supra,* 851 P.2d at page 562: "However a person comes to be convicted—whether by a plea to the charge, through a plea agreement, or after a ****675** trial to judge or jury—for the purposes of a case like this one [claiming professional negligence by former criminal defense counsel], the person convicted is deemed equally guilty.... Although a ***1203** plaintiff may wish that he or she had gotten a better deal, we do not consider it appropriate, outside of circumstances where ... relief ... is available under the post-conviction relief law, to treat a convicted offender as having been caused 'harm' in a legally cognizable way by any disposition of that person's case that was legally permissible." The convicted criminal's own conduct is deemed to be the sole cause of his or her indictment and conviction—either after trial or based on a guilty plea.

As many of these out-of-state courts have stressed, the requirement of exoneration by postconviction relief is firmly grounded in the unique constitutional and statutory guarantees provided to criminal defendants. The Pennsylvania Supreme Court explained in *Bailey v. Tucker, supra,* 621 A.2d at page 114: "Unlike in the civil litigation area, a client does not come before the criminal justice system under the care of his counsel alone; he comes with a full panoply of rights, powers, and privileges. These rights and privileges not only protect the client from abuses of the system but are designed to protect the client from a deficient representative. Thus, whereas in a civil matter a case once lost is lost forever, in a criminal matter a defendant is entitled to a second chance (perhaps even a third or fourth chance) to insure that an injustice has not been committed."

Addressing some of those rights and privileges, the court in *Labovitz v. Feinberg, supra,* 713 N.E.2d at page 383, referred to "the duty imposed upon judges under both Federal practice and the cognate [state] practice to assure not only that guilty pleas are knowingly, intelligently, and voluntarily offered and that there is [a] factual basis for each crime to which a plea is tendered, but also that the defendant's Sixth Amendment right to effective assistance of counsel has been honored." (See also *Stevens v. Bispham, supra,* 851 P.2d at p. 561 [describing the wide range of procedural protections afforded persons accused of criminal offenses in Oregon].)

Wiley similarly observed that the criminal justice system itself provides redress for the errors and omissions of counsel: "All criminal defendants have a Sixth Amendment right to effective assistance of counsel; that is, counsel acting reasonably ' "within the range of competence demanded of attorneys in criminal cases." [Citation.]' [Citation.] Not only does the Constitution guarantee this right, any lapse can be rectified through an array of postconviction remedies, including appeal and habeas corpus. Such relief is afforded even to those clearly guilty as long as they demonstrate incompetence and resulting prejudice, i.e., negligence and damages, under the same standard of professional care applicable in civil malpractice actions. [Citation.]" (*Wiley v. County of San Diego, supra,* 19 Cal.4th at p. 542, 79 Cal.Rptr.2d 672, 966 P.2d 983.) These and other constitutional and statutory protections "are to safeguard against conviction *****478** of the wrongly accused and to vindicate fundamental values." ***1204** (*Id.* at p. 541, 79 Cal.Rptr.2d 672, 966 P.2d 983.) They also support the principle that an individual who was convicted and has not obtained postconviction relief should not be permitted to shift responsibility for his or her predicament to former criminal defense counsel. (*Id.* at p. 540, 79 Cal.Rptr.2d 672, 966 P.2d 983.)

In addition, the requirement of exoneration by postconviction relief protects against inconsistent verdicts—such as a legal malpractice judgment in favor of a plaintiff whose criminal conviction remains intact—that would contravene " 'a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.' [Citation.]" (*Heck v. Humphrey* (1994) 512 U.S. 477, 484, 114 S.Ct. 2364, 129 L.Ed.2d 383.) This requirement also promotes judicial economy. Many issues litigated in the effort to obtain postconviction relief, including ineffective assistance of counsel, would be duplicated in a legal malpractice action; if the defendant is denied postconviction relief on the basis of ineffective assistance of counsel, collateral estoppel principles may operate to eliminate frivolous ****676** malpractice claims. Thus, *Younan v. Caruso* (1996) 51 Cal.App.4th 401, 413–414, 59 Cal.Rptr.2d 103, held that the plaintiff in a legal malpractice action against his former criminal counsel was barred by collateral estoppel from relitigating his claim of professional negligence after he was denied habeas corpus relief on the same ground of ineffective representation. A further policy reason for requiring postconviction relief is to encourage the representation of criminal defendants by reducing the risk of baseless malpractice actions. (See *Glenn v. Aiken* (1991) 409 Mass. 699, 708 [569 N.E.2d 783, 788].)

[4] Like the majority of out-of-state cases on point, we hold that an intact conviction precludes recovery in a legal malpractice action even when ordinary collateral estoppel principles otherwise are not controlling, for example because a conviction was based upon a plea of guilty that would not be conclusive in a subsequent civil action involving the same issues. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., supra,* 58 Cal.2d at pp. 605–606, 25 Cal.Rptr. 559, 375 P.2d 439.)) We thus conclude that the Court of Appeal erred in applying the rule in *Teitelbaum Furs* in the context of a criminal malpractice action.[3]

We did not have occasion in *Teitelbaum Furs* or subsequent decisions to address the unique practical and policy considerations against permitting a ***1205** criminal defendant with an intact conviction to recover on a malpractice claim against his or *****479** her former criminal defense counsel. In light of those considerations, which we deem compelling, we conclude that such a conviction, regardless whether it follows a plea of guilty (or nolo contendere) or a trial, bars proof of actual innocence in a legal malpractice action.

By so holding, we also avoid a potential adverse consequence of distinguishing between convictions based upon guilty pleas and convictions after trial for the purpose of determining the preclusive effect of the convictions in legal malpractice actions. If only the client who pleaded guilty could recover for malpractice without first obtaining postconviction relief, attorneys might be tempted to practice defensive law when faced with the choice of advising a client to enter into a plea agreement or proceed to trial, in order to insulate themselves from malpractice actions. As we observed in *Wiley,* " '[I]n our already overburdened system it behooves no one to encourage the additional expenditure [of] resources merely to build a record against a potential malpractice claim.' [Citation.]" (*Wiley v. County of San Diego, supra,* 19 Cal.4th at pp. 544–545, 79 Cal.Rptr.2d 672, 966 P.2d 983.)

For all these reasons, we conclude that a plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case—for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief—as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel.[4]

***1206 **677 III**

We next consider the effect of the foregoing requirement of exoneration by postconviction relief upon the application of the relevant statute of limitations for legal malpractice actions arising from criminal proceedings.

Code of Civil Procedure section 340.6, subdivision (a), provides that "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] (1) The plaintiff has not sustained actual injury; *****480** [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; [¶] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and [¶] (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action."

In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 76 Cal.Rptr.2d 749, 958 P.2d 1062, we explained that the "actual injury" provision in Code of Civil Procedure section 340.6, subdivision (a)(1), effectively continues the accrual rule established in *Budd v. Nixen, supra,* 6 Cal.3d at pages 200–201, 98 Cal.Rptr. 849, 491 P.2d 433, which held that the statute of limitations began to run when the plaintiff sustained loss or damage from the attorney's negligence. "Under *Budd,* the cause of action could not accrue until the plaintiff suffered actual loss or damage resulting from the allegedly negligent conduct. [Citation.] After sustaining damages compensable in a negligence action, the plaintiff could establish a cause of action for professional negligence, and the limitations period commenced. [Citation.] Under [Code of Civil Procedure] section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of

action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, supra,* 18 Cal.4th at p. 751, 76 Cal.Rptr.2d 749, 958 P.2d 1062.) The test for actual injury is "whether the plaintiff has sustained any damages compensable in an action, other than ***1207** one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services." (*Ibid.*)

The Court of Appeal declined to impose a requirement of exoneration by postconviction relief in the present matter on the ground that "[t]he interest of plaintiffs in pursuing meritorious claims, and considerations of fairness [citation], preclude us from adopting a rule that under existing law would result in the forfeiture of most criminal malpractice actions on technical grounds." It asserted that such a requirement would create an inherent statute of limitations problem in criminal malpractice cases: Because of the time required to complete postconviction proceedings, the statute of limitations in most cases will have run long before the convicted individual has had an opportunity to remove the bar to establishing his or her actual innocence. (Citing ****678** *Wiley v. County of San Diego, supra,* 19 Cal.4th 532, 546–547, 79 Cal.Rptr.2d 672, 966 P.2d 983 (conc. opn. of Werdegar, J.).)

The example of the practice in other jurisdictions, however, reveals that the requirement of postconviction relief, as a prerequisite to proving legal malpractice arising out of a criminal proceeding, need not result in a technical forfeiture of legitimate malpractice claims. As will appear, most courts have adopted one of two approaches to avoid possible unfair results.

Some out-of-state courts have held that the limitations period does not commence until the plaintiff has obtained postconviction relief, because the cause of action does not accrue for statute of limitations purposes until that time. Thus, in *Adkins v. Dixon, supra,* 482 S.E.2d at page 801, the Virginia Supreme Court expressly rejected the contention that the statute of limitations *****481** might bar the plaintiff's malpractice action before he obtained relief in postconviction proceedings: "Since successful termination of such a proceeding is a part of [the plaintiff's] cause of action, he has no right of action until that time, and, thus, the statute of limitations does not begin to run until termination of the post-conviction proceeding. [Citations.]" In crafting a similar rule, the Alaska Supreme Court in *Shaw v. State, Dept. of Admin., supra,* 816 P.2d at page 1362, relied upon the law of malicious prosecution, which requires that a plaintiff must prove that an unsuccessful prosecution occurred: "This element is not established, and indeed, remains uncertain, until the cessation of the underlying action. The same is necessarily true of post-conviction relief. The merits of the application for post-conviction relief cannot be established until the court has ruled on the matter." The decision explained: "By adopting the date that post-conviction relief is obtained as the trigger to the statute of limitations, we establish a bright line test which should significantly assist courts in the resolution of statute of limitation issues." (*Id.* at p. 1361.) Similarly, the Oregon Supreme ***1208** Court in *Stevens v. Bispham, supra,* 851 P.2d at page 566, held that the statute of limitations for malpractice did not start to run until the plaintiff obtained postconviction relief: "Plaintiff could not have brought this action until he had suffered legally cognizable harm. [Citation.]" (See also, e.g., *Morgano v. Smith, supra,* 879 P.2d at pp. 737–738; *Britt v. Legal Aid Socy.* (2000) 95 N.Y.2d 443, 447, 718 N.Y.S.2d 264, 741 N.E.2d 109, 112.)

Other jurisdictions have adopted a so-called two-track approach. In *Gebhardt v. O'Rourke* (1994) 444 Mich. 535, 548 [510 N.W.2d 900, 906], the Michigan Supreme Court rejected as a mere "legal fiction" the rule that a wrongly convicted criminal defendant suffers no cognizable harm, and the criminal malpractice claim does not accrue, until he or she has obtained appellate relief. The court thus held that exoneration by postconviction relief was not an element of a criminal malpractice claim or a prerequisite to proving actual innocence. (510 N.W.2d at p. 908.) The statute of limitations began to run on the day the plaintiff knew that she had a possible claim against her criminal defense counsel. (*Id.* at p. 904.) The decision in *Gebhardt* observed that a criminal defendant who has initiated postconviction relief proceedings "should have knowledge sufficient to have discovered his claim against his initial defense attorney for statute of limitations purposes." (*Id.* at p. 907.) "With his claim preserved, he can and should seek a stay in the civil suit until the criminal case is resolved." (*Ibid.;* see also *Silvers v. Brodeur* (Ind.Ct.App.1997) 682 N.E.2d 811, 818 & fn. 4 [adopting rule consistent with that in *Gebhardt*]; *Seevers v. Potter* (1995) 248 Neb. 621, 629–630 [537 N.W.2d 505, 510–511] [same]; *Duncan v. Campbell* (1997) 123 N.M. 181, 185–187 [936 P.2d 863, 867–869] [same].)

The Supreme Court of Pennsylvania, in *Bailey v. Tucker, supra,* 621 A.2d at page 115, agreed with the decision in *Gebhardt* on the statute of limitations point, but also held that "a plaintiff will not prevail in an action in criminal malpractice

unless and until he has pursued post-trial remedies and obtained relief which was dependent upon attorney error....” Such a requirement does not relieve the plaintiff of his or her “duty to initiate this cause of action within the statute of limitations period.” (*Id.* at p. 115, fn. 13.) In *Bailey,* the statute of limitations commenced upon the termination of the attorney-client ****679** relationship, “since at that point the aggrieved defendant is aware of the injury (i.e., the conviction)....” (*Id.* at p. 116.)

*****482** With regard to the procedural status of a civil action filed prior to completion of the postconviction process, the decision in *Bailey* stated: “[A]n attorney defendant who is served with a complaint alleging professional malpractice for the handling of a criminal matter may interpose a preliminary objection on the grounds of demurrer. [Citation.] The trial court ***1209** shall then reserve its ruling on said objection until the resolution of the post-conviction criminal proceedings.” (*Bailey v. Tucker, supra,* 621 A.2d at p. 115, fn. 13.)

The court in *Berringer v. Steele, supra,* 758 A.2d at page 604, followed *Bailey,* requiring as follows: “[N]otwithstanding that the criminal plaintiff must obtain post conviction relief as a predicate to recovery in a criminal malpractice case, we conclude that a criminal plaintiff must also comply with the limitations period [for professional malpractice].” The court recognized that, to avoid the statute of limitations bar, a criminal plaintiff might be required to initiate the malpractice suit prior to resolution of all postconviction proceedings. “In that circumstance, upon motion of either party, the trial court in the criminal malpractice action should not dismiss the malpractice case merely because the criminal plaintiff has not obtained post conviction relief. Rather, the court should stay the malpractice suit pending the criminal plaintiff's diligent effort to obtain resolution of the requisite post conviction, appellate, or habeas proceedings.” (*Ibid.*)

McKenna & Cuneo urges that we adopt the rule in *Adkins v. Dixon, supra,* 253 Va. 275, 482 S.E.2d 797. It contends that, under the reasoning in *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, supra,* 18 Cal.4th 739, 76 Cal.Rptr.2d 749, 958 P.2d 1062, unless and until such a plaintiff obtains postconviction relief, no cause of action for criminal malpractice has accrued under Code of Civil Procedure section 340.6, subdivision (a). According to **McKenna** & Cuneo, the question presented is not whether the statute of limitations under Code of Civil Procedure section 340.6, subdivision (a), is *tolled* pending the resolution of related actions that might rectify or mitigate the actual harm caused by the malpractice, because this court expressly has rejected that approach. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, supra,* 18 Cal.4th at p. 763, 76 Cal.Rptr.2d 749, 958 P.2d 1062, overruling *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245, 36 Cal.Rptr.2d 552, 885 P.2d 965.) Rather, **McKenna** & Cuneo asserts, delaying accrual until postconviction relief appears logically compelled by the requirement that the plaintiff must exhaust postconviction remedies before he or she can prove the element of actual innocence in an action for criminal malpractice. Alternatively, **McKenna** & Cuneo proposes that the action for criminal malpractice should be subject to tolling, because the plaintiff in such an action either has sustained no “actual injury” (Code Civ. Proc., § 340.6, subd. (a)(1)) or is under a “legal disability” (*id.,* subd. (a)(4)) until he or she is exonerated by postconviction relief.

We agree with the Court of Appeal that these proposals are inconsistent with our previous decisions addressing the subject of accrual and actual injury under Code of Civil Procedure section 340.6, subdivision (a), including ***1210** *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, supra,* 18 Cal.4th 739, 76 Cal.Rptr.2d 749, 958 P.2d 1062. This statute provides that the limitations period begins to run, subject to tolling, on the date the attorney committed an act or omission amounting to professional negligence. An action for attorney malpractice “shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting *****483** the wrongful act or omission, or four years from *the date of the wrongful act or omission,* whichever occurs first.” (Code Civ. Proc., § 340.6, subd. (a), italics added.) The wrongful act or omission giving rise to a criminal malpractice action necessarily occurred during the course of the attorney's representation of the client—not at some time thereafter, when the client obtained postconviction relief.

****680** With regard to tolling, we decline to adopt the legal fiction that an innocent person convicted of a crime suffered no actual injury until he or she was exonerated through postconviction relief. As the Court of Appeal herein observed, “a criminal conviction—with its attendant financial and social ramifications, incarceration, probation, fines or other damaging consequences—would constitute appreciable harm, or ‘actual injury’ ” within the meaning of Code of Civil Procedure section 340.6, subdivision (a)(1). Nor does the tolling provision for legal disability (*id.,* subd. (a)(4))

apply in these circumstances. **Coscia** was not prevented by circumstances beyond his control, such as minority, mental illness, or incarceration, from pursuing his legal remedy.

The alternatives proposed by **McKenna** & Cuneo for avoiding the express provisions of Code of Civil Procedure section 340.6 are inimical to the "fundamental purpose underlying statutes of limitations ... to protect defendants from having to defend stale claims by providing notice in time to prepare a fair defense on the merits. [Citation.]" (*Downs v. Department of Water & Power* (1977) 58 Cal.App.4th 1093, 1099, 68 Cal.Rptr.2d 590.) This purpose is of particular concern in the present context, when years, even decades, may elapse before the wrongfully convicted criminal defendant obtains postconviction relief.

[5] We conclude that the two-track approach adopted in *Bailey v. Tucker, supra,* 533 Pa. 237, 621 A.2d 108, and *Berringer v. Steele, supra,* 133 Md.App. 442, 758 A.2d 574, is most consistent with the requirements of Code of Civil Procedure section 340.6, subdivision (a), and the interests of fairness to both plaintiffs and defendants in criminal malpractice actions. Thus, the plaintiff must file a malpractice claim within the one-year or four-year limitations period set forth in Code of Civil Procedure section 340.6, subdivision (a). Although such an action is subject to demurrer or summary judgment while a plaintiff's conviction remains intact, the court should stay the malpractice action during the period ***1211** in which such a plaintiff timely and diligently pursues postconviction remedies. As explained in *Adams v. Paul* (1995) 11 Cal.4th 583, 593, 46 Cal.Rptr.2d 594, 904 P.2d 1205, "trial courts have inherent authority to stay malpractice suits, holding them in abeyance pending resolution of underlying litigation." By this means, courts can ensure that the plaintiff's claim will not be barred prematurely by the statute of limitations. This approach at the same time will protect the interest of defendants in attorney malpractice actions in receiving timely notice and avoiding stale claims.

IV

[6] **McKenna** & Cuneo contends that the demurrer in the present case correctly was sustained without leave to amend, because **Coscia** did not allege that he was innocent—only that his criminal defense counsel negligently failed to secure a "better deal." We are urged to apply principles of judicial estoppel to preclude him from now amending his complaint to allege his innocence.

Coscia's complaint, which was filed before *****484** *Wiley v. County of San Diego, supra,* 19 Cal.4th 532, 79 Cal.Rptr.2d 672, 966 P.2d 983, did not allege actual innocence. It appears, however, that there is a reasonable possibility that the defect identified by **McKenna** & Cuneo can be cured by amendment. Accordingly, we conclude that **Coscia** should be permitted an opportunity to amend his complaint. (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967, 9 Cal.Rptr.2d 92, 831 P.2d 317.) The trial court should stay proceedings in the present action as necessary to permit **Coscia's** timely pursuit of postconviction remedies.

V

For the foregoing reasons, the judgment of the Court of Appeal is affirmed.

KENNARD, J, BAXTER, J., WERDEGAR, J., CHIN, J., and BROWN, J., concur.

All Citations

25 Cal.4th 1194, 25 P.3d 670, 108 Cal.Rptr.2d 471, 01 Cal. Daily Op. Serv. 5552, 2001 Daily Journal D.A.R. 6837

Footnotes

1 Collateral estoppel precludes a party from relitigating in a second proceeding the matters litigated and determined in a prior proceeding. The requirements for invoking collateral estoppel are the following: (1) the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding. (*People v. Sims* (1982) 32 Cal.3d 468, 484, 186 Cal.Rptr. 77, 651 P.2d 321.)

2 (See also, e.g., *Shaw v. State, Dept. of Admin.* (Alaska 1991) 816 P.2d 1358, 1360 [convicted criminal defendant must obtain postconviction relief before pursuing an action for malpractice]; *Berringer v. Steele* (2000) 133 Md.App. 442, 476 [758 A.2d 574, 592] ["absent relief from a conviction or sentence, the criminal plaintiff's own actions are presumably

the proximate cause of injury"]; *Labovitz v. Feinberg* (1999) 47 Mass.App.Ct. 306, 310–311 [713 N.E.2d 379, 383] ["public policy considerations" require that "[plaintiff's] undisturbed guilty plea should preclude him from pursuing his civil malpractice claim"]; *Schlumm v. Terrence J. O'Hagan, P.C.* (1989) 173 Mich.App. 345, 362 [433 N.W.2d 839, 847] [malpractice claim against former criminal defense counsel should have been dismissed because "[t]he proximate cause of the injuries alleged was the defendant's voluntary plea of guilty and not defendant's negligence"]; *Morgano v. Smith* (1994) 110 Nev. 1025, 1028–1029 [879 P.2d 735, 737] ["to state a claim for legal malpractice against private criminal defense counsel ..., the plaintiff must plead that he or she has obtained appellate or post-conviction relief in order to overcome a motion for summary judgment or a motion to dismiss"]; *Carmel v. Lunney* (1987) 70 N.Y.2d 169, 171, 518 N.Y.S.2d 605, 511 N.E.2d 1126, 1127 ["the undisturbed determination of the client's guilt in the subsequent criminal prosecution precludes him, as a matter of law, from recovering for civil damages flowing from the allegedly negligent representation"]; *Stevens v. Bispham* (1993) 316 Or. 221, 239, 851 P.2d 556, 566 [intact conviction based upon no contest plea precludes action for professional negligence against former criminal defense counsel]; *Bailey v. Tucker* (1993) 533 Pa. 237, 251 [621 A.2d 108, 115] ["a plaintiff will not prevail in an action in criminal malpractice unless and until he has pursued post-trial remedies and obtained relief which was dependent upon attorney error"].)

Other cases implicitly require postconviction relief. (See, e.g., *Gomez v. Peters* (1996) 221 Ga.App. 57, 60 [470 S.E.2d 692, 695] ["a client who has acknowledged his guilt [by pleading guilty] cannot assert that his attorney's poor performance caused his incarceration"]; *Hockett v. Breunig* (Ind.Ct.App.1988) 526 N.E.2d 995, 999 [client who voluntarily pleaded guilty was precluded from asserting a legal malpractice claim against his former criminal attorneys]; *State ex rel. O'Blennis v. Adolf* (Mo.Ct.App.1985) 691 S.W.2d 498, 503 [guilty plea operated to preclude client from bringing a legal malpractice suit against criminal counsel]; *Harris v. Bowe* (1993) 178 Wis.2d 862, 868 [505 N.W.2d 159, 162] [criminal defendant who voluntarily pleaded guilty to a charge was precluded from satisfying the causation and injury elements of a legal malpractice action].)

3 In *Teitelbaum Furs,* the plaintiff corporations brought an action to recover for losses under contracts of insurance with the defendant insurers. We held that the action was barred by collateral estoppel, based upon the criminal conviction of the president of the corporations, after a trial, involving the same losses. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., supra,* 58 Cal.2d at pp. 603–604, 25 Cal.Rptr. 559, 375 P.2d 439.) Discussing the application of collateral estoppel principles to the facts of the case, we distinguished the effect of a plea of guilty in a previous criminal action. "When a plea of guilty has been entered in the prior action, no issues have been 'drawn into controversy' by a 'full presentation' of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice [citation] combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action." (*Id.* at pp. 605–606, 25 Cal.Rptr. 559, 375 P.2d 439.)

4 We recognize that postconviction relief may be obtained on grounds other than attorney ineffectiveness. Like the Supreme Judicial Court of Massachusetts, "we see no logic in making a judicial ruling of attorney ineffectiveness in the constitutional sense a condition precedent to the liability of an allegedly negligent criminal defense attorney." (*Glenn v. Aiken, supra,* 569 N.E.2d at p. 785.) Thus, although an appellate court's ruling, for example *rejecting* a claim of ineffective counsel in a petition for writ of habeas corpus, may preclude a criminal defendant from maintaining a malpractice action against trial counsel, relief on a different ground does not bar him or her from litigating the issue of his attorney's professional negligence in a civil malpractice action.

We have no occasion in the present case to determine whether there might be exceptional circumstances—for example, where the plaintiff establishes that habeas corpus or other postconviction relief is unavailable and that he or she could not reasonably have been expected to have pursued such measures—under which a plaintiff should be afforded an opportunity to establish actual innocence in the malpractice action itself. **Coscia** does not allege any such circumstances here.

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24 Cal.4th 676
Supreme Court of California

Glenn Russell **BARNER**,
Plaintiff and Appellant,
v.
Julie **LEEDS**, Defendant and Respondent.

No. S070377.
|
Dec. 18, 2000.

Synopsis
Former client who was convicted of and incarcerated for bank robbery brought legal malpractice action against deputy public defender after obtaining a judicial determination of factual innocence. The Superior Court, Los Angeles County, No. YCO 19914, Douglas A. McKee, J., granted summary judgment to public defender, and client appealed. The Court of Appeal reversed, and review was granted, superseding the opinion of the Court of Appeal. The Supreme Court, George, C.J., held that: (1) deputy public defender's actual representation of a client generally does not involve discretionary acts within meaning of discretionary act immunity statute, and (2) public defender's decision not to file motion for disclosure of identity of a confidential informant was not a discretionary act protected by discretionary act immunity.

Court of Appeal affirmed.

Opinion, 73 Cal.Rptr.2d 296, vacated.

West Headnotes (15)

[1] **Appeal and Error** Statutory or legislative law

Court of Appeal conducts de novo review of trial court's resolution of underlying issues of statutory construction.

42 Cases that cite this headnote

[2] **Attorneys and Legal Services** Standard of Care; Breach of Duty

Deputy public defenders and privately retained counsel owe the same duty of care to their clients.

2 Cases that cite this headnote

[3] **Public Employment** In general; official immunity

In determining whether discretionary act immunity applies with regard to the acts of a public employee, courts must consider whether the acts or omissions of the particular employee resulted from the exercise of discretion within the meaning of immunity statute. West's Ann.Cal.Gov.Code § 820.2.

28 Cases that cite this headnote

[4] **Appeal and Error** Plenary, free, or independent review

Supreme Court's task in reviewing order granting summary judgment is to conduct an independent review of the trial court's resolution of questions of law.

11 Cases that cite this headnote

[5] **Public Employment** In general; official immunity

Not all acts requiring a public employee to choose among alternatives entail the use of "discretion" within meaning of discretionary act immunity statute. West's Ann.Cal.Gov.Code § 820.2.

22 Cases that cite this headnote

[6] **Municipal Corporations** Discretionary powers and duties

Under discretionary act immunity statute, immunity is reserved for those basic policy decisions which have been expressly committed to coordinate branches of government, and

as to which judicial interference would thus be unseemly; such areas of quasi-legislative policy-making are sufficiently sensitive to call for judicial abstention from interference that might even in the first instance affect the coordinate body's decision-making process. West's Ann.Cal.Gov.Code § 820.2.

52 Cases that cite this headnote

[7] **Municipal Corporations** Discretionary powers and duties

Scope of discretionary act immunity should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions. West's Ann.Cal.Gov.Code § 820.2.

20 Cases that cite this headnote

[8] **Courts** Previous Decisions as Controlling or as Precedents

Principles underlying the doctrine of stare decisis apply with special force in the context of statutory interpretation, because the Legislature remains free to alter what Supreme Court has done.

5 Cases that cite this headnote

[9] **Attorneys and Legal Services** Government attorneys; public defenders

Deputy public defender's actual representation of a client generally does not involve discretionary acts within meaning of discretionary act immunity statute. West's Ann.Cal.Gov.Code § 820.2.

9 Cases that cite this headnote

[10] **Attorneys and Legal Services** Judgmental immunity

Public defender's decision not to file motion for disclosure of identity of a confidential informant was not a discretionary act protected by discretionary act immunity in subsequent legal malpractice action brought by her former client. West's Ann.Cal.Gov.Code § 820.2.

1 Case that cites this headnote

[11] **Attorneys and Legal Services** Standard of Care; Breach of Duty

The same standard of care governing claims of ineffective assistance of counsel applies in a civil legal malpractice action.

2 Cases that cite this headnote

[12] **Attorneys and Legal Services** Criminal practice

Once a deputy public defender has undertaken to represent a defendant in a criminal action, the attorney's actions implementing the basic decision to provide representation—to the extent they do not implicate policy-level decisions—are subject to case-by-case judicial review for alleged negligence.

17 Cases that cite this headnote

[13] **Attorneys and Legal Services** Litigation

An attorney engaged in litigation is granted latitude in choosing among legitimate but competing considerations, and is not liable for an informed tactical choice within the range of reasonable competence.

4 Cases that cite this headnote

[14] **Attorneys and Legal Services** Degree of proof

Deputy public defender's exposure to liability for legal malpractice is circumscribed by the requirement that a defendant in a criminal action must prove his or her actual innocence by a preponderance of the evidence before prevailing on a claim against his or her attorney for negligent representation in the criminal proceeding.

7 Cases that cite this headnote

[15] Attorneys and Legal Services Criminal practice

Actions of a deputy public defender in representing an assigned client in a criminal action generally do not involve the type of basic policy decisions that are within scope of immunity afforded by discretionary act immunity statute. West's Ann.Cal.Gov.Code § 820.2.

32 Cases that cite this headnote

Attorneys and Law Firms

*****98 *678 **705** Cicconi, Iglesias & Cicconi, Drew Allan Cicconi; Cormicle and Belter and Bruce Cormicle, Santa Monica, for Plaintiff and Appellant.

Lloyd W. Pellman, County Counsel, Louis V. Aguilar, Assistant County Counsel, Kevin C. Brazile, Deputy County Counsel; ***679** Greines, Martin, Stein & Richland, Timothy T. Coates, Beverly Hills; Manning, Marder & Wolfe and Steven J. Renick, Los Angeles, for Defendant and Respondent.

Hanson, Bridgett, Marcus, Vlahos & Rudy, Joan L. Cassman, David W. Baer, Lisa K. Puntillo, San Francisco, for Cities of Alameda, Albany, Avalon, Bakersfield, Berkeley, Burlingame, Capitola, Carlsbad, Carpinteria, Chino, Chula Vista, Coachella, Cotati, Culver City, Delano, Dinuba, Gustine, Hollister, Huntington Beach, Huron, Indian Wells, Lafayette, Laguna Beach, Lathrop, Long Beach, Los Altos, Madera, Millbrae, Modesto, Napa, Oceanside, Orange, Orange Cove, Orinda, Oxnard, Palm Desert, Palm Springs, Pico Rivera, Pleasant Hill, Redding, Redlands, Rialto, Riverside, Sacramento, San Buenaventura, San Diego, San Francisco, San Jose, San Luis Obispo, Santa Paula, Signal Hill, South San Francisco, Sunnyvale, Thousand Oaks, Vacaville, Walnut and West Sacramento, Towns of Ross and San Anselmo as Amici Curiae on behalf of Defendant and Respondent.

Opinion

GEORGE, C.J.

In *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 79 Cal.Rptr.2d 672, 966 P.2d 983, we held that in a legal malpractice action against an attorney for alleged *****99** negligence in representing the plaintiff (the accused in a criminal action), the plaintiff must establish, as a necessary element of the malpractice cause of action, that he or she is actually innocent of the offense charged in the underlying criminal proceeding. Our holding in *Wiley* applies to legal malpractice claims asserted against both private attorneys and public defenders, and in that case we were not confronted with the issue whether a public defender is entitled to statutory immunity for his or her acts or omissions in representing a criminal defendant. We granted review in the present case to decide whether the immunity for discretionary acts set forth in Government Code section 820.2 applies to ****706** a deputy public defender's representation of a defendant in a criminal action.[1]

Defendant Julie **Leeds** is a deputy public defender who represented plaintiff Glenn Russell **Barner** in a criminal action that resulted in **Barner's** conviction. After the conviction was set aside and **Barner** obtained a judicial determination of factual innocence, he filed this legal malpractice action alleging that his conviction and incarceration resulted from **Leeds's** negligence in representing him. The trial court concluded that **Leeds** is immune from liability pursuant to section 820.2, because her alleged negligence consisted of discretionary acts or omissions. The Court of Appeal reversed.

As we shall explain, the acts or omissions of a deputy public defender in representing a defendant in a criminal action do not involve the type of basic ***680** policy decisions that are insulated from liability pursuant to section 820.2. Instead, legal representation provided by a deputy public defender entails operational (as opposed to policy) decisions that are incident to the normal functions of the office of the public defender. Once the decision is made to provide legal services, a deputy public defender's actions implementing that decision do not qualify for the immunity afforded by section 820.2. Although the Court of Appeal utilized a faulty analysis, it correctly concluded that the trial court erred in entering summary judgment for **Leeds**. Accordingly, we shall affirm the judgment of the Court of Appeal.

I

On June 18, 1992, two men—one brandishing a handgun—robbed a Bank of America facility in El Segundo. A confidential informant subsequently contacted an El Segundo

police officer and identified one of the robbers appearing in a bank surveillance photograph as an individual named Rusty, who resided on South Crenshaw Boulevard. A deputy sheriff matched the surveillance photograph with a previous booking photograph of plaintiff Glenn Russell **Barner**, whose last known address was on South Crenshaw. After viewing a photographic lineup including **Barner's** booking photograph, one bank employee identified **Barner** as the individual wielding the handgun during the robbery. Another employee also identified **Barner** as one of the robbers.

Barner was arrested based upon this information. The court appointed the Public Defender's Office for the County of Los Angeles to represent **Barner**. At **Barner's** preliminary hearing, one bank employee identified **Barner** as the robber who held a handgun and who wore clothing lighter in color than that worn by his accomplice. A police officer testified that another individual present at the bank on the day of the robbery had identified **Barner** from a photographic lineup as the robber who held a gun. **Barner** was held to answer and arraigned.

The case initially was assigned for purposes of trial to Deputy Public Defender Debra Cole, but responsibility for **Barner's** defense was transferred to defendant Julie **Leeds** sometime in late October or early November 1992. When **Leeds** received **Barner's** case file, it contained an August *****100** 26, 1992, memorandum prepared by the Federal Bureau of Investigation (FBI). This memorandum stated that a confidential source had reviewed the bank surveillance photographs and recognized the bank robber who wore light-colored clothing as Raymond Bell.

According to **Leeds**, she reviewed the FBI memorandum but concluded that it contained no information suggesting that the identification of Raymond Bell, as the bank robber who wore light-colored clothing, was by a ***681** *second* confidential informant—i.e., by an informant other than the individual who had contacted the El Segundo police officer. **Leeds** assumed that the FBI memorandum referred to the same informant who had identified Rusty (**Barner**) as the man with a gun, and that this informant had identified Raymond Bell as **Barner's** unarmed accomplice. She further believed that her colleague Cole had considered but rejected the possibility of filing a motion for disclosure of the identity of the confidential informant. **Leeds**, however, did not verify her assumptions by discussing the memorandum or its contents with Cole, the prosecutor, the FBI ****707** agent who prepared the memorandum, or other law enforcement officers involved in the investigation of the crime. Based upon her assessment of the memorandum's significance, and because there was inadequate time before trial to prepare and file a motion regarding the confidential informant, **Leeds** did not attempt to file such a motion.

A jury trial commenced on November 12, 1992. Throughout the proceedings, **Barner** maintained that he was innocent, but he was convicted and sentenced to a prison term of 16 years. Approximately one month later, the prosecutor advised **Leeds** that the confidential informant mentioned in the FBI memorandum was a second informant who had identified Raymond Bell as the suspect who had brandished a weapon. An FBI agent had indicated to the prosecutor his belief that Raymond Bell—not **Barner**—was the robber wielding a gun.

Leeds conveyed this information to **Barner's** appellate counsel, and **Barner** filed a petition for writ of habeas corpus in the superior court. The prosecutor, Cole, and **Leeds** advised the court of the contents of the FBI memorandum, and the People conceded the merits of the petition. In June 1993, the court set aside the judgment and vacated the sentence, and remanded **Barner** into custody pending a new trial. **Barner**, represented by privately retained counsel, then moved for disclosure of the identity of the FBI informant. After hearing testimony from federal agents who invoked a privilege not to disclose the informant's identity, the court denied the motion. The superior court subsequently granted **Barner's** motion for dismissal on the ground that nondisclosure of the informant's identity might deprive **Barner** of a fair trial. (See Evid.Code, § 1042, subd. (d).)

On the same day that the criminal action against **Barner** was dismissed, Raymond Bell was arrested for committing several bank robberies. Pursuant to a plea agreement, Bell pleaded guilty to three counts of bank robbery and admitted committing four others, including the Bank of America robbery for which **Barner** had been convicted. In light of this development, in December 1993 the superior court granted **Barner's** petition for a finding that **Barner** ***682** was factually innocent of the Bank of America robbery. (See Pen.Code, § 851.8.)

Barner then filed this action alleging several claims against a number of defendants, including a cause of action for legal malpractice against the deputy public defenders who represented him in the criminal prosecution. The complaint alleges that these deputy public defenders, including **Leeds**, negligently failed to (1) investigate the information they

had received before trial regarding the FBI's confidential informant, (2) file a motion for disclosure of the identities of the confidential ***101 informants, and (3) introduce exculpatory evidence that would have been revealed by such an investigation. Absent the negligence of these attorneys, Barner alleges, he would not have been convicted of bank robbery and incarcerated for more than one year for a crime that he did not commit.

Leeds moved for summary judgment, contending among other things that the immunity set forth in section 820.2 for a public employee's discretionary acts shielded her from liability. The trial court granted the motion after concluding that the acts of Leeds were quasi-legislative and that discretionary act immunity applied.

The Court of Appeal reversed the judgment in favor of Leeds. The court determined that the acts of privately retained counsel and publicly appointed counsel should be measured by the same standard. According to the appellate court, because the Legislature has not *clearly* provided for discretionary act immunity for deputy public defenders, they remain subject to liability for legal malpractice until the Legislature chooses to extend such immunity. The court's opinion expressly declined to reach Leeds's contention that her decision not to file a motion seeking disclosure of the FBI informant's identity was a discretionary act immunized under section 820.2. Nevertheless, the Court of Appeal stated: "Given the unambiguous nature of the August 26, 1992, FBI report, which Leeds had the ministerial duty to read and comprehend, we *could* conclude that harm resulted from her ministerial failure to do so." (Italics added.)

**708 We granted review to consider the validity of the Court of Appeal's conclusion.

II

Under the California Tort Claims Act (§ 810 et seq.), public employees are liable for their torts unless a statute provides otherwise. (§ 820, subd. (a).) One exception to this general rule of liability is found in *683 section 820.2, which codifies the common law immunity for the discretionary acts of a government official performed within the scope of his or her authority. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 979–980, 42 Cal.Rptr.2d 842, 897 P.2d 1320 (*Caldwell*).) Section 820.2 states: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Leeds contends, and the trial court concluded as a matter of law, that Leeds is immune pursuant to section 820.2 because her allegedly negligent acts or omissions in representing Barner resulted from her exercise of discretion within the meaning of this statute.

[1] In reviewing the trial court's ruling granting summary judgment for Leeds, we exercise our independent judgment and decide whether Leeds established undisputed facts that negate Barner's claim or state a complete defense. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487, 59 Cal.Rptr.2d 20, 926 P.2d 1114.) We also conduct de novo review of the trial court's resolution of the underlying issues of statutory construction. (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531, 85 Cal.Rptr.2d 257, 976 P.2d 808.)

For the purpose of determining whether the immunity in section 820.2 provides a complete defense to Barner's legal malpractice claim, the following relevant facts are undisputed. Leeds is a deputy public defender who was assigned to represent Barner in a criminal action. She did not file a motion for disclosure of the identities of confidential informants mentioned in the case file or conduct an independent investigation regarding the informants or the information they revealed. Barner's conviction subsequently was set aside, and he obtained a judicial declaration of factual innocence, based in part upon the information imparted by these informants. Barner ***102 claims that these omissions by Leeds were negligent and that, absent such negligence, he would not have been convicted and incarcerated.

[2] The parties further do not dispute the following points. Leeds, as a deputy public defender, is a public employee within the meaning of the California Tort Claims Act, and she acts within the scope of her employment when representing assigned clients charged with criminal offenses. (*Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 612–619, 281 Cal.Rptr. 578.) Deputy public defenders and privately retained counsel owe the same duty of care to their clients. (See *Polk County v. Dodson* (1981) 454 U.S. 312, 318, 321, 102 S.Ct. 445, 70 L.Ed.2d 509; *Wiley v. County of San Diego, supra,* 19 Cal.4th 532, 542, 79 Cal.Rptr.2d 672, 966 P.2d 983.) Therefore, Leeds is liable for injury caused by her professional negligence to the same extent as a private

attorney, "[e]xcept as ***684** otherwise provided by statute *(including Section 820.2)* ...." (§ 820, subd. (a), italics added.)

Despite the Legislature's express reference to section 820.2 as an exception to the general rule that a public employee is liable for his or her torts, the Court of Appeal did not decide whether **Leeds's** allegedly negligent acts or omissions in representing **Barner** were the result of her exercise of discretion within the meaning of section 820.2. Instead, the court emphasized that the acts of privately retained and publicly appointed counsel should be measured by the same standard, and that because the Legislature has not *clearly* provided for discretionary immunity for deputy public defenders, the general rule of liability controls. For this proposition, the Court of Appeal relied upon *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 692, 94 Cal.Rptr. 421, 484 P.2d 93, which states that immunity is the exception to the general rule that a public employee is liable for his or her negligence, and that "[u]nless the Legislature has clearly provided ****709** for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail."

[3] We agree with **Leeds** that the Court of Appeal erred in concluding that **Leeds** lacks immunity pursuant to section 820.2 solely because the Legislature has not clearly or specifically declared that *deputy public defenders* are immune from liability for professional negligence. In enacting section 820.2, the Legislature clearly *has* provided for immunity for injuries caused by acts or omissions that are the result of a public employee's exercise of discretion, as that term is used in section 820.2. In determining whether discretionary act immunity applies with regard to the acts of a public employee, courts must consider whether the acts or omissions of the particular employee resulted from the exercise of discretion within the meaning of section 820.2. The approach taken by the Court of Appeal—that there is no immunity pursuant to section 820.2 unless the Legislature otherwise has provided specifically that a particular class of employees is immune—effectively would eliminate immunity for discretionary acts and render the entire text of section 820.2 surplusage.

[4] Because our task in reviewing the order granting summary judgment is to conduct an independent review of the trial court's resolution of questions of law (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 72, 78 Cal.Rptr.2d 16, 960 P.2d 1046), we shall proceed to consider whether the trial court correctly determined that **Leeds's** alleged professional negligence resulted from her exercise of discretion within the meaning of section 820.2.

[5] **[6]** **[7]** As explained in *Caldwell, supra,* 10 Cal.4th at page 981, 42 Cal.Rptr.2d 842, 897 P.2d 1320, not all acts requiring a public employee to choose among alternatives entail the use of ***685** "discretion" within the meaning of section 820.2. Under that statute, "[i]mmunity is reserved for those '*basic policy decisions* [which have] ... *****103** been [expressly] committed to coordinate branches of government,' and as to which judicial interference would thus be 'unseemly.' [Citation.] Such 'areas of quasi-legislative policy-making ... are sufficiently sensitive' [citation] to call for judicial abstention from interference that 'might even in the first instance affect the coordinate body's decision-making process' [citation]." (*Caldwell, supra,* 10 Cal.4th at p. 981, 42 Cal.Rptr.2d 842, 897 P.2d 1320, original italics; bracketed text added by *Caldwell*.) On the other hand, there is no basis for immunizing lower level decisions that merely implement a basic policy already formulated. (*Ibid.*) The scope of the discretionary act immunity "should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions." (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 445, 131 Cal.Rptr. 14, 551 P.2d 334 (*Tarasoff*) .)

[8] In determining whether an act of a public employee is discretionary under section 820.2, we have distinguished between the employee's operational and policy decisions. (*Caldwell, supra,* 10 Cal.4th at pp. 981–982, 42 Cal.Rptr.2d 842, 897 P.2d 1320, citing cases.) For example, in *Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 415, 134 Cal.Rptr. 402, 556 P.2d 764, we concluded that, although a decision by the clerk of a city and county to discuss a particular matter with the press may have been within the clerk's discretion (as that term is used in common parlance), it was not "in the nature of a 'basic policy decision' made at the 'planning' stage of City's operations" but rather fell within the category of routine duties incident to the normal operations of the office of the clerk. In contrast, in *Caldwell, supra,* 10 Cal.4th at page 983, 42 Cal.Rptr.2d 842, 897 P.2d 1320, we held that the decision by individual members of a school board whether to vote to renew a superintendent's employment contract was "a peculiarly sensitive and subjective one, with fundamental policy implications.... [¶] Judicial abstention with respect to the individual participants is thus appropriate. Where such an important policy issue is at stake, it would be unwise and unseemly to hold individual board members personally

accountable at law for things they ****710** said or considered in the course of deliberations....” (Fn.omitted.)[2]

Our previous decisions construing section 820.2 have not determined whether a public employee charged with a professional duty of care in ***686** rendering services to the employee's client—such as a publicly employed attorney or health care professional—makes policy, as opposed to operational, judgments in discharging his or her *****104** duties to the client. We considered a related issue, however, in *Tarasoff, supra,* 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334, which held that psychologists employed by the government are not immune from liability under section 820.2 for the failure to warn a third person of a risk of harm posed by a patient. We reasoned that the employee's decision whether to disclose such a risk of danger may require the exercise of considerable judgmental skills, but that the failure to warn does not rise to the level of a basic policy decision for which the statute provides immunity. (*Tarasoff, supra,* 17 Cal.3d at p. 446, 131 Cal.Rptr. 14, 551 P.2d 334.)[3] Our decision stated: “We emphasize that our conclusion does not raise the specter of therapists employed by the government indiscriminately being held liable for damage despite their exercise of sound professional judgment. We require of publicly employed therapists only that quantum of care which the common law requires of private therapists. The imposition of liability in those rare cases in which a public employee falls short of this standard does not contravene the language or purpose of Government Code section 820.2.” (*Tarasoff, supra,* 17 Cal.3d at pp. 446–447, 131 Cal.Rptr. 14, 551 P.2d 334.)

Our decisions also have stated that a public employee's initial decision whether to provide professional services to an individual might involve the exercise of discretion pursuant to section 820.2, but that once the employee undertakes to render such services, he or she is not immune for the negligent performance of professional duties that do not amount to policy or planning decisions. In *Johnson, supra,* 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352, we discussed with approval the Court of Appeal's decision in *Sava v. Fuller* (1967) 249 Cal.App.2d 281, 57 Cal.Rptr. 312, which considered whether a botanist employed by the state was immune in an action for negligence alleging that he had erred in analyzing the toxicity of a substance ingested by the plaintiff. ***687** The Court of Appeal concluded that the botanist had exercised discretion by agreeing to analyze the substance, but that once he had decided to do so, the law required the botanist to exercise due care in performing that service. “[O]nce the determination has been made that a service will be furnished and the service is undertaken, then public policy demands (except when the Legislature specifically decrees otherwise) that government be held to the same ****711** standard of care the law requires of its private citizens in the performance of duties imposed by law or assumed.” (*Id.* at p. 290, 57 Cal.Rptr. 312.) Our decision in *Johnson* explains that *Sava* and other cases establish the principle that, although a basic policy decision may be discretionary and thus warrant governmental immunity, subsequent operational actions in the implementation of that basic decision still must face case-by-case adjudication on the question of negligence. (*Johnson, supra,* 69 Cal.2d at p. 797, 73 Cal.Rptr. 240, 447 P.2d 352; see also *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 261–262, 74 Cal.Rptr. 389, 449 P.2d 453.)

As they relate to publicly employed health professionals, the foregoing principles are reflected in a particular provision of the California Tort Claims Act. Section 855.6, which was enacted at the same time as section 820.2, provides immunity for a public employee's failure to make an adequate physical or mental examination for the purpose of determining whether an individual has a condition that would endanger the individual or others. The statute specifies, however, that this immunity does *not* extend to an examination or diagnosis performed for the purpose of treating *****105** the individual.[4] Although we are not confronted with any issue arising under section 855.6 in the present case, we believe that this statute affords some guidance in ascertaining the scope of the immunity provided for discretionary acts. Section 855.6 implicitly suggests that the provision of professional health services, including the making of decisions regarding what constitutes an adequate examination for a particular purpose, does not constitute an act resulting from the exercise of discretion within the meaning of section 820.2; otherwise, the additional immunity set forth in section 855.6 would have been unnecessary. Furthermore, the exception in section 855.6 for examinations conducted for the purpose of treatment indicates a legislative intent not to eliminate the preexisting liability to patients seeking diagnosis and treatment by publicly employed health professionals. (See *Caldwell, supra,* 10 Cal.4th at p. 980, 42 Cal.Rptr.2d 842, 897 P.2d 1320 [the immunity for discretionary acts provided in § 820.2 restated preexisting California law]; ***688** *Muskopf v. Corning Hospital Dist.* 1961) 55 Cal.2d 211, 220–221, 11 Cal.Rptr. 89, 359 P.2d 457 [no common law discretionary act immunity for negligent treatment of a patient in a public hospital]; *Bohrer v. County of San Diego* (1980) 104 Cal.App.3d 155, 161–162, 163 Cal.Rptr. 419 [no immunity

under § 820.2 for negligence in prescribing medication to a patient of a county clinic].) The Law Revision Commission comments regarding section 855.6 support this view: "[The immunity] does not apply to examinations for the purpose of treatment such as are made in doctors' offices and public hospitals. In those situations, the ordinary rules of liability would apply." (Cal. Law Revision Com. com., reprinted at 32 West's Ann.Gov.Code (1995 ed.) foll. § 855.6, p. 487; see *Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 636–637, 76 Cal.Rptr.2d 489, 957 P.2d 1323.)

[9] Although publicly employed health professionals and deputy public defenders obviously perform different services for distinct purposes, a deputy public defender, like a health professional, must exercise considerable judgment in making decisions regarding the type and extent of services necessary to discharge his or her duty of care to clients. In addition, the actual performance of such services ordinarily requires a high level of skill and often involves many choices among complex alternatives. As the foregoing decisions instruct, however, even if the initial determination whether to provide representation to a certain class of individuals or to represent a particular defendant is a sensitive policy decision that requires judicial abstention to avoid affecting a coordinate governmental entity's decisionmaking or planning process (see *In re Brindle* (1979) 91 Cal.App.3d 660, 681–682, 154 Cal.Rptr. 563), and even though a deputy public ****712** defender's actual representation of a client requires the exercise of considerable skill and judgment, such representation generally does not involve discretionary acts within the meaning of section 820.2 (i.e., policy or planning decisions). Instead, such services consist of operational duties that merely implement the initial decision to provide representation and are incident to the normal functions of the office of the public defender.

[10] **Leeds** concedes that certain actions undertaken by a public defender in representing a client are not discretionary acts within the meaning of section 820.2. For example, she states that the actual preparation and filing of a motion for disclosure of the identity of a confidential informant would be a ministerial act, and that a deputy public defender could be *****106** liable for negligently missing the filing deadline or omitting certain information from the motion. But, according to **Leeds**, the initial decision whether to file such a motion is inherently discretionary and should not be subject to later judicial scrutiny in a civil action.

***689** We disagree. **Leeds** does not explain why the decision whether to file a motion is a discretionary act within the meaning of section 820.2 while the decision regarding what information should be included in the motion is not. Both decisions require the exercise of professional judgment in light of an evaluation of all the circumstances of the case, and both may cause injury to the client if made without the exercise of due care. Neither act, however, properly may be characterized as a sensitive decision implicating fundamental policy concerns warranting judicial abstention. Indeed, **Leeds** admits that **Barner's** allegation that she engaged in negligent acts and omissions concerns "the routine, fundamental tasks of providing a criminal defense." "[C]ourts encounter this type of allegation daily and are well suited to resolve its validity under traditional tort doctrine." (*Johnson, supra,* 69 Cal.2d at p. 797, 73 Cal.Rptr. 240, 447 P.2d 352.)

[11] **[12]** Allegations of deficient performance by counsel also are encountered routinely in connection with claims of ineffective assistance of counsel made in the course of appellate and collateral review of criminal convictions. The Sixth Amendment confers a right to the reasonably effective assistance of counsel acting " 'within the range of competence demanded of attorneys in criminal cases.' [Citation.]" (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.) Consequently, deputy public defenders, like all criminal defense attorneys, always may anticipate that a court may examine their representation for substandard performance. The same standard of care governing claims of ineffective assistance of counsel applies in a civil legal malpractice action. (*Wiley v. County of San Diego, supra,* 19 Cal.4th at p. 542, 79 Cal.Rptr.2d 672, 966 P.2d 983.) In addition, if incompetent representation results in the modification or reversal of a judgment, counsel must be reported to the State Bar. (Bus. & Prof.Code, § 6086.7, subd. (b).) Therefore, subjecting deputy public defenders to civil tort liability for the same deficient conduct that constitutes ineffective assistance of counsel does not add measurably to the demands already imposed upon all criminal defense attorneys. Nor does it involve an unseemly interference by the judiciary in the policy decisions of a coordinate branch. (See *Caldwell, supra,* 10 Cal.4th at p. 983, 42 Cal.Rptr.2d 842, 897 P.2d 1320.) Rather, the acts of these attorneys simply are subject to the same examination by a court or jury as are the acts of any private attorney who represents a client in a criminal action. (See Millich, *Public Defender Malpractice Liability in California* (1989) 11 Whittier L.Rev. 535, 538–539.) Therefore, once a deputy public defender has undertaken to represent a defendant in a criminal action, the

attorney's actions implementing the basic decision to provide representation—to the extent they do not implicate ***690** policy-level decisions—are subject to case-by-case judicial review for alleged negligence. (See *Johnson, supra,* 69 Cal.2d at p. 797, 73 Cal.Rptr. 240, 447 P.2d 352.)[5]

****713** **Leeds** advances various policy reasons why deputy public defenders should be immune for their decisions made in the course of representing a client. She observes that, unlike private counsel, deputy public defenders may not choose their clients and, indeed, sometimes must provide representation over the objection of *****107** their clients. This circumstance, **Leeds** asserts, increases the likelihood of conflict between attorney and client and the risk of malpractice actions. **Leeds** maintains that permitting liability for legal malpractice in this context would chill a public defender's zealous representation and not serve the best interest of his or her client. For example, she observes that, in order to avoid liability, a deputy public defender might seek a continuance over the client's objection to conduct an investigation the attorney considers unnecessary, or might be unwilling to cooperate with appellate counsel regarding claims of ineffective assistance of trial counsel.

[13] **[14]** Deputy public defenders undoubtedly face difficulties and challenges not encountered by most private counsel. (See Sadoff, *The Public Defender as Private Offender: A Retreat from Evolving Malpractice Liability Standards for Public Defenders* (1995) 32 Am.Crim.L.Rev. 883, 887–894.) Notwithstanding the circumstances suggesting that these public employees should be insulated from civil malpractice liability, however, there also are countervailing policies that support a contrary view. As established above, deputy public defenders and private attorneys owe the same duty of care to their clients. Denying criminal defendants a remedy for malpractice simply because they are indigent and represented by a deputy public defender could be perceived as unfair. Furthermore, subjecting deputy public defenders to civil liability for negligence would not add measurably to their preexisting duty to act competently; nor would it affect their decisions any more than the decisions of private counsel are affected by the prospect of malpractice liability. An attorney engaged in litigation is granted latitude in choosing among legitimate but competing considerations, and is not liable for an informed tactical choice within the range of reasonable competence. (*People v. Moore* (1988) 47 Cal.3d 63, 82, 252 Cal.Rptr. 494, 762 P.2d 1218; *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 309, 146 Cal.Rptr. 218, 578 P.2d 935.) Moreover, in the absence of bad faith, a public employee—including a deputy public defender—who is sued personally, on the basis of the performance of his or her duties, may obtain both defense and indemnity from the employer, which is vicariously liable for the torts of its employees. ***691** See §§ 815.2, subd. (a), 825 et seq.; *Caldwell, supra,* 10 Cal.4th at pp. 980–981, 42 Cal.Rptr.2d 842, 897 P.2d 1320.) "Hence, fears that personal exposure to damage suits and judgments would deter the vigorous performance of public responsibilities are no longer a policy basis for immunity. [Citation.]" (*Caldwell, supra,* 10 Cal.4th at p. 981, 42 Cal.Rptr.2d 842, 897 P.2d 1320.) Finally, a deputy public defender's exposure to liability for legal malpractice is circumscribed by the requirement that a defendant in a criminal action must prove his or her actual innocence by a preponderance of the evidence before prevailing on a claim against his or her attorney for negligent representation in the criminal proceeding. (*Wiley v. County of San Diego, supra,* 19 Cal.4th at p. 545, 79 Cal.Rptr.2d 672, 966 P.2d 983.)

Resolving the competing policy considerations regarding immunity for deputy public defenders is not a judicial task, however. We have concluded that the immunity conferred by section 820.2 does not extend to the acts of a deputy public defender in representing a criminal defendant. To the extent the particular circumstances encountered by deputy public defenders—or other policy reasons warrant—an exception to the established principles governing the scope of discretionary act immunity pursuant to section 820.2, the matter is best addressed by the Legislature.[6]

*****108** ****714** **[15]** In sum, the actions of a deputy public defender in representing an assigned client in a criminal action generally do not involve the type of basic policy decisions that our past decisions have held are within the scope of the immunity afforded by section 820.2. Although such legal representation entails difficult choices among complex alternatives and the exercise of professional skill, for purposes of section 820.2 the attorney's actions ordinarily involve operational judgments that implement the initial decision to provide representation to the client. Holding deputy public defenders accountable at law for legal malpractice in this context does not result in ***692** unwarranted judicial interference in the affairs of the other branches of government, but rather simply subjects these public employees to the same principles of tort law applicable to private attorneys performing identical professional services in the same type of proceedings.

III

The judgment of the Court of Appeal is affirmed.

MOSK, J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., and BROWN, J., concur.

All Citations

24 Cal.4th 676, 13 P.3d 704, 102 Cal.Rptr.2d 97, 00 Cal. Daily Op. Serv. 9988, 2000 Daily Journal D.A.R. 13,339

Footnotes

1 Further undesignated statutory references are to the Government Code.

2 Amici curiae (59 California cities and towns) criticize our long-standing reliance upon the distinction between policy and operational decisions in determining whether immunity exists pursuant to section 820.2. They urge us to reconsider and overrule *Johnson v. State of California* (1968) 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (*Johnson*)—our first decision construing the scope of section 820.2—and its progeny. Amici curiae contend that *Johnson* unduly limits the scope of discretionary act immunity to policy and planning decisions. According to amici curiae, the distinction between planning and operational decisions is unworkable and leads to haphazard results, and a better approach is that embodied in the federal rule providing immunity for certain operational decisions that involve the exercise of judgment but that do not necessarily involve policymaking or planning (see *United States v. Gaubert* (1991) 499 U.S. 315, 322–334, 111 S.Ct. 1267, 113 L.Ed.2d 335).

Even if we were inclined to disagree with the principles set forth in *Johnson,* we do not believe it would be appropriate to overrule or disapprove more than three decades of precedent applying authoritative, settled statutory construction that has been central to the analysis and holdings of these decisions. During this period, the Legislature has not altered the general scope of the immunity conferred by section 820.2 as construed by this court. The principles underlying the doctrine of stare decisis apply with special force in the context of statutory interpretation, because the Legislature remains free to alter what we have done. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1005, 90 Cal.Rptr.2d 236, 987 P.2d 705.)

3 Compare *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 748–749, 167 Cal.Rptr. 70, 614 P.2d 728 (county immune from liability for selection of custodian and degree of supervision for juvenile offender, because acts entailed both the exercise of judgment and protected policy decisions).

4 Section 855.6 states in relevant part: “Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee ... is liable for injury caused by the failure ... to make an adequate physical or mental examination ... for the purpose of determining whether [a] person has a ... condition that would constitute a hazard to the health or safety of himself or others.”

5 Neither party contends that the allegedly negligent acts of **Leeds** involved decisions establishing or implicating any generally applicable policy of the office of the public defender. We express no view regarding the application of section 820.2 to such decisions.

6 In recent years, the Legislature twice sought to provide immunity for deputy public defenders, without success. (Sen. Bill No. 1876, vetoed by Governor, July 20, 1998, Sen. Final Hist. (1997–1998 Reg. Sess.) p. 1319; Sen. Bill No. 763, vetoed by Governor, Sept. 27, 1999, Sen. Weekly Hist. (1999–2000 Reg. Sess.) June 22, 2000, p. 178.)

Some states expressly have specified statutory immunity for deputy public defenders. (E.g., Conn.Gen.Stat.Ann. § 4–165 (West 1998); Fla.Stat.Ann. § 768.28, subd. (9)(b)(2) (West 1997); Tenn.Code Ann. § 8–14–209.) Other jurisdictions without such a specific statutory immunity are divided on the issue whether deputy public defenders enjoy either common law or general statutory immunity for legal malpractice. (See Note, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent–Defense Crisis* (1996) 45 Duke L.J. 783, 791–802 [collecting cases]; Annot., Public Defender's Immunity from Liability for Malpractice (1981) 6 A.L.R.4th 774, and later cases (2000 supp.) p. 118.) These out-of-state decisions are not instructive in the present case, however, because most rely upon general policy concerns or a

determination that a deputy public defender is not a public employee, and none consider the applicability of an immunity for discretionary acts similar to that set forth in section 820.2 and as construed by this court. (But see *Ramirez v. Harris* (1989) 105 Nev. 219, 773 P.2d 343, 344 [noting, without analysis, that Nevada's statutory discretionary act immunity bars malpractice claims against public defenders].)

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Comment
Nicholas Van Cleve

AMENDING THE *PEELER* DOCTRINE: HOW TO PROVIDE CONVICTED PLAINTIFFS AN EQUITABLE OPPORTUNITY TO PURSUE LEGAL MALPRACTICE CLAIMS[a1]

The criminally accused are entitled to capable lawyering without regard to their guilt or innocence, for only by the competent representation of all criminally accused can society rest assured that the innocent are not unfairly criminalized.[1]

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*928 I. Introduction

For over two decades, the *Peeler* doctrine has kept nonexonerated convicts from recovering for legal malpractice claims.[2] Originally, its scope was narrow.[3] Its primary justification was to keep criminals from profiting from their crimes.[4] But over the years, courts have expanded the doctrine, allowing criminal defense attorneys to use it as a shield when they fail to meet their contractual obligations to clients.[5] Today, application of the doctrine frequently undermines public policy objectives and makes it harder for plaintiffs with legitimate claims to succeed in court.[6]

This Comment is meant to provide attorneys and policymakers the tools they need to roll back the overextension of this doctrine, thus providing convicts a more equitable opportunity to pursue legal malpractice claims.[7] Part II sets *Peeler* in context ***929** by describing the doctrine's evolution, some of its criticisms, and corresponding rules in other states. Part III considers ways to better advance the public policy concerns implicated by *Peeler*.

II. The *Peeler* Doctrine

A. Peeler v. Hughes & Luce

Carol Peeler came under IRS investigation for forging illegal tax write-offs for wealthy investors.[8] Before she was convicted, she signed a plea deal with federal prosecutors in exchange for a lighter sentence for herself and dropped charges against her husband.[9] Three days after pleading guilty, a journalist allegedly informed Peeler that the government had offered her transactional immunity in exchange for further cooperation with the investigation.[10] Her attorney had not disclosed this offer to her before she signed the plea agreement, and the offer would have let her go free so long as she agreed to testify against her colleagues.[11] Peeler sued the attorney and his firm, claiming that this omission violated the Texas Deceptive Trade Practices Act and constituted legal malpractice, breach of contract, and breach of warranty.[12] But the Texas Supreme Court denied her claims, holding that convicts must be exonerated before bringing suit for legal malpractice.[13]

To reach this decision, the court held that one's criminal conduct is "the sole proximate cause" of one's conviction as a matter of law.[14] The court also observed that a majority of state courts had already adopted this rule[15] and determined that four ***930** public policy concerns compelled this result:[16]

- prohibiting convicts from profiting indirectly from their illegal acts;[17]
- prohibiting convicts from shifting the costs and consequences of their crimes to the attorneys who represent them;[18]
- prohibiting convicts from diminishing the consequences of criminal activity;[19] and
- prohibiting convicts from pursuing legal remedies that would undermine the criminal justice system.[20]

The court concluded that to allow Peeler to sue the attorneys who represented her would mean allowing her a chance to profit financially from the criminal activity she pled guilty to.[21] On balance, the court found that this injustice outweighed the countervailing need to "hold[] defense attorneys responsible for their professional negligence ...."[22]

B. Criticism of Peeler

Peeler has been criticized since its inception.[23] Dissenting from the plurality, Chief Justice Phillips argued that *Peeler*'s exoneration requirement imposed an "extraordinary burden" on criminal defendants and would undermine the claims of those who would not have been convicted but for their attorney's negligence.[24] Concurring in *Owens v. Harmon*, Justice Grant from ***931** the Sixth Court of Appeals observed that, under *Peeler*, "[i]f a criminal lawyer can bungle a case sufficiently so that his client will never get out of prison, then the attorney can never be responsible for malpractice."[25] "With no threat of sanction," another commentator wrote, "there may be no need ... *not* to breach the duty of care owed to one's clients."[26] Some have accordingly called the *Peeler* doctrine "the incompetent criminal lawyer defense act"[27] or a "lawyer's holiday."[28]

Addressing the exoneration rule and its corollaries in other states, Professor Vincent Johnson has written that "these obstacles to recovery ... are simply doctrinal overkill."[29] As he explains, they merely add to the hurdles that a malpractice claim must overcome to be successful:

> The difficulty of finding an attorney to initiate a malpractice action, the nature of the jury system, the demanding requirements of the "trial within a trial" causation analysis, and the rules that protect a lawyer's exercise of discretion, all conspire to defeat a malpractice claim raised by one charged with or convicted of a crime.[30]

The extra hurdles for criminal defense legal malpractice claims may explain why, in some jurisdictions, they are brought less frequently than malpractice claims against civil defense attorneys and why the success rates and payouts are lower.[31]

***932** As Kevin Bennardo who now teaches at the University of North Carolina School of Law notes, courts tend to justify the exoneration rule because it (1) conserves judicial resources, (2) avoids inconsistent judgments, (3) sidesteps having to consider whether the convict or the defense attorney was responsible for the conviction, and (4) enforces rules that further penalize criminal acts.[32] In response, Bennardo argues that individual rights and justice are more important than cost savings.[33] He also notes that many judicial proceedings can lead to inconsistent judgments--wrongful death suits and murder prosecutions, for example--meaning that this risk is not unique.[34] Addressing the difficulty of proving whether the convict or the attorney caused the conviction, Bennardo explains that requiring post-conviction relief under the exoneration rule does not avoid these causation challenges.[35] For instance, if the criminal defendant achieved postconviction relief through an ineffective-assistance-of-counsel claim, that judgment would say nothing about whether the defendant committed the crime.[36] Bennardo contends that those wrongfully convicted deserve "compensat [ion] for the wrongful conviction itself, the time wrongly spent in prison, and the cost of seeking post-conviction relief."[37] He concludes that the *Peeler* doctrine ultimately "allows the *lawyer* to escape responsibility for *her* wrongful conduct and [to] shift[] the burden of the malpractice onto her client."[38]

C. The Peeler *Doctrine's Evolution Post-1995*[39]

Peeler has evolved in two ways. First, courts have applied it ***933** to bar a wider variety of claims than it originally addressed.[40] Second, courts have applied it to protect a wider variety of individuals than it originally protected.[41] Recently, however, one court refused to apply the doctrine, possibly signaling a new phase in *Peeler*'s evolution.[42]

1. Peeler *bars more claims*. In *Peeler*, the Texas Supreme Court held that the exoneration rule barred the first four of the following claims. State appellate courts have held that *Peeler* bars the remaining claims as well,[43] though they have observed that the Texas Supreme Court has yet to apply the doctrine so expansively:[44]

- violations of the Deceptive Trade Practices Act;[45]
- legal malpractice;
- breach of contract;

- breach of warranty;[46]
- breach of fiduciary duty;[47]
- civil fraud;[48]
- negligent misrepresentation;[49] and

***934** • fee forfeiture.[50]

2. Peeler *shields nonattorneys*. In *Falby v. Percely*, a convict's mother hired an unlicensed law graduate named William Satterwhite to compose a writ of habeas corpus on behalf of her son.[51] Satterwhite visited the convict once but never produced the writ, and the federal deadline came and went.[52] The convict sued Satterwhite and argued that *Peeler* did not apply because Satterwhite did not represent him at trial.[53] But the Ninth District Court of Appeals in Beaumont disagreed, holding that *Peeler* barred the convict's claims because "[t]he habeas corpus application, regardless of who filed it, relates to and flows from the conviction."[54] Thus, this appellate court extended *Peeler* to claims against unlicensed legal assistants who were not involved with the ***935** convict's original conviction proceedings. Unlike the Beaumont Court of Appeals, however, courts in several other states have held that their interpretations of the *Peeler* doctrine do not protect those hired *after* the plaintiff's original conviction.[55]

Similar to *Falby*, Houston's Fourteenth District Court of Appeals held in *Golden v. McNeal* that *Peeler* barred claims against a court-appointed investigator named Shirley Johnson.[56] Johnson was hired to assist with the convict's defense, but the convict sued him along with his court-appointed attorney after he was sentenced to forty years for possession of a controlled substance.[57] The trial court granted the investigator's summary judgment motion, and the appellate court affirmed.[58] Relying on *Peeler*, the appellate court stated that "[c]onvicts may not shift the consequences of their crime to a third party" and said this "language ... is certainly broad enough to encompass claims of negligence or malpractice on the part of nonattorneys."[59]

3. Peeler *now has a limit--at least in the eyes of one court. Gonyea v. Scott* offers a rare example of a Texas appellate court asserting a limit on *Peeler*'s application.[60] In *Gonyea*, the First District Court of Appeals held that the exoneration rule does not apply when a convict contracts with an attorney for legal services ***936** that the attorney does has yet to provide.[61] Going forward, this rule would require criminal defense attorneys to prove that they performed at least some work on the client's behalf in order for *Peeler* to bar the claims asserted against them.[62]

The *Gonyea* case concerned Orian Scott, who hired attorney William Gonyea to investigate and file a writ of habeas corpus regarding several of Scott's convictions.[63] By accident, Scott overpaid Gonyea, but the attorney never returned the extra money.[64] Nor did Gonyea file the writ of habeas corpus.[65] The attorney claimed that he met with Scott once and performed

initial research, but the trial court found that he never conducted an investigation, outlined the issues to address in the writ, or composed a draft of the petition.[66] Consequently, the trial court ruled against Gonyea, awarding Scott $25,000 for the legal representation he never received, $15,000 for theft damages, and $76,800 for attorney's fees.[67] On appeal, Gonyea contended that *Peeler* barred Scott's breach-of-contract claim and that the statute of limitations barred Scott's theft claim.[68]

The appellate court held that *Peeler* did not bar Scott's breach-of-contract claim for four reasons.[69] First, Scott's complaint was "not that the legal services he received fell below a ... standard of care or contributed to his conviction, but that, instead, he received *no* representation."[70] Second, a decision in the attorney's favor ***937** would advance none of the policy justifications that *Peeler* first identified[71]--after all, the suit would not profit Scott financially because he only sought a return of the cash he paid for services never received.[72] Third, deciding in favor of the attorney "might create a disincentive to diligent representation of criminal defendants."[73] Fourth, "requiring some evidence of active representation to invoke *Peeler* defensively recognizes that the constitutional right to assistance of counsel is foundational to our criminal-justice system."[74]

Whether *Gonyea v. Scott* marks a new trend in Texas jurisprudence remains to be seen. But the *Gonyea* court's requirement that defense attorneys present "some evidence of active representation to invoke *Peeler*" sets a reasonable boundary around the *Peeler* doctrine.[75] It imposes some accountability on criminal defense attorneys without allowing criminals to profit from their crimes or reduce the consequences of their actions. ***938** Furthermore, it enhances the criminal justice system by encouraging criminal defense attorneys to fulfill their contractual obligations to criminal defendants.

D. Corresponding Rules in Other Jurisdictions

Peeler requires plaintiffs in Texas, who pursue criminal legal malpractice claims, to show evidence of "exonerat[ion] by direct appeal, post-conviction relief, or otherwise" before suing their attorneys.[76] This is known as a "legal innocence" requirement[77] and is one of eleven approaches for a standard of criminal malpractice claims adopted by different states.[78] These approaches are listed below, roughly organized on a scale of least to most stringent. The *Peeler* doctrine is an example of the sixth approach.

1. Equivalent civil and criminal malpractice standards. Some states have the same requirements for convicted and unconvicted plaintiffs to sue their attorneys.[79] Both must prove duty, breach, causation, and damages.[80] These states include ***939** Arkansas,[81] Colorado,[82] Delaware,[83] Indiana,[84] Louisiana,[85] Michigan,[86] Montana,[87] New Mexico,[88] North Dakota,[89] Ohio,[90] and Utah.[91]

2. Higher proximate cause standard in criminal defense malpractice actions. North Carolina justifies this rule on the basis that (1) the criminal justice system already provides special protections for criminal defendants, (2) the guilty should not profit from their crimes, and (3) the supply of criminal defense attorneys should be protected.[92]

3. Legally cognizable injury. Some states and the District of Columbia require that the plaintiff either show that (1) he or she would not have been convicted but for the attorney's negligence or (2) the attorney caused a different legally cognizable harm. These ***940** include Alabama,[93] District of Columbia,[94] Georgia,[95] Nebraska,[96] and Rhode Island.[97]

4. Actual innocence. Some states do not require postconviction relief as a prerequisite to bringing suit but do require the plaintiff to prove by a preponderance of the evidence that he or she was innocent of the crime charged.[98] These include Illinois,[99] Kentucky,[100] Massachusetts,[101] Missouri,[102] New York,[103] Oklahoma,[104] South Carolina,[105] and Wisconsin.[106]

5. Legal innocence with actual guilt as an affirmative defense. Alaska requires post-conviction relief as a prerequisite to bringing a malpractice suit. But the state also allows criminal defense attorneys to raise the former client's actual guilt as an affirmative defense established by a preponderance of the evidence.[107]

6. Legal innocence or exoneration. Many states require that ***941** convicts establish legal innocence via proof of exoneration or other post-conviction relief before suing their criminal defense attorneys for malpractice.[108] These states include Arizona,[109] California,[110] Idaho,[111] Iowa,[112] Kansas,[113] Maryland,[114] Minnesota,[115] Mississippi,[116] New Jersey,[117] Tennessee,[118] and Texas.[119]

7. Different standards for suing trial and post-conviction counsel. The Oregon Supreme Court requires that a plaintiff, who sues their trial counsel, allege harm by showing that the plaintiff "has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise."[120] In contrast, to sue post-conviction counsel, "prior exoneration, by means of appeal, post-conviction proceedings, or otherwise, is not a prerequisite ...."[121]

8. Post-conviction relief plus proof that the attorney acted ***942** *recklessly or in wanton disregard for the plaintiff's interest*. Pennsylvania has this requirement.[122]

9. Actual innocence plus legal innocence. Some states require both. These include Florida,[123] Nevada,[124] New Hampshire,[125] Virginia,[126] and Washington.[127]

10. Innocence of both the charge and lesser offenses. West Virginia requires that plaintiffs prove by a preponderance of the evidence not only that they were innocent of the crime for which they were convicted but also that they were innocent of the lesser charges brought against them.[128]

11. No legal malpractice suits against protected groups. Under Delaware's qualified immunity laws, plaintiffs may not sue public defenders and court-appointed attorneys without first overcoming the state presumption of qualified immunity.[129] Minnesota and Nevada do not allow suits against public defenders.[130] Nevada does not allow suits against court-appointed, ***943** private defense attorneys.[131]

12. Undecided. Connecticut,[132] Hawaii,[133] Maine,[134] South Dakota,[135] Vermont,[136] and Wyoming[137] have yet to hear criminal legal malpractice claims at the appellate level and decide what standard to apply.

E. Exonerations in Texas

If exonerations never occurred in Texas, legal malpractice suits under *Peeler* would be uniformly dismissed.[138] But in the last few years, the Texas legislature has passed several laws meant to protect against wrongful convictions.[139] For example, a May 2017 bill implemented tougher regulations on the use of jailhouse informants in prosecutions, special requirements for audio recorded interrogations in some felony cases, and tighter ***944** procedures for eyewitness identifications in police lineups.[140] As a result of these and other efforts, Texas leads the nation in total exonerations[141]--a fact that has been increasingly important since *Peeler*'s pronouncement in 1995. With at least 40,000 annual convictions, however, the chances of exoneration remain slim.[142]

III. Strategies for Reigning in the *Peeler* Doctrine

Peeler warned that "[n]othing in [the] opinion should be construed as relieving criminal defense attorneys of their responsibility to maintain the highest standards of ethical and professional conduct."[143] But some attorneys have used *Peeler* to do just that.[144] Many states do not have exoneration or actual innocence requirements,[145] and some scholars have vigorously criticized the rule,[146] which suggests that modifying, removing, or ***945** replacing it would be justified. Before considering alternatives to the doctrine, however, it is important to understand the public policy interests at issue so that lawmakers, judges, and others can more easily evaluate alternatives to the exoneration rule that might lead to a more just and fair system in Texas and elsewhere.

A. Competing Public Policies

The four public policies that *Peeler*'s plurality considered persuasive[147] are only a few among the many raised by courts and scholars addressing criminal legal malpractice claims:

- ensuring Sixth Amendment protections for criminal defendants by maintaining representation standards;[148]
- seeking equitable representation for all--including alleged lawbreakers;[149]
- treating attorneys equally instead of providing special protections to criminal attorneys;[150]
- denying criminals the opportunity to profit financially from their crimes;[151]
- preventing criminals from shifting responsibility for their crimes to third parties;[152]
- maintaining severe consequences for criminal activity;[153]
- advancing the war on crime;[154]
- protecting the credibility of the justice system;[155]
- holding criminal defense attorneys responsible for their negligence;[156]

***946** • protecting future plaintiffs from bad lawyers;[157]

- providing attorneys the freedom to do what is best for their clients instead of incentivizing the satisfaction of every client request;[158]

- avoiding an influx of criminal legal malpractice cases that might overburden courts;[159]

- avoiding circumstances that might discourage criminal defense attorneys from accepting new clients;[160] and

- avoiding redundancy in a system already safeguarded by protections against mistaken convictions.[161]

B. Alternatives to the Status Quo

Seven alternatives to the *Peeler* doctrine are considered below.

1. Equal standards for convicted and unconvicted plaintiffs. Eleven states have rejected special requirements for legal malpractice claims brought by convicts.[162] This approach arguably (1) protects individual rights by placing criminal defendants on a more level playing field when asserting legal malpractice claims;[163] (2) sees criminal defendants as innocent until proven ***947** guilty;[164] (3) prohibits criminal defense attorneys from shifting the costs or responsibility for their mistakes onto criminal defendants;[165] (4) allows criminal defendants to seek refunds when their attorneys do not do what they promised;[166] (5) helps protect future criminal defendants from negligent attorneys;[167] (6) helps ensure adequate criminal defense counsel for all under the Constitution;[168] (7) places criminal defense attorneys on an equal playing field with other attorneys subject to the traditional standard;[169] and (8) avoids other shortcomings of the exoneration rule previously addressed.[170]

On the other hand, some might be concerned that this approach would (1) allow criminals a financial return made possible by their crimes,[171] (2) shift responsibility for the crimes to their defense counsel,[172] (3) increase caseloads,[173] (4) discourage criminal defense attorneys from taking on new clients, and (5) encourage defense attorneys to do "what makes [their] client[s] happy" instead of what best serves their interests.[174] But not all of these concerns are valid.

Though convicted plaintiffs who prevail against their attorneys in malpractice suits may receive payment, that payment will only serve to offset the additional jail time, fines, and other harms that their attorney's acts or omissions brought upon them.[175] Regarding the potential for responsibility-shifting, this risk cuts both ways. Removing the exoneration rule might force ***948** some attorneys to lose revenue made possible by their client's crimes, but the current rule forces convicts to bear the financial and other consequences of their attorneys' negligence.[176] Addressing the caseload concern, it is likely that more convicts would bring criminal defense legal malpractice actions if the standard were lower.[177] But the current system arguably incentivizes convicts to pursue every form of post-conviction relief imaginable if they believe their attorney made a mistake, even if the evidence against them is strong. While a lower standard might encourage criminal defense attorneys to be more cautious about accepting new clients, this would not be anathema in a profession with high standards of professional conduct.[178] Every attorney must weigh the risks of taking on a new client, and the potential for a malpractice claim serves to encourage attorneys to do what other reasonable attorneys would do for their clients. Furthermore, it is unclear whether imposing higher standards

would noticeably affect the number of criminal defense attorneys practicing in the state.[179] But if Texas and other states with exoneration rules are concerned about ensuring the supply of criminal defense attorneys, they could temper a more relaxed standard with special protections for public defenders and court-appointed defense attorneys, as some other states have done.[180]

2. Follow Gonyea *by refusing to rule in favor of criminal defense attorneys when doing so would not align with* Peeler's *public policy objectives*. This approach would allow convicts to pursue claims that could not result in financial gain, shift responsibility for their criminal activity to someone else, reduce the consequences of their crimes, or otherwise undermine the justice system.[181] Though this option would arguably be an ***949** improvement, it would not fully address the fundamental problems posed by the exoneration and actual innocence requirements.[182]

3. Provide alternative remedies that discipline attorneys without allowing criminals to receive financial gain. Peeler was decided under the assumption that successful plaintiffs in malpractice actions would receive a financial recovery.[183] Courts might consider different equitable remedies to avoid allowing criminals financial gain but still allow suits that discourage poor performance, such as the following:

- allow convicts to recover what they paid for the deficient representation;[184]
- allow modest reductions in convicts' sentences based on what effect courts believe the attorney's subpar performance had;[185]
- force negligent attorneys to pay a fine to an organization that seeks to overturn wrongful convictions or to a fund that sponsors criminal defense for the indigent;
- temporarily or permanently suspend an attorney's bar license; or
- impose a system of comparative responsibility to reduce the plaintiff's recovery in a malpractice suit.[186]

***950** Remedies like these could discourage attorney wrongdoing--thereby protecting future clients while reducing the chance that criminals might profit from their crimes.

4. Allow convicts special exceptions if, through their attorneys' negligence, they miss a deadline. This could provide targeted relief for plaintiffs who prove that their attorneys were solely responsible for missing a deadline to file an important document.[187]

5. Different standards for suing trial and post-trial counsel. Many safeguards exist to protect criminal defendants from faulty convictions.[188] Because these safeguards could protect criminal defendants from the consequences of poor defense counsel performance at trial, the ability to sue post-conviction counsel is arguably more pressing.[189] For this reason, some states have different rules for suing post-conviction counsel. Oregon, for example, allows convicts to sue their attorneys who were not involved in their original conviction proceedings without special prerequisites like proof of exoneration.[190]

6. Require proof of a legally cognizable injury. Some states have adopted a rule similar to the legally cognizable injury rule.[191] According to this rule, as described in the Restatement (Third) of the Law Governing Lawyers, "[a] convicted criminal defendant suing for malpractice must prove both that the lawyer failed to act properly and that, but for that failure, the result would have been ***951** different ...."[192] The rule is less stringent than the exoneration rule because it does not require legal innocence. And it would help hold attorneys responsible for their negligence while providing compensation for the harm their negligence caused.[193]

7. Leave Peeler *alone and allow the state bar to penalize negligent criminal defense attorneys*. According to the Texas State Bar, the number of attorneys disciplined in all practice areas is marginal at best. During the 2014-2015 bar year, Texas had 86,494 active in-state attorneys.[194] During that time, Texas's Office of Chief Disciplinary Counsel issued only 7 disbarments and sanctions in 318 cases.[195] This means, at most, 0.37% of in-state Texas attorneys received a reprimand, and less than 1 in 10,000 were disbarred.[196] Unless changes are made to the Texas State Bar's disciplinary system, these numbers indicate that the state bar is inadequate to protect plaintiffs from bad attorneys.[197]

C. Methods for Reigning in the Exoneration Rule

The Texas legislature could replace the doctrine. ***952** Alternatively, the Texas Supreme Court should have little difficulty restricting the doctrine or replacing it with something else--especially considering that *Peeler*'s holding was reached by a mere plurality. The court might justify its decision based on *Peeler*'s unintended consequences, Texas intermediate appellate courts' recent expansion of the doctrine, or reasoning from other jurisdictions that have considered and rejected the exoneration rule. Texans could also consider an amendment to the state constitution, though this would require more votes than ordinary legislation.[198]

IV. Conclusion

To correct *Peeler*'s misapplication and avoid the fundamental problems with the exoneration rule, Texas courts and lawmakers should consider adopting a different rule that better protects individual rights and ensures that the protections of the civil system are available to hold criminal defense attorneys accountable for their actions.[199] Several alternatives to the present system would advance worthy policy goals and ameliorate the effects of the *Peeler* doctrine, but removing the exoneration rule entirely would provide the most equitable, straightforward path forward.[200]

***953** V. Appendix: Every State's Approach to Criminal Defense Legal Malpractice Claims

The chart below provides a concise overview of the rule in all fifty states and the District of Colombia on criminal defense legal malpractice claims.

STATE OR TERRITORY[201]	RULE ON POST-CONVICTION RELIEF
Alabama	Alabama has imposed different requirements in different cases, but it seems to require--at a minimum--proof that but for the negligence of the convict's attorney, the outcome at trial would have been different.[202]
Alaska	Post-conviction relief is required before bringing a malpractice claim, but criminal defense attorneys may raise their former clients' actual guilt as an affirmative defense.[203] If an attorney raises actual guilt as a defense, he or she must prove it by a preponderance of the evidence.[204] Proof of a plaintiff's actual innocence is not required to succeed on a claim.[205]
Arizona	The plaintiff must prove that the underlying criminal conviction has been set aside.[206]
Arkansas	Arkansas has no post-conviction, actual innocence, or exoneration prerequisites for criminal malpractice suits.[207]
California	The criminal plaintiff must establish actual innocence by proving a reversal of his or her conviction or other post-conviction relief.[208]
Colorado	Proof of innocence is *not* required for a convict to prove causation in a legal malpractice action.[209]
Connecticut	The Connecticut Supreme Court has not yet considered the issue, but a federal court ruling on its judgment regarding state law determined that a convicted plaintiff would likely need to seek appellate or post-conviction relief before beginning a malpractice suit.[210]
Delaware	If a criminal defendant has sued his attorney for ineffective assistance of counsel, he cannot then follow suit with a claim for malpractice.[211] Actual innocence or post-conviction relief are not prerequisites for legal malpractice suits.[212]
District of Columbia	Convicts must show that their counsels' negligent "actions caused a legally cognizable injury."[213]
Florida	The plaintiff must prove legal and actual innocence[214] and prove that the final disposition of the underlying criminal case was in the plaintiff's favor.[215]
Georgia	Legal malpractice claims require proof that the plaintiff would have prevailed but for the defendant's alleged negligence.[216] As a result, a client who has admitted guilt cannot sue his or her attorney for malpractice.[217]

Hawaii	No reported cases require the plaintiff to prove innocence before bringing suit.[218]
Idaho	The Idaho Supreme Court recently rejected the actual innocence requirement[219] while simultaneously embracing the exoneration rule, meaning that a convict's cause of action for malpractice does not accrue until he has received post-conviction relief.[220]
Illinois	The plaintiff must prove actual innocence, which requires that his or her conviction has been overturned.[221] An exception to the actual innocence requirement applies if the attorney intentionally sought his client's conviction.[222]
Indiana	A convict's legal malpractice action accrues upon discovery of counsel's malpractice; post-conviction relief or exoneration is irrelevant.[223]
Iowa	A plaintiff must secure relief from a conviction before bringing a legal malpractice claim.[224]
Kansas	Actual innocence is not required,[225] but post-conviction relief is a requirement.[226]
Kentucky	Post-conviction relief is required, and the criminal must prove innocence by a preponderance of the evidence.[227]
Louisiana	Exoneration is not required;[228] criminal defense attorneys are held to the same standard to which ordinary defense attorneys are held.[229]
Maine	Unsettled.[230] At least the civil malpractice requirements must be met,[231] and one court has suggested that the state supreme court would require actual innocence if a case arose before it.[232]
Maryland	Post-conviction relief is required before recovery in a malpractice suit. However, the "criminal plaintiff need not obtain [postconviction] relief prior to the initiation of a criminal malpractice action, so long as the criminal plaintiff has initiated a [postconviction] action."[233]
Massachusetts	Actual innocence is required,[234] but exoneration is not yet required.[235] If the plaintiff pled guilty in the preceding suit, the "claimant should be precluded from proclaiming his innocence and his lawyer's negligence in a legal malpractice action unless he has succeeded in withdrawing or vacating his guilty plea on direct appeal or through [post-conviction] proceedings."[236]
Michigan	Securing post-conviction relief is not a prerequisite for initiating a malpractice suit over the actions of criminal defense counsel.[237] If the plaintiff pled guilty to the underlying offense, the plaintiff may still sue for malpractice, assuming the claims "allege injuries other than incarceration."[238]

Minnesota	Post-conviction relief is a prerequisite for a convict's malpractice suit.[239] Also, public defenders may not be sued for legal malpractice.[240]
Mississippi	As of November 29, 2018, exoneration is a prerequisite for bringing a criminal malpractice action.[241]
Missouri	Actual innocence is required for a convict to bring a legal malpractice claim.[242]
Montana	Innocence is not required for a convicted plaintiff to bring a malpractice claim.[243]
Nebraska	The plaintiff must prove that he or she would have been successful in the underlying action but for the attorney's negligence.[244]
Nevada	Post-conviction or appellate relief is required,[245] and the plaintiff must also "prove actual innocence of the underlying charge."[246] Court-appointed private attorneys and public defenders are immune from legal malpractice claims,[247] but federal civil rights claims may be brought against public defenders for improper representation of criminal defendants when they "engage[] in a conspiracy with the state to deprive [a defendant in a criminal case] of his civil rights."[248]
New Hampshire	A criminal legal malpractice claim accrues once the criminal defendant receives postconviction relief.[249] Convicted plaintiffs must "prove, by a preponderance of the evidence, actual innocence" of the underlying offense to bring criminal legal malpractice claims.[250] That is, unless: (1) the claim is based on representation after the plea and sentencing, (2) the claim has no bearing on the plaintiff's convictions, and (3) "the plaintiff does not argue that but for his attorney's negligence he would have obtained a different result in the criminal case."[251]
New Jersey	Exoneration is required to bring a criminal malpractice claim.[252]
New Mexico	Post-conviction relief or exoneration are not required for initiation of criminal malpractice suits.[253]
New York	Actual innocence of the underlying offense is required, and a plaintiff's admission of guilt may undermine his or her ability to bring a malpractice suit.[254]
North Carolina	North Carolina requires a higher burden of proof to establish proximate causation in criminal legal malpractice claims.[255] An appellate court held that this standard was not met when there was strong circumstantial evidence of guilt; the plaintiff did not allege that the attorney's actions caused him damages or claim "actual innocence in his complaint."[256]
North Dakota	Innocence or post-conviction relief or exoneration is not required.[257]
Ohio	Criminal defendants need not secure exoneration before pursuing legal malpractice claims.[258]

Oklahoma	Actual innocence is required.[259]
Oregon	For a convict to bring a legal malpractice claim against his or her criminal defense *trial* counsel, the convict must "allege 'harm' in that the person has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise."[260] But to sue *post-conviction* counsel, "prior exoneration, by means of appeal, post-conviction proceedings, or otherwise, is not a prerequisite ."[261] If the plaintiff's alleged harm is suffering brought on by continued incarceration, however, the plaintiff "must plead and prove that, if defendants had performed competently in the post-conviction proceeding, plaintiff would have obtained relief in that proceeding, that he would have avoided reconviction in any subsequent proceeding on remand, and that he would have been released from prison."[262]
Pennsylvania	Requiring post-conviction relief based on attorney error *and* proof that the attorney acted in "[r]eckless or wanton disregard of the defendant's interest ."[263]
Rhode Island	The plaintiff must prove that, but for the attorney's negligence, the plaintiff would not have been convicted.[264]
South Carolina	Actual innocence is required, but a no contest plea to the criminal charge is a bar to bringing a criminal malpractice claim.[265]
South Dakota	No cases have yet addressed the topic.[266]
Tennessee	Post-conviction relief is required.[267]
Texas	Exoneration is required before bringing a criminal malpractice claim.[268]
Utah	Post-conviction relief is not required.[269]
Vermont	Unsettled; actual innocence is not yet a prerequisite for criminal malpractice claims and neither is post-conviction relief.[270]
Virginia	Both post-conviction relief and actual innocence are prerequisites for criminal malpractice suits.[271]
Washington	Both post-conviction relief and actual innocence are prerequisites for criminal malpractice suits.[272]
West Virginia	The plaintiff must prove actual innocence of both "the underlying criminal offense for which he was originally convicted and/or any lesser included offenses involving the same conduct by a preponderance of the evidence."[273]
Wisconsin	The plaintiff must show that, but for the attorney's negligence, the plaintiff would have succeeded in the underlying criminal suit in proving his or her innocence of all the charges of which the plaintiff was convicted.[274]

Wyoming	Undecided; Wyoming has apparently heard no criminal malpractice claims on appeal and thus has not yet required innocence or exoneration for criminal malpractice claims.[275]

Footnotes

a1 J.D. Candidate at the University of Houston Law Center. The Author would like to thank the editors of the *Houston Law Review* for their assistance; Professor David Kwok for his guidance, and his wife, Brenna, and son, Alistair, as well as his parents for their love and support.

1 Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 Ga. L. Rev. 1251, 1305 (2003).

2 *See* John G. Browning & Lindsey Rames, *Proof of Exoneration in Legal Malpractice Cases: The Peeler Doctrine and Its Limits in Texas and Beyond*, 5 St. Mary's J. on Legal Malpractice & Ethics 50, 65-66 (2014).

3 *See id.* at 62 ("Since *Peeler*, courts have continued to extend the criminal malpractice bar to all phases of criminal prosecutions--from pre-trial investigations to appeal and even to parole. As a result, criminal defense attorneys have enjoyed a blanket of protection not afforded to other lawyers in the State of Texas.").

4 *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497 (Tex. 1995) (plurality opinion) (quoting State *ex rel.* O'Blennis v. Adolf, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985)).

5 *E.g.*, Shepherd v. Mitchell, No. 05-14-01235-CV, 2016 WL 2753914, at *1-2 (Tex. App.--Dallas May 10, 2016, pet. dism'd w.o.j.) (mem. op.) (barring a claim against an attorney who did not represent the plaintiff at trial but failed to file a writ of habeas corpus on his behalf--work the plaintiff's family paid him $10,000 to perform); Falby v. Percely, No. 09-04-422 CV, 2005 WL 1038776, at *2-3 (Tex. App.--Beaumont May 5, 2005, no pet.) (mem. op.) (affirming summary judgment barring a claim against an attorney who did not represent the plaintiff at trial but was hired to submit a writ of habeas corpus on his behalf--something he did not do). *Peeler* has been cited over 200 times in Texas and by courts in at least twenty-four other states.

6 *See* Gonyea v. Scott, 541 S.W.3d 238, 247-48 (Tex. App.--Houston [1st Dist.] 2017, pet. denied) (outlining *Peeler*'s four public policy concerns and noting that none would be advanced by applying the doctrine to shield the attorney from responsibility in that case); *infra* Section III.A (listing competing public policies that exoneration rules and other approaches advance or undermine). Data on legal malpractice claims is limited, but anecdotally speaking, data from Missouri indicates that criminal defense malpractice claims succeed less than 10% of the time. *See* Herbert M. Kritzer & Neil Vidmar, *When the Lawyer Screws Up: A Portrait of Legal Malpractice Claims & Their Resolution*, Duke L. Sch. Pub. L. & Legal Theory Series, June 29, 2015, at 1, 37, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6182&context=faculty_scholarship [https://perma.cc/DM7X-ULQX].

7 U.S. Const. amend. VI (setting out rights related to criminal prosecutions); *see* Mashaney v. Bd. of Indigents' Def. Servs., 355 P.3d 667, 686-87 (Kan. 2015) (quoting Mashaney v. Bd. of Indigents' Def. Servs., 313 P.3d 64, 89 (Kan. Ct. App. 2013) (Atcheson, J., dissenting) ("Criminal defendants regardless of guilt or innocence have a right to competent legal representation."), *aff'd in part* and *rev'd in part*, 355 P.3d 667 (Kan. 2015)). States that have yet to adopt an approach to these types of cases-- including Connecticut, Hawaii, Maine, South Dakota, Vermont, and Wyoming--will need to undertake a similar analysis. *See infra* Section II.D.12; *see also infra* Appendix.

8 *Peeler*, 909 S.W.2d at 495-96.

9 *Id*. at 496.

10 *Id*. "Transactional immunity" refers to a witness's protection from government prosecution over anything the witness testifies about. *See* 32 C.F.R. § 719.112 (2018).

11 *Peeler*, 909 S.W.2d at 496 ("In other words, the United States Attorney had offered to not prosecute Peeler for her crime, if she would become a witness and testify against her colleagues.").

12 *Id*.

13 *Id*. at 497-98, 500.

14 *Id*. at 497-98. Proximate cause is one of four elements of legal malpractice claims; namely, duty, breach, causation, and damages. *Id*. at 496.

15 *Id*. at 497-98 (citing illustratively cases applying this rule in Illinois, Florida, Alaska, California, Massachusetts, Nevada, New York, Pennsylvania, and Oregon); *see* Kevin Bennardo, Note, *A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims*, 5 Ohio St. J. Crim. L. 341, 342 & n.3 (2007) (reporting that a majority of jurisdictions require proof that the plaintiff has secured "post-conviction relief, ... actual innocence, or both ...."); Duncan, *supra* note 1, at 1266 & n.96 (listing cases in different states following a similar rule). Historically speaking, this doctrine is relatively new. A Colorado Supreme Court decision attributes the post-conviction relief requirement's origin to a 1974 law review article, and states began adopting it in the 1980s. *See* Browning & Rames, *supra* note 2, at 57-58, 58 n.20 (citing, among others, Rantz v. Kaufman, 109 P.3d 132, 135 (Colo. 2005) (en banc)).

16 *Peeler*, 909 S.W.2d at 497-98; *see* Gonyea v. Scott, 541 S.W.3d 238, 247-48 (Tex. App.--Houston [1st Dist.] 2017, pet. denied) (outlining *Peeler*'s four public policy concerns).

17 *Peeler*, 909 S.W.2d at 497 (quoting State *ex rel*. O'Blennis v. Adolf, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985)).

18 *Peeler*, 909 S.W.2d at 498.

19 *Id*.

20 *Id*.

21 *See id*. at 497-98.

22 *Id*. at 497-98, 500.

23 *See* Browning & Rames, *supra* note 2, at 56 (listing sources of criticism).

24 *Peeler*, 909 S.W.2d at 500-01 (Phillips, J., dissenting). "The public morality is thus protected," he wrote, "at the expense of shielding all criminal defense attorney malpractice, no matter how egregious, from any redress in the civil justice system." *Id*. at 500.

25 *See* Browning & Rames, *supra* note 2, at 56 (quoting Owens v. Harmon, 28 S.W.3d 177, 179 (Tex. App.--Texarkana 2000, pet. denied) (Grant, J., concurring)).

26 *See* Duncan, *supra* note 1, at 1269-70.

27 *Owens*, 28 S.W.3d at 179.

28 Bailey v. Tucker, 621 A.2d 108, 124 (Pa. 1993); Duncan, *supra* note 1, at 1251, 1306 ("It is holiday time for criminal defense attorneys, a time during which criminal defense lawyers are exempt from the usual responsibility of their jobs, namely their professional obligation to provide competent legal representation.").

29 Vincent R. Johnson, Legal Malpractice Law in a Nutshell 297 (2d ed. 2016).

30 *Id*.

31 *See* Kritzer & Vidmar, *supra* note 6, at 16-19, 25, 37, 45, 50 (listing the frequency of malpractice claims across practice areas and providing more targeted information on Florida and Missouri based on uniquely available insurance claim documentation). That said, the overall success rate of legal malpractice claims has risen since the late 1990s. *See Legal Malpractice Claims Costing More, Settling Sooner, Research Shows*, Morgan & Morgan Bus. Trial Group (Oct. 27, 2016), https://www.businesstrialgroup.com/news/legal-malpractice-claims-costing-more-settling-sooner-research-shows/ [https://perma.cc/Q3BW-JBXL] (citing a more recent ABA study that found "[c]laims that ended with no payout to malpractice claimants decreased from almost 60 percent in 2011 to 43 percent in 2015"); Smart Money, *10 Things Your Lawyer Won't Tell You*, Fox News (Aug. 29, 2005), http://www.foxnews.com/story/2005/08/29/10-things-your-lawyer-wont-tell.html [https://perma.cc/7R5P-7JMU] (according to a 2001 ABA survey, "[s]ome 68% of malpractice claims from 1996 through 1999 closed without the client receiving payment from the lawyer's insurance company ....").

32 *See* Bennardo, *supra* note 15, at 345-56 (citing cases in support of each category). At the time this piece was published, Professor Bennardo was a law clerk and recent graduate of the Ohio State University.

33 *Id*. at 347.

34 *Id*. at 347-48. He also argues that reversed convictions, which are necessary for criminal malpractice claims, can undermine the public's view of the justice system at least as much as apparently inconsistent judgments in the criminal and civil arenas. *Id*. at 348.

35 *Id*. at 352-53.

36 *Id*. at 353.

37 *Id*. at 355, 362 ("Criminals can be harmed just as innocent people can be harmed, and criminals should be compensated for their harms just as innocent people are compensated.").

38 *Id*. at 362. Professor Meredith Duncan from the University of Houston Law Center has identified additional shortcomings of the exoneration rule. *See* Duncan, *supra* note 1, at 1268-70 (critiquing both the exoneration and actual innocence rules).

39 For a more in-depth review of particular cases applying the *Peeler* doctrine, see Browning & Rames, *supra* note 2, at 66-125.

40 *See infra* Section II.C.1.

41 *See infra* Section II.C.2.

42 Gonyea v. Scott, 541 S.W.3d 238, 247-48 (Tex. App.--Houston [1st Dist.] 2017, pet. denied); *see infra* Section II.C.3.

43 *E.g.*, Westmoreland v. Turner, No. 07-12-0018-CV, 2012 WL 4867574, at *2 (Tex. App.--Amarillo Oct. 15, 2012, pet. denied) (per curiam) (mem. op.) (citations omitted) ("Whether allegations labeled as breach of fiduciary duty, fraud, or some other cause are actually claims for professional negligence is a question of law. As long as the crux of the complaint is inadequate legal representation, it is a claim for legal malpractice."); *see* Browning & Rames, *supra* note 2, at 65-87 (providing a detailed overview of Texas cases applying and expanding *Peeler*).

44 *Gonyea*, 541 S.W.3d at 245 (citation omitted) ("The Texas Supreme Court has not expanded the rule beyond the malpractice context. But intermediate appellate courts have."); Futch v. Baker Botts, LLP, 435 S.W.3d 383, 391 (Tex. App.--Houston [14th Dist.] 2014, no pet.) ("Since the *Peeler* case, the Supreme Court of Texas has not granted review in a case involving this doctrine. Nonetheless, in a series of opinions, this court has adopted and applied an expansive interpretation of the doctrine articulated in the plurality opinion in *Peeler*."); Wooley v. Schaffer, 447 S.W.3d 71, 77 (Tex. App.--Houston [14th Dist.] 2014, pet. denied).

45 *See generally* David J. Beck, *Legal Malpractice in Texas: Second Edition*, 50 Baylor L. Rev. 547, 761-73 (1998) (providing more details on these claims).

46 Peeler v. Hughes & Luce, 909 S.W.2d 494, 496-98 (Tex. 1995) (plurality opinion).

47 *See, e.g., Westmoreland*, 2012 WL 4867574, at *1-2.

48 *See* Dugger v. Arredondo, 408 S.W.3d 825, 833 (Tex. 2013) ("While some courts of appeals have extended [*Peeler*'s] reasoning to civil defendants bringing legal malpractice actions, we have not directly addressed that issue."); *see, e.g.*, Meullion v. Gladden, No. 14-10-01143-CV, 2011 WL 5926676, at *4-5 (Tex. App.--Houston [14th Dist.] Nov. 29, 2011, no pet.) (mem. op.) (holding that the plaintiff's fraud claim was subsumed by his legal malpractice claim and thus barred by *Peeler*).

49 *See* Garcia v. Garcia, No. 04-09-00207-CV, 2010 WL 307880, at *1-3 (Tex. App.--San Antonio Jan. 27, 2010, no pet.) (mem. op.) (holding that the plaintiff did not satisfy the *Peeler* doctrine's requirements for establishing a claim of negligent misrepresentation because the plaintiff failed to show that she was free from all fault); Johnson v. Odom, 949 S.W.2d 392, 393-94 (Tex. App.--Houston [14th Dist.] 1997, pet. denied) (finding that *Peeler*'s holding barring convicts from suing their attorneys for malpractice similarly barred the appellant's negligent misrepresentation claim against his defense counsel).

50 Futch v. Baker Botts, LLP, 435 S.W.3d 383, 392 (Tex. App.-- Houston [14th Dist.] 2014, no pet.).

51 Falby v. Percely, No. 09-04-422 CV, 2005 WL 1038776, at *1 (Tex. App.--Beaumont May 5, 2005, no pet.) (mem. op.).

52 *Id*.

53 *Id*. at *1-2.

54 *Id*. at *2-3. *Meullion v. Gladden* addressed a similar circumstance in which an inmate claimed that his attorney never filed the writ of habeas corpus after the inmate's mother paid the attorney $10,000 to do so. No. 14-10-01143-CV, 2011 WL 5926676, at *1 (Tex.

App.--Houston [14th Dist.] Nov. 29, 2011, no pet.) (mem. op.). The court adopted *Falby*'s reasoning and held that the *Peeler* doctrine barred the inmate's claims even though the defendant did not represent him at trial. *Id*. at *3-4. But the court also said that a convict might bring a breach of fiduciary duty or fraud claim against his or her attorney should the convict successfully differentiate those claims from a legal malpractice claim. *See id*. at *4; *see also* Browning & Rames, *supra* note 2, at 96-97 (providing additional commentary on *Meullion*). Several other cases have similarly applied *Peeler* to bar claims against attorneys who did not represent the defendant at trial. *E.g.*, Shepherd v. Mitchell, No. 05-14-01235-CV, 2016 WL 2753914, at *1-2 (Tex. App.--Dallas May 10, 2016, pet. dism'd w.o.j.) (mem. op.); Rhodes v. George L. Preston & Assocs., No. 06-14-00057-CV, 2014 WL 7442682, at *2-3 (Tex. App.--Texarkana Dec. 31, 2014, no pet.) (mem. op.); Butler v. Mason, No. 11-05-00273-CV, 2006 WL 3747181, at *1-2 (Tex. App.--Eastland Dec. 21, 2006, pet. denied) (per curiam) (mem. op.); *see* Self v. Emblem, No. D044728, 2005 WL 1926704, at *1-3, *5 (Cal. Ct. App. Aug. 12, 2005) (affirming a judgment against a plaintiff suing a defense attorney appointed on his behalf to assist with post-conviction relief because the plaintiff failed to assert actual innocence as required by *Peeler*). Like the *Falby* court, Texas's Fourteenth District Court of Appeals has "extended *Peeler* to apply to assertions of poor-quality legal representation at the preand post-trial stages of representation." Gonyea v. Scott, 541 S.W.3d 238, 245 n.6 (Tex. App.--Houston [1st Dist.] 2017, pet. denied) (first citing McLendon v. Detoto, No. 14-06-00658-CV, 2007 WL 1892312, at *1-2 (Tex. App.--Houston [14th Dist.] July 3, 2007, pet. denied) (mem. op.); and then citing *Meullion*, 2011 WL 5926676, at *3-4).

55 *See, e.g.*, Costa v. Allen, No. WD67378, 2008 WL 34735, at *7 (Mo. Ct. App.), *vacated*, 274 S.W.3d 461 (Mo. 2008) (considering a suit against an attorney who did not represent the client at trial); Dushane v. Acosta, No. 68359, 2015 WL 9480185, at *1-2 & n.1 (Nev. Ct, App. Dec. 16, 2015) (dismissing a legal malpractice claim against an attorney who did not directly represent the plaintiff at trial because the plaintiff failed to allege that the attorney's actions caused him damages without regard to whether the plaintiff had attained post-conviction relief); Hilario v. Reardon, 960 A.2d 337, 344-45 (N.H. 2008) (allowing an exception to the state's requirement that the plaintiff offer proof of actual innocence when the attorney's alleged negligence occurred *after* the convict's plea and sentencing).

56 *See* Golden v. McNeal, 78 S.W.3d 488, 491-92 (Tex. App.--Houston [14th Dist.] 2002, pet. denied).

57 *Id*. at 491.

58 *Id*. at 491, 496.

59 *Id*. at 492 (internal quotation marks omitted) (quoting Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995) (plurality opinion)).

60 *See* Gonyea v. Scott, 541 S.W.3d 238, 247-48 (Tex. App.--Houston [1st Dist.] 2017, pet. denied) (refusing to extend *Peeler* because doing so would not serve the policy goals *Peeler* advanced); Byrd v. Phillip Galyen, P.C., 430 S.W.3d 515, 525-26 (Tex. App.--Fort Worth 2014, pet. denied) (declining to extend *Peeler* in the civil context). In *Satterwhite v. Jacobs*, the First District Court of Appeals said a malpractice claim against an attorney representing a convict at a pre-trial bond hearing was "materially different" from *Peeler* largely because the representation at issue "did not involve the issue of Satterwhite's ultimate guilt or innocence." Satterwhite v. Jacobs, 26 S.W.3d 35, 36 (Tex. App.--Houston [1st Dist.] 2000), *aff'd in part, rev'd in part*, 65 S.W.3d 653 (Tex. 2001). The court reversed the trial court's grant of the attorney's summary judgment motion and remanded for further proceedings. *Id*. at 37.

61 *See Gonyea*, 541 S.W.3d at 247-48.

62 *See id*. at 247.

63 *Id*. at 240.

64 *Id*. at 241-42.

65 *Id*. at 242.

66 *Id*. at 242-43. Instead, Gonyea apparently relabeled memos drafted by others and placed them in Scott's file to make it appear that he had performed work on Scott's behalf. *Id*.

67 *Id*. at 243.

68 *Id*. at 242-43.

69 *Id*. at 246-48. California appellate courts have reached similar results under similar circumstances. *See, e.g.*, Brooks v. Shemaria, 50 Cal. Rptr. 3d 430, 431, 436 (Ct. App. 2006) (holding that a plaintiff suing for the return of an unused retainer was not required to establish actual innocence before bringing that claim); Bird, Marella, Boxer & Wolpert v. Superior Court, 130 Cal. Rptr. 2d 782, 788-90 (Ct. App. 2003) (holding that a plaintiff claiming that he was not billed according to his contract did not need to first establish actual innocence before bringing his malpractice claim).

70 *Gonyea*, 541 S.W.3d at 246. In order to reach this conclusion, the court had to distinguish *Shepherd v. Mitchell*. *See id*. at 247. *Shepherd* also involved a claim against an attorney who failed to file a writ of habeas corpus, but the client in *Shepherd* received payment in a restitution order from the State Bar of Texas. Shepherd v. Mitchell, No. 05-14-01235-CV, 2016 WL 2753914, at *1 (Tex. App.--Dallas May 10, 2016, pet. dism'd w.o.j.) (mem. op.). *Gonyea* distinguished *Shepherd* by noting, first, that *Shepherd* was a suit for negligent legal representation--as opposed to breach of contract--and second, that the client in *Shepherd* was not a client seeking contract damages or fee restitution because he had already received restitution for the legal services he never received--unlike Scott who never received a refund from Gonyea. *See Gonyea*, 541 S.W.3d at 247.

71 *Gonyea*, 541 S.W.3d at 247; *see supra* Section II.A. The court also noted that other Texas appellate courts had applied the doctrine more expansively than the Texas Supreme Court. *Gonyea*, 541 S.W.3d at 245 (observing that Texas intermediate appellate courts have applied the doctrine beyond the realm of legal malpractice claims, while the Texas Supreme Court has applied it only in the context of legal malpractice).

72 *Gonyea*, 541 S.W.3d at 247. The court also noted that ruling in favor of Scott "would not shift responsibility for the crime away from the client or diminish the consequences of the client's acts. Nor would it undermine our criminal-justice system." *Id*.

73 *See id*. at 248.

74 *Id*. at 247-48 (first citing U.S. Const. amend. VI; and then citing Strickland v. Washington, 466 U.S. 668, 685 (1984)) ("If anything, requiring some evidence of active representation to invoke *Peeler* defensively recognizes that the constitutional right to assistance of counsel is foundational to our criminal-justice system."). This allusion to constitutional rights signaled that, if *Peeler* allowed attorneys to do absolutely nothing for their clients, the doctrine might be unconstitutional. *See Gonyea*, 541 S.W.3d at 247. Whether the Supreme Court's interpretation of the Sixth Amendment would align with that of the appellate court is open to debate. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. But in *Coleman v. Thompson*, the United States Supreme Court determined that "[t]here is no constitutional right to an attorney in state post-conviction proceedings." 501 U.S. 722, 727, 752 (1991) (involving an attorney's failure to file a notice of appeal on time for a habeas corpus petition). The Supreme Court offered an exception to the *Coleman* rule in *Martinez v. Ryan*, but the rule would not be applicable here. *See* 566 U.S. 1, 9 (2012) ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."). As a result, Scott would likely have an uphill battle proving that his claim against Gonyea had constitutional support. *Cf*. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (citation omitted) ("We have never held that prisoners have a constitutional right to counsel when

mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.").

75 *See* *Gonyea*, 541 S.W.3d at 247.

76 Peeler v. Hughes & Luce, 909 S.W.2d 494, 495 (Tex. 1995) (plurality opinion).

77 *See* Browning & Rames, *supra* note 2, at 55.

78 *See* Brewer v. Hagemann, 771 A.2d 1030, 1032-33 (Me. 2001) ("Some courts have required criminal malpractice plaintiffs to prove actual innocence of the criminal charge, while other courts have required that the conviction be overturned, or that the malpractice plaintiff be exonerated of the criminal charge. A minority of courts have rejected the addition of the element of innocence or exoneration to a malpractice action and have held that a criminal malpractice plaintiff must prove the same elements as a civil malpractice plaintiff."). The Appendix following this comment provides a complete list of the approach taken by every state to legal malpractice claims in the criminal arena.

79 *See* Tim Gavin & Ken Carroll, *Exoneration as a Prerequisite to a Criminal Defendant's Legal Malpractice Claim*, Carrington Coleman (Apr. 12, 2016), http://www.ccsb.com/wp-content/uploads/2016/05/Exoneration-as-a-Prerequisite-to-a-Criminal-Defendant_s-Legal-Malpractice-Claim.pdf. [https://perma.cc/X63N-55AY].

80 *See* Cort Thomas, *Criminal Malpractice: Avoiding the Chutes and Using the Ladders*, 37 Am. J. Crim. L. 331, 332-33 (2010).

81 Arkansas appears to have no special requirement for bringing criminal malpractice claims. *See, e.g.*, Smothers v. Clouette, 934 S.W.2d 923, 924 (Ark. 1996). That said, Arkansas ordinarily requires, in civil cases, proof that but for the attorney's malpractice, the results at trial would have been different. *See* Davis v. Bland, 238 S.W.3d 924, 926 (Ark. 2006).

82 Rantz v. Kaufman, 109 P.3d 132, 136 (Colo. 2005) (en banc); *see* Michael McDermott, *Colorado, in* A Survey of the Law of Legal Malpractice (2016), https://www.primerus.com/wp-content/uploads/2016/03/PRI_0216_PDICompendium_LegalMalpractice_FNLR3v1.pdf [https://perma.cc/7BEE-3J9M].

83 Rose v. Modica, No. 285,2002, 2002 WL 31359867, at *1 (Del. Oct. 18, 2002); Sanders v. Malik, 711 A.2d 32, 34 (Del. 1998) ("The standards for proving ineffective assistance of counsel in a criminal proceeding are equivalent to the standards for proving legal malpractice in a civil proceeding."). Note that, as discussed below, Delaware does have special rules for public defenders and court-appointed attorneys. *See infra* Section II.D.11.

84 Godby v. Whitehead, 837 N.E.2d 146, 151 (Ind. Ct. App. 2005); *see* Silvers v. Brodeur, 682 N.E.2d 811, 818 (Ind. Ct. App. 1997).

85 Schwehm v. Jones, 872 So. 2d 1140, 1147 n.7 (La. Ct. App. 2004).

86 Gebhardt v. O'Rourke, 510 N.W.2d 900, 906 (Mich. 1994).

87 *See* Spencer v. Beck, 245 P.3d 21, 23-24 (Mont. 2010) (allowing a legal malpractice claim against an attorney who failed to pursue post-conviction relief that might have led to the overturning of the plaintiff's conviction); Hauschulz v. Michael Law Firm, 30 P.3d 357, 360 (Mont. 2001) (holding that an attorney's "failure to consult with his client prior to entering a guilty plea on his behalf could clearly be construed as a failure to use reasonable care and skill").

88 Duncan v. Campbell, 936 P.2d 863, 865-66 (N.M. Ct. App. 1997).

89 *See* Klem v. Greenwood, 450 N.W.2d 738, 743 (N.D. 1990).

90 *See* Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989); Amy L. Leisinger, *A Criminal Defendant's Inability to Sue His Lawyer for Malpractice: The Other Side of the Exoneration Rule*, 44 Washburn L.J. 693, 707 (2005).

91 *See* Willey v. Bugden, 318 P.3d 757, 761 n.5 (Utah Ct. App. 2013) (noting that other states require post-conviction relief or actual innocence but acknowledging no such rule in Utah).

92 *See* Dove v. Harvey, 608 S.E.2d 798, 801-02 (N.C. Ct. App. 2005) (quoting Belk v. Cheshire, 583 S.E.2d 700, 706 (N.C. Ct. App. 2003)).

93 The law in Alabama is in flux and unsettled, but the Alabama Supreme Court has suggested that convicts asserting legal malpractice claims must establish that but for their attorneys' negligence, the outcome at trial would have been different. *See* Bennardo, *supra* note 15, at 343 n.9 (citing contradicting cases imposing this standard and a stricter variant in the state).

94 *See* McCord v. Bailey, 636 F.2d 606, 611 (D.C. Cir. 1980).

95 *See* Gomez v. Peters, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996). Note that the state also denies convicts who have admitted guilt the right to sue for legal malpractice. *See id*.

96 McVaney v. Baird, Holm, McEachen, Pedersen, Hamann, & Strasheim, 466 N.W.2d 499, 507 (Neb. 1991); Eno v. Watkins, 429 N.W.2d 371, 372 (Neb. 1988).

97 *See* Laurence v. Sollitto, 788 A.2d 455, 459 (R.I. 2002).

98 *E.g.*, Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991); *see* Bennardo, *supra* note 15, at 342 & n.3 (listing cases mentioning this requirement); Browning & Rames, *supra* note 2, at 61-62 (noting that Massachusetts, Washington, Wisconsin, and Illinois have adopted this rule).

99 Paulsen v. Cochran, 826 N.E.2d 526, 530 (Ill. App. Ct. 2005). An exception to actual innocence requirement applies if the attorney intentionally sought his client's conviction. *Id*. at 531.

100 Ray v. Stone, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (noting in dicta that attaining post-conviction relief could help establish the convict's innocence but holding that it was the convict's guilty plea at the trial court that precluded him from claiming he was actually innocent).

101 Marchetti v. Atwood, No. 17-00749, 2017 WL 5760936, at *3 (Mass. Super. Ct. Nov. 21, 2017).

102 *See* Costa v. Allen, 323 S.W.3d 383, 387 (Mo. Ct. App. 2010).

103 Britt v. Legal Aid Soc'y, Inc., 741 N.E.2d 109, 110 (N.Y. 2000); Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987).

104 *See* Robinson v. Southerland, 123 P.3d 35, 43-44 (Okla. Civ. App. 2005).

105 Brown v. Theos, 550 S.E.2d 304, 306-07 (S.C. 2001).

106 Tallmadge v. Boyle, 730 N.W.2d 173, 181 (Wis. Ct. App. 2007).

107 Shaw v. State, 861 P.2d 566, 569, 572 (Alaska 1993) (stating that the statute of limitations for a malpractice suit does not begin until the criminal defendant obtains post-conviction relief); *see* Bruce Gagnon & Christopher Slottee, *State of Alaska, in* The Law of Lawyers' Liability 13 (Merri A. Baldwin et al. eds., 2012).

108 *See* Bennardo, *supra* note 15, at 341-42 (defining "legal innocence" as "prov[ing] by a preponderance of the evidence that but for the lawyer's negligence, the malpractice plaintiff would not have been convicted in the underlying criminal trial by proof beyond a reasonable doubt"); Browning & Rames, *supra* note 2, at 61 & nn.53-60 (noting that forms of this rule have been applied in Tennessee, Iowa, West Virginia, Georgia, Idaho, Kentucky, New Hampshire, and California).

109 Glaze v. Larsen, 83 P.3d 26, 32-33 (Ariz. 2004) (en banc) (citation omitted) (stating that "'any post-conviction relief suffices,' ... as long as the underlying criminal proceedings are thereby terminated favorably to the defendant").

110 Coscia v. McKenna & Cuneo, 25 P.3d 670, 673-74 (Cal. 2001); **Wiley** v. Cty. of **San Diego**, 966 P.2d 983, 987 (Cal. 1998).

111 *See* Molen v. Christian, 388 P.3d 591, 595-96 (Idaho 2017).

112 Barker v. Capotosto, 875 N.W.2d 157, 166 (Iowa 2016); Trobaugh v. Sondag, 668 N.W.2d 577, 583 (Iowa 2003).

113 Canaan v. Bartee, 72 P.3d 911, 913 (Kan. 2003).

114 Berringer v. Steele, 758 A.2d 574, 597 (Md. Ct. Spec. App. 2000).

115 Noske v. Friedberg, 670 N.W.2d 740, 744 (Minn. 2003).

116 Trigg v. Farese, No. 2015-CA-00045-SCT, 2018 WL 6241322, at *8 (Miss. Nov. 29, 2018) ("To be clear, when we say a defendant must be 'exonerated,' we mean he must obtain a more favorable disposition of his conviction or sentence through direct appeal, postconviction relief, habeas corpus, or similar means within the criminal justice process.3 At that point, the malpractice suit may be initiated even if the underlying criminal case has not yet been finally resolved." (footnote omitted)).

117 Rogers v. Cape May Cty. Office of the Pub. Def., 31 A.3d 934, 939-40 (N.J. 2011).

118 *See* Gibson v. Trant, 58 S.W.3d 103, 108 (Tenn. 2001).

119 *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497-98 (Tex. 1995) (plurality opinion).

120 Stevens v. Bispham, 851 P.2d 556, 557, 560 (Or. 1993) (en banc).

121 Drollinger v. Mallon, 260 P.3d 482, 490 (Or. 2011) (en banc). If the plaintiff's alleged harm is suffering brought about by continued incarceration, however, the plaintiff "must plead and prove that, if defendants had performed competently in the post-conviction proceeding, plaintiff would have obtained relief in that proceeding, that he would have avoided reconviction in any subsequent proceeding on remand, and that he would have been released from prison." *Id*.

122 *See* Bailey v. Tucker, 621 A.2d 108, 114-15 (Pa. 1993).

123 *See* Schreiber v. Rowe, 814 So. 2d 396, 398-400 (Fla. 2002) (per curiam); *see* Steele v. Kehoe, 747 So. 2d 931, 932-33 (Fla. 1999); Cocco v. Pritcher, 1 So. 3d 1246, 1248 (Fla. Dist. Ct. App. 2009) ("The [plaintiff] must also 'establish [that] the final disposition of the underlying criminal case [was] in his or her favor.'"); Cira v. Dillinger, 903 So. 2d 367, 370-71 (Fla. Dist. Ct. App. 2005).

124 *See* Clark v. Robison, 944 P.2d 788, 790 (Nev. 1997) (per curiam) (finding that post-conviction relief is required for a malpractice suit); Morgano v. Smith, 879 P.2d 735, 737-38 (Nev. 1994) (per curiam) (adding the requirement that the plaintiff prove actual innocence as an element of a malpractice suit).

125 *See* Therrien v. Sullivan, 891 A.2d 560, 563-64 (N.H. 2006) (requiring proof of actual innocence and post-conviction relief). The criminal malpractice claim begins to accrue when the plaintiff attains and establishes by a preponderance of the evidence actual innocence to bring the claim. Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 727 A.2d 996, 998-1000 (N.H. 1999).

126 Adkins v. Dixon, 482 S.E.2d 797, 800-02 (Va. 1997).

127 Ang v. Martin, 114 P.3d 637, 640-41 (Wash. 2005) (en banc).

128 Humphries v. Detch, 712 S.E.2d 795, 801 (W. Va. 2011).

129 Browne v. Robb, 583 A.2d 949, 950-51 (Del. 1990).

130 Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn. 1993); Morgano v. Smith, 879 P.2d 735, 736-37 (Nev. 1994) (per curiam).

131 *See* Nev. Rev. Stat. Ann. §§ 41.0307(4)(b), 41.032 (LexisNexis 2012 & Supp. 2016); *Morgano*, 879 P.2d at 737.

132 The Connecticut Supreme Court has not yet considered the issue, but a federal court ruling determined that a convicted plaintiff would need to seek appellate or postconviction relief before bringing a malpractice suit. *See* McCurvin v. Law Offices of Koffsky & Walkley, No. CIV.A.3:98CV182(SRU), 2003 WL 223428, at *3-4 (D. Conn. Jan. 27, 2003).

133 *See* Jeffrey S. Portnoy & Peter W. Olson, *State of Hawaii, in* The Law of Lawyers' Liability, *supra* note 107, at 118 ("Hawaii does not have any reported cases requiring a criminal defendant/legal malpractice plaintiff to prove innocence in order to prove causation.").

134 *See* William C. Saturley & Holly E. Russell, *State of Maine, in* The Law of Lawyers' Liability, *supra* note 107, at 205 ("We have not yet had occasion to determine whether legal malpractice based on negligent representation in a criminal case should be treated differently from legal malpractice arising from representation in a civil matter." (citing Brewer v. Hagemann, 771 A.2d 1030, 1031-33 (Me. 2001))).

135 *See* Thomas J. Welk & Jason R. Sutton, *State of South Dakota, in* The Law of Lawyers' Liability, *supra* note 107, at 455 ("There are no South Dakota cases addressing whether the plaintiff must prove innocence to recover in legal malpractice actions arising out of a criminal case.").

136 *See* Herbert G. Ogden, *State of Vermont*, *in* The Law of Lawyers' Liability, *supra* note 107, at 505 (noting that in 2006 the Vermont Supreme Court "declined to decide whether to require actual innocence." (citing Bloomer v. Gibson, 912 A.2d 424, 431 (Vt. 2006))).

137 *Cf.* Scott E. Ortiz, *State of Wyoming*, *in* The Law of Lawyers' Liability, *supra* note 107, at 558 ("Wyoming does not have an innocence requirement for legal malpractice plaintiffs in criminal cases.").

138 *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497-98 (Tex. 1995) (plurality opinion) (holding that a criminal defendant does not have a malpractice action unless the guilty verdict is a result of the attorney's illegal conduct and the conviction has been overturned).

139 Jolie McCullough & Justin Dehn, *How Some See Texas as the "Gold Standard" Against Wrongful Convictions*, Tex. Trib. (Sept. 20, 2017), https://www.texastribune.org/2017/09/20/texas-lawmakers-hope-prevent-wrongful-convictions/ [https://perma.cc/DA8Y-4BFU].

140 *Id.; Texas Governor Signs Landmark Comprehensive Legislation to Prevent Wrongful Convictions*, Innocence Project (June 15, 2017), https://www.innocenceproject.org/texasgovernorsignslandmarkbill/ [https://perma.cc/M3X7-792E] ("Texas now has the most comprehensive statute in the nation to regulate the use of jailhouse informants, which played a role in nine wrongful convictions in the state and is a leading contributor to wrongful convictions nationally."); *Bill Texts: TX HB34 | 2017-2018 | 85th Legislature*, Legi Scan, https://legiscan.com/TX/drafts/HB34/2017 [https://perma.cc/CV4D-UKT6] (last visited Mar. 19, 2019) (showing that the bill was passed on June 12, 2017, and became effective on September 1, 2017). These reformations were inspired, in part, by the stories of people recently exonerated. McCullough & Dehn, *supra* note 139.

141 McCollough & Dehn, *supra* note 139 ("Texas has long led the nation in the number of people it exonerates .... Since 2010, more than 200 people have been exonerated in Texas, according to the National Registry of Exonerations. That's more than twice as many as any other state during the same period."). The National Registry of Exonerations tracks the number of exonerations by state, recording the alleged crime, number of years lost in prison, and more. *Exonerations by State*, Nat'l Registry Exonerations, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx [https://perma.cc/V9WC-CE4Q] (last visited Mar. 19, 2019). The registry was the result of coordinated efforts by the Newkirk Center for Science & Society at the University of California Irvine, University of Michigan Law School, Michigan State University College of Law, and the Center on Wrongful Convictions at Northwestern University School of Law. *Id.* As of February 21, 2019, Texas has exonerated 359 people since 1989. The state with the second highest number of exonerations is Illinois with 281. *Id.*

142 *Conviction Rates for Concealed Handgun License Holders*, Tex. Dep't Pub. Safety, http://www.dps.texas.gov/rsd/ltc/reports/convrates.htm [https://perma.cc/3XT3-2R8Q] (last visited Mar. 19, 2019) (listing total convictions annually from 2001 to 2017, which range from 40,624 in 2001 to 73,914 in 2010).

143 *Peeler*, 909 S.W.2d at 500.

144 Many states reference *Peeler* as justification for embracing an approach to criminal defense legal malpractice cases that makes it more difficult to hold attorneys accountable for negligent representation. *See, e.g.*, Coscia v. McKenna & Cuneo, 25 P.3d. 670, 674 (Cal. 2001) (quoting *Peeler*, 909 S.W.2d at 498).

145 *See supra* Section II.D; *see also infra* Appendix.

146 *See supra* Section II.B; Duncan, *supra* note 1, at 1292-93 ("Lawyers practicing without accountability present the very real risk of routinely providing substandard legal representation.").

147 The four policies advanced in *Peeler* include: prohibiting a convict from profiting from his illegal conduct, prohibiting a convict from shifting responsibility for the crime to a third party, protecting convicts from shirking from the consequences of their actions, and prevent the undermining of the criminal justice system. *Peeler*, 909 S.W.2d at 497-98.

148 *See Peeler*, 909 S.W.2d at 501 (Phillips, C.J., dissenting).

149 Duncan, *supra* note 1, at 1305.

150 *Id*. at 1287. *See also* Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 727 A.2d 996, 999 (N.H. 1999).

151 *In re* Estate of Laspy, 409 S.W.2d 725, 730 (Mo. Ct. App. 1966).

152 Gonyea v. Scott, 541 S.W.3d. 238, 245 (Tex. App--Houston [1st Dist.] 2017, pet. denied) (citing *Peeler*, 909 S.W.2d at 497-98).

153 *Id*. (citing *Peeler*, 909 S.W.2d at 497-98).

154 *See* Johnson, *supra* note 29, at 298 (suggesting that the "war on crime" policy justification for limiting criminal legal malpractice claims may be explained by a different underlying concern that criminal defense attorneys could be at risk of receiving a deluge of malpractice suits).

155 *See Peeler*, 909 S.W.2d at 498.

156 *Id*. at 500; *see Gonyea*, 541 S.W.3d at 245.

157 Duncan, *supra* note 1, at 1291-92.

158 *See* Browning & Rames, *supra* note 2, at 55.

159 *See id*. at 55-56; Johnson, *supra* note 29, at 298. *See also* Leisinger, *supra* note 90, at 706 ("Prisoners have a lot of time and little else to do, and if prisoners must obtain post-conviction relief before maintaining a legal malpractice action, a great deal of litigation can be avoided." (citation omitted)).

160 Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 727 A.2d 996, 999-1000 (N.H. 1999) ("[T]he pool of legal representation available to criminal defendants, especially indigents, needs to be preserved .... Setting the standard at a lower level may well dampen counsels' willingness to enter the criminal defense arena.").

161 *See* Browning & Rames, *supra* note 2, at 55; Susan M. Treyz, Note, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, Fordham L. Rev. 719, 731-33 (1991). In *Mahoney*, the court argued that public policy favors a "stricter standard for criminal malpractice actions" because, among other policy considerations, "the criminal justice system affords individuals charged with crimes a panoply of protections against abuses of the system and wrongful conviction ...." 727 A.2d at 999. The court proceeded to list safeguards for criminal defendants including "the right to constitutionally effective defense counsel, ... [T]he law governing search

and seizure, the probable cause requirement for arrest, the beyond a reasonable doubt standard for conviction, and post-conviction relief not afforded civil litigants." *Id*. (citations omitted).

162 *See supra* Section II.D.1.

163 *See* Duncan, *supra* note 1, at 1296 (arguing that guilty criminal defendants and innocent criminal defendants alike should be entitled to a tort remedy "by means of a criminal malpractice action").

164 *See id*. at 1268.

165 *See id*. at 1287, 1306.

166 *See* Gonyea v. Scott, 541 S.W.3d 238, 241-42 (Tex. App.--Houston [1st] 2017, pet. denied).

167 *See* Duncan, *supra* note 1, at 1291.

168 *Cf. Gonyea*, 541 S.W.3d at 247-48.

169 *See* Duncan, *supra* note 1, at 1287.

170 *See supra* Section II.C.

171 Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995) (plurality opinion).

172 *Id*. at 498.

173 Duncan, *supra* note 1, at 1272.

174 *See* Browning & Rames, *supra* note 2, at 55-56.

175 *See* Bennardo, *supra* note 15, at 362. And the opportunity to recover financially from a criminal legal malpractice suit may not fully offset the jail time, fines, and other consequences of conviction that criminal defendants face. For instance, Carol Peeler was fined a total of $250,000 in addition to other penalties under her plea deal, and she paid her defense counsel at least another $250,000 to represent her. *Peeler*, 909 S.W.2d at 496. If her malpractice suit had allowed her a $500,000 recovery minus attorney's fees, she still would have to serve her prison sentence and five years on probation, as well as the reputational harm and other consequences of her conviction. *See id*. Whether this result "would allow the criminal to profit [from her] own fraud" or to "escap[e] the consequences of" her crime is questionable. *See id*. at 497, 500 (quoting State *ex rel*. O'Blennis v. Adolf, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985)).

176 Duncan, *supra* note 1, at 1287 ("[T]here is no public policy favoring allowing [sic] a negligent attorney to shift the responsibility for that attorney's negligence onto his client simply because his client may have committed a criminal offense. Yet, that is precisely the effect of the present standard.").

177 *See* Leisinger, *supra* note 90, at 706.

178 *See* Duncan, *supra* note 1, at 1288-89.

179 *Id*. at 1290.

180 *See, e.g., supra* Section II.D.11.

181 *See* Gonyea v. Scott, 541 S.W.3d 238, 247-48 (Tex. App.--Houston [1st Dist.] 2017, pet. denied). It would also allow others who paid for unreceived or inadequate legal services to pursue their own claims against criminal defense attorneys, such as the parents of convicts who hire defense counsel to defend their children facing criminal charges or seeking post-conviction relief. *See, e.g.*, Manderscheid v. Cogdell, No. 01-99-00930-CV, 2000 WL 233154, at *1-2 (Tex. App.--Houston [1st Dist.] Mar. 2, 2000, no pet.) (not designated for publication) (applying *Peeler* to bar claims by the convict's parents against a defense attorney whom they hired to defend their son). Allowing these claims would certainly not allow convicts to profit from their crimes.

182 *Cf. supra* Section III.B (discussing alternatives to the *Peeler* doctrine).

183 *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497-99 (Tex. 1995) (plurality opinion) (making multiple references to the policy goal of keeping convicts from profiting from their crimes).

184 This rule would allow convicts to receive a refund on money spent in contract with attorneys for services that were never provided, as in *Gonyea. See Gonyea*, 541 S.W.3d at 241-42.

185 Alternatively, courts could allow convicted plaintiffs financial compensation for punishments the convict would likely not have received had the plaintiff received better representation. The Colorado Supreme Court allowed a similar argument in *Rantz v. Kaufman*; while rejecting the exoneration rule, it established the "legally cognizable harm" standard in its place. 109 P.3d 132, 137-38 (Colo. 2005) (en banc); *see also infra* Section III.B.6 (discussing a requirement of proof of a legally cognizable injury as an alternative to the *Peeler* doctrine). Responding to the argument that criminals should not be allowed to profit from their crimes, the court ruled that

> [P]reventing an individual from profiting from criminal conduct is better addressed at the individual case level. Before recovering damages, a criminal defendant will have to demonstrate that the negligence of his or her attorney caused legally cognizable harm. A criminal defendant who prevails in a malpractice action is receiving compensation for an injury suffered, in the form of time spent in prison or the burden of a criminal record, not a windfall.

Rantz, 109 P.3d at 137-38.

186 *See* Duncan, *supra* note 1, at 1293-94. This alternative remedy would be similar to that in *Dugger v. Arredondo* in which the Texas Supreme Court considered a proportionate responsibility statute for tort claims and ruled that application of the common law unlawful acts doctrine, which barred recovery for plaintiffs who were engaged in unlawful acts, was no longer a viable affirmative defense in wrongful death suits. *See* 408 S.W.3d 825, 831-32 (Tex. 2013); Browning & Rames, *supra* note 2, at 124-26 (suggesting that *Dugger v. Arredondo* may one day be applied in the legal malpractice context); Johnson, *supra* note 29, at 299-300. Application of a proportionate responsibility statute in the context of criminal legal malpractice suits would allow malpractice claims to proceed but would treat the criminal's misconduct that gave rise to the situation as partially responsible for any penalty imposed on the attorney. *See* Browning & Rames, *supra* note 2, at 125.

187 This was the point of contention at issue in *Falby*, the case that first extended *Peeler* in Texas to bar claims against attorneys who agreed to represent convicts after their original conviction proceedings had concluded. *See* Falby v. Percely, No. 09-04-422 CV, 2005 WL 1038776, at *2-3 (Tex. App.--Beaumont May 5, 2005, no pet.) (mem. op.).

188 *See* Duncan, *supra* note 1, at 1291 & n.175 (listing safeguards designed to protect criminal defendants from negligent representation).

189 *See, e.g., Falby*, 2005 WL 1038776, at *2-3 (affirming summary judgment that barred a claim against an attorney who did not represent the plaintiff at trial).

190 Drollinger v. Mallon, 260 P.3d 482, 489-90 (Or. 2011) (en banc).

191 *See supra* Section II.D.3 (discussing six states that have adopted this approach).

192 Restatement (Third) of the Law Governing Lawyers § 53 cmt. d (Am. Law Inst. 2000).

193 *See* Duncan, *supra* note 1, at 1296-97 (arguing in favor of the legal injury rule and explaining that "[c]ourts need to recognize that a person convicted of criminal charges may have suffered harm by virtue of his attorney's negligent conduct even if, without the negligent conduct, the person may have been convicted and punished to some extent").

194 *See* Dep't of Research & Analysis, State Bar of Tex., 2014 Attorney Population Density by Metropolitan Statistical Area 2 (2014-15), https://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=30865 [https://perma.cc/3BUU-XNB9].

195 Office of Chief Disciplinary Counsel, State Bar of Tex., https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/OfficeOfCDC.htm [https://perma.cc/N25G-KDK5] (last visited Mar. 19, 2019).

196 According to professors Hazard and Dondi, "[t]here are no reliable figures on the effectiveness of professional policing of incompetence, and a reliable measure of the incidence of incompetence would be difficult or impossible to construct. However, we believe that disciplinary response to lawyer incompetence is weak everywhere." Geoffrey C. Hazard Jr. & Angelo Dondi, Legal Ethics: A Comparative Study 136 (2004). Professor Duncan has similarly noted that "ethics opinions and decisions alike have indicated that the disciplinary process should not be used to ensure that clients receive competent lawyering." Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 50 BYU L. Rev. 1, 43 (2002) (citations omitted). Professor Duncan further argued that "an automatic referral system should be implemented" that subjects "the conduct of any lawyer who is the subject of an ineffective assistance of counsel claim or a criminal malpractice claim to [an] appropriate disciplinary body." *Id*. at 46.

197 *See* Duncan, *supra* note 1, at 1291 & n.178 (arguing that neither the criminal justice system nor the disciplinary system provides criminal defendants adequate protections against incompetent representation). The same is likely true outside of Texas. Nationally speaking, "[d]isciplinary sanctions against errant criminal defense lawyers are a rarity." Johnson, *supra* note 29, at 297.

198 *See* Tex. Const. art. XVII, § 1(a) (stating that the legislature may submit proposed amendments to voters with the support of two-thirds of the Texas House and Senate).

199 *See* Duncan, *supra* note 1, at 1254-55 (stating that existing obstacles render "the civil system ... essentially unavailable as a means of monitoring--and thereby improving--criminal defense lawyering").

200 *See supra* Section III.B.1.

201 See Johanna M. Hickman, *Recent Developments in the Area of Criminal Malpractice*, 18 Geo. J. of Legal Ethics 797, 797-98 (2005), for a list of states rejecting the exoneration rule.

202 *See* Bennardo, *supra* note 15, at 343 n.9 (citing contradicting cases imposing this standard and a stricter variant within the state).

203 Shaw v. State (*Shaw II*), 861 P.2d 566, 569, 572 (Alaska 1993); *see* Gagnon & Slottee, *supra* note 107, at 13 ("A plaintiff convicted of a crime 'must obtain post-conviction relief before pursuing an action for legal malpractice against his or her attorney.'" (quoting Shaw v. State (*Shaw I*), 816 P.2d 1358, 1360 (Alaska 1991))).

204 *Shaw II*, 861 P.2d at 572.

205 *Id*.

206 Glaze v. Larsen, 83 P.3d 26, 32-33 (Ariz. 2004) (en banc).

207 Arkansas ordinarily requires proof that but for the attorney's malpractice, the results at trial would have been different. *See* Davis v. Bland, 238 S.W.3d 924, 926 (Ark. 2006).

208 Coscia v. McKenna & Cuneo, 25 P.3d. 670, 673-74 (Cal. 2001) (holding that reversal of a conviction or other exoneration is required to prove actual innocence); **Wiley** v. City of **San Diego**, 966 P.2d 983, 987 (Cal. 1998) (declining to allow a malpractice claim without proof of actual innocence).

209 Rantz v. Kaufman, 109 P.3d 132, 136 (Colo. 2005) (en banc) (rejecting the notion that a criminal must acquire post-conviction relief to bring or establish proximate cause in a criminal malpractice suit); *see* Khan, *supra* note 82, at 22-23.

210 *See* McCurvin v. Law Offices of Koffsky & Walkley, No. Civ.A.3:98CV182(SRU), 2003 WL 223428, at *2 (D. Conn. Jan. 27, 2003) (stating that the Connecticut Supreme Court would likely require the plaintiff seek appellate or post-conviction relief prior to a malpractice suit). The decision fails to clarify whether such a plaintiff would need to *prevail* in his post-conviction relief suit. *See id*. A state appellate court *has* ruled, however, that ineffective assistance of counsel is not the same as a malpractice claim. *See* Schiff v. Williams, No. 267512, 1991 WL 29349, at *4-5 (Conn. Super. Ct. Feb. 7, 1991).

211 *See* Rose v. Modica, No. 285, 2002, 2002 WL 31359867, at *1 (Del. Oct. 18, 2002) (upholding dismissal of legal malpractice claim filed after denial of ineffective assistance of counsel claim); Sanders v. Malik, 711 A.2d 32, 34 (Del. 1998) (barring legal malpractice claim because plaintiff previously litigated an ineffective assistance of counsel claim).

212 *See* Tanya E. Pino, *State of Delaware*, *in* The Law of Lawyers' Liability, *supra* note 107, at 80 (citing Sanders v. Malik, 711 A.2d 32, 34 (Del. 1998)).

213 *See* McCord v. Bailey, 636 F.2d 606, 610-11 (D.C. Cir. 1980) (holding that a prior hearing for an ineffective assistance of counsel claim is not required for collateral estoppel to bar a later malpractice claim); Smith v. Pub. Def. Serv. for D.C., 686 A.2d 210, 211-12 (D.C. 1996) (holding that collateral estoppel barred a malpractice suit following a failed ineffective assistance of counsel suit but stating that failed ineffective assistance of counsel claims do not "automatically" bar subsequent malpractice claims because the standards for each differ.); Bennardo, *supra* note 15, at 343 n.9 (citing Brown v. Jonz, 572 A.2d 455, 457 n.7 (D.C. 1990).

214 *See* Schreiber v. Rowe, 814 So. 2d 396, 398-400 (Fla. 2002) (upholding a rule that criminal defendants must prove innocence for a viable legal practice claim); Steele v. Kehoe, 747 So. 2d 931, 932-33 (Fla. 1999) (holding that a "convicted criminal defendant must obtain appellate or post-conviction relief as a precondition to maintaining a legal malpractice action").

215 Cocco v. Pritcher, 1 So. 3d 1246, 1248 (Fla. Dist. Ct. App. 2009) (requiring "final disposition of the underlying criminal case in [the defendant's] favor" (citing Cira v. Dillinger, 903 So. 2d 367, 371 (Fla. Dist. Ct. App. 2005))).

216 *See* Gomez v. Peters, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996) ("[A] plaintiff must show that he would have prevailed in the underlying litigation if the defendant had not been negligent ...." (citing McDow v. Dixon, 226 S.E.2d 145, 146 (1976) ("[T]he plaintiff's proof of damages effectively requires proof that he would have prevailed in the original litigation.")).

217 *See Gomez*, 470 S.E.2d at 695.

218 *See* Portnoy & Olson, *supra* note 133, at 118.

219 *See* Molen v. Christian, 388 P.3d 591, 596 (Idaho 2017). In reaching this decision, the court reasoned as follows:

> Requiring a criminal malpractice plaintiff to prove actual innocence is contrary to the fundamental principle that a person is presumed innocent until proven guilty beyond a reasonable doubt. Further, a criminal defendant can be harmed separately from the harm he or she incurs as a result of being guilty of a crime. Additionally, as a practical matter, requiring actual innocence would essentially eliminate a defense attorney's duty to provide competent counsel to a client he or she knows to be guilty.
>
> *Id*. at 596 (citation omitted).

220 *See id*. at 595-96 (reasoning that adoption of the exoneration rule can help in avoiding multiple lawsuits and wasting judicial resources).

221 Paulsen v. Cochran, 826 N.E.2d 526, 530 (Ill. App. Ct. 2005) (citing Kramer v. Dirksen, 695 N.E.2d 1288, 1290 (Ill. App. Ct. 1998)).

222 *Id*. at 531 (quoting Morris v. Margulis, 718 N.E.2d 709, 720-21 (Ill. App. Ct. 1999)).

223 *See* Godby v. Whitehead, 837 N.E.2d 146, 151 (Ind. Ct. App. 2005) ("[A] criminal defendant does not have to prove his innocence before he files a legal practice claim." (citing Silvers v. Brodeur, 682 N.E.2d 811, 818 (Ind. Ct. App. 1997) (holding that a malpractice action must be filed "within two years of discovering the malpractice")); Leisinger, *supra* note 90, at 707 (citing *Silvers*, 682 N.E.2d at 818); Hickman, *supra* note 201, at 799-800 (citing *Silvers*, 682 N.E.2d at 818).

224 *See* Barker v. Capotosto, 875 N.W.2d 157, 166 (Iowa 2016) ("We find the approach taken by the Restatement and like-minded jurisdictions to be persuasive. The prerequisite that the malpractice plaintiff obtain judicial relief from her or his conviction, which the Restatement endorses and which we adopted in *Trobaugh* after 'considering all of the issues presented and the wealth of commentary on this issue,' serves as an important screen against unwarranted claims and 'preserves key principles of judicial economy and comity.' But we do not think an additional actual innocence screen is appropriate. Such a prerequisite goes beyond respecting the criminal process-- i.e., 'judicial economy and comity'--and interposes an additional barrier to recovery that other malpractice plaintiffs do not have to overcome." (citation omitted) (quoting Trobaugh v. Sondag, 668 N.W.2d 577, 583 (Iowa 2003))).

225 Mashaney v. Bd. of Indigents' Def. Servs., 355 P.3d 667, 687 (Kan. 2015).

226 Canaan v. Bartee, 72 P.3d 911, 913 (Kan. 2003) (adopting a rule that postconviction relief is a prerequisite to a malpractice action).

227 *See* Ray v. Stone, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (quoting Peeler v. Hughes & Luce, 868 S.W.2d 823, 832 (Tex. App.--Dallas (1993), *aff'd*, 909 S.W.2d 494 (Tex. 1995))).

228 *See* Schwehm v. Jones, 872 So. 2d 1140, 1147 n.7 (La. Ct. App. 2004) (declining to adopt the exoneration rule).

229 *See id*. at 1144 (stating that an attorney who does not meet "the standard of competence and expertise usually exercised by other attorneys in handling such matters" is liable for his actions).

230 *See* Saturley & Russell, *supra* note 134, at 204-05 ("Whether criminal-malpractice plaintiffs in Maine must prove innocence is an unsettled question of law." (citing Brewer v. Hagemann, 771 A.2d 1030, 1031-32 (Me. 2001) ("We have not yet had occasion to determine whether legal malpractice based on negligent representation in a criminal case should be treated differently from legal malpractice arising from representation in a civil matter.")).

231 *See Brewer*, 771 A.2d at 1033 ("The situation presented by this case does not require us to consider departing from the standard elements that every legal malpractice plaintiff must prove.").

232 Whitmore v. O'Brien, No. CV-09-224, 2010 Me. Super. LEXIS 52, at *15-16 (Me. Super. Ct. May 14, 2010) (citing Hilario v. Reardon, 960 A.2d 337, 344-45 (N.H. 2008)).

233 Berringer v. Steele, 758 A.2d 574, 597 (Md. Ct. Spec. App. 2000) (emphasis omitted).

234 Marchetti v. Atwood, No. 17-00749, 2017 WL 6210752, at *5 (Mass. Super. Ct. Nov. 21, 2017) (mem. op.) ("[C]ivil recovery by a guilty plaintiff is not warranted without proof of innocence." (quoting Correia v. Fagan, 891 N.E.2d 227, 233 n.13 (Mass. 2008))). This actual innocence requirement imposes a higher standard on the plaintiff than a legal innocence requirement would. *See* Browning & Rames, *supra* note 2, at 61 (arguing that proof of actual innocence "set[s] the bar even higher" than post-conviction relief). Indeed, "[b]ecause of the heavy burden of proof in a criminal case [in another Massachusetts court ruling which also applied the actual innocence standard], an acquittal did not suffice to satisfy the actual innocence requirement." *Id*.

235 *See* Labovitz v. Feinberg, 713 N.E.2d 379, 384 n.11 (Mass. App. Ct. 1999) ("We do not consider whether a criminal defendant must also be exonerated before being permitted to bring a civil malpractice action ....").

236 *Id*. at 383-84.

237 *See* Gebhardt v. O'Rourke, 510 N.W.2d 900, 906 n.13 (Mich. 1994) (Unis, J., concurring) (remarking tongue in cheek that "persons convicted of a crime will be astonished to learn that, even if their lawyers' negligence resulted in their being wrongly convicted and imprisoned, they were not harmed when they were wrongly convicted and imprisoned but, rather, that they are harmed only if and when they are exonerated" (quoting Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993))).

238 *See* Schlumm v. Terrence J. O'Hagan, P.C., 433 N.W.2d 839, 847 (Mich. Ct. App. 1988) (affirming the denial of summary judgment for the plaintiff's breach of contract and fraudulent misrepresentation claims against his former attorney).

239 *See* Noske v. Friedberg, 670 N.W.2d 740, 744 (Minn. 2003) (noting that a legal malpractice claim cannot withstand a motion to dismiss unless the plaintiff receives postconviction relief prior to the claim).

240 Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn. 1993).

241 Trigg v. Farese, No. 2015-CA-00045-SCT, 2018 WL 6241322, at *8 (Miss. Nov. 29, 2018) ("To be clear, when we say a defendant must be 'exonerated,' we mean he must obtain a more favorable disposition of his conviction or sentence through direct appeal, postconviction relief, habeas corpus, or similar means within the criminal justice process. At that point, the malpractice suit may

be initiated even if the underlying criminal case has not yet been finally resolved." (footnote omitted)). Before *Trigg*, Mississippi required that the plaintiff show that but for his attorney's negligence, "he would today be a free man." Singleton v. Stegall, 580 So. 2d 1242, 1246 (Miss. 1991).

242 *See* Costa v. Allen, 323 S.W.3d 383, 387 (Mo. Ct. App. 2010) (quoting State *ex. rel*. O'Blennis v. Adolf, 691 S.W.2d 498, 503 (Mo. Ct. App. 1985)); *see also* Scott. D. Hofer, *Missouri, in* A Survey of the Law of Legal Malpractice, 71, 73 & n.3 (2016) (citing *Costa*, 323 S.W.3d at 387), https://www.primerus.com/wp-content/uploads/2016/03/PRI_0216_PDICompendium_LegalMalpractice_FNLR3v1.pdf [https://perma.cc/6L9Q-PX4C]

243 See Spencer v. Beck, 245 P.3d 21, 24 (Mont. 2010) (allowing a legal malpractice claim against an attorney who failed to pursue post-conviction relief that might have led to the overturning of the plaintiff's conviction); Hauschulz v. Michael Law Firm, 30 P.3d 357, 360 (Mont. 2001) (holding that an attorney's "failure to consult with his client prior to entering a guilty plea on his behalf could" form a sufficient basis for a valid malpractice claim).

244 *See* McVaney v. Baird, Holm, McEachen, Pedersen, Hamann, & Strasheim, 466 N.W.2d 499, 507 (Neb. 1991) (citing Eno v. Watkins, 429 N.W.2d 371, 372 (Neb. 1988)).

245 Clark v. Robison, 944 P.2d 788, 790 (Nev. 1997) (citing Morgano v. Smith, 879 P.2d 735, 737 (Nev. 1994)).

246 *Morgano*, 879 P.2d at 738 (citing Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991)).

247 Nev. Rev. Stat. Ann. §§ 41.0307(4)(b), 41.032 (2016); *Morgano*, 879 P.2d at 736-37 (citing Ramirez v. Harris, 773 P.2d 343, 344-45 (Nev. 1989)).

248 *See Ramirez*, 773 P.2d at 345 (noting that civil rights claims against public defenders are not viable unless the complainant makes these allegations).

249 Therrien v. Sullivan, 891 A.2d 560, 564 (N.H. 2006).

250 Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 727 A.2d 996, 998-99 (N.H. 1999).

251 Hilario v. Reardon, 960 A.2d 337, 345 (N.H. 2008) (citing *Mahoney*, 727 A.2d 996).

252 *See* Rogers v. Cape May, 31 A.3d 934, 939 (N.J. 2011) (affirming that a legal malpractice claim does not accrue until the plaintiff is exonerated (citing McKnight v. Office of Pub. Def., 962 A.2d 482, 483 (N.J. 2008) (per curiam))). Exoneration may include: (1) "vacation of a guilty plea and dismissal of the charges," (2) "entry of judgment on a lesser offense after spending substantial time in custody following conviction for a greater offense," or (3) "any disposition more beneficial to the criminal defendant than the original judgment." *See McKnight*, 962 A.2d at 483 (quoting McKnight v. Office of Pub. Def., 936 A.2d 1036, 1056 (N.J. Super. Ct. App. Div. 2007) (Stern, J., dissenting), *rev'd*, 962 A.2d 482 (2008)).

253 *See* Duncan v. Campbell, 936 P.2d 863, 865 (N.M. 1997) (holding that the statute of limitations for a legal malpractice claim begins upon discovery of the injury (citing Sharts v. Natelson, 885 P.2d 642, 645 (N.M. 1994))).

254 *See* Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987) (finding that failure to successfully challenge the underlying conviction by plea bars a legal malpractice claim (citing Claudio v. Heller, 463 N.Y.S.2d 155 (Sup. Ct. 1983))); Britt v. Legal Aid Soc., Inc., 741 N.E.2d 109, 110, 112 (N.Y. 2000) (citing *Carmel*, 511 N.E.2d at 1128).

255 Dove v. Harvey, 608 S.E.2d 798, 802 (N.C. Ct. App. 2005) (quoting Belk v. Cheshire, 583 S.E.2d 700, 706 (N.C. Ct. App. 2003)).

256 *Id*. at 802.

257 *See* Klem v. Greenwood, 450 N.W.2d 738, 743 (N.D. 1990) (listing the various elements of a legal malpractice claim--not including innocence or post-conviction relief (citing Wastvedt v. Vaaler, 430 N.W.2d 561, 564-55 (N.D. 1988))).

258 *See* Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989); Leisinger, *supra* note 90, at 707 (citing *Krahn*, 538 N.E.2d at 1061).

259 Robinson v. Southerland, 123 P.3d 35, 43-44 (Okla. Civ. App. 2005).

260 Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993).

261 Drollinger v. Mallon, 260 P.3d 482, 489-90 (Or. 2011) (en banc). The Oregon Supreme Court justified the lesser standard for suing post-conviction counsel, in part, because the state legislature had provided unique protections at the trial level that are not present for those pursuing post-conviction civil claims. *Id*. at 488.

262 *Id*. at 490.

263 Bailey v. Tucker, 621 A.2d 108, 114-15 (Pa. 1993).

264 *See* Laurence v. Sollitto, 788 A.2d 455, 459 (R.I. 2002) (requiring the plaintiff prove that his attorney proximately caused his injury (quoting Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc., 740 A.2d 1262, 1264 (R.I. 1999))).

265 Brown v. Theos, 550 S.E.2d 304, 306-07 (S.C. 2001).

266 *See* Welk & Sutton, *supra* note 135, at 455.

267 Gibson v. Trant, 58 S.W.3d 103, 107 (Tenn. 2001).

268 *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497-98 (Tex. 1995) (plurality opinion) (holding that a plaintiff must be exonerated to meet the proximate cause requirement).

269 *See* Willey v. Bugden, 318 P.3d 757, 761 n.5 (Utah Ct. App. 2013) (noting that other states require post-conviction relief or actual innocence but acknowledging no such rule in Utah).

270 *See* Bloomer v. Gibson, 912 A.2d 424, 433 (Vt. 2006) (declining to decide whether to adopt the actual innocence requirement for legal malpractice claims).

271 *See* Adkins v. Dixon, 482 S.E.2d 797, 801-02 (Va. 1997) ("[A]ctual guilt is a material consideration since courts will not permit a guilty party to profit from his own crime." (citing Zysk v. Zysk 404 S.E.2d 721, 722 (1990))). Virginia has also allowed a criminal to sue for malpractice over claims arising from a court's sentencing errors. Johnson, *supra* note 29, at 299. As Johnson notes, this approach was exemplified by a case in Virginia involving an attorney who did not object when his client was sentenced to a mistakenly enhanced punishment. *Id.; see* Jones v. Link, 493 F. Supp. 2d 765, 769 (E.D. Va. 2007). In *Jones*, the court reasoned that proof of actual innocence was not necessary because "the improper sentence was not the direct result of the plaintiff's criminal behavior, but

rather, it was the proximate result of his attorney's negligence." 493 F. Supp. 2d at 770 (citing Powell v. Associated Counsel for the Accused, 129 P.3d 831, 833 (Wash. Ct. App. 2006)).

272 Ang v. Martin, 114 P.3d 637, 640-41 (Wash. 2005) (en banc). Actual innocence requires the plaintiff to establish by a preponderance of the evidence that he or she did not commit the crimes of which he or she was accused. *Id*. at 642.

273 Humphries v. Detch, 712 S.E.2d 795, 801 (W. Va. 2011); Johnson, *supra* note 29, at 298 (noting that some courts require proof of innocence of both the crime underlying the malpractice claim and the lesser included offenses). If the plaintiff's suit arises from a conviction over which the plaintiff was granted a new trial but in which the plaintiff pleaded nolo contendere, evidence of that plea may be admitted in the legal malpractice suit to evidence the plaintiff's conviction. *Id*. at 806.

274 *See* Tallmadge v. Boyle, 730 N.W.2d 173, 181 (Wis. Ct. App. 2007) ("[S]uccess here means proving to jury that the convicted criminal is innocent of all charges.").

275 *See* Ortiz, *supra* note 137, at 558 ("Wyoming does not have an innocence requirement for legal malpractice plaintiffs in criminal cases.").

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Essay

Anita Bernstein[d1]

PITFALLS AHEAD: A MANIFESTO FOR THE TRAINING OF LAWYERS

Many entrants into the legal profession decided to become lawyers after they were inspired by improvements in social conditions achieved by lawyers like Abraham Lincoln and Thurgood Marshall or literary heroes like Atticus Finch. The historical record of achievement recursively invites new generations into this occupation. Once these entrants arrive at law school, however, the sense of inspiration with which they began often fades, and an inchoate pessimism, if not full-blown cynicism or depression, takes its place. Critics of contemporary legal education who lament this descent into malaise tend to see no cure for it. When they do offer a fix, it looks uncannily like an agenda they advocated in another context, repackaged as a tonic.

This Essay explores a better source of vigor and occupational skill within legal education. Learning about the perils and defeats that their profession experiences would, paradoxically, increase the strengths of new lawyers. In this context, forewarned really does mean forearmed. Informed judgment about this profession includes knowing how and why lawyers lose their licenses; why a lawyer pays out money for malpractice; what constitutes a breach of fiduciary duty; what level of work performance is incompetent or ineffective under the Sixth Amendment; when to struggle against judges; why a lawyer is disqualified from representing clients; and why lawyers forfeit some of their freedoms of speech and association. A command of pitfalls enables individual lawyers not only to defend themselves against the attacks they might someday face but also to advance what is good for their clients and the public. Only from a base of pitfalls-knowledge can lawyers master their own profession.

***480 Introduction**

Observers of American lawyers and the American legal curriculum who agree on little else come together to find malaise in the legal profession. While he served at the helm of an extraordinarily esteemed school, Anthony Kronman wrote a jeremiad that spoke of "a crisis of morale."[1] This condition, Dean Kronman continued in The Lost Lawyer, "is the product of growing doubts about the capacity of a lawyer's life to offer fulfillment to the person who takes it up. Disguised by the material well-being of lawyers, it is a spiritual crisis that strikes at the heart of their professional pride."[2]

***481** This morose assessment, spoken from a locus of relative comfort and ease, appears to be shared at varying levels of privilege within the profession. Whether they choose to address demoralization,[3] depression,[4] dissatisfaction at work and in school,[5] alienation,[6] cynicism,[7] heartlessness,[8] or another pathology that lawyers and law students manifest, commentators on this population are united in their gloom.[9] The empirically inclined among them gather data about lawyers' unhappiness that suggest an intractable problem.[10]

Most of the commentary proposes no solution for the problem, and the cures that have been proposed say at least as much about the prescriber as the disease. Decades ago, a psychiatrist on a law school faculty diagnosed psychopathology in the profession and called for attention to "the psychological dimension" of legal education.[11] An economist on another law faculty, who elsewhere denounced American Bar Association accreditation of law schools, has written that accreditation is a culprit, noting that "the recent malaise"--in contrast, ***482** perhaps, to what had prevailed in lost Lincolnesque eras of apprenticeship--arose "during the same period that law school training became dominant."[12] The venerable critic Duncan Kennedy rooted the first of his many condemnations of legal education in the New Left politics that went on to permeate much of his work.[13] Anthony Amsterdam, a lion of clinical legal education, sited the problem in the lecture-and-take-notes classroom tradition.[14] More recently, feminists trace much of the malaise to sexism,[15] while a critic of feminist legal theory has written that feminist critiques of legal education obstruct positive change.[16] Addressing lawyers' and law students' discontents, the therapeutic-jurisprudence scholar Marjorie Silver hopes for "affective assistance of counsel";[17] provocateur Linda Hirshman recommends pugnacity;[18] Paula Franzese revives her call for more humanism.[19] Critical legal scholars and literary enthusiasts Jean Stefancic and Richard Delgado blame legal formalism and the stifling ***483** of creativity,[20] while Paul Carrington, an opponent of critical legal studies (CLS), blames those who support CLS.[21]

So much already having been said (and the sickness apparently not going away in response), one might wonder what remains to be written about, or recommended to repair, the blight on American legal education and the legal profession. This Essay makes a few modest claims to novelty. It starts by declaring a more limited agenda than what preceding works have undertaken: I do not propose to locate or comfort the Lost Lawyer, nor lead this profession back to whatever bygone idyll other observers may recall. Writing from the legal academy, I propose a shift in training--the domain I know--that focuses on law students but speaks occasionally to the continuing education of licensed lawyers. I do not here reiterate an oft-stated view of any topic, never having

urged attention to pitfalls in any of my other writings. Indeed, “pitfalls” is not entirely my idea; it already pervades the American legal curriculum and informs other analyses of how to tell nascent lawyers about the responsibilities of their profession.

Like any other recommendation for the instruction of lawyers, this “pitfalls” notion joins a sprawling pedagogical menu. Designers of law school curricula have many choices, among them opportunities to omit and abstain. Every American law school could, for instance, quit teaching its fixtures like contracts, torts, property, criminal law, and constitutional law without jeopardizing its accreditation. These seemingly required courses are in fact electives as far as American Bar Association approval is concerned. Tradition, inertia, and prerogative anchor them in place, rather than any rule.

Against this laissez-faire backdrop, one incongruous demand sticks out: according to the accreditation standard, law students must receive instruction in professional responsibility, or on “the history, goals, structure, values, rules and responsibilities of the legal profession and its members.”[22] An “interpretation” in the ABA rules recommends “instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association.”[23] More improbable specificity--inside a standard otherwise inclined to tolerate almost anything, and the omission of anything, in the curriculum.

***484** This Essay explores two questions that arise in reaction to the professional responsibility mandate. It starts by undertaking an interpretation, a quest for prescriptive content: what do accreditors want to accomplish by requiring that all law students receive instruction about the profession they will enter?[24] A related question, assuming that law schools share the accreditors' goal, seeks best practices in pedagogy: which factual information about the legal profession should a law school try to deliver?[25]

Engaging the first question, on the reason for the instructional requirement, the Essay emphasizes preparation: American accreditors have deemed information about the profession central to preparing every student to practice law.[26] Unlike graduate schools that grant the Ph.D.--a different kind of doctorate that reflects students' achievements and promise as researchers--law schools teach J.D. students how to perform in an occupation.[27] Other material that does not address preparation for practice is necessarily less fundamental to the study of law. Elective courses remain optional for varying reasons. Most electives pertain to the future work of only a fraction of students. Some classes teach skills that can be taught equally well after graduation or learned on one's own. Some have value but are simply not important enough to warrant mandatory status.

If preparation occupies the heart of legal education, then distinguishing curricular necessities from mere optional studies is helpful. Preparation must occupy the heart of the only required course. An answer to the second question follows: the law school curriculum should strive to tell students what they need to know in order to enter their profession well-prepared to practice law.[28] This mandate calls for instruction in a range of skills--among them analysis, writing, oral advocacy, and the instrumental uses of precedent and quantitative ***485** data--as they function in a context of policy and a pursuit of justice. For the professional responsibility training that the ABA requires for accreditation, the quest for preparation becomes more pointed: law schools should teach their students about the dangers and opportunities that await them in this profession.[29] With this approach, instructors fulfill this mandate according to their own priorities, while maintaining focus on three unifying themes: decision points for an attorney;[30] the positive law of lawyering; and viewing pitfalls as opportunities.

Decision points for an attorney. A pitfalls pedagogy sees the individual lawyer, usually a person who represents clients or wishes to do so, as the protagonist of the course. Students will typically take the role of this person as they work through problems of professional responsibility.[31] Throughout the semester, our hero faces dilemmas where neither alternative path suggests a pain-free way out. Even before the dilemmas arise, she goes about the day's work with a slight sense of foreboding. Abstractions take on a particularistic cast: not “What is the optimal rule?” or “What would be the best outcome?” but “What, specifically, would you do?” and “What [bad thing] could happen to you in this situation?” . Although the pedagogy starts with a measure of sympathy for the lawyer, it does not hesitate to condemn the lawyer's missteps.

The positive law of lawyering. In partial contrast to the more general approach announced in the title of a leading casebook, Law and Ethics of Lawyering,[32] the positive law of lawyering makes a priority of doctrine. Course materials consider regulation of the profession in broad terms, looking not only at disciplinary law as written in "model" terms by the ABA, but also criminal law, civil law, fiduciary rules, the law of agency, and other sources of regulatory control over lawyers.[33] ***486** Ethics is very much present in a pitfalls course, but it emerges from a base of doctrine rather than from "what would you do if" hypotheticals that ask students to choose between truth and partisanship in a vacuum, without overt reference to rules or case law.

Viewing pitfalls as opportunities. Every occupational pitfall for one lawyer can benefit another lawyer, and pitfalls also function to effect ideals and social goods that extend beyond the interests of this profession. As detailed below, some pitfalls amount to privileges. The opportunities theme is always present in a pitfalls pedagogy. Instructors can return to opportunities--the positive aspect of an accentuate-the-negative pedagogy[34]--whenever class discussions wobble out of balance as too negative, too focused on individual lawyers, too cynical sounding, or not cynical enough.

Whenever it omits pitfalls, the legal curriculum withholds crucial facts, doctrines, policies, and philosophical insights from people who have entrusted educators to prepare them for their vocation. The prevailing promise that graduates will leave the campus positioned to do well and do good--"you can make a lot of money," schools imply, "and you can also follow in the footsteps of Abraham Lincoln or Thurgood Marshall or Ruth Bader Ginsburg or Atticus Finch or your favorite TV-procedural lawyer; it's your choice"--is not exactly false; but it conveys only a rosy-side partial description of the profession that does not by itself reassure or satisfy anyone who hears it. Knowing about pitfalls ahead of time makes new lawyers more, not less, fulfilled and secure when they begin their work.

I

Forewarned About What?

Joining this profession opens new avenues of danger and opportunity that most students will learn about only fitfully before they graduate from law school. Although the standard curriculum covers some of these contingencies (and extracurricular experiences like summer associateships and conversations with peers deliver relevant informal information), classroom instruction about the legal profession is uniquely well situated to bring together varied constituents to forewarning law students. Pitfalls for lawyers, as surveyed below, range from the exalted to the mundane.

A. Threats

1. The Vulnerable License

Years (not to mention money) spent in pursuit of a law degree trains the risk-averse mind on the prospect of losing one's privilege to ***487** work as a lawyer. For law students, the pitfall of becoming disbarred--the most dramatic sanction that the bar imposes on its members--is not obscure. The threat has a grand scope, suited to opera-sized figures like the two lawyer-Presidents of the late twentieth century who lost their licenses shortly after they left office.[35] All the perceived grandeur of this penalty notwithstanding, only a tiny fraction of lawyers will ever face disbarment. Indeed, if one measures the need to forewarn by the probability that a dangerous contingency will occur, then instructors do not need to din their students in the risk of suffering professional sanctions generally. Researchers agree that sanctioning rates fall well below the level of sanction-worthy acts that lawyers commit in the aggregate.[36] On the relatively rare occasion that an errant lawyer receives some form of professional discipline, that form is likely to be the gentlest arrow in the quiver: the admonition or private reprimand.

The pedagogical need to forewarn is, however, not measured adequately by the probability that a particular contingency will happen. Knowing that they could be disbarred does not make law students aware enough of the vulnerability of their license to

practice. The authority of licensure casts a shadow wider than the range of sanctions that disciplinarians in fact impose. New lawyers should learn about the breadth of the professional shadow before they graduate and take up their careers under it.

What can the licensors do to you when you become a lawyer? Entry to the profession makes a natural starting point. After candidates graduate from law school, perform well enough on written exams, and apply for membership, bar authorities inquire into their moral character and fitness to practice law. Interviews, credit checks, criminal background checks, recitations of past brushes with the law, investigations into the reasons for having declared bankruptcy, and other proxies for rectitude become available to support a past-is-prologue, static character determination about moral status.[37]

***488** Unfair or hypocritical as such scrutiny of the postulant class may be,[38] it does provide initiation into a regime of control where regulators can impose a range of conditions that would look like impertinences outside the professional monopoly. A bar regulator might conclude that a lawyer needs treatment for alcoholism, training on how to keep better financial records, restrictions on his or her practice, more continuing legal education, or any other intervention "that the state's highest court or disciplinary board deems consistent with the purpose of lawyer sanctions."[39] This purpose is to protect "clients, the public, the legal system, and the legal profession."[40] Any lawyer inclined to feel offended by such ministrations should bear in mind that full-blown sanctions would feel worse. In a comment about the tradeoff, the California Bar observes that a lawyer offered an "agreement in lieu of discipline" may be forced "to fulfill nearly any type of remedial condition deemed appropriate for his or her case rather than face an investigation and prosecution."[41]

The swath of control gets wider because of regulators' habitual demands of full disclosure about a lawyer's past. Even the gentle private reprimand forces a lawyer to answer "Yes" on all subsequent documents that ask officially whether the lawyer ever experienced professional discipline. Regulators can treat lack of candor as a worse offense than the offense omitted from an application or declaration: expunged criminal convictions or misdemeanor convictions in juvenile court do not blot a copybook much, but lawyers who have omitted these histories from applications to practice law have been sanctioned for this omission.[42]

Another way to see the power of disciplinary law is from the perspective of client protection. Discipline complements the economic clout that some clients hold and that students who intend to practice in firms may take for granted.[43] Clients who pay their lawyers high fees hold strength from the simple fact that they can walk away, pulling their money with them. This economic leverage gives rich clients ***489** the protections and prerogatives in practice that disciplinary law assigns to all clients in principle. Because well-heeled individuals and entities seldom need to resort to Bar authorities to get what they think is coming to them, "[d]isciplinary proceedings against lawyers in large and even medium-sized firms are very rare."[44]

Focusing on the vulnerable license reminds new lawyers about their vulnerability before and after they join these large- or medium-sized shelters from discipline. From a pitfalls perspective, the bar governs private-sector lawyers interstitially, fitting itself into spaces the economic power of wealthy clients does not reach. Scrutiny of applicants has ensured a ritual of examination and submission for every newcomer. Over the next several years, young lawyers in this scrutinized cohort will respond to discipline more from the market than the bar.[45] Those who give offense in a way that an economic weapon cannot redress--that is, termination of their employment or a threat of that penalty--may find themselves in its sights. The sanctions apparatus gives pitfalls-power to affronted third parties; aggrieved clients with more spunk than money; enforcers of public law who are willing to report violations incidentally; and other initiators who are not situated to control errant lawyers by threatening to withdraw their business.

As positive law, then, disciplinary rules unite the legal profession under universal conditions of danger and opportunity. Economically privileged lawyers learn that non-enforcement, or at most under-enforcement, characterizes almost every rule on the books[46]--or, as David Wilkins has put the point, regulators interpret disciplinary rules to "mirror the norms of the marketplace."[47] Lawyers outside the reach of client-controlled market power will experience their danger in disciplinary law. This message, which emerges by degrees in a pitfalls pedagogy and which may sound cynical at first to students, actually affirms

a progressive ideal: the lawyer's license is vulnerable because the bar will listen to complaints and sometimes take action in response. Laypersons who lack material wealth can have power over lawyers.

***490** 2. Civil Liability

Civil liability is a pitfall of underreported dimensions within the profession generally, not just in legal education. One major segment of civil liability, actions by clients and third parties for legal malpractice, remains especially unseen. "Legal malpractice is a taboo subject," began one law review article.[48] "It has been ignored by the legal profession, law schools, mandatory continuing legal education (CLE) programs, and even by scholarly and lay publications,"[49] even though the profession has experienced "an unprecedented growth in legal malpractice claims and lawsuits."[50] Ignoring legal malpractice in these forums continued after this 1994 publication, a period that saw yet another spike in the rate of claims against insured lawyers.[51]

Students who proceed through law school and then graduate without learning anything about legal malpractice may presume that others will shield them from their own ignorance. A minority of them--law clerks, government lawyers, public defenders--are indeed almost perfectly safe from malpractice liability based on the jobs they have chosen.[52] Those who go to work in larger firms might count on the practice of overstaffing to keep them at the bottom of a hierarchy, giving them little chance to breach their duty to anyone until they learn the liability ropes. They might also assume that the experienced managers who run their offices install safeguards against inadvertent malpractice. For those lawyers who serve lower-income clients, a feeling of shelter from malpractice claims might come from the lack of money and privilege in the office: less money and less prestige means less to lose. Lawyers not long out of school, regardless of the kind of work they undertake, might think of themselves as not worth suing because they are too saddled by debt; or new lawyers might feel sure that malpractice insurers will know which behaviors or practices to ***491** recommend to them as part of a business plan to keep their payouts down.[53]

These comforting beliefs do contain some truth, but the peril of civil liability for malpractice remains, especially in the longer term. A pitfalls-sensitive pedagogy for legal malpractice would provide a variety of warnings. Foremost, it could tell students that the set of individuals and entities that can bring actions against them is not limited to what they regard as the roster of their own retained clients. Liability to a third-party non-client has been a fixture of malpractice law for decades. A related pitfall of civil liability emerges from agency law and fiduciary principles, which for some students will come up in no other classroom venue. The agency or fiduciary pitfall is the occasional obligation to rank another's interests ahead of one's own or to proceed without seeking gain for oneself or a third party. "Permitting an agent's focus to encompass additional incentives," as the Restatement of Agency puts the point, "is inconsistent with the singleness of focus due the principal."[54] Despite typically having studied contract law, students can take up their practices without having encountered case law imposing fiduciary-duty liability on actors who intended no harm,[55] breached no overt agreement,[56] or caused no harm to any victim.[57]

3. Criminal and Regulatory Liability

Federal courts have upheld convictions for an array of crimes that lawyers committed while representing clients, including obstruction of justice, false swearing, perjury, suborning perjury, aiding and abetting, securities fraud, and mail fraud. Similar pitfalls for lawyers appear in state criminal law.[58] The pitfalls grow larger in those ***492** jurisdictions where conviction of a felony triggers automatic disbarment.[59]

In a pitfalls pedagogy, obstruction of justice warrants particular attention because of the unique vulnerabilities inherent in the practice of criminal defense law. Lawyers, like non-lawyers, ordinarily stay clear of criminal prosecution by heeding their own inclinations to honesty and prudence. For a criminal defense lawyer, however, this law is relatively hard to obey. To start, "obstruction of justice" is vague. Vaguely worded criminal statutes jeopardize anyone the state may want to prosecute for their violation, but obstruction of justice menaces criminal defense lawyers in particular because thwarting the prosecutorial apparatus--or standing against "justice," as the word appears in the name of this crime--is part of their job; the crime empowers

prosecutors as enforcers of law against them.[60] Eschewing criminal-defense work shelters a lawyer from this danger only to the extent that her clients, or the lawyer herself, can avoid interacting with criminal prosecutors.

Another set of pitfalls for the unwary presents itself in the authority of federal agencies to regulate and discipline lawyers who practice before them. Just as obstruction of justice imposes little danger on the majority of lawyers (and imperils mainly the minority who practice criminal defense), agency authority is not a threat for most practitioners. Specialists who practice before the Internal Revenue Service or the Patent and Trademark Office know where they stand with those agencies; for pedagogy, a chief hidden peril of regulatory authority lurks in federal securities law. An attorney's work can constitute practice before the Securities and Exchange Commission (SEC) whether the lawyer knows it or not.[61] As entities, law firms are vulnerable to SEC-initiated civil and criminal sanctions if they employ individuals who violate fraud and insider-trading laws.[62]

4. Being Deemed Incompetent or to Have Given a Defendant Less than Effective Assistance of Counsel

Both the Constitution and state-level disciplinary rules declare that work that lawyers do for their clients can be so bad as to amount ***493** to a public disgrace. A defendant convicted of a crime following ineffective assistance of counsel may be entitled to a new trial or the withdrawal of an ill-advised guilty plea.[63] Lack of competence is a disciplinary offense in the Model Rules,[64] and the ABA recommends the disbarment of any lawyer whose "course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures" if this lawyer's conduct injures a client.[65]

Some observers call the risk of disgrace for incompetent or ineffective work not half-strong enough. In its leading ineffective assistance decision, Strickland v. Washington,[66] the Supreme Court construed the right to counsel indulgently in protection of the profession; subsequent courts have deemed an array of egregious behaviors and lapses not bad enough to reverse a conviction under the Strickland standard.[67] As for incompetence, bar authorities almost never sanction a lawyer for it;[68] actions for malpractice serve as almost the sole source of external review of attorney competence.[69]

This lax response noted, incompetence and ineffective assistance of counsel do present a pitfall--not the danger that any individual lawyer will suffer disgrace, which is slight, but the pitfall of feeble professional standards. New lawyers ought to know that a habeas claim alleging ineffective assistance of counsel will probably fail; that courts generally do not hear claims of ineffective assistance on direct appeal, ***494** only collaterally, which forces a defendant to spend years exhausting the appellate route before being heard;[70] that whether a lawyer suffers adverse consequences after injuring a client through incompetent work will depend largely on whether a client sues for malpractice; and that this profession produces, shares, and acts on very little publicly available information about whether a particular lawyer possesses minimal competence.[71] The law school climate of ongoing competition and evaluation can lull students into believing that because lawyers are perpetually judged and found wanting, the truly ineffective or incompetent among them will be eliminated from the profession or at least disabled from doing them harm. (Slackers know better, but most law students are not slackers.)

B. Tangling With Judges

The Langdellian emphasis on what judges decide still pervades American legal education and will likely remain a central theme, even if reformers who want the curriculum to emphasize something else--drafting, business planning, transactions, negotiation, alternative dispute resolution, the deployment and understanding of statutes, or extrinsic subjects like economics--continue to expand their influence. Law students seldom graduate without hearing about "what the judge had for breakfast"; how a judge hews to (or strays from) precedent; the path of case law on particular topics; the interplay of statutes and the common law; rules of forensics (in courses on evidence and civil procedure); and a few famous Supreme Court decisions. The apex of this profession is a supreme court, and providers outside the professional monopoly of bar-approved lawyers, no matter how liberally

indulged when they try to give clients advice about law and business, must always keep a respectful distance from at least one lawyerly function: they may not appear in court on behalf of clients.[72]

As instruction for lawyers who will practice before judges, this hierarchical-institutional view of the courts does not mention the role of the judge as antagonist. Both the judge's power and the lack thereof can get in a lawyer's way.[73] A litigator might manipulate her. When it robes the judge in detachment, if not pure neutrality, a pedagogy ***495** without pitfalls leaves students who will deal with this person unprepared.

1. A Panoply of Sanctions

The prerogative to give lawyers orders covers more ground than what emerges with reference to statutes and rules because trial judges hold the inherent power to do much of whatever they see fit to control their courtrooms and dockets.[74] They can fine or incarcerate a lawyer they deem to be in contempt of court. They can sanction lawyers for frivolous pleadings per Rule 11 or its state-law counterparts. Several judges have refused to follow statutes and administrative rules written to authorize non-lawyers to do certain work, contending that judges hold inherent power to determine what constitutes the practice of law.[75] Judges enjoy considerable authority to interfere with the payment of attorneys' fees--some derived from statutes, such as provisions for fee shifting in civil rights cases, and some from (once more, with feeling) their inherent powers.[76] A leading treatise notes that judges will sometimes declare, even "without the complaint of any party," that attorneys' fees are too high and must be reduced or refunded.[77]

2. Disqualification (by)

The prerogative to disqualify a lawyer from representing a particular client, typically because of the lawyer's conflicts of interest, likewise derives from the judge's inherent power. This power means that litigators who invest time and money in a case risk being removed by court order at a point when they cannot recoup their investment. Disqualification motions made in federal court have skyrocketed in recent years, on both the civil and criminal sides of the docket.[78] Commentators attribute this growth in part to an increase in real risks of conflicts--law firms fell into the habit of merging; client businesses started to spread their work among multiple law firms; and complex litigation involving corporations expanded--and also to the rise of ***496** new law that denies interlocutory review of disqualification under the collateral order doctrine.[79]

Compounding this uncertainty, judges hold divergent views on key points regarding conflicts. At the trial level, some judges seek to enforce the ban on conflicts present in disciplinary law, while others would leave that job to bar authorities, disqualifying lawyers only when the conflict-tainted representation causes harm to the party.[80] At the appellate level, courts disagree about how much interlocutory relief to give conflicts-disqualified lawyers:[81] some courts will view a disqualification motion as, presumptively, a mean and costly trick; others are willing to engage lawyers' adversaries in the fight against representations tainted by conflicts. High stakes and murky doctrine combine to make disqualification a pitfall for litigators.

3. Disqualification (of)

Conflicts of interest can disqualify judges as well as lawyers. Judicial disqualification is a sword with several edges for litigators. The judge's conflict might be harmful, harmless, or inconsequential to the client's interest. Attempting to disqualify one's assigned judge could help a client in some cases and cause harm to her in others. For a lawyer, informal norms around the courthouse about what constitutes a conflict of interest for a judge and what to do about it likely matter at least as much as phrases in a state code of judicial conduct or the federal disqualification statutes.[82]

Experience and observation will teach this particular pitfall better than a classroom exercise, but the pedagogy that this Essay advocates would include strategy in any classroom discussion of judicial disqualification. The blackletter in 28 U.S.C. § 455,

for example, takes on force when read for its provocation to judges. An instructor could broach the topic through role-playing. How would you as a judge react if a lawyer appearing in your court said that you had a conflict of the kinds enumerated in § 455(b)(4)?[83] If you as a litigator were requesting ***497** judicial recusal because of a conflict, how would you present your initiative? If the judge were to ask you and your client to waive the conflict, what would you want to know? Do you see strategic perils or opportunities in the judicial disqualification rules?

C. Abridged Political and Civil Rights for Attorneys

Entry into this profession can curb an individual's freedoms and prerogatives: lawyers impose silence on themselves in numerous rules and norms. The ones most frequently associated with the First Amendment address advertising and solicitation of new business. Lawyers, who compete for work in a market economy, cannot pursue what might be called new business without restraint.[84] Bar authorities forbade lawyer advertising until the Supreme Court struck down this prohibition as part of its expansion of commercial-speech rights;[85] still apparently put off by lawyers' touting themselves to the public, these regulators continue to constrain the practice.[86] Caselaw holds lawyers to stern standards of accuracy and technical compliance when they advertise,[87] and a few states that do not screen other types of advertising compel lawyers to turn in proposed ad copy for clearance by regulators.[88] Most jurisdictions maintain the Model Rules ban on direct in-person solicitation of new clients, although they do not enforce it much[89] and liberalize it with several permissive exceptions.[90] Rules ***498** also limit what a lawyer can say in public about a case before it comes to trial,[91] and while campaigning to be elected to a judicial office.[92]

Speech-related rules that have escaped First Amendment scrutiny may be seen in pitfalls terms. Take confidentiality: rules in every jurisdiction order lawyers to keep silent about at least some confidential information pertaining to their clients. These restraints on speech give way to some telling exceptions. The Model Rules, for example, include a broad exception for self-protection; a lawyer may reveal client confidences if revelation would establish a claim or defense for the lawyer or in response to allegations about the lawyer's representation of a client.[93] The interests of innocent third parties in disclosure do not rank as high in the Rules.[94] In this slightly sinister light, the silence esteemed so highly in various bans might look more haughty, distant, and self-insulating than dignified. The pitfall of professionally suppressed speech here is for clients, third parties, and the public.

At the same time, the rule about suppressing confidential information endangers lawyers too. Whenever the information in question relates to dangers that threaten third parties, neither silence nor revelation will necessarily keep an advocate out of trouble. Since the passage of the Sarbanes-Oxley Act of 2002, lawyers and businesses have struggled--and spent millions of dollars--trying to find a middle path whereby lawyers can honor confidentiality rules, the organized bar's ideal, while at the same time not withhold disclosure, which securities regulators want from them.[95]

In this context, my assertion that a few curbs amount to “abridged political and civil rights” becomes less hyperbolic. This occupation admittedly enjoys many privileges in the United States--among them wage income above the median-- and near-control of many branches of government. Lawyers as a group are not oppressed or silenced. The pitfall to share with students is not a story of their own victimization-to-come but rather a device to think about political and civil rights generally.

***499** Examining the ways in which freedom of speech or freedom of association grants lawyers fewer safeguards from government control than what their fellow citizens enjoy becomes, in this pitfalls pedagogy, a challenge to under-questioned dogma. Perhaps these entitlements are less wonderful or meaningful than their exalters say, if the profession that writes and enforces them does not fully want them for itself. Alternatively--and also more heretically, inside the rights-enthusiastic culture of a law school--lawyers might be enjoying these entitlements at the right level, and non-lawyers might have too much of them. Discussing the reasons that lawyers cannot speak (and associate)[96] as freely as non-lawyers conveys what these rights mean.

II

Accentuating the Negative

Johnny Mercer's wartime advice to the contrary, legal educators should not allow curricula to "eliminate the negative,"[97] "the negative" being contingencies summarized in the last Part, at least some of which lie ahead of everyone who will practice law. Not, of course, that anybody has eliminated "the negative," in the sense of the ambient misery that pervades legal education. As we have already noted, the coffers of gloom at any law school are probably flush long before any pitfalls pedagogy arrives.[98] Law students suffer from depression at a higher rate than the general population and researchers attribute some of their symptoms of distress to their law school experience rather than their preexisting mental state.[99] Anxiety--an effect of the perpetual rank-and-sort apparatus augmented by job searches, loan repayment prospects, a sense of foreclosed opportunities--is rife inside law schools.[100] Students often perceive employers as categorically disdaining the bottom half, or even the bottom nine-tenths, of their ranked class.

The pitfalls pedagogy seizes this ambient negativity and turns it into strength. The dangers recited in Part I are not quite news to students, who vaguely know that their licenses are vulnerable, judges ***500** can hurt them, legal malpractice exists, and so on. Law schools cannot conceal the general danger of professional unpleasantness ahead. Candor, however, about these facts of occupational life constitutes forewarning. Both by their temperament and the design of the larger curriculum, law students are well positioned to become forearmed when forewarned.

A. Risk Aversion

As both curricular prescription and a fact on the ground, risk aversion pervades the legal academy. The conventional wisdom that law students are risk averse[101] may be hard to verify[102] but appears sound: as an occupation, law delivers relatively certain payoffs (status, expected income, the approval of one's family) while withholding the higher, though less likely, gains available in other endeavors (business enterprises, the creation of art). One perceived value of a law degree is that it bestows and maintains open options for its holder.[103]

Law schools teach risk aversion to a population inclined in that direction to a degree that goes beyond student temperaments. Paul Brest and Linda Krieger link risk aversion to an unhealthy conservatism built into legal education and the practice of law. Lawyers and legal educators

> are viewed--perhaps by ourselves as well as by others--as conservative, risk-averse, precedent-bound, and wedded to a narrow, legalistic range of problem solving strategies. There may be substance to this view. The appellate case method and adversarial legal processes ***501** in general train lawyers to be more adept at criticizing ideas than at creating them.[104]

Brest and Krieger have a gloomy view of what they see, analogizing lawyers to the farmer who finds a flat tire on his car while on a deserted road near a barn and, hoping to repair it but not having a jack with him, starts a long walk to town, "failing to notice that the barn's hay lift pulley is positioned to lift up the car. His error was in framing the problem too narrowly. He confused the problem ('How can I lift my car?') with one particular solution ('Find a jack!')."[105] Such confusion is not unique to lawyers--Brest and Krieger also attribute it to clients and "people"[106] generally--but the authors believe that occupational resistance to creativity and fresh thinking would diminish if law school curricula were to relax about precedent, stare decisis, and hewing to a "narrow, legalistic" approach to client problems. The Brest and Krieger criticism links risk aversion to an imposed mental staleness and rigidity that impedes the advocate's role.

Pitfalls pedagogy, focusing on similar concerns about giving value to clients, takes a differing view of risk as law students and lawyers perceive it. Brest and Krieger are surely right to suggest that a curriculum mis-educates whenever it uses precedent, the case method, the adversary system, and other mainstays to relate a sense of futility and to teach the power to demolish another person's ideas, rather than the equally valuable power to create new ones. But this sense of defeat is not part of the pitfalls approach. On the contrary: talking to students about contingencies ahead in the practice of law gives them a boost of vigor and optimism, in the way that athletes planning for a marathon or long bicycle ride seek out and relish any advance information they can get about the hill, the stretch of potholes, or the bad neighborhood on their route. Specifics matter. "You'll have a rotten time; the road is awful" is not a pitfalls message, especially when it hovers unspoken in the air. "Look out for X, Y, and Z when you take off," by contrast, anticipates a satisfying journey.

Pitfalls are more than figurative potholes. They offer opportunities. Consider the topics surveyed in the last Part. Involuntary disqualification, for example, functions as a blow to the lawyer with the conflict, but for the initiator it is a weapon. Judicial codes of conduct can serve as weapons too. Retained lawyers prosecute and defend--that is, profit from--claims for legal malpractice. Ineffective assistance of counsel can give a litigator the memorable thrill of invalidating ***502** a client's criminal conviction. Lawyers endure the penalties of disciplinary sanctions, but they also write, threaten, impose, celebrate, and review them.

B. Assonance with the Rest of the Curriculum

One problem with the mandate requiring instruction in professional responsibility is that it has given birth to an anomalous course and a burdensome teaching assignment. Most law schools omit this class from their first-year requirements and compel students to take it in the semester of their choice between completion of the first year and graduation.[107] This placement away from most other requirements forces the course to compete for esteem in the schedule with courses that students take because they are interested in a subject.[108] Second-year students enroll in the belief (sometimes misplaced) that the course can help them with the Multistate Professional Responsibility Examination, a test they may take, in a "get it out of the way" fashion, before they graduate. Graduating students enroll having run out of semesters in which they can put it off. No other law school class is regarded--by students, faculty, and associate deans alike--as this much of a chronic nuisance, and instructors who teach it have been resenting its unpopularity in print for years.[109]

Pitfalls can assuage the unpopularity problem by bringing Professional Responsibility or Legal Profession in line with other law school courses. Elsewhere in their schedules, students learn that dangers and obstacles occupy virtually every corner of the law; because references to pitfalls make this class look more like its peers, the burden of being an anomaly in the eyes of students is eased. Once students perceive that this class really does belong on their schedule, those who teach it, ***503** now less vexed by challenges to the legitimacy of their material, become better positioned to advance other pedagogical aims beyond pitfalls.[110]

To see how pitfalls-thinking pervades American legal education, consider first-year required courses as described by the institution that has had the most influence on American law school curricula. At Harvard Law School, the course on Criminal Law puts "special emphasis on the phenomenon of discretion,"[111] a large source of risk for lawyers as well as defendants. In Contracts, instructors ask "whether and when contracts should be voided because of duress, nondisclosure, a failure to read, unconscionability, or immorality."[112] Civil Procedure notes "tensions underlying an evolving adversarial system of adjudication."[113] Property warns landholders about the pitfalls of "zoning, health and safety regulations, protection of minority or economically disadvantaged groups, eminent domain, and taxes."[114] The three "fundamental theories of liability" in Torts --" intentional interference, negligence, and strict liability"[115]-- announce that legal responsibility for injury will be governed by three very different, almost mutually exclusive, categorical conceptions, which in turn suggests pitfalls for both actors trying to comport with tort law and lawyers who presumably will suffer if they misapply the rubrics.

Other large-enrollment courses share the same preoccupation with danger and particular trouble-spots to be foreseen. The business curriculum, for example, spends much of its time on failure, bankruptcy, lack of candor, and fights over governance. (By contrast, similarly titled courses in business schools consider methods to attract investment, expand, innovate, and provide returns on capital.) The course on Evidence works with the general pitfall of inadmissibility along with specifics: unreliability, uncertainty, deterioration, privilege, prejudice, impeachment, human frailty, limitations derived from the Bill of Rights, and other vexations. Administrative Law portrays an epic struggle among individuals, legislatures, courts, and agencies, where each sector can be the others' pitfall. Tax courses see pitfalls everywhere, especially in the happy occasions of reaping profits and income. Law school landmines are under everyone's feet, and instructors ***504** teaching a class on professional responsibility who know that their students are taking or have recently taken a particular course can raise pertinent comparisons.

III

Learning About Ethics, and Fulfilling Other Mandates, Using Pitfalls

Although the accreditation rule mandates instruction about "the legal profession" rather than lawyers' ethics,[116] law school curricula see professional ethics as an important constituent of the required course--and so, regardless of whether it fits with the preparation for work thesis of this Essay,[117] ethics in the practice of law warrants attention in any study of professional responsibility pedagogy. The salience of ethics is unlikely to diminish: many casebooks for the course, especially newer ones, have "ethics" or "ethical" in their titles[118] and all pay at least some attention to questions of right and wrong action for lawyers.

A pitfalls approach to professional responsibility strengthens this theme in the course. Pitfalls are always relevant to ethics in the practice of law. As the second section of this Part elaborates, this approach also helps to advance the various pedagogical agendas that innovative instructors have presented in the professional responsibility literature.

Given these large claims about what a pitfalls pedagogy can do, it may be helpful at this point to review the elements of this approach. An instructor depicts the rules and doctrine of professional responsibility in terms of immediate, concrete perils for lawyers. Recurring questions for the classroom may appear inattentive to right and wrong because they focus more directly on getting caught. "What kind of trouble could you get into if you proceed? Has an opponent taken a misstep, and if so, how might the lawyer respond? What can the judge do to the lawyer, and what can the lawyer do to the judge? Suppose you're the lawyer: if you fail, what adverse consequences might follow? ***505** If you succeed, what adverse consequences might follow? Now that we have seen the unfortunate story unfold, in hindsight which pitfalls did the lawyer fail to anticipate?" Some instructors might feel more comfortable covering ethics by, so to speak, rushing to judgment: they would truncate analysis by asking the class to condone or condemn an outcome. Yet by inviting participants to take the role of a lawyer and thereby develop a sense of dangers, this pedagogy starts with the particulars necessary for thorough evaluation.

A. The Centrality of Consequences to Ethics

"In the philosophical tradition," writes W. Bradley Wendel, "ethics is the study of concepts such as goodness, right action, duty, and what ends we ought to choose and pursue, as rational beings."[119] Philosophy classifies ethics for lawyers under the aegis of normative ethics (rather than the more abstract "metaethics"), also known as "morals" or "substantive ethics."[120] The philosophical endeavor may be stated in the overlapping questions it seeks to answer: What is right and wrong? What is blameworthy and praiseworthy? What is desirable or worthwhile? How should we live?[121]

1. Normative Ethics As Professional Responsibility Sees It: Pitfalls As Part of Consequentialism and Deontology

When considering problems of ethics, the professional responsibility tradition is to look at two sources in the philosophical tradition: "competing alternative visions of moral theory, dividing largely along consequentialist and deontological lines,"[122]

or "utilitarianism and Kant's categorical imperative."[123] Our custom is to note both alternatives without favoring one, staying neutral on which is more compelling because "[w]e have . . . no 'thick theory of the good.'"[124] Happily for a defender of pitfalls pedagogy, this approach to professional responsibility comports with both alternatives. The link between the pitfalls notion of consequences and the philosophical notion of consequentialism is easier to see, because the words align, but a pitfalls pedagogy is equally central to deontology and Kant.

***506** Putting the terms consequentialism and utilitarianism together for this purpose, we can readily identify the value of using pitfalls to convey fidelity to the prescriptions of utilitarianism. Teaching rules to students through a utilitarian lens invokes "rule utilitarianism," which invites judgments of a rule with reference to the criterion of how much good will occur when the rule is followed.[125] Virtually every rule of professional conduct is amenable to this analysis, and a pitfalls approach makes the study concrete. One could teach the Model Rules of Professional Conduct entirely as rule utilitarianism, asking students to imagine universal acceptance of its provisions and anticipating the consequences for the profession, clients, and the public.

Rule utilitarianism and pitfalls come together in course material beyond the Model Rules. For example, as mentioned above, some fields of work make lawyers vulnerable to legal malpractice claims while for other groups of lawyers, this sanction is entirely hypothetical; in some jurisdictions public defenders enjoy immunity from malpractice liability.[126] Justifying the status quo of divergences in this pitfall requires a rule-utilitarian conclusion that the threat of malpractice liability is either a good or a bad thing depending on what kind of work the lawyer does. Rule utilitarianism also engages the pitfalls tenet that dangers also constitute opportunities (for example, the filing of a Rule 11 motion for sanctions is of itself subject to Rule 11)[127] and that absences of danger constitute absences of opportunity (no, you probably cannot get your client's conviction overturned on ineffectiveness grounds).[128] Danger, lack of danger, opportunity, and lack of opportunity for classes of lawyers amount to distribution of utilities.

Some authorities regard the rule-utilitarian strand of utilitarianism as "a modified version of deontological ethics,"[129] which brings us to Kantian thought, or deontology. Pitfalls are central here too, the supposed disdain for consequences in this tradition notwithstanding.[130] One cannot omit consequences from the Kantian injunction "never to act except in such a way . . . that [one's] maxim should ***507** become a universal law."[131] The rightness or wrongness of an action depends on the outcome of an analysis.

Legal scholars and philosophers have worked hard to correct the erroneous notion that Kant did not care about outcomes.[132] "The conclusion that consequences are foreign to the Kantian way of thinking about crime and punishment represents a total perversion of Kantian thought," writes George Fletcher, reacting to "sophisticated thinkers" who misread Kant to say that attempts should be punished as severely as consummated offenses.[133] Indeed, unless one wishes to halt deontological inquiry at the actions that Kant himself pondered in the nineteenth century--killing, lying, robbery--and thereby have nothing to say about dilemmas raised in contemporary life, any question of legal ethics needs to attend to consequences (if only to investigate whether considerations of duty are present) before a "universal law" of how to act can emerge.

2. Pitfalls As a Constituent of Moral Development

The sometimes-controversial developmental theorist Lawrence Kohlberg can make a noncontroversial contribution to a study of pitfalls as pedagogy.[134] Kohlberg laid out a famous sequence of six moral development stages through which human beings pass.[135] The sequence becomes controversial in the middle: some critics contend that the fourth stage may not represent an advance over the third.[136] We may bypass the quarrel here by focusing on the first two stages and treating the third and fourth, "conventional morality," as a unit. The lesson from Kohlberg is that human beings move from the preceding two stages of moral development, united as "preconventional morality," ***508** to the conventional-morality understanding that they are members of society.

The pitfalls pedagogy, presented here as a graduate-level technique to teach intelligent and motivated adults, rests on the earliest stage of moral development, Stage One, the level characterized by a "punishment and obedience orientation."[137] In this first stage, young children understand wrongness by the punishments they encounter. As they develop, they become aware that other people hold moral status (Stage Two), and later become positioned to recognize the necessity of social order when they move to the third stage. Law students outgrew Stage One long ago, of course.[138] At a minimum they once wrote (or at least turned in under their own name) a good-enough personal statement or application essay that made some reference to law, politics, social order, or communal welfare. In its frequent references to law as a source and instrument of "policy"--heard throughout the academy, not only in elite institutions--legal education presupposes that students have reached the fourth stage and are headed higher than "conventional morality."[139]

The pitfalls pedagogy reaches the same heights as legal education generally, while also keeping its feet on the ground. It always engages with what lawyers perceive as their own occupational punishments and rewards. With these responses to antecedents at the fore, students are able to think concretely about the function of motives and incentives for lawyers as constituents of policy. At the same time, the pitfalls pedagogy does not hold students back (unless the pedagogy is misapplied) in a primitive "whatever you do, don't get caught" perversion of ethics: teaching pitfalls does not stop at saying what these pitfalls are, but also opens discussions about why, how, and at what cost they loom.

B. Pitfalls As an Instrument in Other Professional Responsibility Pedagogies

The pitfalls approach serves as both a pedagogy of its own and a device that supports other approaches in the classroom. Experienced and distinguished instructors have published an array of strategies for teaching students about this profession that make reference to occupational hazards but do not focus on them explicitly as pitfalls. Here I focus on six of the best-known approaches to the professional responsibility ***509** course--clinical education, experiential instruction, pervasive instruction, specific contexts, philosophy of lawyering, and sociology of the profession--to suggest uses for pitfalls in classes that gather the material under a variety of rubrics.

1. Clinical Education

Some observers deem law school clinics the ideal venue for teaching legal ethics and professional responsibility.[140] Representing real clients while also receiving traditional classroom instruction unites theory and practice: "Judgment is the product of this ongoing synthesis of experience and reflection."[141]

Writers who find the law school clinic well suited to furnishing instruction about legal ethics and professional responsibility offer examples that look like pitfalls. Just as clinical legal education generally delivers instruction in the form of student experiences, clinical legal education about pitfalls presents burdens, dilemmas, and tough questions to students as action items that need action now, by them. For example, overlapping work in a school clinic with work for an outside employer gives the student a chance to fulfill mundane yet crucial duties relating to conflicts of interest. A clinic can facilitate creation of documents and systems to gather information about each student's concurrent and recent employment and also relay information about the clinic's clients for students to share with their outside employers.[142] When traditional faculty collaborate with students and clinical instructors on work for the clinic's clients, sometimes at the behest of a student--for example, one might ask the tax professor whether a client's anticipated award is taxable income--the student is exposed to vivid pitfalls concerning the attorney-client relationship, confidentiality, and unauthorized practice, among other possibilities.[143]

***510** #### 2. Experiential Instruction Outside of a Clinic

Some instructors applaud the theory and practice pedagogy of a law school clinic as a vehicle for teaching ethics, yet insist that clinics alone cannot cover the subject. For them, simulations or pre-scripted exercises have the real-time, trench-like advantages of clinical education at a somewhat lower cost and with more instructor control.[144] The leading advocate of experiential instruction in professional responsibility has gone further, proposing "the near-total elimination of live-client, in-house clinics"[145] in favor of an experience rich, multi-semester sequence consisting of "(1) a long-term comprehensive simulation; (2) case, rule, and material reading with attendant classroom discussion; and (3) live-practice placements."[146] A friendly reviewer of this suggestion estimated that it allots 25 percent of students' total time in law school to simulations courses.[147]

As with clinical education, the principal mode taught in experiential learning is pitfalls.[148] By focusing on specific junctures as a representation progresses, this pedagogy conveys ethics and professional responsibility primarily via "the thousand natural shocks that flesh is heir to," the "daily dilemmas that lawyers face."[149] The pedagogy is particularly strong in teaching what James Moliterno calls "trade usage," which is another key pitfall in the practice of law that can, for example, render a particular statement in negotiation acceptable in family practice but unacceptable in labor practice or vice versa.[150]

3. "Pervasive" Instruction

The belief that good law schools teach professional responsibility day in and day out along with the rest of their curricula--making segregation of the subject in its own separate course superfluous at best -- ***511** has a long history.[151] Deborah Rhode has led a movement advocating the teaching of lawyers' "ethics by the pervasive method," a deliberate effort to instill what had been seen as an ambient condition, occurring naturally, before the onset of a required course in the 1970s.[152] Rhode turns the old description of professional responsibility into prescription: "Professional responsibility questions should be addressed in all substantive courses because they arise in all substantive fields, and because their resolution implicates values that are central to lawyers' personal and professional lives."[153]

Like the experiential education proposed by Moliterno, this statement of purpose strenuously rejects business-as-usual in a law school: instructors who teach "all substantive courses" must either cooperate voluntarily with the "pervasive" plan or be ordered to comply. After they fall in line, questions of what and how to teach in their classrooms arise.[154] Few American law faculties have been open to this costly investment.[155] Those that make this choice would find pitfalls an effective way to isolate topics for attention in each substantive course: pitfalls and the pervasive method are united by their common desire to align professional responsibility instruction with the larger curriculum.

For any course, the pervasive method of instruction would begin with pitfalls from the law of lawyering[156] and then link these dangers to the substantive ends that a particular body of law pursues. The study necessarily encounters collisions. For example, judicial applications of contract doctrine to construe a disputed agreement are impeded, rather than enhanced, by the advocate-witness rule. The ban on contingent fees in matrimonial cases appears to advance some of the aims of matrimonial law (encouraging reconciliation, reducing ***512** overt strife) and to defeat others (fostering fairness for the poorer party, enhancing zeal).[157]

The pervasive method is stellar--much better than a stand-alone course--at remembering that issues of professional responsibility arise when a lawyer is trying to do something else. In a course on corporations, for instance, the instructor mandated to include topics covered in the Model Rules (for example, confidentiality and conflicts of interest) will be inclined to present them in contexts where lawyers will face trouble when they hew to the disciplinary rule. Part of what is pervasive about pitfalls is that they extend beyond disciplinary law; both the pitfalls approach and the pervasive method seek out breadth.

4. Specific Contexts

This approach to teaching professional responsibility, as announced by leaders of one noted ethics center, calls for "a new genre of courses" to "join the pervasive method and the traditional survey course."[158] Students focus on the legal profession in particular specialty. Examples of contexts that have filled freestanding alternative classes on professional responsibility at Fordham Law School include public interest law, criminal advocacy, and business transactions.[159] Robert Granfield and Thomas Koenig make a different plea for context, more polemical and less specific, in that it focuses overtly on justice and politics. They find the professional responsibility curriculum hollow--and also bad at preparing students for practice--whenever it ignores the force of external pressures on a lawyer's work.[160]

Any reference to context, including these two near-opposites, necessarily brings in pitfalls. The Fordham experience nicely illustrates the two sides of the danger/opportunity coin by noting the function of student choice in fulfilling the graduation requirement. The choice to take the basic survey course gives students a sense of freedom to follow their own interests, but also might make them worry that they have chosen the wrong context or opted too soon for specialization. Instructors and curriculum designers savor the chance to dig deeper but wonder whether they are failing to convey some urgent point that the survey course would have covered.[161] Overt attention ***513** to political power, as commended by Granfield and Koenig, also comports with pitfalls pedagogy.[162]

5. A "Philosophy of Lawyering"

Nathan Crystal has urged instructors and students of professional responsibility to reflect on what he sees as an imperative to each lawyer: to form "a philosophy of lawyering" that guides the lawyer through dilemmas that are "not clearly answered by the rules of professional conduct or the law governing lawyers," brings together the lawyer's professional role and personal life, and involves the lawyer "in institutional issues facing the profession."[163] For Crystal, "the necessity for lawyers to develop a philosophy of lawyering" was the "fundamental theme" of his popular casebook.[164] Elaborating on this theme in a law review article, Crystal proposed that each state should compel lawyers to state in writing his or her philosophy of lawyering as a condition of bar admission, to re-certify this statement each year when paying bar dues, and to furnish clients and prospective clients with a written statement explaining this philosophy.[165] The last portion of the proposal, notice to clients about one's philosophy of lawyering, is the most important to Crystal.[166]

Notice to clients is central because, as stated by the architect of this pedagogy, the chief issue that "a philosophy of lawyering" raises for lawyers is their discretion to veer from the partisan interests of the persons and entities they represent.[167] Before clients sign a retainer agreement, Crystal wants lawyers to tell them several things: on what basis the lawyer takes and declines new work; the scope of counseling he or she will provide; which circumstances would impel the lawyer to withdraw from representing a client on the ground that the client is "acting immorally"; whether the lawyer would prevent a client from doing harm to others or act on behalf of a client in a way that would harm others; and on what basis the lawyer would exercise "professional discretion on behalf of a client."[168]

***514** When we discard for this purpose one extra item at the end of Crystal's list--"[p]articipation in pro bono, law reform, and other professional activities to improve the law"[169]--which comes across (to me at least) as an anodyne afterthought that most prospective clients would not especially care to know about, we see the strong overlap between "a philosophy of lawyering" and pitfalls. Crystal worries that inattentive readers might dismiss his proposal as "touchy-feely nonsense,"[170] which is what it would amount to if complying lawyers were permitted to file boilerplate rhetoric that extolled excellence, integrity, high standards, justice, public service, and so on. Only the specifics about lawyer discretion that Crystal raises--"What would you do? Who would you turn away at the door? When would you quit?"--give meaning to "a philosophy of lawyering," which would otherwise be as bland and hollow as the old buzzword "professionalism." An individual's philosophy of lawyering can

include many parts, but its center is a concatenation of predictions about what this lawyer would do in a tight spot when no course of action offers safety and the stakes are high.

6. Sociology of the Profession

Before the reader leaps to infer that a pitfalls pedagogy will fulfill any and every agenda with respect to the teaching of professional responsibility, a word about one potentially discordant approach is in order. Several commentators commend the teaching of professional responsibility in a sociological context.[171] Of the six pedagogies reviewed in this section, the sociological one may hew most closely to the ABA mandate that launched this Essay; it provides overt instruction on "the history, goals, structure, values, rules, and responsibilities of the legal profession and its members."[172]

Legal sociologist Elizabeth Chambliss argues that attention to the sociology of this profession does not neglect lawyers' ethics. On the contrary, she says: the pressures and constraints that fill this milieu are unintelligible unless one takes into account the force of groups and organizations:

> [T]he sociological approach does expose students to important moral issues, but it focuses on the moral responsibilities of the profession as a whole, and of lawyers as members of a profession, rather ***515** than treating individual lawyers as if they operated independently of any organizational or professional context. The sociological approach thus makes explicit the organizational, professional and societal implications of lawyers' individual actions, as well as alerting students to the external pressures that can lead to unethical behaviors. In my view, this approach better-equips students to identify and address the moral implications of their individual practice than a course organized around abstract issues of individual morality.[173]

Never having tried the sociological approach in the classroom, I sense that it may appear to eschew pitfalls but actually sees them everywhere in this profession. Attention to groups and systems rather than individuals may seem static to outsiders habituated to think of change or stress as originating in a person's consciousness. The cohort of individualists may be pleased to read about legal sociologists that disagree and attribute stasis and resistance to misguided beliefs about "individual professional autonomy."[174]

An instructor could teach a sociology-of-the-profession version of professional responsibility without any mention of pitfalls that lawyers face as they do their jobs. More likely, however, this instructor would embrace pitfalls. In one version of a sociology-informed course, for example, an introduction about comparative sources of regulation--including disciplinary law, civil liability, legislation, and agency oversight--segues into an extended exercise in which class participants write an ethics code for law students (or, alternatively, an explanation of why no such code is necessary) along with an enforcement scheme. This pedagogy uncannily resembles the beginning of this Essay, which also started with institutional controls.

Conclusion

When songwriter and social critic Tom Lehrer found himself sharing hotel space with a convention of Boy Scout leaders, he was inspired to laugh at their notion of anticipating what might go wrong:

> Be prepared! That's the Boy Scouts' marching song,
>
> Be prepared! As through life you march along

Be prepared to hold your liquor pretty well.

Don't write naughty words on walls if you can't spell.

***516** . . . .

If you're looking for adventure of a new and different kind

And you come across a Girl Scout who is similarly inclined

Don't be nervous, don't be flustered, don't be scared! Be prepared![175]

Urging law teachers to warn students about what lies ahead of them in the practice of law may seem as risible as the Scout motto or a curriculum of Don't Get Caught. Where's the aspiration? Whatever happened to our lofty ideals?[176]

The pitfalls pedagogy has several responses to this hypothetical rhetorical dismay, all of which share the premise that instruction in professional responsibility should, indeed, teach high principles. For starters, we who teach law can look in the mirror when we answer one book's query: "Who among us will do the right thing?"[177] Enjoying as we do the fruits of tuition revenue and professional status--and having constrained our students' prerogatives by requiring them to study their profession--we owe instruction in how lawyers can look out for their own occupational welfare. Manifesting concern about the opportunities and dangers that students face after graduation presents legal educators as lawyers working to fulfill their own professional responsibility, thereby providing students a model of the client service that instructors are training them to render.[178]

In the classroom, speaking about pitfalls offers small building blocks that an instructor can assemble to create a structure of considerable loft. Take for example a pitfalls approach to one topic covered in virtually every version of the required course in professional responsibility: former-client conflicts of interest. Under-enforcement of Model Rule 1.9 and its neighboring Rule 1.10 makes the blackletter less than a real pitfall for the lawyer with a conflict, but other dangers and opportunities related to conflicts abound--as class time spent on the malpractice-liability or judicial-disqualification pitfall will indicate. From these particulars an instructor can move to abstractions, ideals, and policy on the subject, knowing that students have envisioned themselves as lawyers burdened with conflicting representations. Without the guidance of pitfalls for individual lawyers, this topic is a place for students to get bored and lost in the mists of pseudo-algebra: "Okay, lawyer L in firm X represented corporation C, and now attorney ***517** A, the partner of lawyer L in firm X, wants to represent business B . . . ."

A pitfalls pedagogy gives law students the vantage point from which to see any topic of professional responsibility both as a quick prod for a lawyer and in all its depth. By talking about problems for lawyers as sources of strategy and strength, and commending vigor in response to a setback, the pedagogy combats a tendency toward anxiety and unhappiness that wafts through law schools.[179] Making reference to pitfalls functions as an approach of its own to professional responsibility and also an adjuvant to other designs for teaching the subject.[180] This approach unites the American legal curriculum.

Footnotes

d1 Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. My thanks to faculty participants at a workshop at the University of Hawai'i School of Law, especially Randall Roth, for their insights, and to my Brooklyn colleagues Joan Wexler, Ed Cheng, and Nelson Tebbe for helpful comments on a draft. My thanks also to the Brooklyn Law School faculty research program for its support. This Essay is indebted to the foresight and creative thinking of Judge Hugh Lawson of the United States District Court of the Middle

District of Georgia, who established an endowment to create and support my post as the Sam Nunn Professor of Law at Emory University (2000-07), as well as training for lawyers and law students.

1 Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 2 (3d prtg. 1995).

2 Id.

3 See Lawrence S. Krieger, Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence, 52 J. Legal Educ. 112, 113-14 (2002).

4 See Jean Stefancic & Richard Delgado, How Lawyers Lose Their Way: A Profession Fails its Creative Minds 62-64 (2005) (discussing malaise, intellectual confusion, and stifling of creative thought); Robert P. Schuwerk, The Law Professor as Fiduciary: What Duties Do We Owe to Our Students, 45 S. Tex. L. Rev. 753, 764-65 (2004) (discussing clinical depression).

5 See Jason M. Dolin, Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession, 44 Cal. W. L. Rev. 219, 238-43 (2007); Adam Neufeld, Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School, 13 Am. U. J. Gender Soc. Pol'y & L. 511, 520 (2005).

6 See Bonita London et al., Psychological Theories of Educational Engagement: A Multi-Method Approach to Studying Individual Engagement and Institutional Change, 60 Vand. L. Rev. 455, 469-79 (2007) (reporting on a psychological study that found significant alienation in the law school environment, particularly among minority students).

7 See Benjamin H. Barton, The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons, 83 N.C. L. Rev. 411, 422 (2005). Patrick J. Schiltz, Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney, 82 Minn. L. Rev. 705 passim (1998).

8 See Bridget A. Maloney, Distress Among the Legal Profession: What Law Schools Can Do About It, 15 Notre Dame J.L. Ethics & Pub. Pol'y 307, 310-16 (2001) (reviewing psychological studies of law students' perceptions of coldness and hostility in their school environment).

9 See Barton, supra note 7, at 414 (finding "at least four related but distinct crises listed in these various accounts of the Job-like woes of the legal profession").

10 The most commonly cited summaries of these findings were written by Professors Susan Daicoff and Patrick J. Schlitz. Susan Daicoff, Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism, 46 Am. U. L. Rev. 1337, 1346-47 (1997); Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 Vand. L. Rev. 871, 873-80 (1999). But see Kathleen E. Hull, Cross-Examining the Myth of Lawyers' Misery, 52 Vand. L. Rev. 971 passim (1999) (responding to Schiltz); Robert Nelson, The AJD Project: The First National Longitudinal Study of Lawyer Careers, 36 Sw. U. L. Rev. 355, 361 (2007) (reporting on studies that found an unexpectedly high level of lawyer satisfaction).

11 Alan A. Stone, Legal Education on the Couch, 85 Harv. L. Rev. 392 passim (1971).

12 George B. Shepherd & William G. Shepherd, Scholarly Restraints? ABA Accreditation and Legal Education, 19 Cardozo L. Rev. 2091, 2252 (1998); see also George B. Shepherd, No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools, 53 J. Legal Educ. 103, 104-08 (2003) (blaming ABA accreditation for preventing African-Americans from entering the legal profession). William Shepherd, like George Shepherd, is an economist.

13 See Duncan Kennedy, How the Law School Fails: A Polemic, 1 Yale Rev. L. & Soc. Action 71 (1970).

14 Amsterdam called the problem of declining student interest the MOPIE Syndrome, an acronym for Maximum Obtainable Passivity In Education. Geoffrey C. Hazard, Jr. et al., The Law and Ethics of Lawyering 1019 (4th ed. 2005) (citation omitted).

15 See Lani Guinier et al., Becoming Gentlemen: Women, Law School, and Institutional Change 7-8 (1997) (reviewing reports of gender-specific responses to law school); Sari Bashi & Maryana Iskander, Why Legal Education is Failing Women, 18 Yale J.L. & Feminism 389, 391 (2006) ("Despite gender parity in entering J.D. classes, law schools are not adequately preparing female law students for success, particularly in the upper ranks."); Autumn Mesa, A Woman's Climb up the Law School Ladder, 9 Cardozo Women's L.J. 379, 389 (2003) (claiming that "feelings of low self-esteem, inferiority, self-doubt, alienation, depression, and anxiety that affect many of the women attending America's law schools should be a signal that sexism continues to lurk in the law school halls and continues to preserve the hierarchical structure that places women in the lower tiers").

16 See Dan Subotnik, The Cult of Hostile Gender Climate: A Male Voice Preaches Diversity to the Choir, 8 U. Chi. L. Sch. Roundtable 37, 40 (2001).

17 The Affective Assistance of Counsel: Practicing Law As a Healing Profession (Marjorie A. Silver ed., 2007).

18 Linda Hirshman, A Woman's Guide to Law School 273 (1999) (urging female law students to demand more using a "Questionnaire for Deans"). On the author's pugnacity, see the contentiously received Linda R. Hirshman, Get to Work: A Manifesto for Women of the World (2006).

19 See Paula A. Franzese, To Be the Change: Finding Higher Ground in the Law, 50 Me. L. Rev. 11, 15 (1998); see also Paula A. Franzese, E Pluribus Unum--From Many, One: In Unity There is Strength, 25 Seton Hall L. Rev. 1460, 1465 (1995) (excerpting a speech before the New Jersey Ocean **County** Bar Association (May 1, 1995)) ("Let us embrace each other, so that together we nurture strength of spirit and peace of mind.").

20 Stefancic & Delgado, supra note 4, at 29-30.

21 Paul D. Carrington, Of Law and the River, 34 J. Legal Educ. 222, 226-28 (1984).

22 2007-2008 Standards for Approval of Law Schools, ch. 3, Standard 302(a)(5) [hereinafter ABA Standards], available at http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf. The other apparently mandatory element in the curriculum is legal writing, but the ABA remains vague about what exactly this requirement means. See id. Standard 302(a)(3).

23 Id. interpretation 302-9.

24 I echo the leading work that undertook to find reasons for an ABA mandate, written during the transition from the Model Code to the Model Rules. Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 689 passim (1981).

25 Although I consider this question in the context of the required course on professional responsibility, much of what I describe or conclude also pertains to other law school courses.

26 It may bear mentioning that to the extent that legal education prepares students for practice, this preparation will vary from student to student, in response to individual circumstances and career plans. The professional responsibility course is a suitable venue to anticipate needs that pervade all, or most, categories of work for lawyers.

27 See James E. Moliterno, Legal Education, Experiential Education, and Professional Responsibility, 38 Wm. & Mary L. Rev. 71, 101 (1996) ("Legal education is, at the end of the day, professional education.").

28 Jason Dolin argues, as does this Essay, that improvements in preparation-education will improve satisfaction for students. Dolin, supra note 5, at 235-42. He focuses on encouraging legal educators to heed the recommendations of the 1992 MacCrate report. Id. at 235.

29 See Deborah L. Rhode & David Luban, Legal Ethics 1-3 (4th ed. 2004) (observing that both the substantive law of lawyering and empirical information about the profession have mushroomed in recent decades, redeeming the course from its past irrelevance). On teaching dangers and opportunities for lawyers, see generally Carol Rice Andrews, Highway 101: Lessons in Legal Ethics that We Can Learn on the Road, 15 Geo. J. Legal Ethics 75 passim (2001) (analogizing the study of professional responsibility to learning how to comply with the law while driving).

30 Here I follow the convention that all attorneys are lawyers but not all lawyers are attorneys: a lawyer is a person trained to give legal advice, whereas an attorney is a lawyer who advocates for a client.

31 On the relation between role-taking and legal doctrine, see Anita Bernstein, How Can a Product Be Liable?, 45 Duke L.J. 1, 29-30 (1995).

32 Hazard et al., supra note 14, at lxv.

33 The Restatement of the Law Governing Lawyers gives pride of place to pitfalls, installing this warning in its Section One: "Upon admission to the bar of any jurisdiction, a person becomes a lawyer and is subject to applicable law governing such matters as professional discipline, procedure and evidence, civil remedies, and criminal sanctions." Restatement (Third) of The Law Governing Lawyers § 1 (1998).

34 See infra Part II.

35 See Todd v. Ligon, 148 S.W.3d 229, 232 (Ark. 2004) (noting the five-year suspension of former President Clinton from the Arkansas bar); In re Nixon, 385 N.Y.S.2d 305, 307 (N.Y. App. Div. 1976) (ordering disbarment of the former President). When his Arkansas suspension expired in January 2006, President Clinton took no steps to be reinstated, either in Arkansas or at the Supreme Court Bar. Andrew Glass, Gonzales Joins List of Conflicted Predecessors, Politico, Aug. 28, 2007, http://www.politico.com/news/stories/0807/5540.html.

36 Leslie C. Levin, The Case for Less Secrecy in Lawyer Discipline, 20 Geo. J. Legal Ethics 1, 1 (2007) (noting that state disciplinary agencies formally sanction only about 5,600 lawyers per year, despite receiving more than 125,000 lawyer discipline complaints per year).

37 See generally Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491 (1985) (describing and offering a reconsideration of the bar's moral character requirement).

38 The claim of unfairness is that the bar looks closely at new applicants while turning a blind--or at most an indulgent--eye to much misconduct that established lawyers commit. See id. at 546-50.

39 ABA Standards for Imposing Lawyer Sanctions, Standard 2.8(g) (1986).

40 Id. Standard 1.1.

41 The State Bar of California, Priorities and Prevention, http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10136&id=1647 (last visited Oct. 23, 2008).

42 See, e.g., Ky. Bar Ass'n v. Guidugli, 967 S.W.2d 587, 589 (Ky. 1998) (suspending an admitted attorney practicing law for 30 days for failure to disclose a material fact on his bar application); Layon v. N.D. State Bar Bd., 458 N.W.2d 501, 512 (N.D. 1990) (denying admission to the North Dakota bar).

43 See generally Symposium, What Do Clients Want?, 52 Emory L.J. 1053 (2003) (addressing neglect, failure to communicate, and failure to represent clients diligently, the disciplinary offenses that dominate enforcement even though rich clients, who presumably have good access to bar authorities, almost never bring complaints about them).

44 Elizabeth Chambliss, Professional Responsibility: Lawyers, A Case Study, 69 Fordham L. Rev. 817, 820 n.17 (2000). A leading casebook notes the epiphenomenon of "private discipline," where large law firms impose sanction-like suspensions on their associates for relatively minor infractions. See Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 838 (6th ed. 2002).

45 Discipline is especially rare during the first ten years of admission to the bar. Hazard et al., supra note 14, at 1148 (reporting a study that indicated 82 percent of disciplined lawyers had been in practice more than eleven years).

46 See Chambliss, supra note 44, at 819-20.

47 David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799, 867 (1992).

48 Manuel R. Ramos, Legal Malpractice: The Profession's Dirty Little Secret, 47 Vand. L. Rev. 1657, 1658 (1994).

49 Id. at 1658-59 (internal citations omitted).

50 Id. at 1661.

51 See Gillers, supra note 44, at 766 (describing an increase in claims against lawyers, from 22,838 claims in 1990-95 to 35,678 in 1996-99).

52 Some states explicitly immunize public defenders from malpractice liability. See Amanda Myra Hornung, Note, The Paper Tiger of Gideon v. Wainwright and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants, 3 Cardozo Pub. L. Pol'y & Ethics J. 495, 531-33 (2005). On the futility of bringing malpractice actions against criminal defense lawyers, see, for example, **Wiley** v. **County** of **San Diego**, 966 P.2d 983, 991 (Cal. 1998) (imposing a requirement that the defendant prove innocence to establish malpractice); Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995) (rejecting a malpractice claim after a lawyer failed to relay an offer of transactional immunity that would have avoided the plaintiff's criminal conviction).

53 Presumably informed by experience, one provider of legal malpractice insurance wrote a primer to ease this population out of complacency. See Douglas R. Richmond, Professional Responsibilities of Law Firm Associates, 45 Brandeis L.J. 199 (2006).

54 Restatement (Third) of Agency § 8.02 cmt. b, illus. 2 (2005).

55 See Klemme v. Best, 941 S.W.2d 493, 496 (Mo. 1997) (en banc) (holding that a lawyer can be liable for breach of fiduciary duty without proof of unlawful intent).

56 See Estate of Keatinge v. Biddle, 316 F.3d 7, 8-9 (1st Cir. 2002) (noting that under Maine law, an attorney-client relationship can exist despite an attorney's denial of the relationship).

57 See Restatement (Third) of The Law Governing Lawyers § 55 cmt. d (1998) ("[I]f a lawyer mistakenly deposits a client's money in[to] the lawyer's own bank account and proceeds to invest it and make a profit, the client is entitled to restitution of the original sum and the profits from its investment.") (citations omitted).

58 See Hazard et al., supra note 14, at 26-46 (reviewing cases that upheld prosecutions of attorneys under both federal and state criminal law); see also Stephen Gillers & Roy D. Simon, Regulation of Lawyers: Statutes and Standards 651-83 (2008) (titling a chapter "Federal Provisions on Conflicts, Confidentiality, and Crimes").

59 See Miss. Code Ann. § 73-3-41 (West 2004); N.Y. Jud. Law § 90.4.a (McKinney 2002); see also Laughlin v. United States, 474 F.2d 444, 447 (D.C. Cir. 1972) (interpreting D.C. law to make disbarment following a felony conviction mandatory).

60 See Bruce A. Green, The Criminal Regulation of Lawyers, 67 Fordham L. Rev. 327, 328-29 (1998).

61 See Roberta S. Karmel, Professor of Law, Brooklyn Law Sch., Panel Discussion: The Evolution of Corporate Governance (Nov. 22, 2002), in Symposium, The Evolving Legal and Ethical Role of the Corporate Attorney After the Sarbanes-Oxley Act of 2002, 52 Am. U. L. Rev. 613, 634 (2003).

62 Ted Schneyer, Professional Discipline for Law Firms?, 77 Cornell L. Rev. 1, 44 n.271 (1991).

63 See, e.g., Wiggins v. Smith, 539 U.S. 510, 538 (2003) (invalidating a capital conviction on the ground of ineffective assistance at trial); Rollins v. State, 591 S.E.2d 796, 799-800 (Ga. 2004) (permitting petitioner to withdraw the guilty plea that she had chosen to make after receiving ineffective assistance).

64 Edmund B. Spaeth, Jr., To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?, 61 Temp. L. Rev. 1211, 1220 (1988) (noting that the rule on competence is Rule 1.1, "the place of honor").

65 ABA Standards for Imposing Lawyer Sanctions, Standard 4.5.1 (1991).

66 466 U.S. 668 (1984).

67 E.g., Burger v. Kemp, 483 U.S. 776, 777-78 (1987) (holding that a lawyer's lack of investigation into mitigating evidence for a capital sentencing hearing did not violate the defendant's Sixth Amendment rights); Burdine v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001) (en banc) (condoning the "assistance" of a lawyer who slept during a trial; the defendant ultimately received a death sentence); Smith v. Ylst, 826 F.2d 872, 873-74 (9th Cir. 1987) (denying an ineffective-assistance claim on the ground that the defendant failed to show any prejudicial effect of his lawyer's having experienced a documented "paranoid psychotic reaction" during his trial).

68 See Susan R. Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar?, 69 Geo. L.J. 705 passim (1981) (surveying pre-Model Rules disciplinary case law).

69 See id. at 732 ("Perhaps because of the void in self-regulation, market sanctions in the form of malpractice suits have become the primary method by which standards of care are defined.") (citation omitted); see also Gillers, supra note 44, at 743-45 (noting that lawyers are seldom disciplined for their lapses of competence). Lawyers who represent defendants in capital cases "are virtually guaranteed" an accusation of ineffective assistance at some point, see David M. Siegel, My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings, 23 J. Legal Prof. 85, 90-91 (1999), but for purposes of this Essay, "virtual[ ]" guarantees are not considered pitfalls.

70 See Eve Brensike Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims, 92 Cornell L. Rev. 679, 680 (2007).

71 Levin, supra note 36, at 21-22.

72 Hazard et al., supra note 14, at 910 (surveying the debates on what constitutes unauthorized practice, which swirl around one uncontroversial, centuries-old tenet: "that a nonlawyer could not appear in court to represent another person").

73 Judges hold other kinds of power over the legal profession, notably through their prerogative to adopt rules of professional responsibility. This section addresses potential clashes between a lawyer and judge in the courtroom.

74 The Supreme Court first recognized this power in Link v. Wabash Railroad Co., 370 U.S. 626, 630-32 (1962). The Restatement remarks that judges have used inherent powers to assert "extravagantly broad" authority over lawyers. Restatement (Third) of The Law Governing Lawyers § 1, Reporter's Note on cmt. c (1998).

75 Gillers, supra note 44, at 759 (summarizing cases).

76 See, e.g., In re Goldstein, 430 F.3d 106, 110 (2d Cir. 2005) (approving fee reduction); Guralnick v. Supreme Court of N.J., 747 F. Supp. 1109, 1118 (D.N.J. 1990) (approving mandatory fee arbitration rules promulgated by the New Jersey Supreme Court).

77 Charles W. Wolfram, Modern Legal Ethics 496 (1986).

78 See Leah Epstein, Comment, A Balanced Approach to Mandamus Review of Attorney Disqualification Orders, 72 U. Chi. L. Rev. 667, 667 & n.3 (2005).

79 See id. at 673-78 (summarizing case law and commentary).

80 For an endorsement of the abstemious latter path that pays due heed to arguments favoring the former, see Bruce A. Green, Conflicts of Interest in Litigation: The Judicial Role, 65 Fordham L. Rev. 71, 84-98 (1996).

81 Epstein, supra note 78, at 669-70.

82 See 28 U.S.C. § 455 (2006) (providing disqualification rules for federal judges); Model Code of Judicial Conduct R. 2.11 (2007) (providing model rules on disqualification of state judges). For an extended argument that this informality and ad hoc decision making

needs repair in the form of more determinate procedural reforms, see Amanda Frost, Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal, 53 U. Kan. L. Rev. 531 (2005).

83 See 28 U.S.C. § 455(b) (requiring judicial recusal if, among other things, the judge has a personal bias or if the judge worked on the matter in private or government practice).

84 See Model Rules of Prof'l Conduct RR 7.1-7.3 (2007).

85 See Bates v. State Bar of Ariz., 433 U.S. 350, 379-82 (1977). The commercial speech era began with Virginia State Board of Pharmacy v. Virgina Citizens Consumer Council, 425 U.S. 748 (1976).

86 See William E. Hornsby, Jr. & Kurt Schimmel, Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse, 9 Geo. J. Legal Ethics 325, 327-28 (1996) (describing increases in scrutiny and skepticism toward advertising from bar authorities in the wake of liberalization from the Supreme Court).

87 See, e.g., Haymond v. Lundy, No. CIV. A. 99-5048, 2001 WL 15956, at *2-5 (E.D. Pa. Jan. 5, 2001) (applying the Lanham Act to lawyers' advertising); Comm. on Prof'l Ethics & Conduct v. Humphrey, 377 N.W.2d 643, 647 (Iowa 1985) (approving detailed restrictions for broadcast advertisements); Office of Disciplinary Counsel v. Shane, 692 N.E.2d 571, 573-74 (Ohio 1998) (per curiam) (reprimanding lawyers for an advertisement because it did not tell potential clients that clients are technically responsible for the costs of litigation).

88 See, e.g., Fla. Rules of Prof'l Conduct R. 4-7.7 (2007) (requiring filing advertisement with the Florida Bar no later than the first dissemination); Miss. Rules of Prof'l Conduct R. 7.5(a) (2007) (requiring submission of proposed advertisements to the Office of the General Counsel of the Mississippi Bar).

89 I elaborate in Sanctioning the Ambulance Chaser, 41 Loy. L.A. L. Rev. (forthcoming 2008).

90 See Model Rules of Prof'l Conduct R. 7.3(a) (2007) (permitting solicitation of a new prospective client when the person solicited is a lawyer or a person who has a prior relationship with the lawyer, unless the lawyer's "significant motive" for the solicitation is his or her own pecuniary gain).

91 See id. R. 3.6. The First Amendment-based revisions to this rule derive from Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

92 Model Code of Judicial Conduct Canon 4 (2008).

93 Model Rules of Prof'l Conduct R. 1.6(b)(5).

94 For example, under the Model Rules, a lawyer who knows that misconduct by her client threatens a third party with financial ruin may not reveal the misconduct unless the client used the lawyer's services to further it. Id. R. 1.6(b)(3). By contrast, when lawyers assert or defend their own interests, they can reveal all the confidential information they want, limited only by the thin proviso that they confine revelation to what they "reasonably believes [is] necessary" to assert or defend these interests. Id. R. 1.6(b)(5). For a critique of this inconsistent stance toward client secrets and confidences, see Henry D. Levine, Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection, 5 Hofstra L. Rev. 783, 785-86 (1977).

95 For an overview of this battleground, see Robert N. Rapp, Sarbanes-Oxley and SEC Standards of Professional Conduct, 57 Case W. Res. L. Rev. 365, 367-68 (2007).

96 See, e.g., Stropnicky v. Nathanson, 19 M.D.L.R. 39, 1997 Mass. Comm. Discrim. LEXIS 12, at *16-17 (Mass. Comm. Discrim. Feb. 25, 1997) (sanctioning a lawyer for attempting to maintain a women-only client base for her matrimonial practice); Model Rules of Prof'l Conduct R. 1.8(j) (prohibiting a lawyer from having sex with a client unless a consensual sexual relationship preceded the representation).

97 Mercer wrote the lyrics and Harold Arlen the music for the Academy Award-nominated "Ac-Cent-Tchu-Ate the Positive." See Richard Harrington, Still Another Indictment of Bad Frankie, Chi. Sun-Times, June 5, 2005, at 5, LexisNexis Academic (commending, as does this Essay, the opposite of this advice).

98 See supra notes 1-19 and accompanying text.

99 Neufeld, supra note 5, at 552 & n.123.

100 Ruth Ann McKinney, Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?, 8 J. Legal Writing Inst. 229, 229-30 (2002).

101 For guarded endorsements of this proposition, see Richard L. Hasen, The Efficient Duty to Rescue, 15 Int'l Rev. L. & Econ. 141, 144, 149 n.12 (1995); Jonathan R. Macey, Lawyers in Agencies: Economics, Social Psychology, and Process, 61 Law & Contemp. Probs. 109, 110-11 (1998).

102 A 1990 study found that in all graduate fields of study except law, optimists perform better than pessimists. Richard G. Uday, That Frayed Rope, 16 Utah B. J. 8, 9 (2003). One commentator supports the risk-averse construct with evidence that the profession has historically resisted technological innovation, notably the telephone at the end of the nineteenth century. Catherine J. Lanctot, Regulating Legal Advice in Cyberspace, 16 St. John's J. Legal Comment. 569, 570 (2002). For a law professor's skepticism about the utility of risk utility as a concept, see Victor Goldberg, Columbia Sch. of Law, Risk Management Round Table: Aversion to Risk Aversion (Apr. 12-13, 2002), http://www.ldeo.columbia.edu/chrr/documents/meetings/roundtable/pdf/notes/goldberg_ vic_note.pdf.

103 See Susan Sturm & Lani Guinier, The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity, 60 Vand. L. Rev. 515, 534 (2007) (lamenting that the authors' innovations demand "a level of intellectual and professional curiosity that is not cultivated by the current default (and often conformist) cultural stance of detached mastery, a stance that both distances students from the object of their learning and leads them to keep their options forever open"). On the lure of open options, see John Tierney, The Advantages of Closing a Few Doors, N.Y. Times, Feb. 26, 2008, at F1.

104 Paul Brest & Linda Krieger, On Teaching Professional Judgment, 69 Wash. L. Rev. 527, 541 (1994).

105 Id. at 540.

106 Id.

107 See Julie A. Oseid, It Happened to Me: Sharing Personal Value Dilemmas to Teach Professionalism and Ethics, 12 J. Legal Writing Inst. 105, 111-12 (2006) (contending that this belated placement causes law students to underrate the importance of the subject).

108 See Edward Rubin, What's Wrong with Langdell's Method, and What to Do About It, 60 Vand. L. Rev. 609, 655-57 (2007) (noting the isolation of professional responsibility in the curriculum).

109 See John M. Conley, How Bad Is It Out There? Teaching and Learning About the State of the Legal Profession in North Carolina, 82 N.C. L. Rev. 1943, 1950-51 (2004); Roger C. Cramton & Susan P. Koniak, Rule, Story, and Commitment in the Teaching of Legal Ethics, 38 Wm. & Mary L. Rev. 145, 146-47 (1996) ("[L]egal ethics remains an unloved orphan of legal education. 'Serious scholarship' in legal ethics is still considered somewhat of an oxymoron. Many law school faculties remain convinced that the subject is unteachable or believe that it is not worth teaching.") (citations omitted); Mary C. Daly, Bruce A. Green & Russell G. Pearce, Contextualizing Professional Responsibility: A New Curriculum for a New Century, 58 Law & Contemp. Probs. 193, 195 n.6 (1995) (quoting sources calling the class "a blowoff course," a "dog," and "hard to teach, disappointing to take, and often presented to vacant seats or vacant minds"); William H. Simon, The Trouble with Legal Ethics, 41 J. Legal Educ. 65, 65-66 (1991); Dennis Turner, Infusing Ethical, Moral, and Religious Values into a Law School Curriculum: A Modest Proposal, 24 U. Dayton L. Rev. 283, 291-92 (1999).

110 See infra Part III.B.

111 Harvard Law Sch., Criminal Law 4, http://www.law.harvard.edu/academics/courses/2008-09/?id=5194 (last visited Oct. 23, 2008).

112 Id. Contracts 1, http://www.law.harvard.edu/academics/courses/2008-09/?id=5260 (last visited Oct. 23, 2008).

113 Id. Civil Procedure 1, http://www.law.harvard.edu/academics/courses/2007-08/?id=4719 (last visited Oct. 23, 2008).

114 Id. Property 1, http://www.law.harvard.edu/academics/courses/2007-08/?id=4723 (last visited Oct. 23, 2008).

115 Id. Torts 1, http://www.law.harvard.edu/academics/courses/2008-09/?id=5181 (last visited Oct. 23, 2008).

116 See ABA Standards, supra note 22, Standard 302(a)(5); see also Andrews, supra note 29, at 96 n.3 (distinguishing "legal ethics" from the rules of professional conduct); Linda S. Mullenix, Mass Tort As Public Law Litigation: Paradigm Misplaced, 88 Nw. U. L. Rev. 579, 584 n.16 (1994) (estimating that the large majority of instructors teach "the course as a code course, or a 'lawyering' course, not an ethics course").

117 See supra notes 27-29 and accompanying text. For a cautionary note on conflating legal ethics with disciplinary rules and the law governing lawyers, see W. Bradley Wendel, Professional Responsibility: Examples and Explanations 4 (2004).

118 See, e.g., Paul T. Hayden, Ethical Lawyering: Legal and Professional Responsibilities in the Practice of Law (2003); Hazard et al., supra note 14 (entitled The Law and Ethics of Lawyering); Lisa G. Lerman & Philip G. Schrag, Ethical Problems in the Practice of Law (2005); Susan R. Martyn & Lawrence J. Fox, Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility (2d ed. 2008).

119 Wendel, supra note 117, at 3.

120 3 Encyclopedia of Philosophy 118 (Paul Edwards ed., 1967).

121 See id. at 121.

122 Paul R. Tremblay, Acting "A Very Moral Type of God": Triage Among Poor Clients, 67 Fordham L. Rev. 2475, 2505 n.126 (1999).

123 Id. (citing Mortimer D. Schwartz et al., Problems in Legal Ethics 3-26 (4th ed. 1997)). For an argument that hewing only to these two traditions has impoverished the study of legal ethics, see Heidi Li Feldman, Codes and Virtues: Can Good Lawyers Be Good

Ethical Deliberators?, 69 S. Cal. L. Rev. 885, 887-88 (1996) (arguing that the traditional dichotomy slights the contributions available from virtue ethics).

124 Tremblay, supra note 122, at 2505 n.126 (quoting William H. Simon, Lawyer Advice and Client Autonomy: Mrs. Jones's Case, 50 Md. L. Rev. 213, 225 (1991)).

125 The Penguin Dictionary of Philosophy 543-44 (Thomas Mautner ed., 2d ed. 2005).

126 See supra note 52.

127 See Bennett v. Prime TV, LLC, No. 1:02CV0611, 2003 WL 21077130, at *1-2 (M.D.N.C. May 9, 2003); Curto v. Smith, 248 F. Supp. 2d 132, 143 (N.D.N.Y. 2003); Fashion House, Inc. v. K Mart Corp., 124 F.R.D. 15, 22 (D.R.I. 1988).

128 See supra notes 67-69 and accompanying text.

129 2 Encyclopedia of Philosophy, supra note 120, at 343.

130 Immanuel Kant, Fundamental Principles of the Metaphysics of Morals 18-19 (Thomas Kingsmill Abbott trans., Arc Manor 2008) (1785) (contending that the moral worth of an action cannot be measured by its consequences).

131 Immanuel Kant, Groundwork of the Metaphysics of Morals 15 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785).

132 See Jacques Thiroux, Ethics Theory and Practice 47-48 (6th ed. 1998) (discussing Kant's attention to consequences); Bailey Kuklin, On the Knowing Inclusion of Unenforceable Contract and Lease Terms, 56 U. Cin. L. Rev. 845, 848 n.7 (1988) ("Certainly Kant noted consequences."); id. at 856 n.30 (observing that in several writings Kant took "notice of the results of doing one's duty or even the results in determining one's duty"); David Luban, Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice, 49 Md. L. Rev. 424, 440 (1990) (noting that "a Kantian applying the generalization test must look to the real-world consequences of a universal permission to act in a certain way").

133 George P. Fletcher, The Nature and Function of Criminal Theory, 88 Cal. L. Rev. 687, 696 (2000).

134 See Anita Bernstein, Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss, 48 Ariz. L. Rev. 773, 794 n.113 (2006) (proposing to "put aside controversy-Kohlberg and stay within consensus-Kohlberg"). On the relevance of Kohlberg to understanding lawyers' ethics, see Elliott M. Abramson, Puncturing the Myth of the Moral Intractability of Law Students: The Suggestiveness of the Work of Psychologist Lawrence Kohlberg for Ethical Training in Legal Education, 7 Notre Dame J.L. Ethics & Pub. Pol'y 223 passim (1993).

135 Abramson, supra note 134, at 224.

136 See Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development 18 (35th prtg. 1998).

137 Ronald Duska & Mariellen Whelan, Moral Development: A Guide to Piaget and Kohlberg 45-47 (1975).

138 See generally Steven Hartwell, Moral Growth or Moral Angst? A Clinical Approach, 11 Clinical L. Rev. 115, 118-20 (2004) (describing the gap in legal pedagogy between conventional morality and postconventional morality, located beyond Stage Four).

139 I draw this conclusion from my own experiences of speaking and teaching at a range of law schools ranked in all four tiers of a notorious hierarchy.

140 See, e.g., Anthony V. Alfieri, Teaching Ethics/Doing Justice, 73 Fordham L. Rev. 851, 857 (2004) (describing one clinic "devoted to the values of ethical judgment, professional responsibility, and public service in law and society") (citations omitted); William Berman, When Will They Ever Learn? Learning and Teaching From Mistakes in the Clinical Context, 13 Clinical L. Rev. 115, 136 (2006) (emphasizing the relation between legal ethics and clinical education). Much of this literature comes from Canada, see Hartwell, supra note 138, at 143 n.75, an unsurprising pedigree given the Canadian practice of requiring "articling," or apprenticeship, before a law school graduate can join the bar.

141 David Luban & Michael Millemann, Good Judgment: Ethics Teaching in Dark Times, 9 Geo. J. Legal Ethics 31, 64 (1995).

142 Peter A. Joy & Robert R. Kuehn, Conflict of Interest and Competency Issues in Law Clinic Practice, 9 Clinical L. Rev. 493, 572-78 (2002) (providing two appendices for clinics to share with enrolled students).

143 This "(not so) hypothetical situation" occupies much of the analysis in Laura L. Rovner, The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics, 75 U. Cin. L. Rev. 1113, 1121 (2007).

144 Dennis Turner notes that in clinics, time crunches arise if a student hurrying to finish a complaint or the preparation of a witness barely has time to reflect on ethics, and instructors lack control of the ethics issues that will reveal themselves over the academic year; moreover, high faculty/student ratios in clinics make these programs too expensive as a means to teach a required subject. Turner, supra note 109, at 292-93; see also Moliterno, supra note 27, at 116-17 (arguing that every educational advantage that clinics now deliver can be delivered better by a combination of simulations and externships). Experiential education gained national attention in March 2008 when Washington & Lee University School of Law announced that the third year of its J.D. program would henceforth be entirely experiential. See Dean Rod Smolla, Wash. and Lee Univ. Sch. of Law, A Message from the Dean, http://law.wlu.edu/thirdyear.

145 Moliterno, supra note 27, at 77.

146 Id. at 106.

147 Kenney F. Hegland, Jim's Modest Proposal, 38 Wm. & Mary L. Rev. 125, 128 (1996).

148 At one point Moliterno says as much. See Moliterno, supra note 27, at 105 (suggesting that the experiential mode in a torts or products liability class should emphasize "the potential pitfalls inherent in personal injury representation or insurance defense").

149 Hegland, supra note 147, at 131.

150 Moliterno, supra note 27, at 103-04.

151 See Michael J. Kelly, Legal Ethics and Legal Education 8 (1980) (describing Harvard's "disdain" for teaching a single ethics course). For a survey of the same themes in business education, see Thomas R. Piper, A Program to Integrate Leadership, Ethics, and Corporate Responsibility into Management Education, in Can Ethics Be Taught? Perspectives, Challenges, and Approaches at Harvard Business School 117, 117 (Thomas R. Piper et al. eds., 1993).

152 See Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method (2d ed. 1998).

153 University of San Francisco Center for Applied Ethics, How Do Others Teach?, http://www.usfca.edu/legalethics/methods.html (summarizing Rhode's method).

154 Rhode's sympathetic dean, to whom Ethics by the Pervasive Method is dedicated, reviews some of these difficulties in Paul Brest, The Alternative Dispute Resolution Grab Bag: Complementary Curriculum, Collaboration, and the Pervasive Method, 50 Fla. L. Rev. 753, 754-55 (1998).

155 For accounts from people who have tried it, noting its limitations and its promise, see id. passim; Carrie Menkel-Meadow & Richard H. Sander, The "Infusion" Method at UCLA: Teaching Ethics Pervasively, 58 Law & Contemp. Probs. 129, 135 (1995).

156 This phrase comes from a casebook title. See Hazard et al., supra note 14.

157 See Rhode, supra note 152, at 697-99.

158 Daly, Green & Pearce, supra note 109, at 193.

159 Id. at 202-06.

160 See Robert Granfield & Thomas Koenig, ''It's Hard to Be a Human Being and a Lawyer'': Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice, 105 W. Va. L. Rev. 495, 520 (2003).

161 See Daly, Green & Pearce, supra note 109, at 200-01.

162 Granfield & Koenig, supra note 160, at 507-09, 523 (recommending that the course convey some of the "management strategies" recounted to the authors in their study of forty graduates of Harvard Law School asked to describe their own professional encounters with political power and social injustice).

163 Nathan M. Crystal, Professional Responsibility: Problems of Practice and the Profession 51 (3d ed. 2004).

164 Id. at xxv.

165 Nathan M. Crystal, Developing a Philosophy of Lawyering, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 94-97 (2000).

166 Crystal offered to withdraw the condition-of-licensing part of his proposal should critics deem it too much of an affront to lawyers' free speech rights. Id. at 101.

167 Id. at 86-92.

168 Id. at 96.

169 Id.

170 Id. at 98.

171 See Chambliss, supra note 44, passim; Ian Johnstone & Mary Patricia Treuthart, Doing the Right Thing: An Overview of Teaching Professional Responsibility, 41 J. Legal Educ. 75, 85-86 (1991); Posting of Bill Henderson to Empirical Legal Studies, A Plug for the Economics and Sociology of the Legal Profession, http://www.elsblog.org/the_empirical_legal_ studi/2006/04/a_plug_for_the_.html (Apr. 30, 2006, 9:09 EST).

172 See supra note 22 and accompanying text.

173 Chambliss, supra note 44, at 854.

174 See Robert L. Nelson, The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation, 67 Fordham L. Rev. 773, 794 (1998) (lamenting the tendency of managing partners at large law firms to regard attorney misconduct as an individual aberration); see also Chambliss, supra note 44, at 854 (identifying situational sources of unethical behaviors); Peter Margulies, The New Class Action Jurisprudence and Public Interest Law, 25 N.Y.U. Rev. L. & Soc. Change 487, 491 (1999) (referring to "the new institutionalism" to argue that rules "shape cognition and enact meaning").

175 Tom Lehrer, Be Prepared, on Tom Lehrer Revisited (Warner Bros. & Reprise Records 1990).

176 See supra notes 1-2 and accompanying text (finding nostalgia in writings about the decline of the profession).

177 Hazard et al., supra note 14, at 3.

178 See Schuwerk, supra note 4, passim (arguing that law professors owe their students fiduciary duties).

179 See supra notes 99-100 and accompanying text.

180 See supra Part III.B.

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The public defender as private offender: a retreat from evolving malpractice liability standards for public defenders

Author: David A. Sadoff
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Abstract:
Public defenders should be held to the ordinary standard for malpractice, except when budgetary limitations prevent the employment of outside experts. Other contextual factors such as locality of practice, criminal defense specialty, and pressures of heavy workloads do not warrant a different liability standard. Plaintiffs already face obstacles in a public defender malpractice case. Nevertheless, some states have granted public defenders immunity, based on sovereign, official, or judicial immunity or on public policy grounds. Arguments based on effects on defendants, on public defenders and on the criminal justice system do not justify the practice.

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INTRODUCTION

Suppose a public defender(1) omitted interviewing an alibi witness, failed to call a relevant expert to the stand, or neglected to move for the exclusion of illegally seized evidence. Suppose further that, as a result, his client's case was jeopardized. Should the client, an indigent criminal defendant, have the opportunity to sue the public defender for civil damages(2) on account of malpractice? And, if so, what legal standard should be used to determine liability? This Note seeks to determine a fair, coherent, and realistic negligence(3) standard governing criminal malpractice(4) suits against public defenders.(5)

Currently, states(6) lack a uniform negligence standard for public defender malpractice. The vast majority of states adopt ordinary tort negligence as their standard.(7) In recent years, many state courts, evidently dissatisfied with this traditional approach, have deviated from the norm. By and large, these states have adopted more protective approaches, ranging from public defender immunity on wholly public policy grounds,(8) to the heightened liability threshold of gross negligence(9) to stiffer pleading requirements.(10) This wide-ranging experimentation sets the stage for a wholesale re-examination of the public defender malpractice standard.(11)

Determining a satisfactory standard by which to evaluate malpractice claims against public defenders is critical to ensuring the legal system's effectiveness and integrity. The presence and impact of public defenders today are pervasive. Public defender offices serve most of the American population,(12) with especially wide coverage in highly populated areas.(13) Public defenders play a pivotal role in our criminal justice system, representing society's most economically and politically disadvantaged.(14) The legitimacy of and public confidence in our court system depends in no small part on the perception that indigents receive fair and adequate representation. A system of justice, after all, is only as effective as its treatment of the most disenfranchised.

The question of how to treat malpractice actions against public defenders is also timely. In recent years, the incidence of crime, especially felonies, has risen sharply nationwide.(15) Because eighty percent of all felonies are committed by indigents,(16) as indictments rise, so too will the volume of cases assigned to public defenders. State and county governments also face shrinking budgets, placing an ever-greater financial strain on the provision and quality of indigent defense services.(17) Coupled with the fact that malpractice suits have become an increasingly popular remedy for tort victims of professionals generally,(18) malpractice litigation against public defenders can reasonably be expected to increase. Further, as state experimentation with the malpractice standard continues, the potential arises for other states to model their own standard after such novel approaches.

In Part I, this Note describes the rarefied working conditions and pressures faced by public defenders, but rejects granting them an overall heightened level of protection from liability due to countervailing ethical obligations. Part II discusses the substantial legal and practical obstacles to filing and winning malpractice actions against public defenders, heavily insulating them from tort liability. Part III evaluates the arguments for granting public defenders some form of malpractice immunity and demonstrates the strength of a liability rule.

Finally, Part IV examines both well-established and optional features of a malpractice liability standard, concluding that, with one

exception, the predominant standard of ordinary tort negligence should persist. The sole situation in which public defenders should be entitled to complete protection is when their negligence results directly from budgetary constraints in connection with securing necessary out-of-office investigators, translators or experts.

I. The Character of the Public Defender's Job

There are few positions as laden with tension and contradiction as that of the public defender. He is typically a government employee and yet functions as private counsel. In most instances, he is paid and staffed by the very entity - the state - he opposes in his client representations. He is an integral part of the judicial system and yet typically treated as an outsider. He is sometimes appointed by the very judges before whom he argues in court. He is lauded for defending the defenseless, but often resented when he defends them successfully.(19)

The unique character of his job renders a public defender more exposed than private or specially appointed counsel(20) to a criminal malpractice claim. The public defender is typically confronted with burdensome and challenging caseloads; severe resource constraints; distrusting, litigious, and unreliable clients; and real or perceived collusion with or coercion by judges, prosecutors, or both.

In recognition of these unusual pressures and sensitive relationships, some argue that public defenders deserve a level of protection from malpractice liability above and beyond that accorded their criminal defense counterparts. Notably, however, public defenders themselves are not among those calling for special treatment. Moreover, the American Bar Association (ABA) has made clear that public defenders are to be held to the same professional and ethical standards as any other defense counsel.(21)

A. Heavy Caseloads and Underfunding

Public defenders are characteristically saddled with an overwhelming volume of cases.(22) As a result, they cannot always invest the amount of time each case requires, or necessarily defend each client vigorously.(23) In this connection, public defenders have been faulted at times for "playing for the average" by strategically apportioning their efforts according to each case's likelihood of success or failure.(24)

While admittedly public defenders work under considerable time pressure to process large numbers of cases, this circumstance does not exempt them from their basic responsibilities. According to the ABA, a public defender's functions and duties with respect to his clients are no different from those of assigned or privately retained counsel.(25) More specifically, the ABA exhorts "defender organizations" not to "accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations."(26) As for the allegation that public defenders are prone to "play for the average," empirical evidence is scarce,(27) and there is no reason to believe they would be any more inclined to make such strategic calculations than busy private attorneys.

The difficulty of the public defender's job is arguably exacerbated by the fact that an indigent client can recommend and insist upon frivolous defenses or tactics with financial impunity. Unlike the paying client who must carefully consider each claim or defense in light of the number of billable hours he will be charged, it is contended that the indigent defendant has no such "brake" on the type of defense he wages.(28) Pursuing such frivolous matters consumes time which the public defender could otherwise allocate to more promising avenues of defense for the same or another client.

This argument is unpersuasive, however, as a justification for differential liability treatment for public defenders. To begin, assuming arguendo that public defender clients are more apt than paying clients to file frivolous malpractice claims against their attorneys, this tendency reflects wholly on client motives, and not on attorney performance. Moreover, client motives do not, and should not, necessarily translate into legal claims: Attorneys are prohibited, as an ethical matter, from handling frivolous claims, notwithstanding attorney-client financial arrangements.(29) Further, even if such frivolous suits were filed, they should be subject to swift summary judgment.

Public defender services are notoriously underfunded. Available financial resources are often inadequate to provide even minimally effective representation.(30) All too frequently, expert witnesses go unhired and investigations unlaunched.(31) A losing client is more likely to sue for malpractice if he perceives, reasonably or unreasonably, that resources were inadequately expended on his behalf. And such suits, whether meritorious or not, tie up a public defender's precious time.

According to ABA Standards, however, "[t]he legal representation plan [of defense services] should provide for investigating, expert, and other services necessary to quality legal representation."[32] While public defenders are supposed to represent their clients using adequate resources, those resources are to be furnished by the government. "The Government has the responsibility to fund the full cost of quality legal representation for all eligible persons . . . ."(33) Because the onus of providing adequate resources lies ultimately with the government, to the extent a public defender's negligence is attributable to a resource shortfall beyond his immediate or direct control, he arguably should be granted protection from liability.(34)

However, office budgets are fungible, and virtually and alleged negligent conduct by a public defender could be characterized post facto as a function of financial constraints beyond his control. Therefore, a line must be drawn between those constraints that warrant conferring protection and those that do not. The one scenario that should qualify for such protection is when a public defender's operating budget precludes him from hiring an investigator, translator, or expert in a case requiring such service.(35) This exception is discussed infra in Part IV(B)4.

B. Client Distrust and Sensitivity

A public defender's susceptibility to a malpractice claim is heightened by virtue of the quasi-involuntary relationship that exists between him and his client. In contrast to private defense counsel, a public defender cannot decline to represent a particular

client.(36) Thus, a public defender is unable to weed out those cases which appear to be problematic or meritless, those clients whose views or temperament is offensive or who are by nature litigious,(37) or those assignments that could not be handled effectively given the burdens of an existing caseload.(38)

To compound matters, the indigent defendant himself does not specifically choose the public defender assigned to his case.(39) Consequently, public defenders can have difficulty with "client control."(40) Trust and confidence in the public defender may take longer to develop(41) and, in the meantime, the client is more likely to exhibit resistance. Not uncommonly, clients feed public defenders unreliable information or behave unpredictably, creating greater skepticism in general about clients' claims and proposed testimony.(42) Mistrust is also engendered when the client perceives, as he often does, that the publicly-funded defender is merely a cog in the very "court bureaucracy that is `processing' and convicting" him.(43)

Such perceptions of mistrust are apt to flourish under the distancing circumstances in which public defenders operate. Public defender offices are typically small, sparse, and simple, which some clients associate with an inexperienced, struggling, or unsuccessful advocate.(44) Public defenders are not always apt to engage in "hand-holding" or daily confidence-building behavior because, unlike private counsel, they have no sales incentive to generate and retain paying clients.(45) Also, excessive caseloads often leave public defenders little time to communicate with clients (who may be confined in jail and/or located a considerable distance away), especially with regard to litigation developments.(46)

While these conditions introduce added challenges to a public defender's job, he is still obligated to perform his functions competently. Under the ABA Model Rules of Professional Conduct, "[a] lawyer shall provide competent representation to a client . . . [which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."(47) If a lawyer's representation would result in a violation of a Rule of Professional Conduct - say, due to inadequate preparation - he must refrain from accepting, or must withdraw from, such representation.(48) While violations of these ethical guidelines are not determinative of negligence,(49) as a matter of practice, courts frequently base their decisions on such considerations.(50)

C. Pressure to Accommodate Judges and Prosecutors

The public defender's job would appear to cast him in a particularly sensitive position vis-a-vis judges and prosecutors. While the level of formal control a judge can exert over a public defender varies across jurisdictions,(51) it is not unusual for courts or judges to decide on the hiring and firing of public defenders and on the funding of the public defender offices.(52)

A public defender also has an interest in appearing accommodating before a judge both because a reputation for moderation will serve him well in future cases, and because the judge may one day provide him with a job reference.(53) Furthermore, given that public defenders and prosecutors are both state officials, that they are in constant contact over a large number of cases, and that plea bargains can be struck, public defenders are conceivably subject to a degree of influence or coercion by the district attorney.(54)

This complex of job-related sensitivities facing public defenders, however, does not reasonably warrant increased protection against negligence liability. First, while judges may exert some control over the hiring and firing of public defenders, their salaried positions help insulate them from such judicial pressure.(55) Second, most lawyers, not just public defenders, are concerned about their appearance before a judge; such an everyday concern presents no real basis for lowering the applicable negligence standard. Third, courts have found that district attorneys exert less pressure over public defenders than the peculiar nature of their relationship might suggest.(56)

Overall, public defenders face a range of job pressures that, in aggregate, would seem to expose them to malpractice claims more readily than is the case with private or court-appointed counsel. But public defenders operate under the same ethical obligations as other defense attorneys, and must therefore uphold identical standards of competency and professionalism. In the one instance, however, when a public defender's representation is clearly handicapped beyond his control - i.e., when his case budget constrains him from hiring essential outside personnel - he should be legally excused from any consequential negligence.

II. The Nature of Malpractice Claims Against Public Defenders

This section provides general information about the mechanics and dynamics of a negligence suit for malpractice against a public defender. Three areas are covered: (i) the avenues available for filing a malpractice action; (ii) the doctrinal and practical obstacles encountered in such actions; and (iii) the elements of a malpractice claim against a public defender under the predominant standard of ordinary tort negligence.

A. Filing a Malpractice Action

Traditionally, two types of claims for monetary relief based on a negligence theory have been available to criminal defendants, whether indigent or otherwise: (1) a federal civil rights action under 42 U.S.C. [sections] 1983, and (2) a tort action under state law.(57) To succeed under the federal statute, a plaintiff has to show both that a public defender's act or omission deprived him of a constitutional or federal right, and that the public defender was acting "under color of [state law]."(58)

Historically, criminal defendants have exhibited a strong preference for this federal action over the state law remedy. Unlike the latter, the section 1983 action requires no filing fee for indigents, pro se petitions are interpreted more leniently than those filed by counsel, and the statute of limitations is not statutorily fixed.(59) If a plaintiff chooses to obtain counsel, attorney's fees are recoverable(60) unlike in a state tort action. Additionally, a plaintiff need not exhaust state judicial remedies before initiating a section 1983 claim.(61)

However, in 1981 the United States Supreme Court effectively closed off this federal avenue to public defender clients. In Polk County v. Dodson,(62) the Court ruled that public defenders do not act under color of state law when they perform traditional lawyer functions.63 The Court reasoned that while public defenders are paid, employed, and thereby to an extent, controlled, by state or

local government, they do not act as government employees when serving as defense counsel.(64) In essence, public defenders play the same role as private counsel in representing clients, and are, moreover, obligated to vigorously oppose state efforts.(65) Public defenders are also vested with no extra powers as a result of their employment status, and remain subject to the same ethical obligations as private counsel.(66)

The upshot of this ruling is that those ex-defendants who wish to bring a malpractice action against their public defender stand little chance of successfully invoking the federal civil rights statute. Such indigent parties now almost certainly have to channel their action through the state system as a tort claim, barring evidence of deliberate misconduct(67) or possibly a nondiscretionary decision(68) on the part of a public defender.

B. Plaintiff Obstacles in a Malpractice Action

Apart from such jurisdictional restrictions, a plaintiff faces a host of doctrinal and practical barriers to filing and winning a malpractice claim in state court against a public defender. These obstacles provide public defenders with a significant layer of protection against liability. Nevertheless, as legal malpractice actions mount, some concerned states are seeking to bolster existing constraints against public defender liability.

Most jurisdictions require would-be criminal malpractice plaintiffs, whether represented by public defenders or otherwise, to file and secure post-conviction relief prior to bringing suit.(69) Such relief typically derives from a criminal defendant's charge that defense counsel violated his Sixth Amendment right to effective assistance of counsel.(70) In 1984, the Supreme Court articulated a two-pronged test in Strickland v. Washington,(71) which established a uniform standard across states for evaluating such ineffective assistance claims. A petitioner must show both that: (1) defense counsel's performance was deficient, and (2) this deficiency prejudiced the defense to the extent of depriving the defendant of a fair trial.(72) This test has proven difficult to satisfy,(73) especially with respect to omissions.(74)

Many state courts have acknowledged that their state malpractice standard is essentially equivalent to the Strickland standard governing ineffective assistance claims.(75) This equivalency is significant because once the ineffectiveness claim has been raised and defeated, a public defender defendant (or other criminal defense counsel) can assert collateral estoppel to bar a legal malpractice action.(76) The doctrine of collateral estoppel precludes the relitigation of issues settled by a prior proceeding.(77) Thus, in effect, when a defendant fails to prove ineffective assistance of counsel, the issue of the attorney's culpability is deemed to have been settled, thereby relieving him of any liability.(78)

By itself, a finding of ineffective assistance in a prior proceeding does not necessarily establish a breach of duty in a criminal malpractice action.(79) Furthermore, even if a defendant's conviction is reversed on ineffective assistance of counsel grounds, some states appear to additionally require a malpractice plaintiff to prove his actual innocence with respect to the underlying criminal offense.(80)

Practical contingencies may also obstruct a successful malpractice claim against a public defender. To begin, the ex-defendant wishing to bring a malpractice suit is often confined in jail, handicapping his physical movement and ability to launch such a suit.(81) In addition, securing legal representation can be problematic. Because a malpractice suit is legally complex, a defendant will almost certainly need an attorney to represent him, effectively precluding the option of his appearing pro se.(82) Thus, lacking financial resources, the indigent defendant will need to find an attorney willing to accept his case on a contingency fee basis.(83) Cognizant of the fact that unless the criminal defendant prevails he will not be paid, an attorney will be reluctant to represent the defendant unless he has an unusually strong case, one most likely involving transparent malpractice.(84)

Even if the claim is adjudicated, under state rules of evidence and the ABA ethics rules, a plaintiff effectively waives his attorney-client privilege for the purposes of the malpractice action."-' Thus, sensitive information shared in confidence with the public defender in connection with the criminal proceeding can be used, in boomerang fashion, to discredit the plaintiff in a negligence action. Moreover, in most cases expert testimony is required to show a departure from the accepted course of conduct,"" but some attorneys are loath to testify against one another,"7 they may be hard to locate,"" or courts may simply choose to deny the admissibility of their testimony. 89

In addition, juries in malpractice actions tend to be unsympathetic to the plaintiff - often the type of person the public would prefer to keep off the streets anyway - and are generally inclined against awarding him damages.90 Finally, defense lawyers, including public defenders, have a quiver full of effective defenses such as the statute of limitations and contributory negligence. These defenses can be, and are frequently, used to pierce a malpractice charge against them.9'

Empirical data support the implication raised by these doctrinal and practical constraints. Currently, only a small number of malpractice actions are filed against public defenders in state courts each year, and very few are successful.92 However, the frequency of criminal malpractice suits generally is on the rise.93 A reaction by states to this development is encouraging, and ideally should take the form of increased budgets for public defender services. But overreaction, namely by erecting largely impermeable barriers to a successful malpractice action, will prove counterproductive.

C The Predominant Negligence Liability Standard

While legal malpractice liability standards vary by state, those used in criminal malpractice cases generally track those established for civil malpractice.94 The predominant standard today consists of ordinary tort negligence.95 The four elements to be satisfied in a negligence suit for legal malpractice are: (1) the existence of a legal duty running from attorney to client; (2) an act or omission constituting a breach of that duty; (3) resulting harm to client measurable in damages; and (4) proximate cause between the breach of duty and the harm." These elements must be established by a preponderance of the evidence.9"

To satisfy the legal duty element, the plaintiff need only show the existence of an attorney-client relationship. 98 Expert testimony is

frequently needed to show breach of duty and causation.99 Proving the damage element can be highly complicated; courts have little experience and knowledge on how to account for "[s]uch factors as the sentencing discretion of the criminal trial judge, the role of the parole board, . . . [andl the effects of conviction on future employment."100 Proximate cause, which incorporates causation in fact,101 is typically the most problematic element to establish. 102 The causation requirement varies by state, but generally the ex-defendant must establish by a preponderance of the evidence that "but for" the attorney's negligence, a jury would have returned a more favorable verdict.'03 This requirement effectively amounts to retrying the criminal case as a civil case or, put more concretely, conducting "a trial within a trial.'"04 Given that any single variable or combination thereof could have led to the criminal conviction, it is often difficult to attribute the conviction with a reasonable degree of certainty to the attorney's breach of duty. 105 Proving causation is further complicated by the fact that a criminal malpractice plaintiff lacks the benefit of a prosecutor's resources."*

The act or omission allegedly constituting breach of duty is evaluated according to a reasonableness standard. The reasonableness of such conduct is measured against the conduct of a prudent and careful attorney operating under comparable circumstances. 107 These circumstances are often defined to account for geographic- or specialty-based considerations.'08 The geographic standard sets forth a level of care expected of attorneys practicing in a particular locality, however broadly or narrowly defined. Courts vary widely in their application of this standard, from the same district or county, to the same state, to the nation at large.'09 Persons operating under a specialty-based standard are expected to maintain a higher level of skill and care than the non-specialist. Some states have recognized criminal attorneys, for example, as criminal law specialists.110

The reasonableness standard among professionals applies to the level of skill of the minimally qualified member in good standing, not the average member.'" The attorney will never be held liable simply because a successful result was not attained and will only rarely be so held because he failed to adopt a certain strategy.112 Nor will an attorney be liable for a mere error of judgment.' 13

In sum, to prevail in a malpractice action against a public defender for negligence, then, a plaintiff must skillfully negotiate a veritable obstacle course. This formidable challenge may well continue to discourage many ex-criminal defendants from asserting negligence claims against public defenders for malpractice or, when they are raised, to prevent them from succeeding. Nevertheless, several states have sought to enhance these already substantial protections, reasoning that it is unfair to pin liability on public defenders when they are forced to function under increasingly pressure-filled and liability-prone conditions. The most extreme version of such protective devices is immunity, which is explored in its multiple guises below.

111. EVALUATING A PUBLIC DEFENDER IMMUNITY RULE

This section will evaluate the relative desirability of an immunity rule. Before examining the various types of immunity and their underlying rationales, the analysis first assesses the independent value offered by the alternative: a liability rule.

A. The Affirmative Case for a Liability Rule

For several reasons, maintaining a liability rule for the tort of malpractice is both prudent and fair. First, liability breeds responsibility. A public defender is more likely to act responsibly and represent his client zealously when facing the threat of a civil suit than in the absence of such a threat. 114 A liability rule introduces a significant external force - the prospect of malpractice liability - in addition to other external'" and internal forces, to create more rigorous performance incentives for a public defender.

Second, a liability rule is compensatory. Such a rule permits an injured party to recover damages commensurate with the injury suffered. This rule captures the notion of corrective justice, of "righting a wrong." In economic terms, tort liability recognizes the creation of an externality and arranges for the responsible party to internalize it. When an injured party is so compensated, the system is properly accountable, and accountability is a hallmark of fairness. Third, our criminal justice system is only as strong as public confidence in its legitimacy. If indigent criminal defendants were foreclosed from suing their attorneys while economically advantaged defendants could continue to bring malpractice claims against private counsel, the system would strike us as unfair. If an indigent criminal defendant proved ineffective assistance of counsel but could not seek civil damages for malpractice, the system would likewise reek of illegitimacy. A liability rule would thus prevent such deterioration in the public perception of our criminal justice system.

B. Sovereign, official and Judicial Immunity

Despite these cogent reasons favoring a liability rule, several state courts currently allow public defenders to assert immunity as an affirmative defense'16 to malpractice liability. Public defender malpractice immunity can assume many forms, ranging from sovereign immunity to official immunity to judicial immunity to immunity on wholly public policy grounds. 117 Each of these variants is examined in turn below. The arguments advanced in their support can be readily countered.

1. Sovereign Immunity

The Eleventh Amendment of the United States Constitution bars suits against an unconsenting state government or an arm or agency thereof in federal court. 118 This type of immunity derives from the sovereign power of the state. The vast majority of states, however, have substantially abolished such immunity either by statute or judicial decision; few states maintain full sovereign immunity. 1 ' This doctrine has been extended via the common law to officers of the state sued in their official capacity.120 The underlying rationale is to insulate public officials from the fear of disruptive or distracting lawsuits that would hamper the execution of their duties.

An individual qualifies as a public official for sovereign immunity purposes where he has: "l) an authority conferred by laws; 2) a fixed tenure of office; and 3) the power to exercise a portion of the sovereign functions of government.,,121 While arguably satisfying the first two criteria, a public defender would certainly fail the third prong of the test because representing a criminal defendant is not a sovereign act.

The Connecticut Supreme Court rejected a sovereign immunity claim in a public defender malpractice suit on this logic, observing

that a state cannot function simultaneously as prosecutor and defender.(122) A Michigan Supreme Court judge pointed out that simply because a government pays for a particular service (such as "legal services for indigent defendants") that might just as easily be performed by the private sector does not per force render that service "governmental."(123) Notably, no state court has yet found a public defender immune from malpractice on sovereign immunity grounds.(124)

2. Official Immunity

Unlike sovereign immunity, which derives from the state's sovereign power, official immunity derives from particular public policy considerations. Nevertheless, their respective underlying justifications are similar: To protect public officers from the consequences of erroneous or negligent judgments made in connection with their official duties.(125) Official immunity is determined by the function performed, not the title of the officer.(126) Discretionary decisions, which constitute the manifest exercise of sovereign power and lie at the heart of governance, are covered under official immunity. By contrast, ministerial duties, which are of a clerical or administrative nature performed without the exercise of judgment, are not subject to immunity protection.(127)

Courts in Delaware, Nevada, and Tennessee have held public defenders immune from malpractice liability on the basis of official immunity.(128) Public defenders are included within the definition of "state employee or officer" or otherwise accorded immunity under each state's Tort Claims Act.(129) While the opinions do not spell out a rationale for this treatment, public defenders are conceivably state officials inasmuch as their positions are publicly funded and authorized by statute. Also, the state can impose reporting and training requirements on public defenders;(130) instruct them to undertake particular assignments;(131) and determine their workloads, time allocation, and resources.(132)

Courts in California, Connecticut, Indiana, and Pennsylvania, however, properly reject the official immunity rationale.(133) For these courts, public defenders are not public employees or officers because their functions, standards, and obligations do not depend on governmental authority. Government control over the public defender with respect to reporting requirements, workload management, or client assignments has no effect on the attorney-client relationship. Once a client has been assigned, the nature and scope of a public defender's duties are equivalent to that of private counsel.(134) Unlike public servants, moreover, public defenders do not formulate or administer public policy, and are not accountable to the community at large.(135) And public defenders are held to the same standards of competence and integrity as private counsel.(136)

Given that the vast majority of public defender services are publicly funded, it is notable that government-salaried doctors remain, for the most part, subject to tort liability.(137) Besides, under the canon of legal ethics, an attorney owes his primary allegiance to the client, not to the party paying for his services.(138) Thus, the public defender is not accountable to an administrative superior, but rather is independent of any government control in the performance of his assigned task.(139) This independence is underscored by a public defender's obligation to vigorously represent his clients in direct opposition to the state. Finally, while public officials can be sanctioned for misconduct by impeachment or electoral defeat, public defenders are not subject to such political checks.(140)

3. Judicial Immunity

Judicial immunity is a common law doctrine intended to promote "principled and fearless [judicial] decisionmaking" by removing any fear that unsatisfied litigants might harass, intimidate, or interfere in other ways with a judge's impartiality.(141) Judicial immunity is a powerful protection; judges have been found immune even from charges of malice, corruption, and severely damaging action.(142) Judges are only subject to liability if acting in "the clear absence of all jurisdiction."(143) The knowledge that judges are free to exercise their discretion without fear of consequence, it is reasoned, is for the benefit of the public, not the judges themselves.(144)

Quasi-judicial immunity, a doctrinal derivative, has been extended broadly to other court and public officers for their judicial acts.(145) Examples include court reporters, court clerks, parole board members undertaking judicial functions, administrative hearing officers, and probation officers acting at the direction of a judge.(146)

Prosecutors are also accorded quasi-judicial immunity because their judgments are "functional[ly] comparab[le]" to those of judges and because, like judges, they "exercise discretionary judgment" affecting individual rights.(147) The prosecutor's duty is to prosecute the guilty and protect the innocent, and his office "is vested with a vast quantum of discretion . . . necessary for the vindication of the public interest."(148)

In certain significant ways public defenders perform similar functions to prosecutors. Both positions may be said to entail discretionary decisionmaking.(149) Both are obligated, as officers of the court, to ensure the fair treatment of the accused(150) and both perform an integral function in the judicial process.(151) The public defender is part of a delicately balanced triad consisting of judge, prosecutor, and defense counsel that, as a collective unit, is designed to reach just outcomes.(152) Viewed in this light, the public defender appears to serve the public interest as much as a prosecutor does.(153) Accordingly, its proponents argue that judicial immunity should protect the discretionary conduct of public defenders. A county court in New York(154) has endorsed such a judicial immunity approach.

Connecticut, Florida, and New Jersey courts,(155) however, reject judicial immunity for public defenders on several grounds. First, judges and prosecutors have a long history of common law immunity, while public defenders do not.(156) Second, a prosecutor's primary duty is "to see that impartial justice is done to the accused as well as to the state," while a public defender need only be concerned with his client's welfare.(157) Third, if, as claimed, public defenders deserve judicial immunity due to their integral role in the judicial process as an officer of the court, then it logically follows that any private attorney representing a criminal defendant should likewise be eligible.(158)

C. Immunity on Public Policy Grounds

A fourth justification for immunity is rooted entirely in public policy. Unlike official and judicial immunity, which are tailored to specified individuals and which focus on a single policy concern - freeing decisionmakers from pre-decision intimidation or post-decision

harassment - the public policy rationale need not meet narrow definitional parameters and reflects a far wider range of policy interests. In August 1993, the Minnesota Supreme Court held in Dziubak v. Mott,(159) a nationally unprecedented decision,(160) that public defenders are immune from criminal malpractice claims on wholly public policy grounds.

The policy arguments favoring immunity fit, by and large, into three broad, consequentialist categories: (i) effects on the defendant, (ii) effects on public defenders and/or public defender services, and (iii) effects on the criminal justice system. In the end, the policy arguments do not justify shielding public defenders with the extraordinary defense of immunity.

1. Effects on the Defendant

The desirability of an immunity rule must be gauged in part by its effects on indigent criminal defendants, the victims of alleged negligent representation. The two key inquiries are: first, whether the defendants have an adequate remedy apart from civil damages and, second, whether absent an immunity rule the defendants might indirectly profit from their misconduct.

a. Adequacy of remedy

Proponents argue that an immunity rule would still permit a remedy for an indigent criminal defendant whose defense was impaired due to negligent representation. A defendant in such circumstances could seek a retrial by asserting an ineffective assistance of counsel claim, via a direct appeal, state post-conviction proceeding, or a federal habeas corpus petition.(161)

This argument for the immunity rule, however, ignores the distinctive value of a civil remedy. While appeals can correct for errors in an earlier proceeding, they cannot fully compensate a wronged party for additional time confined in prison, for attendant public humiliation and angst, or for the economic hardship his family may have endured during the appeals process.(162) Civil damages may remain an imperfect corrective, but at least it provides some compensation for real injuries brought on by someone other than the defendant himself.

Moreover, given that civil damages are widely used to compensate those injured at the hands of private attorneys, an immunity rule as applied to public defenders would create, in effect, a "two-tiered criminal justice system."(163) Those economically advantaged enough to afford their own defense counsel potentially could obtain monetary damages, whereas poor defendants who must rely on public defenders could have no such remedy.(164) Yet an attorney's ethical obligations, the benefit of competent representation, and an expectation of equal justice should not turn on the financial wherewithal of a client.(165)

b. Profit from misconduct

An immunity rule would prevent a criminal defendant from obtaining damage awards due to a negligent defense, and thereby profiting from his misconduct.(166) Such a recovery, it is contended, would effectively dilute individual responsibility for criminal conduct.(167) Permitting defendants who actually committed crimes to recover awards would also discredit the law enforcement motto that "crime doesn't pay."

A critical flaw in this reasoning is that it unjustifiably assumes the defendant is actually guilty of the charged crime. Our legal system rests on the contrary assumption that a person is innocent until proven guilty - and only so when the defendant has been afforded adequate representation. Thus, as a matter of semantics, the defendant is arguably not "profiting" by his crime as much as being fairly compensated for an injustice endured as a result of his (unchosen) attorney's negligence.

While an actually guilty defendant would receive damages for the negligence of his public defender, in practice only the most egregious claims of malpractice are likely to be filed in the first place because of the structural incentives of contingency fees.(168) Finally, because our legal system does not preclude legal malpractice recoveries by, for example, white collar criminal defendants with the economic means to hire private counsel, the rationale of preventing benefits to criminals per se collapses.

2. Effects on Public Defenders and Public Defender Services

The most robust arguments made in support of an immunity rule involve the rule's effects on public defenders and public defender services. These arguments underscore the benefits of an immunity rule by alleging defects in a liability rule. They are: (1) a liability rule would tend to "chill" a public defender's judgment; (2) public defenders do not require the strict accountability of a liability rule in order to behave responsibly; (3) a liability rule may have a deterrent effect on recruiting dedicated professionals to fill the ranks of public defenders and on maintaining those ranks; and (4) a liability rule would divert limited public defender resources toward defending against malpractice claims and away from the pressing needs of indigent clients.

a. Chilling effect on judgment

Immunity rule advocates contend that the threat of a malpractice suit would effectively inhibit a public defender's exercise of discretionary authority in representing his client.(169) Under this threat, tactical and strategic decisions arguably will gravitate toward the conventional and away from the creative, may be driven by the frivolous demands of a defendant undeterred by cost, and must in every case be balanced against priority assignments on behalf of other defendants.(170) Such circumstances create a troubling tension for the public defender; he must vigorously represent his client's best interests while, at the same time, worrying about his potential exposure to a malpractice suit.(171)

Torn between conflicting loyalties to his client and to preserving his livelihood, it is argued, a public defender is under increased pressure to act in his self-protective interest, rendering him more prone to self-censorship as well as to intimidation and other chilled judgment.(172) Moreover, public defenders often must operate in a hostile courtroom due to client unpopularity(173) - a condition which places a premium on freedom of judgment and to which their immunized counterparts in court, judges and prosecutors, are not

subject.

Additionally, it is argued that to tolerate some negligence may be worthwhile in order to avoid plaguing honest, dutiful public defenders with the threat of liability at every turn. As Justice Learned Hand reasoned: "`In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'"(174)

This reasoning does not stand up to scrutiny. The posited conflict of interest itself is artificial. Fear that a particular legal strategy or an unsuccessful defense will produce a malpractice suit does not conflict with the public defender's representational duties. Rather, the very prospect of malpractice should further impel a public defender to fulfill his duty as counselor competently.(175) Also, private counsel, retained or appointed, regularly operate under the shadow of malpractice, and a public defender needs no more "discretion, freedom, or encouragement to exercise his professional judgment and skill than does privately retained counsel."(176) Moreover, any such chilling effect would be residually offset by malpractice insurance provided by the public defender service(177) or by state indemnification covering state employee negligence.(178)

b. Checks on irresponsibility

Any argument in favor of an immunity rule must address the concern that immunity might spawn irresponsible conduct because of the lessened incentives to represent clients zealously. Immunity rule proponents point to a broad range of checks that, they contend, sufficiently ensure public defender accountability. These checks include disciplinary action by appellate courts, penalties imposed by the bar association, and criminal sanctions.(179) Thus, even when indemnified or insured against civil damages, a public defender could potentially suffer one or more of the following: loss of livelihood, demotion, public embarrassment, or blemished reputation.

While theoretically powerful, this argument collapses on empirical grounds. Courts have proven reluctant to embarrass attorneys and so only infrequently initiate disciplinary proceedings against them.(180) While the bar association requires practicing attorneys to abide by certain ethical standards, the standard of proof is heightened in many jurisdictions to "clear and convincing evidence,"(181) and the code of professional responsibility has been, at best, irregularly enforced.(182) Also, criminal charges, which cannot be brought by the aggrieved defendant, are typically made only with respect to particularly gross violations of rights.(183) At bottom, then, public defenders would not likely be adequately deterred from irresponsible conduct in the absence of malpractice liability.(184)

c. Recruitment and maintenance of public defenders

A liability rule, some argue, would deter the recruitment and maintenance of able and dedicated professionals to serve in public defender services. Under this contention, concern about being sued for legal malpractice while practicing in a highly pressurized work environment would discourage potential recruits and disaffect existing staff.(185) This problem is presumably exacerbated in rural areas where fewer public defenders are presently stationed.(186) To the extent public defender offices would become understaffed or staffed by less qualified professionals, the risk of injustice to indigent defendants would rise correspondingly.

Concerns that a liability rule would give rise to an unsatisfactory public defender workforce are unsubstantiated. "There is no shortage of private attorneys willing to do criminal defense work without immunity."(187) Empirically, public defender services (PDS's) have been "able to recruit to the extent of their budgets" even absent malpractice immunity for public defenders.(188) The United States Supreme Court has acknowledged, moreover, that the "effect of immunity on [PDS] recruitment is speculative."(189)

The prospect of malpractice liability is not unique to public defenders; it is a well-understood reality across the legal landscape. Lawyers expect to be held liable for negligence, and are far more likely to let job decisions turn on factors other than the presence or absence of immunity.(190) Notably, public defenders do not typically number among those calling for immunity. In addition, those public defenders who insist on quality performance should actually prefer a liability rule. Such a rule would help ferret out incompetent attorneys and consequently heighten the real or perceived professionalism of their office staff. If recruitment or maintenance ever became a problem, moreover, alternatives short of an extreme measure like malpractice immunity readily exist to heighten the appeal of a public defender position, such as offering higher salaries, reducing the workload, or adding perquisites.(191)

Finally, an immunity rule could backfire, resulting in more, not less, attrition. States or counties could perceive immunity protection as an invitation to burden public defenders with heavier caseloads or to diminish resources.(192) After afl, neither the public defender nor the state would be held liable for any civil damages resulting from a malpractice claim. Under such conditions, some public defenders would likely become overwhelmed, and seek a less demanding work environment elsewhere. An immunity rule could also backfire on the recruitment of able attorneys by implicitly assigning public defenders second-class status.(193) The perception by some that truly competent counsel do not need such protection could drive away otherwise interested candidates.

d. Diverting limited resources

Another problem associated with malpractice liability for public defenders, many claim, is that it tends to skew an otherwise efficient allocation of limited defense resources. Instead of spending his limited time and effort defending indigent criminal defendants, a public defender charged with malpractice would have to devote considerable resources to his own defense.(194) Even where no liability was ultimately found, pre-trial discovery alone could prove time-consuming, expensive, and disruptive.(195) Such a diversion of resources would only aggravate a situation in which public defenders already labor under heavy caseloads.(196) As a direct result, immunity proponents point out, the quality of their representation would naturally suffer.

Public defenders appear to be appropriate recipients for immunity, then, because immunity's objective of shielding state officers from the burdensome consequences of litigation would be duly served. This logic underlies judicial and prosecutorial immunity. The same reasoning explains why police officers are immunized when testifying in court.(197) The legal system does not want to divert a police officer's attention and energy from enforcing the law each time a disgruntled defendant charges him with wrongdoing. Immunity rule advocates argue that public defenders, who also fulfill a critical public duty, should likewise be accorded such protection.

Such resource diversion, however, is arguably but a small price to pay to provide ex ante incentives for quality defense work and to permit an overall fair legal system to flourish. Even if the number of malpractice actions against public defenders climbs, judges, prosecutors, and police witnesses would all be far more likely objects of a lawsuit for wrongdoing (absent immunity) than public defenders. Moreover, resource diversion is only troubling to the extent frivolous or vexatious claims are involved. The proper goal should not be to eliminate all claims but only those which are without merit. Public defenders should be held to defend against legitimate claims of negligence. Thus, an immunity rule would be overinclusive, preventing the filing of even perfectly legitimate grievances.

3. Effects on Criminal Justice System

Whether public defenders are cloaked with malpractice immunity also has far-reaching implications for the criminal justice system. The consequences at stake include systemic coherence, efficiency, and legitimacy. Once again, the arguments in support of malpractice immunity can be soundly defeated.

a. System coherence

A system is coherent when similarly situated persons are treated logically and consistently. Immunity rule proponents draw our attention in particular to guardians ad litem(198) and Good Samaritans(199) to reveal by analogy how public defenders are improperly treated with respect to malpractice liability. The law accords immunity to guardians ad litem, who, like public defenders, are "appointed to protect the best interests of their clients and must be free to exercise independent judgment without weighing every decision in terms of potential civil liability.(200)

Also, some states have "Good Samaritan" statutes which immunize doctors and other medical professionals in health emergencies in which they otherwise would have no obligation to intervene. Because public defenders also have no choice but to represent indigent clients who seek their assistance, it is argued, public defenders should be treated likewise.(201)

These arguments based on systemic coherence are of limited persuasion. The immunity granted to guardians ad litem extends only to those duties discharged by them as an arm of the court (e.g., when testifying), and not when they function as an advocate for the represented party.(202) The "Good Samaritan" argument breaks down as well because, unlike doctors called on to intervene in medical emergencies, public defenders have voluntarily chosen to assume their jobs, which explicitly entail representing indigent defendants who seek their help. Public defenders, moreover, are on a payroll for their services, unlike Good Samaritans.(203)

b. System efficiency

From the standpoint of judicial economy, granting public defenders malpractice immunity would be optimally efficient.(204) Immunity would result in neither litigation(205) nor liability costs. The public defender would not need to commit time and energy to defending himself. Vexatious, frivolous, and duplicitous cases that unnecessarily burden the judicial machinery would cease.(206) In addition, the state would not have to indemnify public defenders for any damages determined by settlement or litigation. Furthermore, some states would no longer need to provide a supplemental budget for public defender liability coverage.

This argument is valid, however, only to the extent that market efficiency is the dominant policy goal undergirding our inquiry. Where corrective justice is the driving concern, by contrast, some inefficiency can be tolerated. While the importance of efficiency cannot be downplayed in a budget-tight environment like ours, higher values like judicial accuracy and individual liberty must take precedence. Moreover, inefficiency is far from a foreign or hateful notion in the legal system; we regularly compromise efficiency for liberty and fairness through such means as court appeals and due process requirements.

Furthermore, institutional mechanisms already exist for discouraging frivolous suits. The ABA maintains and enforces its own standards against filing frivolous lawsuits.(207) In addition, courts can fine public defenders under the state rule equivalent of Rule 11 of the Federal Rules of Civil Procedure, a popular tool for sanctioning attorneys for frivolous claims.(208)

c. System legitimacy(209)

Conceivably, holding public defenders immune from malpractice could promote the legitimacy of the criminal justice system. An immunity rule would, inter alia, eliminate any apparent inconsistent rulings that might arise out of relitigation. For "ample, a defendant might be acquitted upon retrial following a determination of ineffective assistance of counsel. and yet not be found civilly wronged in a malpractice action.(210) Also, when questions concerning a public defender's conduct are relitigated in civil court, they, too, may yield inconsistent rulings.(211) Such inconsistency tends to undermine the legal system's credibility. One could also argue that granting public defenders immunity would also elevate their status in the legal system through implied public trust and, perhaps as well, by favorable association with such immunized parties as judges and prosecutors. To the extent according immunity heightens their status, public confidence in the judicial system itself might also rise. It is additionally contended that an immunity rule would effectively restore the proper incentives for the public defender to protect his client's interest when in conflict with his own. Such a realignment of motivations would tend to increase public respect for the criminal justice system.

An immunity rule for public defenders, however, would more likely arouse, rather than allay, concerns about systemic legitimacy. To begin, immunity would perpetuate a widely held view that the legal system is largely set up to insulate the economically privileged from the economically disadvantaged and to sustain the status quo.(212) After all, the only clients barred from filing a malpractice action against their defense counsel would be those who were unable to afford one.

Inconsistent rulings, moreover, will only likely foster illegitimacy if the public perceives the rulings to be arbitrary or capricious. If, however, justice is deemed to prevail in any given case, then the system will be vindicated.(213) Finally, nobody expects perfection in

the legal system; indeed, inconsistent verdicts are constitutionally tolerated.(214) In the end, inconsistency is a small toll to pay along the road to corrective justice.

D. Level of Immunity

Immunity may be characterized not only by type, but also by level, of protection. The immunity accorded an official may be absolute or qualified. While the conceptual difference is significant, neither is appropriate in the public defender context.

Officials cloaked with absolute immunity are immune from tort liability for any conduct undertaken within their scope of authority. By contrast, those accorded qualified immunity are only shielded from liability stemming from discretionary (non-ministerial) conduct taken in good faith while acting within the scope of their authority or employment.(215) To illustrate, a judge covered by absolute immunity may act maliciously and wantonly, but a government official accorded qualified immunity must act in good faith in order to avoid liability.

There is no justifiable reason to accord public defenders such an extraordinary protection as absolute immunity. Functionally, public defenders are more akin to advocates and private counselors than to judges, prosecutors, and other absolutely immune judicial officials. Public defenders do not make decisions on behalf of the state but are rather adversaries of the state; thus, it is hard to justify absolute protection on official immunity grounds.

According public defenders absolute immunity on public policy grounds is equally untenable. Cloaking public defenders with absolute immunity would give them the freedom to make mistakes - even egregious, malicious ones - with legal impunity. At the same time, their clients would be denied the opportunity to redress their possibly valid grievances in court. Further, absolute protection would overshoot the comparatively modest objectives of keeping the public defender services professionally and fully staffed and preventing criminals from profiting indirectly from their misconduct.

Qualified immunity for public defenders, although more justifiable than absolute immunity, also provides a much stronger dose of medicine than the apparent ailment warrants. The largest defect in a qualified immunity approach is that public defenders would not be held liable for errors in judgment so long as they were made in good faith. This scenario leaves an ex-defendant uncompensated for an injury caused directly by, say, the forgetfulness or carelessness of a public defender. Also, under the rules of professional ethics, a public defender is expected to maintain a standard of care commensurate with other attorneys practicing under the same conditions. According public defenders this added layer of protection would effectively undercut the rules.

IV. Retreating to a Sensible Malpractice Liability Standard

Having established that a liability standard of some kind is essential in the context of public defender malpractice claims, the question is what character that standard should assume. A liability standard should, on the one hand, protect public defenders against frivolous suits and ensure that they are neither deterred from assuming such a noble vocation nor chilled in the manner of their representation. On the other hand, the proper standard should make public defenders fully accountable for their performance and permit ex-defendants to be fairly compensated for valid malpractice claims.

The key features of this inquiry include: (1) whether to impose an ordinary or gross negligence standard; (2) assuming adoption of ordinary negligence, how to define the requisite standard of care; and (3) whether a plaintiff must prove his actual innocence of the underlying criminal offense as an integral part of his pleading requirement.

A. Ordinary vs. Gross Negligence

Until recently, state courts that did not immunize public defenders from negligence liability universally embraced an ordinary tort negligence standard. In 1993, however, the Pennsylvania Supreme Court, in Bailey v. Tucker,(216) raised its liability standard from ordinary to gross negligence.(217) Under this heightened standard, Pennsylvania public defenders are now liable only for conduct exhibiting "reckless or wanton disregard of the defendant's interest,"(218) and not merely for a failure to perform with reasonable care and prudence under the circumstances. This sui generis decision provides an unjustifiably high degree of protection.

Gross negligence has been applied in only a few limited contexts. The most well-known of these is automobile guest statutes. Generally, under such statutes, if the driver of a motor vehicle causes the death of a nonpaying passenger, he will be liable only if he can be shown to have driven recklessly.(219)

Limited liability statutes, which protect a broad range of persons and institutions for important public policy reasons, often require a showing of gross negligence to establish liability for specified conduct. For example, Louisiana accords the gross negligence standard to landowners who allow gratuitous access to their lands for recreational purposes, to providers of voluntary emergency care, and to volunteer coaches and team physicians, among others.(220) In Florida, a medical malpractice plaintiff cannot recover punitive damages unless the emergency room doctor acted with malice or fraud in the diagnosis or treatment of the patient's condition.(221) In Rhode Island, a Good Samaritan is only liable for negligence if, in rendering volunteer emergency assistance, he acted maliciously.(222) Rhode Island has also adopted a gross negligence standard with respect to emergency medical transportation services.(223)

The above illustrations collectively suggest the underlying justification for gross negligence. Where the risk of harm is substantially great, and there is a concomitant need to protect the actor or encourage his actions, the standard of care must be accordingly adjusted lest the actors abandon the valued conduct due to the real or perceived prospect of a lawsuit.

Therefore, if gross negligence is to be the standard against which public defender malpractice actions are gauged, it appears that: (i) public defenders must perform a valued function; (ii) their clients must be exposed to a high degree of risk; and (iii) there must be concern that a failure to raise the liability standard will result in significant attrition from the ranks of public defender services. While

the first two conditions arguably can be satisfied, the third is questionable. Even with a substantial increase in malpractice claims against public defenders, it is unlikely that there would be an exodus from their ranks. Public defenders will almost certainly continue to find such public-spirited work rewarding and the perhaps unequaled opportunity for trial experience appealing. The state or county government is also likely to accommodate public defenders' needs to the extent necessary to maintain these critical services.

In addition, it is significant that gross negligence is only used very selectively,(224) and its principal application - automobile guest statutes - is gradually receding from use.(225) Also, like the qualified immunity standard, gross negligence affords a public defender far more leeway than necessary to do his job effectively.(226) A public defender would not be liable under this standard for clear errors that jeopardized a client's defense so long as his conduct was not malicious or wanton. This standard would protect a public defender from almost all claims, including legitimate ones, such as a missed filing deadline. In sum, a gross negligence standard cannot be defended, and thus its introduction should be resisted.

B. Defining Standard of Care for Ordinary Negligence

Having opted in favor of ordinary tort negligence. we must now determine more specifically the appropriate standard of care that should apply. Ordinary tort negligence is based on the notion of reasonableness, as defined contextually. Thus, a public defender would be found liable for negligence only if he failed to exercise reasonable diligence and skill ordinarily possessed, by attorneys operating under comparable circumstances. This Part will examine four contextual factors for purposes of defining reasonableness with respect to a public defender's conduct: (1) locality of practice; (2) criminal defense specialty; (3) heavy workload pressures; and (4) budgetary constraints on representation.

1. Locality of Practice

The level of professional care provided may vary depending on the nature of the locality. For example, attorneys practicing in urban areas generally have better access to information, superior equipment, greater financial resources, and more frequent opportunities for skills training than their rural counterparts. Courts tend to adjust their expectations of an attorney's thoroughness, tactical sophistication, and rigor accordingly. In addition, local customs and rules may vary considerably across courts, especially in less populated venues. Consequently, in years past many states have opted to measure an attorney's alleged negligent conduct against the prevailing state, regional, or local standard of reasonableness.(227)

Such locality considerations seem inapposite with respect to crafting a public defender malpractice standard. First, in principle, the fact that a degree of care might be prevalent in a local community should not itself dictate the standard of care to be expected.(228) On the contrary, standards should be set which society can reasonably expect, and attorneys practicing in local jurisdictions should be required to conform to those standards.

Second, locality realistically only relates to a public defender's conduct to the extent that he must be familiar with local customs and rules to represent his client effectively.(229) Such a modest demand does not warrant differentiated treatment. Third, a locality standard reduces the available pool of eligible experts to testify as to a public defender's alleged breach of duty or to the element of causation. This situation could become especially problematic if the same expert also must be qualified to testify on specialty or other standards.(230)

Finally, the primary rationale for a locality standard - limited access to information and resources - has been substantially undercut in recent years by technological advances. Improved communications, transportation, and data availability, for instance, have led some courts to abandon a fixed locality rule in connection with physician malpractice.(231) In as much as public defenders have similarly benefited, the trend toward a national standard should equally apply to their standard of care in a negligence suit.

2. Criminal Defense Specially

States have also defined the reasonableness standard for professional negligence to account for any recognized specialties. After all professionals who possess and exercise knowledge and skills above and beyond those required of non-specialists should be held to a higher standard of care.(232) Attorneys practicing criminal law, including public defenders, are typically held to a standard of those experienced in the practice of criminal law, rather than to a standard applying generally to civil practitioners.(233) An attorney who practices criminal law must, for example, possess a working knowledge of criminal procedure, be able to plead constitutional provisions intended to protect the rights of criminal defendants,(234) and make key strategic judgments such as those involved in plea bargaining.

Since the basic skills, knowledge and judgments required of a public defender are essentially identical to those required of a private or court-appointed criminal defense attorney, there is no need for a differentiated standard governing public defenders alone. Thus, public defenders should not be held to a standard any lower than that expected of criminal defense counsel generally. One implication of this equivalent specialty status is that criminal lawyers, as opposed to other public defenders alone, should be able to testify as expert witnesses in a public defender malpractice action.

3. Workload Pressures

States generally do not account for workload pressures in defining the standard of care reasonably expected of their attorneys. Even attorneys facing discipline for neglect have not been excused due to heavy caseloads.(235) This strict approach is proper for several reasons. Most importantly, as the New Mexico Supreme Court stated: "As licensed professionals, attorneys are expected to develop procedures which are adequate to assure that they will handle their cases in a proficient fashion and that they will not accept more cases than they can manage effectively."(236)

In addition, public defenders have an available recourse to deal with excessive workloads or staffing shortages: they can move the

court to withdraw an assigned case, to appoint alternative counsel, or to provide a deadline extension.(237) Admittedly, some courts will refuse such motions and require the requesting public defender to handle the case even when an excessive caseload cannot reasonably be refuted.(238)

When a public defender's motion for withdrawal on excessive caseload grounds has been denied, a public defender may appeal the trial court ruling. Assuming the ruling is affirmed, a public defender must now choose between two unenviable courses of action. First, he may refuse to proceed with the case in question and risk contempt of court. Alternatively, he may follow the court's ruling and risk both an inadequate defense for his client and a possible negligence suit against himself .

The first option is preferable both on ethical and legal reformist grounds. Refusing to proceed with such a case is consonant with an attorney's ethical obligations to provide competent, zealous, and diligent representation.(239) In addition, this scenario would consist of a challenge to a judge's contempt order, which would, in effect, bring pressure to bear toward legal reform. State legislators would no longer be able to blithely obstruct the filing of malpractice actions by ex-criminal defendants as a way to insulate public defenders from the consequences of their overwhelming caseloads. This confrontational action by public defenders would present in a dramatically public way the need for a fair and directed solution: greater resources for public defender offices.

4. Budget Limitations

The general budgetary constraints facing a public defender office should not relieve one of its attorneys of any liability for his negligent conduct. A public defender can generally rely on his own resourcefulness, good judgment or, if necessary, court leniency to provide competent legal counsel. The quality of his representation is determined, for the most part, by his own strategy and effort; the case remains comfortably within his immediate control. Thus, for example, where a public defender were required to balance a hefty caseload (due to a budget-driven staffing shortage) which, in turn, affected his manner of representation in a given case, the public defender should remain subject to liability.

However, a public defender should not be held accountable for any negligent acts or omissions dictated wholly or substantially by circumstances ultimately beyond his control and responsibility. The only time such an exception to malpractice liability appears justifiable is when a public defender is financially inhibited from hiring an expert, investigator, or translator in a case where such services are necessary.

Such outside experts are pivotal in many cases.(240) Their testimony or other service has no substitute by way of an attorney's extra effort, creative defenses, or budgetary reallocations. And, importantly, such outside personnel expenses can be separately classified within a public defender office budget to screen for post facto allocational manipulation. Other budgetary line-drawing would be too susceptible to abuse. In cases where essential investigators, translators, or experts are denied due to budgetary constraints, fault lies properly with the employer - the state or county government - to the extent they are amenable to suit.(241) The budgetary latitude provided to public defenders represents the single exception to an ordinary negligence standard recommended under this analysis.

C. Proof of Actual Innocence as a Pleading Requirement

A variation on the malpractice liability standard for criminal defense counsel is to impose a specified pleading requirement on the plaintiff. The most common vehicle in use today is requiring proof of one's "actual innocence."(242) A growing number of states, including Illinois, Massachusetts, New York, and Pennsylvania, require that criminal malpractice plaintiffs establish their actual innocence of the underlying criminal offense as part of their malpractice claim.(243)

A majority of courts that require a showing of actual innocence place the burden of proof on the plaintiff.(244) This proof must generally be made by a preponderance of the evidence.(245) Evidentiary rules for proving factual innocence (by the plaintiff) or factual guilt (by the State) in a civil trial are eased compared with those governing criminal trials.(246)

Only by proving his actual innocence, these courts reason, can an ex-defendant show that he is truly deserving of civil damages. These courts stress that: (i) a defendant's innocence is essential to showing the element of proximate cause;(247) (ii) a defendant's criminal conduct supersedes any subsequent tortious conduct by an attorney;(248) and/or (iii) the added constitutional and procedural safeguards in a criminal proceeding sufficiently heighten the pleading requirements in malpractice cases.(249)

The policy concerns underlying this requirement are multi-faceted. First, proof of one's actual innocence will further the policy of judicial economy. Second, this approach lends public defenders, among other criminal defense counsel, an added barrier against the least valid claims which, if litigated, would unjustifiably divert valuable resources away from their primary mission of representing indigents.(250) Third, this requirement eliminates the concern that, without an immunity rule, guilty parties might effectively profit from their wrongdoing.(251)

The actual innocence proof, however, is fundamentally unfair. An actually innocent defendant may be logically unable to satisfy this malpractice claim requirement where a defense counsel's negligence was the sole source of the defendant's conviction.(252) Furthermore, if a public defender knows that his client is actually guilty, and at the same time any malpractice liability is foreclosed, one important source of a public defender's motivation to maintain a reasonable level of care would be eliminated. In addition, the legal system has seen cases in which a public defender has sacrificed himself on the altar of incompetence in order to obtain a new trial for his client.(253) A public defender, cognizant that such an admission may open the door to a malpractice action against him, would naturally be deterred from undertaking such a self-effacing tactic.(254)

Any concern about reduced judicial economy or more frivolous suits would also be effectively eliminated by virtue of the collateral estoppel defense. By raising this defense, which bars relitigation of a public defender's culpability, he would be able to exclude all but genuinely meritorious malpractice claims. Finally, an actually guilty ex-defendant would not necessarily be the beneficiary of a windfall. Such a defendant may have suffered a legitimate grievance, such as an unjustifiably long prison sentence based on his public defender's negligence.(255) Thus, the fact that he was actually guilty of the underlying offense should not bar him from

compensation for the added injury he suffered.

CONCLUSION

The trend toward according public defenders greater protection from negligence liability is counterproductive. While states appear to have the best interests of these public servants in mind, the evolving responses will only exacerbate the very workload and budgetary problems that are purportedly the primary objects of their concern. As states enhance liability protections, the overwhelming need for increased office funding will only become further diluted and less immediate. At the same time, these protections will deny indigent criminal defendants adequate compensation for any wrongs suffered.

Short of an infusion of funds to support public defender operations, it would be best to encourage the retention of, and return to, the doctrinal approach still followed by a majority of states: an ordinary tort negligence standard. The extremely low rate of successful malpractice claims against public defenders testifies to their already heavy protection from liability. Further, this negligence standard insists on accountability, a quality that engenders responsible conduct, and exposes and punishes those who cannot uphold minimum performance standards.

However, one important change is required. A public defender must be protected from liability when budgetary constraints prevent him from hiring a required outside expert, specialist, or translator. It would be unfair to hold a public defender liable when the fate of his client lies wholly beyond his control. With this sole modification, the prevailing liability standard should satisfactorily meet the competing needs of the criminal defendant and the public defender alike. As such criminal malpractice claims become increasingly common, this approach will allow the system to adapt with optimal flexibility and fairness. (1.) A public defender is a salaried attorney, typically funded by the public, who represents criminally charged indigents. See Robert L. Spangenberg et al., Abt Associates Inc., National Criminal Defense Systems Study: Final Report 9, 14 (Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ-94702, Sept. 1986) [hereinafter Spangenberg] (public defenders are salaried on a full-time or part-time basis; they may be funded either: (i) exclusively by the State, (ii) jointly by the State and County, or (iii) by private bar services, especially in rural areas). Public defenders are to be distinguished from other types of indigent defense lawyers - particularly contract defense attorneys and assigned counsel - both of which hail from the private sector, and are court-appointed and - funded. See id. at 9 (discussing characteristics of three chief types of criminal defense services available to indigents). Whether as draftees or volunteers, private counsel are appointed pursuant to the Criminal Justice Act (codified as 18 U.S.C. [sections] 3006A (1988 & Supp. V 1993)). Public defenders should be further distinguished from Legal Aid Society attorneys, who also represent indigent clients but generally not in criminal matters, and never in the capacity as government employees.

Public defenders are defined here to include all nonprobationary public defender chiefs, as well as their deputies and assistants, whether at the state or county level. Although federal public defenders also represent indigent criminal defendants, the laws and the organizational and policy issues at stake are distinct from those applicable to state and local jurisdictions. Federal public defenders are authorized under 18 U.S.C. [sections] 3006A (1988 & Supp. V 1993). (2.) Other remedies, including declaratory or injunctive relief, or a new trial, are not available based on a malpractice claim. Declaratory or injunctive relief may be sought, instead, against judges or prosecutors as state officers enforcing the law. See, e.g., Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980) (holding Virginia Supreme Court judges and state prosecutors proper defendants in suit for declaratory and injunctive relief as a function of their respective law enforcement authorities). A new trial will be awarded where a public defender has been shown to have provided ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments. Ned J. Nakles, Criminal Defense Lawyer. The Case for Absolute Immunity from Civil Liability, 81 Dick. L. Rev. 229, 235 (1977); see also infra note 4. Only economic damages are generally awarded in malpractice claims; recovery for related pain and suffering is not available. Paul D. Rheingold, Legal Malpractice. Plaintiffs Strategies, 15 Litig. 13, 14 (A.B.A. Section on Litigation) (Winter 1989). (3.) In addition to negligence, other less common theories can provide grounds for a legal malpractice action: intentional tort (such as fraud or slander), breach of fiduciary duty, or breach of contract. A contractual claim can be based on an express breach or on an implied breach stemming from an attorney's failure to exercise a reasonable level of professional care, skill, and diligence in fulfilling his contractual duties. See Michael P. Ambrosio & Denis F. McLaughlin, The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases, 61 Temp. L. Rev. 1351, 1356-57 & nn.21-23 (1988) (discussing distinction between two contract-based theories). While the proof required in an implied breach of contract claim bears a strong resemblance to that in a tort negligence claim, they are governed by different common law. (4.) The term "criminal malpractice" indicates that the claim arose out of an underlying criminal action, rather than out of a civil proceeding ("civil malpractice"). See Jerome E. Bogutz & Jeffrey B. Albert, A Survey of the Developing Pennsylvania Law of Attorney Malpractice, 61 Temp. L. Rev. 1237, 1273 & n.285 (1988). Criminal malpractice claims are nevertheless adjudicated in civil courts and civil liability attaches. Criminal claims against a public defender are beyond the scope of this Note. Such claims would include conspiracy under 42 U.S.C. [sections] 1985 or willful deprivation of a client's constitutional rights under 18 U.S.C. [sections] 242.

Constitutional claims are also not considered by this Note. The most closely related constitutional claim is for failure to provide effective assistance of counsel as guaranteed under the Sixth and Fourteenth Amendments. See Gideon v. Wainwright, 372 U.S. 335 (1963) (states required to grant indigent criminal defendants the right to counsel); Kimmelman v. Morrison, 477 U.S. 365 (1986) (right to counsel implies right to effective assistance of counsel); Evitts v. Lucey, 469 U.S. 387 (1985) (right to effective assistance of counsel applies to every criminal prosecution, whether counsel is retained or appointed). The standard a petitioner must meet essentially boils down to the idea that "but for [the] attorney's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). The relief sought is generally a new trial, whereas in a malpractice claim, the plaintiff seeks monetary damages. Notably, most courts treat the Strickland standard as essentially equivalent to their state malpractice standard. See infra note 75 and accompanying text. The standard for legal malpractice is discussed in Part II, and the relationship between the two claims is treated in Parts II and IV. (5.) Public defenders work for services or offices that are usually part of the executive branch, but sometimes are an arm of the judiciary, or more rarely, a private nonprofit organization. Spangenberg, supra note 1, at 15; see also Stephen J. Schulhofer & David D. Friedman, Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for all Criminal Defendants, 31 Am. Crim. L. Rev. 73, 83-89 (1993) (same). Public defender office staffs are typically small. While some offices employ more than 50 staff, others have none. As

of 1982, about 75% of all counties that maintain public defender offices employed three or fewer full-time attorneys. Spangenberg, supra note 1, at 16. Claims against a public defender service or office exceed the scope of this inquiry. Only claims against individual public defenders are at issue in this Note. (6.) Malpractice liability is governed exclusively by state law; no federal malpractice law exists. Federal jurisdiction, when invoked, is always based on diversity of citizenship grounds, and federal courts are obligated to follow the malpractice law of the state in which they sit. Ambrosio & McLaughlin, supra note 3, at 1353 n.8. (7.) Tort negligence claims are actions alleging a breach of duty in the representation of a client proximately resulting in damages. See, e.g., Briggs v. Lawrence, 281 Cal. Rptr. 578, 580 (Cal. Ct. App. 1991) (allegation that public defenders "caused [criminal defendant] various economic injuries by breaching their professional duties to him" would "suffice to state a cause of action for attorney malpractice"); Pearson v. Sublette, 730 P.2d 909, 910 (Colo. Ct. App. 1986) (negligence claim for malpractice against public defender based on his alleged failure to represent criminal defendant "diligently in the manner that a reasonably careful attorney would do under the same or similar circumstances"). This standard is discussed more extensively in Part II(C). (8.) Dziubak v. Mott, 503 N.W.2d 771 (Minn. 1993). (9.) Bailey v. Tucker, 621 A.2d 108 (Pa. 1993). (10.) Several recent court opinions require a criminal malpractice plaintiff to prove his actual innocence of the underlying criminal charge as part of his malpractice claim. E.g., Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991); Bailey, 621 A.2d at 113. The relevance of a criminal defendant's innocence to his malpractice action is a growth area. 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice [sections] 21.1, at 284 n.4 (3d ed. 1989). This development is discussed normatively in Part IV(C). (11.) Providing public defenders with enhanced liability protection reflects a desire to minimize the vulnerability of these publicly-funded attorneys to the increased use of malpractice suits. However, this response effectively cuts off a critical legal remedy to potentially wronged criminal defendants. A better response would be to improve the standard of care through an infusion of funds to public defender offices. While such a resource-based response would be ideal, state legislatures have exhibited an abiding reluctance to commit such funding. See Suzanne E. Mounts, Public Defender Programs, Professional Responsibility, and Competent Representation, 1982 Wis. L. Rev. 473, 482 1982) (arguing that politicians have little incentive to advocate large expenditures for public defender offices). Therefore, this Note alternatively addresses a doctrinal approach. (12.) See Spangenberg, supra note 1, at 13 ("Most of the Nation's population is concentrated in the counties served by public defenders."). As of 1982, all but three states (Maine, West Virginia, and North Dakota) had county public defender offices, and 12 states relied exclusively on public defenders to meet their indigent defense needs. Id. at 10, 12. In half the states, public defender organizations constitute the majority or plurality indigent defense system. Id. at 10 (comparison made with assigned counsel and contract defense attorneys). Public defenders represent nearly all the indigent defendants in the jurisdictions they cover. See Schulhofer & Friedman, supra note 5, at 83 (virtually the only bar to a public defender representing an indigent defendant in a served jurisdiction is conflict of interest). See generally Richard Klein, The Relationship of the Court and Defense Counsel: The Impact of Competent Representation and Proposals for Reform, 29 B.C. L. Rev. 531, 532 n.3 (1988) (estimating that public defenders provide 65% of criminal defense services nationwide). (13.) By the early 1980's, 43 of the 50 largest counties in the United States maintained public defender programs. Spangenberg, supra note 1, at 13. (14.) As Justice Sutherland remarked in Powell v. Alabama, "[Even the intelligent and educated layman] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he may not be guilty, he faces the danger of conviction because he does not know how to establish his innocence." 287 U.S. 45, 68-69 (1932). The indigent, who is frequently uneducated, arguably requires the assistance of counsel to an even greater extent. (15.) In Wisconsin, for example, the incidence of violent crimes (murder, forcible rape, robbery, and aggravated assault) increased by 51.6% from 1980 to 1990. More specifically, the murder rate increased statewide by nearly 67% from 1980 to 1990. The 227 murders in 1990 represented the most in a single year throughout the 60 years such statistics have been kept. Statistical Analysis Center, Wisconsin Office of Justice, Wisconsin Crime and Arrests 1990: Uniform Crime Reports 3, 6, 19, 31 (1991). Violent crimes rose 5.6% between 1992 and 1993 to 10.9 million, according to the National Crime Victimization Survey of the Bureau of Justice Statistics. Wash. Post, Oct. 31, 1994, at A4. (16.) Andy Court, Is There a Crisis?, American Lawyer, Jan./Feb. 1993, at 46. (17.) See, e.g., John B. Arango, Tennessee Indigent Defense System in Crisis, 7 Crim. Just., Spring 1992, at 42 (Tennessee's public defender budget cut 5.3% in Fiscal Year 1992); Dziubak, 503 N.W.2d at 776 (noting decreased state budgets and their adverse effect on public defender operations). At the same time, the overall cost of providing indigent defense services has mounted. A study commissioned by the U.S. Department of Justice's Bureau of Justice Statistics found that in 1982 nearly $625 million was spent on indigent defense services nationwide. This study also revealed that the 1982 figure far exceeded the 1980 estimate. Spangenberg, supra note 1, at 23. By 1986, public expenditures on indigent defense had reached $991 million. Schulhofer & Friedman, supra note 5, at 76 n.12. Based on these figures, the public cost soared by nearly 60% in only four years. (18.) See William H. Gates, Lawyers' Malpractice: Some Recent Data About a Growing Problem, 37 Mercer L. Rev. 559, 567 (1986) ("There is no question, however, that claims against lawyers are increasing and that it is a serious problem for the bar, for lawyers, and for their clients."); see also Robert H. Aronson & Donald T. Weckstein, Professional Responsibility in a Nutshell 81 (2d ed. 1991) ("Legal commentators unanimously agree that the frequency of legal malpractice suits has increased alarmingly in the past few years"); American Medical Association Special Task Force on Professional Liability and Insurance, Professional Liability in the '80s, Report 1, at 3 (1984) ("Claims and suits against physicians and hospitals have proliferated. Settlements and awards have broken all records, with million-dollar payouts becoming increasingly common."). (19.) See Mounts, supra note 11, at 481-82 ("A defender program is perhaps unique among government agencies in that the better it does its job, the more likely it is that it will be subjected to criticism."). (20.) See Spangenberg, supra note 1, at 9 (distinguishing public defenders from court-appointed counsel). (21.) See infra text accompanying notes 25-26, 29, 32-33, 47-49 (arguments based on the ABA Model Rules of Professional Conduct, the ABA Model Code of Professional Responsibility, and the ABA Standards for Criminal Justice). (22.) For example, in Minnesota, a 1991 study reported that: "Workload is too high in every district given the current level of staff.... And things are getting worse in this regard." The Spangenberg Group, Weighted Caseload Study for the State of Minnesota Board of Public Defense (1991), at 20 [hereinafter Weighted Caseload Study], cited in Dziubak, 503 N.W.2d at 775; see also State v. Peart, 621 So. 2d 780, 788 (La. 1993) (due to overwhelming caseload facing New Orleans public defenders, their appointment to a case creates a rebuttable presumption of ineffectiveness of counsel); Scott v. City of Niagara Falls, 407 N.Y.S.2d 103, 105 (Sup. Ct. Niagara County 1978) (observing that public defenders are often assigned overwhelming caseloads); Arango, supra note 17, at 42 ("Caseloads in virtually all the public defender offices have been higher than recommended standards almost from the day the offices opened."). For additional case illustrations painting a similar portrait, see Schulhofer & Friedman, supra note 5, at 85 n.34. (23.) See Richard Klein, Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant, 61 Temp. L. Rev. 1171, 1171-72 & nn.2-8 (1988) (citing surveys and reports indicating linkage between excessive caseload and inadequate representation). (24.) See Albert W. Alschuler, The Defense Attorney's role in Plea Bargaining, 84 Yale L.J. 1179, 1210 (1975) (recognizing this approach as a potential problem, but author personally not aware of any instances from his own extensive experience). (25.) ABA Standards for Criminal Justice Standard 4-1.2(h)Am. Bar Ass'n 1980) [hereinafter Standards for Criminal Justice]. (26.) Standards for Criminal Justice Standard 5-5.3(a). (27.) See Alschuler, supra note 24. (28.) See

Dziubak, 503 N.W.2d at 776 (quoting Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976) ("`[The indigent] client has no economic incentive for eschewing frivolous claims.'"), cert. denied, 429 U.S. 1102 (1977)); see also Scott, 407 N.Y.S.2d at 105 ("Because his (or her) services are `free' indigent defendants will often pursue claims or motions which have little if any chance of success."); Catherine Carl Wakelyn, Case Note, Court-Appointed Attorneys who Represent Indigent Defendants Enjoy Absolute Immunity in the Performance of Their Duties from Damage Suits Brought Under 42 U.S. C. [sections] 1983, 26 Cath. U. L. Rev. 620, 630-31 (1977) ("[B]ecause indigents do not pay for the legal services which they receive, they are more apt to be dissatisfied and to harass their attorneys than are paying clients. Therefore, . . . court-appointed attorneys must be insulated from . . . patently frivolous claims . . . ."). (29.) See Model Rules of Professional Conduct Rule 3.1 [hereinafter Model Rules] (lawyer can neither bring nor defend a frivolous suit); Model Code of Professional Conduct DR 7-102(A)(2) [hereinafter Model Code] (lawyer is prohibited from knowingly advancing a claim or defense that is unwarranted under existing law). (30.) See Dziubak, 503 N.W.2d at 775-76 (Minnesota public defender office lacks sufficient funds to provide service each client demands); Arango, supra note 17, at 42 (Tennessee public defender system underfunded since inception); Schulhofer & Friedman, supra note 5, at 85 ("[T]he great majority of [public] defender systems are . . . underfunded; they cannot provide their clients with even the basic services that a nonindigent defendant would consider necessary for a minimally tolerable defense."). National data from 1982 indicate that the average cost per indigent defense case was under $200 ($195.97). Spangenberg, supra note 1, at 29. This figure actually may be lower with regard to public defender cases. See Michael McConville & Chester L. Mirsky, Criminal Defense of the Poor in New York City, 15 N.Y.U. Rev. L. & Soc. Change 581, 589 (1986-87) (referencing study showing that public defender case costs were one-third those of assigned counsel in New York City). (31.) See, e.g., Weighted Caseload Study, supra note 22, at 29-30 (in Ramsey County, Minnesota, "[t]here is a serious problem in the office with an insufficient budget for expert witness services"). Prosecutors' offices, by contrast, do not generally operate under such tight budgetary constraints. (32.) Standards for Criminal Justice Standard 5-1.4. (33.) Standards for Criminal Justice Standard 5-1.6. (34.) See Dziubak, 503 N.W.2d at 776 ("It would be an unfair burden to subject the public defender to possible malpractice for acts or omissions due to . . . an underfunded office: something completely out of the defender's control."). (35.) By and large, state courts do not recognize a federal constitutional or state statutory right to expert services for indigent criminal defendants. See John F. Decker, Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents, 51 U. Cin. L. Rev. 574, 574-75 (1982) ("[A] majority of the state courts considering [indigent] defense requests for expert witnesses or other expert services asserts that there exists neither a constitutional nor an explicit statutory right within their respective jurisdictions that mandates such assistance."). However, the U.S. Supreme Court has opened the door under the Fourteenth Amendment to ensure the provision of at least one kind of expert service for indigent defendants. Ake v. Oklahoma, 470 U.S. 68 (1985). The Court held that an indigent defendant is guaranteed access to "a competent psychiatrist who will conduct an appropriate examination . . . and presentation of the defense" in situations where the defendant's sanity is a significant factor at trial. Id. at 83. Whether the Ake decision will be read broadly to encompass non-psychiatric expert examination and testimony as well remains to be seen. Indigents facing federal criminal charges, by contrast, enjoy statutory protection under the Criminal Justice Act. See 18 U.S.C. [sections] 3006A(e) (1988 & Supp. V 1993) (providing for "investigative, expert, or other services" where the service is "necessary for an adequate defense."). (36.) See Reese v. Danforth, 406 A.2d 735, 743 (Pa. 1979) (O'Brien, J., dissenting) ("the public defender, unlike his private counterpart, is, in a real sense, not free to contract with his client"). In a few rare instances public defenders have successfully refused to contract with particular clients on the grounds of severe staffing shortages, but only with the court's permission. See infra note 237 and accompanying text. (37.) See Stephen L. Millich, Public Defender Malpractice Liability in California, 1 1 Whittier L. Rev. 535, 538 (1989) ("The public defender, once appointed, cannot refuse to represent unpopular or obnoxious clients, but a private attorney usually can."). Significantly, indigents tend to be more litigious than average. See Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976), cert. denied, 429 U.S. 1102 (1977) ("The experience of the federal courts in federal habeas corpus and [sections] 1983 litigation demonstrates that indigents more frequently attempt to litigate claims which are patently without merit than do non-indigent parties."). (38.) See Dziubak, 503 N.W.2d at 775 ("[A] public defender may not reject a client, but is obligated to represent whomever is assigned to her or him, regardless of her or his current caseload or the degree of difficulty the case presents."). (39.) Morris v. Slappy, 461 U.S. 1, 11-14 (1983) (holding that indigents have neither right to choose own defense counsel nor right to a meaningful attorney-client relationship); see also United States v. Pina, 844 F.2d 1, 6 (1st Cir. 1988) (no right to counsel of own choice and court not obliged to appoint an attorney outside public defender's office because defendant believes all attorneys from that office are incompetent); Dziubak, 503 N.W.2d at 778 (Gardebring, J., dissenting) (indigent criminal defendant has no right to choose his lawyer so must depend on whomever is assigned his case). (40.) See Alschuler, supra note 24, at 1247 (discussing private attorney's ability to exert "client control" through a threat to withdraw from representation but acknowledging that public defender may employ his own type of leverage, by delaying efforts "to secure [defendant's] release from custody pending trial"). (41.) See id. at 1242 ("[T]he relationship of confidence that arises when a defendant selects his own lawyer is undoubtedly slower to develop when an unknown advocate is thrust upon him. In addition, some defendants believe that `one gets what one pays for'; they are suspicious of the fact that the public defender is paid by the state and that `he gets his money either way.'"). (42.) See Jay Sterling Silver, Truth, Justice, and the American Way: The Case Against the Client Perjury Rules, 47 Vand. L. Rev. 339, 384-91 (1994) (discussing defense counsel's exposure to unreliable and inflammatory information during the client interview and investigatory stages). (43.) Schulhofer & Friedman, supra note 5, at 86; see also Mallen & Smith, supra note 10, at 288 (perceptions of conspiracy between defense counsel and prosecution give rise to more alleged client relation errors than in other areas of the law). (44.) See Alschuler, supra note 24, at 1245 ("The offices of many private defense attorneys are strikingly opulent . . . . The carpeting, electronic gadgetry, furniture, and fixtures may themselves convey a message to visitors: the occupant of this executive palace has `made it' and knows his way around . . . . They provide a sharp contrast to the sterile atmosphere of most public defenders' cubicles."). (45.) See id. at 1244 ("A public defender, free of the constraints of a competitive marketplace, is less likely than a private defense attorney to conclude that producing satisfied customers is among his highest priorities."). This observation, made 20 years ago, is probably less true today, especially among the higher-caliber public defender offices such as the District of Columbia Public Defender Service. (46.) See Klein, supra note 23, at 1182-83 (citing examples from Denver and New York City where case overload resulted in inadequate communication with clients); Thomas S. Zilly, Recent Developments in Legal Malpractice Litigation, 6 Litig 8, 12 (1979) (extent to which client was kept abreast of litigation progress is factor as to whether he files malpractice suit). (47.) Model Rules Rule 1.1; Model Code DR 6-101 (equivalent requirement). (48.) Model Rules Rule 1.16. The Model Code of Professional Responsibility has a parallel provision for mandatory withdrawal where a lawyer "knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule." Model Code DR 2-110(B). (49.) See Model Rules Preamble ("Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached . . . . They are not designed to be a basis for civil liability."); Model Code Preamble and Preliminary Statement ("The Code makes no attempt to . . . define standards for civil liability of lawyers for

professional conduct."). (50.) Interview with Samuel Dash, Professor of Law, Georgetown Univ. Law Center, in Washington, D.C. (Mar. 9, 1995). (51.) For the most part, the chief public defender is appointed by executive branch officials, but in some cases appointment is made by a bar association committee, by judges, or by the board of a nonprofit organization. In all or part of only four states, namely, Florida, California, Nebraska, and Tennessee, public defenders are elected. Schulhofer & Friedman, supra note 5, at 84. (52.) Alschuler, supra note 24, at 1238-40. Even absent such formal control, judges' "power over sentencing and other judicial matters" grants them leverage "over the hiring, assignment, and firing of defenders." Id. at 1240. (53.) See Silver, supra note 42, at 377 ("a [p]ublic defender may benefit professionally from favorable comments by or the formal recommendation of a judge who is impressed with her temperate advocacy") (emphasis in original). (54.) See Alschuler, supra note 24, at 1210-24 (discussing the theoretical prospect of trade-outs by public defenders, but is himself aware of none). (55.) See Schulhofer & Friedman, supra note 5, at 85-86 (arguing that their salaried posts grant public defenders greater independence from judicial pressure). (56.) See Ex Parte Hough, 150 P.2d 448, 451-52 (Cal. 1944) holding that public defender was free "from restraint or domination by the district attorney"); People v. Lewis, 333 P.2d 428, 432 (Cal. Ct. App. 1958) (fact that public defender and district attorney were both state officials was itself insufficient to prove collusion, influence, or coercion). (57.) Nakles, supra note 2, at 229. (58.) 42 U.S.C. [sections] 1983 (1988 & Supp. V 1993); Pokrandt v. Shields, 773 F. Supp. 758, 765 (E.D. Pa. 1991); Ehn v. Price, 372 F. Supp. 151, 153 (N.D. Ill. 1974). The "under color" of state law requirement is equivalent to a state action requirement. United States v. Price, 383 U.S. 787, 794 (1966). Section 1983 liability exists for all actions taken in an officer's official capacity whether authorized by state law or in violation of it. Monroe v. Pape, 365 U.S. 167, 184 (1961). (59.) See Mallen & Smith, Supra note 10, at 488 ("filing fees are not necessary if the plaintiff is indigent . . . . In addition, the petitions are interpreted liberally and much less stringently than those drafted by counsel.") (citations omitted); see also Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972) ("Except where patently frivolous, they may be filed without the payment of a filing fee by indigents . . . . [and] public policy dictates [complaints] be broadly interpreted in favor of inclusion . . . ."), cert. denied, 412 U.S. 950 (1973). Congress failed to establish a uniform statute of limitations, permitting courts to adopt the nearest equivalent local law as the applicable federal law. Lee L. Cameron, Jr., Note, Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims, 61 Notre Dame L. Rev. 440,446 (1986). (60.) 42 U.S.C. [sections] 1988 (1976). (61.) Monroe v. Pape, 365 U.S. 167, 183 (1961). By contrast, certain requirements must often be satisfied before states will permit a criminal malpractice action under state law. See infra note 69 (discussing common state practice to require previous filing of ineffective assistance of counsel claim under Sixth Amendment). (62.) 454 U.S. 312 (1981) (prisoner claimed his civil rights violated when public defender moved to withdraw as counsel on ground that prisoner's appellate claims were frivolous). (63.) Id. at 324-25. (64.) Polk County, 454 U.S. at 321. But see Case Comment, Liability of Public Defenders Under Section 1983: Robinson v. Bergstrom, 92 Harv. L. Rev. 943, 947 (1979) (arguing pre-Polk County that state control over public defender is sufficient to justify his acting in exercise of state power). (65.) Polk County, 454 U.S. at 321. (66.) Id.; accord Peake v. County of Philadelphia, 280 F. Supp. 853, 854 (E.D. Pa. 1968) (attorneys in organization that is subsidized by government have no power beyond that granted by the bar); Vance v. Robinson, 292 F. Supp. 786, 788 (W.D.N.C. 1968) (professional responsibilities for both government-funded and privately retained attorneys flow from same canon of ethics). (67.) Three years after Polk County, the Court held that intentional misconduct by a public defender to conspire with state officials rendered him amenable to a federal civil rights action. Tower v. Glover, 467 U.S. 914, 923 (1984). Courts have strictly interpreted its application, however, requiring specificity of the alleged conspiracy. Klein, supra note 23, at 1197-98. (68.) The Court left open the question of whether a public defender was a government employee while performing administrative or investigatory functions. See Polk County, 454 U.S. at 325 ("It may be - although the question is not present in this case - that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions."). Notably, the Court had found only one year earlier that a public defender acted under color of state law when he made hiring and firing decisions. Branti v. Finkel, 445 U.S. 507 (1980). (69.) See, e.g., Shaw v. State, 816 P.2d 1358, 1360 (Alaska 1991) ("We hold that a convicted criminal defendant must obtain post-conviction relief before pursuing an action for legal malpractice against his or her attorney.") (citation omitted); Gebhardt v. O'Rourke, 510 N.W.2d 900, 905 (Mich. 1994) ("[A] convicted criminal defendant must obtain postconviction relief before pursuing an action for legal malpractice against trial counsel."); Stevens v. Bispham, 851 P.2d 556, 561 (Or. 1993) (en banc) (criminally convicted person may only assert legal malpractice claim if he or she has challenged successfully the conviction through the direct appeal or post-conviction processes now provided by Oregon law, or the person otherwise has been exonerated of the offense"). But see Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989) ("[A] plaintiff need not allege a reversal of his or her conviction in order to state a cause of action for legal malpractice arising from representation in a criminal proceeding."). (70.) See, e.g., Johnson v. Schmidt, 719 S.W.2d 825, 826 (Mo. Ct. App. 1986) (before bringing legal malpractice claim, plaintiff must "secure[] post-conviction relief upon a finding that he was denied effective assistance of counsel"). As a practical matter, without this sequential condition, an ex-criminal defendant could file the ineffective assistance and malpractice claims simultaneously, leading to an array of troubling conflict issues. See Bogutz & Albert, supra note 4, at 1282-83 (issues include "disclosure of informants, breach of immunity, [and] waiver of attorney-client privilege"). (71.) 466 U.S. 668 1984. (72.) Id. at 687. (73.) See Gary Goodpaster, The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases, 14 N.Y.U. Rev. L. & Soc. Change 59, 80 (1986) (describing test as "far less a standard for effective assistance of counsel than a standard for disposing of effective assistance of counsel claims."). (74.) See Rodger Citron, Note, (Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services, 101 Yale L.J. 481, 486 (1991) ("[An ineffective assistance of counsel claim] may correct flagrant errors, but it cannot reach claims never brought and strategies never used."). (75.) See, e.g., McCord v. Bailey, 636 F.2d 606, 609 (D.C. Cir. 1980) ("[T]he legal standards for ineffective assistance of counsel . . . and for legal malpractice in this action are equivalent."), cert. denied, 451 U.S. 983 (1981); Johnson v. Raban, 702 S.W.2d 134,137-38 (Mo. Ct. App. 1985) (standard for measuring counsel's performance was same in both ineffective assistance of counsel and malpractice cases); Alberici v. Tinari, 542 A.2d 127, 131 (Pa. Super. Ct. 1988) ("If the court determining the assistance of counsel claim uses this [reasonable competency] standard [followed by most courts], the malpractice standard may be sufficiently analogous to provide the requisite identity of issues."); Garcia v. Ray, 556 S.W.2d 870, 872 (Tex. Civ. App. 1977) ("[H]ow could you test the adequacy of counsel any better than by having the direct point determined by the highest court of our State in the related criminal case?"). (76.) David H. Potel, Note, Criminal Malpractice.- Threshold Barriers to Recovery Against Negligent Criminal Counsel, 1981 DUKE L.J. 542, 551 (1981); see also Weiner v. Mitchell, Silberberg & Knupp, 170 Cal. Rptr. 533, 538 (Cal. Ct. App. 1981) (collateral estoppel precluded relitigation of plaintiff's guilt because damages proximately caused by his guilt of underlying criminal offense, and not by negligence of defense attorney); Schlumm v. O'Hagan, 433 N.W.2d 839, 844-45 (Mich. Ct. App. 1988) (where plaintiffs ineffective assistance of counsel claim has been rejected, defense attorney in malpractice action may plead issue preclusion); Johnson, 719 S.W.2d at 826 ("If appellant is not successful in his pursuit of post-conviction relief, then he is barred by collateral estoppel from pursuing his alleged legal malpractice claim."). A normative discussion of the requirement to prove innocence in advance of filing a malpractice claim is discussed infra in Part IV(C). An important constraint may exist to bringing the ineffectiveness claim in the first instance, at least

under a liability rule. To the extent a criminal defendant needs a public defender's help in developing an ineffectiveness claim, the public defender will naturally be reluctant to do so, because a successful claim would only expose him to a potential malpractice suit. Susan M. Treyz, Note, Criminal Malpractice: Privilege of the Innocent Plaintiff.?, 59 Fordham L. Review 719, 727 (1991). (77.) Collateral estoppel applies regardless of whether the case in question involves the same cause of action. See, e.g., McCord, 636 F.2d at 608-09 ("Collateral estoppel `prohibits parties who have litigated one cause of action from relitigating in a second and different cause of action matters of fact which were, or necessarily must have been, determined in the first litigation.' ") (citation omitted). However, both cases must contain the same issue, the issue must have been actually litigated, and resolution of the issue must have been necessary to the court's judgment. Restatement (Second) of Judgments [sections] 27 (1982); see also Briggs v. Lawrence, 281 Cal. Rptr. 578, 581 (Cal. Ct. App. 1991) (estoppel requires that issue was properly raised and determined, and that issue is identical). (78.) If the criminal defendant actually succeeds in getting his conviction overturned via an ineffective assistance action, res judicata cannot be invoked with respect to a malpractice action, given the fact that each claim seeks a different type of relief (retrial vs. civil damages). Klein, supra note 23, at 1203. (79.) See Bogutz & Albert, supra note 4, at 1277finding of ineffective assistance of counsel will not alone establish breach of duty in Pennsylvania Criminal malpractice action). But see Walker v. Kruse, 484 F.2d 802, 804 (7th Cir. 1973) ("standard of proof in a malpractice action might not be as strenuous as it is when questioning the constitutional adequacy of counsel"). (80.) See infra note 243 and accompanying text. (81.) This situation is not peculiar to the clients of public defenders, though it is frequently the case with them. See Ronald E. Mallen, The Court-Appointed Lawyer and Legal Malpractice - Liability or Immunity, 14 Am. Crim. L. Rev. 59, 68-69 (1976) ("[Q]uite possibly in confinement, the unhappy client is not likely to have an easy time mounting a civil action against his court-appointed attorney."). (82.) Comment, Liability of Court-appointed Defense Counsel for Malpractice in Federal Criminal Prosecutions, 57 Iowa L. Rev. 1420, 1426 & n.44 (1972). The constitutional right to counsel for indigents guaranteed under the Sixth Amendment does not extend to malpractice suits against one's criminal defense attorney. See Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987) (right to appointed counsel extends to the first right of appeal and thus not to collateral attacks upon conviction). (83.) This scenario often occurs in many civil malpractice suits against defense counsel as well. (84.) See Dziubak v. Mott, 503 N.W.2d 771, 778 (Minn. 1993) (Gardebring, J., dissenting) ("[Blecause of their indigence, defendants who have had public defenders will find it difficult to retain counsel to represent them in a malpractice suit against a public defender unless the circumstances are so outrageous as to be obvious malpractice.").

85. See, e.g., Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991) (defendant attorney is "entitled to testify to relevant statements by his former client unrestrained by the attorney-client privilege"); Gebhardt v. O'Rourke, 510 N.W.2d 900, 906 (Mich. 1994) ("defendant attorney may produce privileged information against his former client during discovery or trial"); Johnson v. Schmidt, 719 S.W.2d 825, 827 (Mo. Ct. App. 1986) (claim of attorney-client privilege waived when appellant filed malpractice action against public defender); See also MODEL RULES Rule 1.6(b); MODEL CODE DR 4-101(C).

86. An expert witness is often necessary to assist the trier of fact in determining whether each tort element has been fully satisfied. See, e.g., Wright v. Williams, 121 Cal. Rptr. 194, 200 (Cal Ct. App. 1975) (expert testimony required where lawyer holds himself out as legal "specialist"); O'Neil v. Bergan, 452 A.2d 337, 341 (D.C. 1982) (expert testimony required unless attorney's lack of care is blatantly obvious to finder of fact). Such testimony is perhaps most crucial on the issue of causation because of the delicacy required in gauging whether an attorney's conduct failed to conform with a reasonable standard of care in the legal profession. See Ambrosio & McLaughlin, supra note 3, at 1357 (expert witness critical on causation element). Expert testimony is also important for showing breach of duty of care. See Pearce v. Duffy, No. 93APE11-1512,1994 WL 454725, at 3 (Ohio Ct. App. Aug. 16, 1994) (expert testimony required "unless breach is so obvious that it is within the ordinary knowledge and experience of a layman"). In order to be perceived as a credible and convincing expert, a testifying attorney must be knowledgeable and experienced in the area of law that was the subject of the prior litigation. Ambrosio & McLaughlin, supra note 3, at 1391-92.

87. Compare Ambrosio & McLaughlin, supra note 3, at 1392-93 (specialists concerned that by testifying against others in their field they will dry up client sources and/or incur peer hostility) with id. at 1352 "[L]awyers are no longer as reluctant as they were ... to testify as an expert witness on behalf of a plaintiff in a legal malpractice case.") and Frederic L. Goldfein, Legal Malpractice Insurance, 61 TEMP. L. REV. 1285, 1292 (1988) (increased willingness today on part of attorneys to testify as expert witnesses in legal malpractice suits).

88. See Ambrosio & McLaughlin, supra note 3, at 1367 (pool of attorneys available to testify as expert witnesses very small where they are required to be specialists from same locale). But see Klein, supra note 23, at 1206 (may only need one expert in many cases, or none if "proof of negligence is clear").

89. Courts sometimes hesitate to allow expert testimony on the issue of causation or damages in a malpractice action. See Ambrosio & McLaughlin, supra note 3, at 1353-54 n.10 (reasoning includes general legal aversion to testimony which is speculative or conjectural" and concern that testimony "becomes entangled in the confusing distinction between questions of law and questions of fact"). But see id. at 1354 n.11 (courts appear to be increasingly amenable to expert testimony on issues of causation and damages).

90. See Rheingold, supra note 2, at 15 "[T]here is virtually no sympathy for the plaintiff-to-be. There he is, up in Dannemora for drug dealing, and he wants a jury to award him money damages because his lawyer failed to put him back on the street."). This situation is, however, not unique to public defender's clients.

91. See Otto M. Kaus & Ronald E. Mallen, The Misguiding Hand of Counsel - Reflections on Criminal Malpractice,' 21 UCLA L. REV. 1191, 1219 (1973-74) (noting common affirmative defenses used by attorneys charged with malpractice include statute of limitations and contributory negligence).

92. See MALLEN & SMITH, Supra note 10, at 284-86 and 119-20 (Supp. 1993) (listing few reported criminal malpractice actions); Potel, supra note 76, at 564 (such suits are rare); Steve Davis, Case Note, Ferri v. Ackerman: Malpractice Liability of Appointed Counsel, 34 ARK. L. REV. 746, 756 n.71 (1981) (low incidence of immunity-related cases involving public defenders suggestive of few filed or successful malpractice claims); Mounts, supra note 11, at 515 n.175 (few successful claims brought).

93. See Bailey v. Tucker, 621 A.2d 108, 112 (Pa. 1993) (criminal malpractice suits occurring with greater frequency); MALLEN & SMITH, Supra note 10, SS 21.1, at 284-86 (volume of criminal malpractice suits has increased); Bogutz & Albert, supra note 4, at 1273 (number of criminal malpractice suits steadily increasing); Kaus & Mallen, supra note 91, at 1193 n.6 relating comments made by Chief Justice Burger in the early 1970's about the poor quality of trial advocacy in America and suggesting malpractice actions are waiting to happen).

94. See Kaus & Mallen, supra note 91, at 1192 (in recent annotation of criminal malpractice cases across country, decisions "based solidly on the law of civil malpractice"); see also DeBrosse v. Jamison, No. 91-CA-26,1992 WL 5851, at 2 (Ohio Ct. App. Jan. 14,1992) (indicating 1989 holding by Ohio Supreme Court that same elements apply whether in criminal or civil malpractice action); Tijerina v. Wennermark, 700 S.W.2d 342, 344 (Tex. Ct. App. 1985) (observing that Texas authority appears to apply same standards in legal malpractice suit whether underlying case was criminal or civil).

95. See, e.g., O'Neil v. Bergan, 452 A.2d 337, 341 (D.C. 1982) ("The elements of an action for professional negligence are the same as those of an ordinary negligence action. The plaintiff bears the burden of presenting evidence which establishes the applicable standard of care, demonstrates that this standard has been violated, and develops a causal relationship between the violation and the harm complained of.' ") (citation omitted); see also supra note 7.

96. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE Law OF TORTS SS 30, at 164-65 (5th ed. 1984 & Supp. 1988); see also Shaw v. State, 861 P.2d 566, 569 n.2 Alaska 1993); Schlumm v. Terrence J. O'Hagan, P.C., 433 N.W.2d 839,846 (Mich. Ct. App. 1988); Krahn v. Kinney, 538 N.E.2d 1058,1061 (Ohio 1989).

97. KEETON ET AL., Supra note 96, SS 38, at 239.

98. The same duty applies whether the attorney is appointed or retained. See Moore v. McComsey, 459 A.2d 841, 843 (Pa. Super. Ct. 1983) (rejecting any difference in duty based on this status distinction); Mallen, supra note 81, at 60 (same legal standard applicable to retained and appointed counsel alike).

99. See supra note 86.

100. Bogutz & Albert, supra note 4, at 1279. Other types of damages are also difficult to quantify, including denial of the right to vote, denial of the right to carry a firearm, and perennial invasion of privacy to reveal one's conviction record. RONALD E. MALLEN & VlCTOR B. LEVIT, LEGAL MALPRACTICE 341 (1977). The courts, moreover, have little experience in determining damages in criminal malpractice cases. See Potel, supra note 76, at 545 & nn.22-23.

1 0 1. KEETON ET AL., supra note 96, SS 30, at 165.

102. Justice Marshall was convinced of the difficulty of proving causation in the analogous ineffective assistance of counsel context. See Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) "[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better had his lawyer been competent.").

103. See Mylar v. Wilkinson, 435 So. 2d 1237, 1239 (Ala. 1983) (plaintiff must show that result would have been different but for attorney error); Shaw, 861 P.2d at 573 (must show jury could not have found defendant guilty beyond a reasonable doubt absent attorney negligence); Trice v. Mozenter, 515 A.2d 10, 13 (Pa. Super. Ct. 1986) (plaintiff must show he would otherwise have prevailed in criminal case). But cf. Schlumm, 433 N.W.2d at 846 (plaintiff not required to show he would have prevailed completely).

104. Shaw, 861 P.2d at 573.

105. See id. (causation might well involve "eyewitness identifications, witness and investigative techniques which are difficult to isolate as distinct factors resulting in conviction of a criminal defendant").

106. See Bogutz & Albert, supra note 4, at 1278 (amounting to a "difficult, if not impossible, task of attempting to match the [prosecutor's] resources. . . .").

107. KEETON ET AL., Supra note 96, SS 32, at 175; see also O'Neil, 452 A.2d at 341 ("A uniform standard of care applies in actions for negligence: reasonable care under the circumstances.").

108. KEETON ET AL., Supra note 96, SS 32, at 185-88; Mallen, supra note 81,,at 60. For a normative discussion of the effect that geographic and specialty standards should have on defining the reasonableness of a public defender's conduct, see infra notes 227-34 and accompanying text.

109. See Ambrosio & McLaughlin, supra note 3, at 1363-64 (identifying range of options and concluding that same jurisdiction standard is optimal).

1 10. MALLEN & SMITH, supra note 10, at 292.

1 1 1. RESTATEMENT (SECOND) OF Torts SS 299A, cmt. e (1965); KEETON ET AL., supra note 96, SS 32, at 185 (professionals must possess "standard minimum of special knowledge and ability").

112. See Dziubak, 503 N.W.2d at 776 ("It is doubtful that an indigent client could prevail against a public defender in a negligence suit for failing to pursue a particular strategy.").

1 13. See, e.g., Hodges v. Carter, 80 S.E.2d 144, 146 (N.C. 1954) ("An attorney who acts in good faith and in an honest belief that

his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgement . . . ."); Talbot v. Schroeder, 475 P.2d 520 (Ariz. Ct. App. 1970) (same); Tijerina v. Wennermark, 700 S.W.2d 342, 344 (Tex. Ct. App. 1985) (same); MALLEN & LEVIT, supra note 100, at 163 (no liability for error in judgment).

114. See Klein, supra note 23, at 1201 n.180 (lawyer fears about malpractice claims almost certainly exist).

115. Other external forces include bar sanctions and state court disciplinary proceedings.

116. See Ferri v. Ackerman, 444 U.S. 193, 198 (1979) "[W]hen state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law.").

117. The law in one state, New Mexico, defies ready classification. New Mexico immunizes public defenders from liability for negligence but the case law does not explain the grounds for such immunity beyond probable legislative intent. See Herrera v. Sedillo, 740 P.2d 1190 (N.M. Ct. App. 1987) (holding public defender immune under the state's Public Defender Act as read in pari materia with the Indigent Defense Act).

118. U.S. CONST. amend XI ("The Judicial Power of the United States shall not be construed to extend to any suit in law or in equity commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or subjects of any foreign state"); see also KEETON ET AL., supra note 96, SS 13 1, at 1043 & n. 17 (11th Amendment provides procedural or jurisdictional immunity by forbidding suits in federal court against states that have not given their express consent in waiver). This immunity has been construed to include suits by a state's own citizens. Hans v. Louisiana, 134 U.S. 1 (1890).

119. See KEETON ET AL., Supra note 96, SS 131, at 1044-45 & n.25 (vast majority of states have consented to at least some tort liability; only Maryland and Mississippi seem to have retained something akin to blanket sovereign immunity).

120. SHEPARD'S/MCGRAW-HILL, INC., I CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT: ITS Divisions, AGENCIES, AND OFFICERS 40 (1992) [hereinafter CIVIL Actions].

121. Jeffrey Isralsky & Merlyn O'keefe, Defender's Liability for Malpractice: A Case of Future Shock?, 34 NLADA BRIEFCASE 103, 104 (1977). (122.) Spring v. Constantino, 362 A.2d 871, 875 (Conn. 1975). (123.) Thomas v. State Highway Dep't, 247 N.W.2d 530, 545 (Mich. 1976) (Levin, J., dissenting). (124.) A federal district court in Indiana, however, has held that the state's public defender service, as an arm of the state government, was protected under sovereign immunity. Hendrix v. Indiana State Public Defender System, 581 F. Supp. 31, 32 (N.D. Ind. 1984). Also, in the related medical malpractice context, it is noteworthy that government doctors have been accorded sovereign immunity. See Gargiulo v. Ohar, 387 S.E.2d 787, 791 (Va. 1990) (holding physician to be a state employee entitled to sovereign immunity where he was involved in medical research and training program conducted by state hospital). (125.) Civil Actions, Supra note 120, at 304-05; see also Reese v. Danforth, 406 A.2d 735, 739 (Pa. 1979) (such immunity is protective of "`society's interest in the unfettered discharge of public business.'") (quoting Montgomery v. Philadelphia, 140 A.2d 100, 103 (1958)). (126.) Civil Actions, supra note 120, at 311. (127.) Id. at 320. (128.) Vick v. Haller, 512 A.2d 249, 252 (Del. Super. Ct.) (all statutory requirements satisfied for official immunity), aff'd, 514 A.2d 782 (Del. Super. Ct. 1986); Ramirez v. Harris, 773 P.2d 343, 344-45 (Nev. 1989) (tort claims statute defines "public officer" to include public defenders); Darnell v. Stack, No. 01-A-019206CV00233, 1992 WL 205251, at *1 (Tenn. Ct. App. 1992) (under tort claims act, assistant public defender immunized from negligence liability when acting in official capacity). (129.) Vick, 512 A.2d at 252; Ramirez, 773 P.2d at 344-45; Darnell, 1992 WL 205251, at *1. (130.) See Spring v. Constantino, 362 A.2d 871, 878 (Conn. 1975) (acknowledging that state may control reporting and training matters, but characterizing these as indicia of master-servant relationship, and not pertinent to attorney-client relationship). (131.) See id. (public defender "may be assigned to a requisite number of clients and to a particular client"). (132.) See id. ("public defender may be told when he is to work and within what area"); see also Polk County v. Dodson, 454 U.S. 312, 321 (1981) ("State decisions may determine the quality of his law library or the size of his caseload."); White v. Galvin, 524 N.E.2d 802, 804 (Ind. Ct. App. 1988) ("administrative decisions may influence the way a public defender works, his case load, and the quality of his library"). (133.) Briggs v. Lawrence, 281 Cal. Rptr. 578 (Cal. Ct. App. 1991); Spring v. Constantino, 362 A.2d 871 (Conn. 1975); White v. Galvin, 524 N.E.2d 802 (Ind. Ct. App. 1988); Reese v. Danforth, 406 A.2d 735 (Pa. 1979). (134.) See, e.g., White, 524 N.E.2d at 803 ("The public defender is the accused's lawyer which is, except for the source of payment, a relationship that exists between any lawyer and client. That is, he is a personal counselor and advocate."). (135.) See, e.g., Reese, 406 A.2d at 740 (scope of public defender's authority coextensive with that of a trained professional, not a public servant). (136.) See, e.g., Polk County, 454 U.S. at 321 (ABA Code of Professional Responsibility governs the ethics and conduct of all practicing attorneys). (137.) In Kassen v. Hatley, 887 S.W.2d 4, 10-11 (Tex. 1994), the court divided state courts into three camps on the issue of according official immunity to state-employed personnel providing medical treatment. One camp denies official immunity, holding that such treatment is by nature ministerial, not discretionary. See, e.g., Watson v. St. Agnes Hosp., 386 N.E.2d 885, 889-90 (Ill. App. Ct. 1979) (medical care not eligible for immunity because not discretionary conduct). A second camp denies official immunity where medical, rather than governmental, discretion was exercised. See, e.g., Scarpaci v. Milwaukee County, 292 N.W.2d 816, 827 (Wis. 1980) (no immunity granted with respect to performance of autopsy). A third camp provides official immunity whether medical or governmental discretion was exercised. See, e.g., Smith v. Arnold, 564 So. 2d 873, 875-76 (Ala. 1990) (psychiatrist held immune with respect to medical care for suicidal patient in state facility). (138.) See, e.g., Spring, 362 A.2d at 878 ("`An attorney's allegiance is to his client, not to the person who happens to be paying him for his services.'") (quoting Martyn v. Donlin, 198 A.2d 700, 706 (Conn. 1964)); see also Polk County, 454 U.S. at 318 (form of payment to counsel does not render representation state action). (139.) See Polk County, 454 U.S. at 321 ("canons of professional responsibility . . . mandate [public defender's] exercise of independent judgment on behalf of the client"). "Control, or the right to control is a precondition to establishing vicarious liability in tort." White, 524 N.E.2d at 804. (140.) Comment, supra note 82, at 1425-26 n.43. (141.) Pierson v. Ray, 386 U.S. 547, 554 (1967); see also Nakles, supra note 2, at 230 (discussing rationale behind judicial immunity). (142.) See Stump v. Sparkman, 435 U.S. 349, 356 (1978) judge immune even if acted in error, maliciously, or in excess of authority); Pierson, 386 U.S. at 554 (immunity applies even when judge accused of acting corruptly and maliciously). (143.) Stump, 435 U.S. at 357; see also Bauers v. Heisel, 361 F.2d 581, 590 (3d Cir. 1966) (quoting Bradley v. Fisher, 80 U.S. 335, 351-52 (1872), which first delineated the scope of judicial immunity), cert. denied, 386 U.S. 1021

(1967). (144.) See, e.g., Pierson, 386 U.S. at 554 (public benefits because judges free to exercise their functions independently). (145.) See Nakles, supra note 2, at 231-32 (quasi-judicial immunity accorded "other persons directly involved in the judicial process" because of their judicial functions or for performance of "ministerial duties at the direction of the judge"); see also Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972) (others with quasi-judicial immunity include public defender's "counterpart across the counsel table, the clerk of the court recording the minutes, the presiding judge, and counsel of a co-defendant, privately retained or court-appointed"), cert. denied, 412 U.S. 950 (1973). "The title of office . . . does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process." Robichaud v. Ronan, 351 F.2d 533, 537-38 (9th Cir. 1965). Generally, quasi-judicial immunity is absolute so long as the officer acts within his jurisdiction and the act is judicial in nature. However, in some states (e.g., North Dakota) only qualified immunity applies. Civil Actions, Supra note 120, at 311 & n.52. (146.) Civil Actions, Supra note 120, at 311-13. Arguably, a court reporter's claim that he or she protects individual rights, enforces the law, and engenders legitimacy in the court system is no greater than that assertable by a public defender. Reese v. Danforth, 406 A.2d 735, 745 (Pa. 1979) (O'Brien, J., dissenting). (147.) Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976). (148.) Bauers, 361 F.2d at 589-90. (149.) Public defenders arguably need as much freedom to exercise their professional discretion as prosecutors do; thus, some courts have urged that, for the sake of consistency, judicial immunity be granted to public defenders. Brown, 463 F.2d at 1048-49; Scott v. City of Niagara Falls, 407 N.Y.S.2d 103, 105-06 (Sup. Ct. Niagara County 1978) (quoting Brown). (150.) Reese, 406 A.2d at 741 (Manderino, J., concurring). (151.) Millich, supra note 37, at 537. (152.) See id. ("The judge, district attorney, and public defender are parts of a courtroom triumvirate. Each has a function which is essential to the working of the system. The public defender's role is that of an adversary to the prosecutor - not an adversary of the system but an integral part of it."). (153.) See Nakles, supra note 2, at 231 (contending that because the judge, prosecutor, and defense counsel each perform a function that in the aggregate works toward a just outcome, they should have equal civil liability protection). (154.) Scott, 407 N.Y.S.2d at 106. (155.) Spring v. Constantino, 362 A.2d 871, 874-75 (Conn. 1975); Windsor v. Gibson, 424 So. 2d 888, 889 (Fla. Dist. Ct. App. 1982); Starr v. Reinfeld, 630 A.2d 801, 804 (N.J. Super. Ct. App. Div. 1993) (case concerns court-appointed attorney but logic of opinion would seem to apply equally to public defender). (156.) Case Comment, supra note 64, at 948 (history discussed in Robinson v. Bergstrom, 579 F.2d 401, 409 (7th Cir. 1978) (per curiam)). (157.) Spring, 362 A.2d at 874-75; see also Windsor, 424 So. 2d at 889 (public defender role "does not differ from that of privately retained counsel"); Starr, 630 A.2d at 804 (court-appointed attorney "performed none of the traditional discretion, decision-making functions of a judge"). Judges and prosecutors regularly make decisions about whether evidence warrants further court proceedings. Public defenders also do so but only in connection with plea bargaining. Such a limited exercise of discretion does not justify such an extraordinary protection from liability for public defenders as it does for judges and prosecutors. Case Comment, supra note 64, at 949 & n.53. (158.) See Spring, 362 A.2d at 874 (argument "encompasses any privately retained attorney who is representing a criminal defendant" because all attorneys licensed in state are officers of court and perform an integral part of judicial process). (159.) 503 N.W.2d 771 (Minn. 1993). (160.) While both the United States Supreme Court and the Seventh Circuit have indicated in dicta that malpractice immunity might be justified by pure policy considerations, their inquiries focused on court-appointed attorneys. Ferri v. Ackerman, 444 U.S. 193, 204 (1979) ("valid policy reasons might justify an immunity for appointed counsel"); Walker v. Kruse, 484 F.2d 802, 804 (7th Cir. 1973) ("there are strong reasons of policy which might persuade the Illinois courts to hold that . . . [appointed defense counsel] . . . should be immune from malpractice liability"). It is noteworthy that almost two decades later the Seventh Circuit held, on essentially policy grounds, that federal public defenders did not enjoy absolute immunity from malpractice suit. Sullivan v. Freeman, 944 F.2d 334 (7th Cir. 1991). (161.) See Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976) (redress may be obtained via direct appeal, a state post-conviction remedy, or by federal habeas corpus), cert. denied, 429 U.S. 1102 (1977); Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972) (same), cert. denied, 412 U.S. 950 (1973). The opportunity to file an appeal on ineffectiveness of counsel grounds is a remedy uniquely afforded criminal defendants. Mallen & Smith, supra note 10, at 291. (162.) See Dziubak v. Mott, 503 N.W.2d 771, 778 (Minn. 1993) (Gardebring, J., dissenting) (overturning conviction cannot fully "right the wrong"); see also Wakelyn, supra note 28, at 630-31 n.58 (post-conviction relief cannot fully compensate individual for economic hardship and public humiliation experienced). (163.) Dziubak, 503 N.W.2d at 778 (Gardebring, J., dissenting) (observing that Gideon v. Wainwright, 372 U.S. 335 (1963), the landmark United States Supreme Court case that guaranteed indigent criminal defendants the right to counsel, arguably sought to eliminate any such differentiation of basic treatment on the basis of wealth).

The Equal Protection and Due Process Clauses of the Fourteenth Amendment are arguably implicated by this analysis. Although it is beyond the scope of this inquiry, it is worth noting that these constitutional concerns arc probably less real than they may appear. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages"); Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971) (while the Due Process Clause gives indigents access to the courts, there is no authority holding that unimpaired access to state courts for all purposes is a constitutionally guaranteed right). (164.) See Reese v. Danforth, 406 A.2d 735, 740 (Pa. 1979) public defender immunity would deprive "an indigent [of] the tort relief which would be available to the paying client in a similar fact situation"); see also Klein, supra note 23, at 1200-01 (public defender immunity would discriminate against indigent defendants by denying them compensation even for negligent representation). (165.) See Donigan v. Finn, 290 N.W.2d 80, 82 (Mich. Ct. App. 1980) ("'[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has'") (quoting Griffin v. Illinois, 351 U.S. 12, 19 1956)); Reese, 406 A.2d at 740 ("quality and extent of the services or ethical responsibilities of public defenders" should not turn on economic means of client). (166.) Even courts without an immunity rule have been keen to keep criminal defendants from obtaining monetary benefits. See, e.g., Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991) ("A person who is guilty need not be compensated for what happened to him as a result of his former attorney's negligence."); Bailey v. Tucker, 621 A.2d 108, 113 (Pa. 1993) (expressing concern that guilty party could actually profit from crime because of his attorney's negligence). (167.) See Shaw v. State, 861 P.2d 566, 571 Alaska 1993) (indicating that "civil recovery should not be a tool for shifting an individual's responsibility for the individual's criminal acts"). (168.) See supra note 84 and accompanying text. (169.) Nakles, supra note 2, at 230. Virtually all tactical decisions pursuant to an indigent criminal defendant's legal defense are made by the public defender, and the defendant is thereby bound by these decisions. Thus, the defense attorney's discretion must be unimpeded. (170.) See Minns v. Paul, 542 F.2d 899, 901 (4th Cir. 1976) (public defender needs to be able to "decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced"), cert. denied, 429 U.S. 1102 (1977); Reese, 406 A.2d at 739 (same). (171.) See Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972) ("Defense counsel would be caught in an intrinsic conflict of protecting himself and representing his client."), cert. denied, 412 U.S. 950 (1973); Ehn v. Price, 372 F. Supp. 151, 153 (N.D. 111. 1974) (same); see also Nakles, supra note 2, at 233 (a public defender malpractice liability rule would "create conflicts between the attorney's desire to protect himself and his mandate to represent the client"). (172.)

Cf. Briscoe v. LaHue, 460 U.S. 325, 342-43 (1983) (immunity accorded to police officer witnesses in part due to intimidation concerns), cert. denied sub nom. Talley v. Crosson, 460 U.S. 1037 (1983). (173.) Nakles, supra note 2, at 233. (174.) Briscoe, 460 U.S. at 345 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). (175.) See Ferri v. Ackerman, 444 U.S. 193, 204 (1979) ("If anything, [fear of malpractice] provides the same incentive for appointed and retained counsel to perform that function competently."). (176.) Reese, 406 A.2d at 741 (Roberts, J., concurring) (quoting Ferri v. Ackerman, 394 A.2d 553, 558 (1978) (Roberts, J., joined by Larsen, J., dissenting)). (177.) See Keeton et al., Supra note 96, at 1068 (many states provide liability insurance on behalf of state-employed attorneys); Klein, supra note 23, at 1207 (public defenders in Missouri insured up to $100,000 per incident). According to the National Legal Aid and Defender Association (NLADA), which provides discounted insurance coverage for public defender offices, as many as 50% of state and local offices maintain malpractice insurance policies with NLADA or other private insurers. Telephone interview with Melanie Herman, Director of Development, Membership and Communications, NLADA (Washington, D.C. Feb. 24, 1995). While currently a large number of public defender offices are not privately insured, largely as a function of cost, more and more offices are contracting for such coverage as concern about legal malpractice claims mounts. Id. These policies are typically broad, encompassing negligent conduct by individual public defenders, although not intentional torts. Id. (178.) The vast majority of public defender services are indemnified against liability so that the state or county employer will absorb any damages for malpractice liability on behalf of the public defender so long as he is acting within the scope of employment and his conduct is not wanton, reckless, or malicious. Telephone interview with Melanie Herman, Director of Development, Membership and Communications, NLADA (Washington, D.C. Feb. 24, 1995); see also Dziubak, 503 N.W.2d at 778 (Gardebring, J., dissenting) (state indemnification, which is likely to be provided for any malpractice award, will eliminate any "fears of conflict of interest"); e.g., Conn. Gen. Stat. [sub-section] 5-141(d) (1988). (179.) See Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976) (public defender subject to bar discipline, including disbarment); Scott v. City of Niagara Falls, 407 N.Y.S.2d 103, 105 (Sup. Ct. Niagara County 1978) (public defender may face discipline by bar or appellate courts, or risk being removed from job); Klein, supra note 23, at 1184 & n.78 ("Available [bar association] sanctions typically include a letter of caution, private reprimand, public censure, suspension, or disbarment."); Nakles, supra note 2, at 235 (public defender subject to bar discipline and criminal statutes); Wakelyn, supra note 28, at 630 n.58 (grievances can be filed against public defender with state bar association). (180.) See Aronson & Weckstein, supra note 18, at 65 (fewer than 0.5% of lawyers in most states are formally charged with a disciplinary action, and only 6% of those charged are actually disciplined). But see Klein, supra note 23, at 1175 (disciplining lawyers in New York has been called a "growth industry" and percentage of complaints in Arkansas resulting in disciplinary action in 1986 twice as high as in 1981). (181.) See Klein, supra note 23, at 1177 (citing Florida and Rhode Island as examples). (182.) Case Comment, supra note 64, at 950; see also W. Noel Keyes, The Gross Inadequacy of Reimbursement of Costs by Disciplined Attorneys and Lack of Fines, 26 Beverly Hills Bar Ass'n. J. 184, 185 (Fall 1992) (describing California State Bar's collection of less than $300,000 from disciplined attorneys in 1991 as very low"); Janine C. Ogando, Sanctioning Unfit Lawyers: The Need for Public Protection, 5 Geo. J. Legal Ethics 459, 464 (1991) ("system is inconsistent in imposing discipline"). (183.) Case Comment, supra note 64, at 950-5 1. (184.) See Reese, 406 A.2d at 741 (Roberts, J., concurring) ("Immunity would only permit less zealous representation. . . ."). It is no coincidence that recovery for malpractice is a preferred means of ensuring effective performance by professionals generally. (185.) See Dziubak v. Mott, 503 N.W.2d 771, 776-77 (Minn. 1993) ("the potential of civil liability for a lack of resources not within a defender's control would serve as a deterrent to recruiting and maintaining dedicated professionals"); Scott v. City of Niagara Falls, 407 N.Y.S.2d 103, 105 (Sup. Ct. Niagara County 1978) (potential liability "may well make it difficult to recruit capable personnel to the office of Public Defender"); Nakles, supra note 2, at 233 ("To withhold immunity may tend to discourage skilled individuals from assuming defender roles"). (186.) See White v. Galvin, 524 N.E.2d 802, 807 (Ind. Ct. App. 1988) (Robertson, J., dissenting) (pool of attorneys willing to take jobs defending indigents is smaller in rural counties). (187.) Dziubak, 503 N.W.2d at 778 (Gardebring, J., dissenting). The author conducted a random telephone survey of several public defender offices, large and small, urban and rural, to determine the number and level of competitiveness of applicants seeking to fill vacancies. While the offices contacted either did not maintain such statistics on file or were reluctant to publicly reveal such data, the common theme that emerged was that applicants were plentiful and showed virtually no concern about immunity. Applicants were far more likely to be deterred by the relatively modest salaries offered by such offices. (188.) Davis, supra note 92, at 756 n.71. (189.) Id. (190.) Job features attracting attorneys to a public defender's office include the public service nature of the job, the high level of responsibility they exercise over cases, and the nearly unparalleled opportunity to litigate. (191.) See id. at 756 n.71 (could compensate defenders for exposure by increasing compensation); Klein, supra note 23, at 1200 (attempts in one-third of states to increase fees paid to court-appointed counsel to compensate for their increased exposure to malpractice in aftermath of Polk County decision). (192.) See Dziubak, 503 N.W.2d at 778 (Gardebring, J., dissenting) (rejecting majority's establishment of an immunity rule because it "sanction[ed] the chronic underfunding of public defense organizations by lessening the obligations which public defenders have to their indigent clients"). (193.) See Jeffrey H. Rutherford, Comment, Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders, 78 Minn. L. Rev. 977 (1991) (immunity rule "contributes to the public defenders' image as second-class lawyers"). (194.) See, e.g., Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976) (discussing resource diversion in connection with defense of [sub-section] 1983 claims), cert. denied, 411 U.S. 1102 (1977). (195.) See Dziubak, 503 N.W.2d at 776 ("Substantial time, energy and money are consumed in discovery: answering interrogatories, filing affidavits, and deposing witnesses."); see also Millich, supra note 37, at 541 ("the costs alone of defending a protracted lawsuit can be catastrophic"). (196.) See supra note 22. (197.) Briscoe v. LaHue, 460 U.S. 325, 343-44 (1983), cert. denied sub nom. Talley v. Crosson, 460 U.S. 1037 (1983). (198.) A guardian ad litem is defined as "a special guardian appointed by the court to prosecute or defend, in behalf of an infant or incompetent, a suit to which he is a party, and such guardian is considered an officer of the court to represent the interests of the infant or incompetent in litigation." Black's Law Dictionary 635 (5th ed. 1979). (199.) A Good Samaritan is defined as "[o]ne who sees a person in imminent and serious peril . . . and risk[s] his own life or serious injury in attempting to effect a rescue." Id. at 624. (200.) Dziubak, 503 N.W.2d at 775; see also Tindell v. Rogosheske, 428 N.W.2d 386, 387 (Minn. 1988) ("A guardian must be free . . . to engage in a vigorous and autonomous representation of the child. Immunity is necessary to avoid harassment from disgruntled parents who may take issue with any or all of the guardian's actions."). (201.) See Reese, 406 A.2d at 744 n.8 (O'Brien, J., dissenting) ("good samaritan legislation . . . immunizes physicians and certain others from liability to which they would be exposed were they at liberty to decline treatment of the patient"). (202.) See Collins v. Tabet, 806 P.2d 40, 48 (N.M. 1991) ("a guardian ad litem who is not acting as a `friend of the court' - assisting the court in determining the reasonableness of the settlement - is not entitled to immunity") (emphasis in original); Barr v. Day, 854 P.2d 642, 650 (Wash. Ct. App. 1993) ("When . . . a guardian ad litem acts as an advocate for his client to further the financial interests of the ward, the basic reason for absolute immunity evaporates."). (203.) Admittedly, however, Good Samaritans are often permitted to submit bills for the emergency services they provide. (204.) See Nakles, supra note 2, at 230 (public defender malpractice immunity necessary for the

efficient administration of criminal justice system). (205.) See Bailey v. Tucker, 621 A.2d 108, 113 (Pa. 1993) (acknowledging claim that public defender malpractice liability would open floodgates of litigation). (206.) See White v. Galvin, 524 N.E.2d 802, 807 (Ind. Ct. App. 1988) (Robertson, J., dissenting) (court's finding of no official immunity invites vexatious and harassing malpractice suits); see also Nakles, supra note 2, at 230 (liability rule would invite "multiplicity of suits based upon fancied wrongs"). Moreover, criminal convicts are known to be especially litigious. Mallen & Smith, supra note 10, at 121 (Supp. 1993). (207.) Standards for Criminal Justice, commentary to Standard 4-3.9; see also Poi County v. Dodson, 454 U.S. 312, 323 (1981) (lawyers are obligated "not to clog the courts with frivolous motions or appeals"). (208.) See Mallen & Smith, supra note 10, at 443. (209.) System legitimacy has substantive, procedural, and institutional dimensions. The substantive and procedural issues are discussed in the text. With regard to institutional legitimacy, there remains the question whether the courts or the legislature is better suited and capable of resolving the public defender immunity issue. This issue is beyond the scope of this inquiry. For one opinion in which the issue is considered, see Ferri v. Ackerman, 444 U.S. 193, 205 (1979) ("Whether a sufficient need can be demonstrated that would justify such a[n immunity] rule . . . [is a] question[] that can most appropriately be answered by a legislative body acting on the basis of empirical data."). (210.) See Reese, 406 A.2d at 745 n.10 (O'Brien, J., dissenting) ("Respect for the judicial process, much less understanding of it, will be hard won by a system which permits (a) a determination that a defendant was denied his Sixth Amendment right to effective counsel, (b) warrants thereby a subsequent new trial, (c) is subsequently acquitted or has the charges against him nolle prossed, but (d) was not civilly wronged."). (211.) See Reese, 406 A.2d at 745 (O'Brien, J., dissenting) ("Questions concerning the conduct of counsel during the rigors of defending a criminally accused, questions of sufficient intricacy to divide this court, will be relitigated in the civil courts. The scenario begs for inconsistent results."). (212.) See Wakelyn, supra note 28, at 631 (immunizing court-appointed attorneys "helps perpetuate the belief that `the criminal justice system is deliberately constructed and administered to protect the haves from the have-nots and to perpetuate the status quo.'") (quoting N.Y. Times, Sept. 12, 1976, [sub-section] 6, at 95 (letter from William M. Kunstler)). (213.) See Scott v. City of Niagara Falls, 407 N.Y.S.2d 103, 105 (N.Y. Sup. Ct. 1978) (respect for judicial system depends partly on perception of achievement of justice case-by-case). (214.) See Standefer v. United States, 447 U.S. 10, 25 (1980) ("While symmetry of results may be intellectually satisfying, it is not required."). (215.) Civil Actions, supra note 120, at 307. (216.) 621 A.2d 108 (Pa. 1993). (217.) Id. at 115. (218.) Id. (219.) The rationale behind these statutes stems largely from a concern about encouraging ingratitude by guests and as a guard against collusion between the driver and passenger in a lawsuit. One treatise refers to these as the hospitality protection principle and the collusion protection principle. Keeton et al., supra note 96, [sections] 34, at 215. (220.) Edwin H. Byrd, III, Comment, Reflections on Willful, Wanton, Reckless, and Gross Negligence, 48 La. L. Rev. 1383, 1403 (1988). (221.) Curry v. Cape Canaveral Hospital, 426 So. 2d 64, 64 (Fla. 1983). (222.) R.I. Gen. Laws [sections] 9-1-27.1 (1985). (223.) Id. [sections] 23-4.1-12. (224.) "Early American decisions purporting to apply the gross negligence standard have been either disapproved or ignored over the passage of time." Mallen & Levit, supra note 100, at 193. (225.) Few automobile guest statutes remain on the books; only three states - Alabama, Indiana, and Nebraska - maintain such statutes today. Keeton et al., supra note 96, [sections] 34, at 217 & n.87. Many of these statutes have been perceived as unfair or complex, or held violative of the Equal Protection Clause because no rational basis exists to deny recovery to the class of non-colluding plaintiffs. Id. [sections] 34, at 216-17 & n.86; see, e.g., Brown v. Merlo, 506 P.2d 212 (Cal. 1973) (California automobile guest statute held overinclusive in violation of Equal Protection Clause). (226.) See supra Part III(D). (227.) See Keeton et al., supra note 96, [sections] 32, at 188; see also Tijerina v. Wennermark, 700 S.W.2d 342, 347 (Tex. Ct. App. 1985) (standard for legal representation in San Antonio relevant factor in suit against attorney practicing law in San Antonio for several years). (228.) Mallen & Levit, supra note 100, at 180. (229.) Id. (230.) See Ambrosio & McLaughlin, supra note 3, at 1367 (difficulty compounded when malpractice plaintiff must "produce an expert not only knowledgeable in the specialized area of law but also as to its practice in the particular locale."). (231.) See James O. Pearson, Jr., Annotation, Modern Status of "Locality Rule" in Malpractice Action Against Physician Who is Not a Specialist, 99 A.L.R.3d 1133, 1139 (1980) (in the medical context, locality can be a factor, but trend in recent years for courts to adopt in effect a national standard); cf. Keeton et al., supra note 96, [sections] 32, at 188 (observing that some courts have opted in favor of treating locality among other factors in shaping the appropriate standard). (232.) See Rodriguez v. Horton, 622 P.2d 261, 264 (N.M. Ct. App. 1980) ("A lawyer holding himself out to the public as specializing in an area of the law must exercise the same skill as other specialists of ordinary ability specializing in the same field."). (233.) See Mallen & Levit, supra note 100, at 332-33 (where jurisdictions recognize specialties, criminal law is area of practice most commonly acknowledged). (234.) "Such [constitutional] protections include the right to the assistance of an attorney, the right to a speedy trial, the right to a jury trial, the privilege against self-incrimination, and the prohibition against double jeopardy." Shaw, 861 P.2d at 570 n.5. (235.) See Klein, supra note 23, at 1185 ("It will not be a defense for a lawyer confronted with a disciplinary proceeding to claim that the reason for the neglect of clients was that the lawyer had too many cases demanding attention."). (236.) Id. at 1185-86 (quoting In re Martinez, 717 P.2d 1121, 1122 (N.M. 1986)). (237.) See, e.g., Grube v. State, 529 So. 2d 789, 790 (Fla. Dist. Ct. App. 1988) (per curiam) (court willing to consider motions of withdrawal of up to 100 new cases due to staffing shortages, and to establish revised briefing schedules for initial briefs); Schwarz v. Cianca, 495 So. 2d 1208, 1209 (Fla. Dist. Ct. App. 1986) (per curiam) (reversing trial court's denial of motion to withdraw upon finding that public defender's pending caseload was so excessive as to disable him from providing effective assistance of counsel). (238.) See, e.g., In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Public Defender and by Other Public Defenders, 504 So. 2d 1349, 1349-50 (Fla. Dist. Ct. App. 1987) (en banc) (ordering public defender to file overdue briefs in 150 oldest cases within next three months despite acknowledgment that public defender office had lost attorneys assigned to noncapital appeals over previous three months during which time over 1,000 new noncapital appeals cases had been assigned to that office). (239.) See Model Rules Rules 1.1 (competence), 1.3 (diligence), and 1.3 cmt. 1 (zealous); Model Code DR 6-101 (competence), DR 7-101 (zealous), and EC 6-4 (diligence). (240.) See United States v. Johnson, 238 F.2d 565, 572 (1956) (Frank, J., dissenting) ("The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, e.g., if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or mining engineer or chemist."). (241.) Holding the state or county government liable would create a positive incentive for the government entity to provide fully adequate funds in support of its public defender service. Such a suit for damages, however, would need to overcome any sovereign immunity accorded the state or municipality in question. (242.) A distinction must be drawn between legal innocence and actual innocence. Legal innocence is the result reached in a criminal proceeding by the trier of fact "beyond a reasonable doubt." Actual innocence is the result reached in a civil proceeding by a judge based on a "preponderance of the evidence." It follows, then, that a defendant can be found legally innocent though he is in fact guilty of the crime. For example, a jury may not be persuaded beyond a reasonable doubt of the defendant's legal guilt even though he committed the crime. Conversely, a defendant may be found legally guilty although he is actually innocent. For instance, due to a criminal defense attorney's failure to move for the suppression of adverse evidence, an actually innocent defendant could be found guilty. For further discussion of this distinction, see Shaw v. State, 861 P.2d 566, 570 n.3 Alaska 1993); Potel, supra note 76, at 546-50. (243.) See

Sullivan v. Wiener, No. 88-C6813, 1989 WL 65163, at *2 (N.D. Ill. 1989) (plaintiff must prove not only that the result would have differed but for the negligent defense, but also that plaintiff is indeed innocent of the crime alleged); Glenn v. Aiken, 569 N.E.2d 783 (Mass. 1991) (to recover for legal malpractice, plaintiff must show by preponderance of evidence that he is innocent of underlying crime); Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987) ("To state a cause of action for legal malpractice ... plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense."); Bailey v. Tucker, 621 A.2d 108, 113 (Pa. 1993) (requiring that as element of malpractice case against attorney "whose dereliction was the sole proximate cause of the defendant's unlawful conviction, the defendant must prove that he is innocent of the crime or any lesser included offense"). See generally Rheingold, supra note 2, at 15 (in some states "the courts say that a convicted felon has no basis to claim malpractice since he was guilty anyway. That he was convicted with evidence that a competent lawyer should have kept from the jury is held irrelevant."). (244.) See, e.g., Glenn, 569 N.E.2d at 786 (plaintiff has burden of proving his innocence on arson charge); see also Potel, supra note 76, at 546 (client required to prove his actual innocence or malpractice claim barred). But see Shaw, 861 P.2d at 572 (burden of proof on defendant attorney, not plaintiff, because issue of plaintiff's actual guilt raised as an affirmative defense). (245.) E.g., Glenn v. Aiken, 569 N.E.2d 783 (Mass. 1991). (246.) Evidence of actual innocence or guilt need not be limited to that which would be admissible in the previous criminal trial because the evidentiary standards differ between criminal and civil forums. See Sullivan, 1989 WL 65163, at *1 ("evidence of guilt should not be limited to that introduced in the underlying prosection"); Shaw, 861 P.2d at 573 ("State is not limited to evidence admissible at the criminal trial to prove [plaintiff's] guilt beyond a reasonable doubt."). See generally Treyz, supra note 76, at 728 (to show actual innocence, plaintiff must use evidentiary standards of civil proceedings). (247.) See Bailey, 621 A.2d at 113 (in criminal malpractice cases, in which attorney's alleged "dereliction was the sole proximate cause of the defendant's unlawful conviction, the defendant must prove that he is innocent of the crime or any lesser included offense."). (248.) See Shaw, 861 P.2d at 572 ("Any subsequent negligent conduct by a[n] ... attorney is superseded by the greater culpability of [the defendant's] criminal conduct."). (249.) See Carmel, 511 N.E.2d at 1128 ("[P]olicy considerations require different pleading and substantive rules" in criminal malpractice cases than in civil malpractice cases because "criminal prosecutions involve constitutional and procedural safeguards designed to maintain the integrity of the judicial system and to protect criminal defendants from overreaching governmental actions."). (250.) See Glenn, 569 N.E.2d at 788 ("The public has a strong interest in encouraging the representation of criminal defendants, particularly those who are ruled to be indigent. The rule we favor helps to encourage that kind of legal representation by reducing the risk that malpractice claims will be asserted and, if asserted, will be successful."). (251.) See id. at 788 ("A person who is guilty need not be compensated for what happened to him as a result of his former attorney's negligence. There is no reason to compensate such a person, rewarding him indirectly for his crime."). (252.) See id. at 787 ("It may be difficult to defend logically a rule that requires proof of innocence as a condition of recovery, especially if a clear act of negligence of defense counsel was obviously the cause of the defendant's conviction of a crime."). See generally Kaus & Mallen, supra note 91, at 1205 (requiring proof of actual innocence just about destroys criminal malpractice as an actionable tort in the very type of situation where the lawyer's incompetence is most flagrant and its consequences most easily demonstrable."). (253.) See Kaus & Mallen, supra note 91, at 1198-99 (noting existence of large number of decisions in which attorneys relied on their own incompetence as basis for relief for their clients, usually as basis to argue for new trial); Klein, supra note 23, at 1205 nn.207-08 (examples of attorney admissions of neglect as grounds for mistrial or new trial). (254.) See Kaus & Mallen, supra note 91, at 1199 ("Who can say how many viable submissions of ineffectiveness will never be made for fear that their only result will be a complaint for malpractice?"). (255.) See Treyz, supra note 76, at 732-33 (attorney negligence could have resulted in a longer sentence than warranted or in the conviction of a more serious crime than he committed).

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Note
Cort Thomas[a1]

*331 CRIMINAL MALPRACTICE: AVOIDING THE CHUTES AND USING THE LADDERS

*332 I. Introduction

The overwhelming majority of legal scholarship dealing with criminal malpractice focuses on how the current system generally favors the defendant-attorney and performs some value-based comparative analysis. Although such a process is extremely valuable, it largely ignores the multitude of ways an attorney might be subject to liability and the steps an attorney should take to avoid such liability in a moral and ethical fashion. This Note, while examining several of the same aspects of criminal malpractice attacked by critics, looks particularly to the contours of the law today, pointing out the practical consequences of the wide variance of positions courts currently adopt concerning criminal malpractice issues.

It is important to note from the outset some general principles undergirding legal malpractice. First, the Restatement of the Law Governing Lawyers[1] generally provides the duties and obligations an attorney owes her client. Accordingly, this Note relies upon the Restatement heavily. Second, a malpractice plaintiff generally brings her claim under one of two fundamental theories: negligence or breach of fiduciary duty.[2] Aspects of these theories of liability thus comprise the majority of the discussion below.

The purpose of this Note is two-fold: to make attorneys aware of potential pitfalls in and successful defenses to malpractice liability and to advise them on how to ethically avoid such suits. Part II begins by discussing how the typical malpractice action takes shape, i.e., how a plaintiff establishes a cause of action. Part III then looks at several issues germane to criminal malpractice, discussing how courts deal with these issues and alerting attorneys to the impact such variance can have on potential liability. Part IV then provides additional advice to attorneys on how to further shield themselves from liability in an ethical manner.

II. An Overview of Typical Criminal Malpractice Claims

A. Claims Based on Negligence

In order to be successful, any legal malpractice action based upon negligence must necessarily include four elements: duty, breach, causation, ***333** and damages.[3] A criminal malpractice action based upon negligence requires the same four elements.[4] Simply because criminal malpractice claims rely upon the same four basic elements, however, does not mean that one need merely look at standards of civil malpractice. Although such a method would be helpful due to the general dearth of criminal malpractice scholarship, it cannot be pursued because of the variety of special protections and rights bestowed upon criminal clients.[5] Thus, it is appropriate to discuss each element specifically in the context of criminal malpractice.

1. Duty

The Restatement provides four duties that an attorney owes every client at a minimum.[6] First, the attorney must "proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation."[7] In the criminal context in particular, this duty presents intriguing questions as to the extent an attorney must gain the informed consent of her clients--a question that is dealt with below.[8] The second duty placed on attorneys is that they "act with reasonable competence and diligence."[9] Whether the standard of reasonable competence and diligence is measured on the basis of attorneys in general or the specialized subgroup of criminal attorneys is discussed in the context of breach of the standard of care.[10]

The third duty owed to a criminal client also raises several issues. The Restatement places a duty on attorneys to "comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client."[11] Several aspects of the third duty are discussed in further detail below.[12] The fourth duty is that attorneys "fulfill valid contractual obligations to the client."[13]

***334** At least one commentator has noted that the element of duty will not pose any difficulty to the typical criminal malpractice plaintiff.[14] While duty generally will not be the crux of the disagreement between the client and her attorney, it is important to realize that several of the issues discussed later in this article tie back to the question of what duty is owed from the outset.

Finally, the issue of to whom an attorney owes these four duties is a question that sometimes arises in the context of criminal malpractice. An attorney owes each of these duties to any criminal client, whether that client is appointed or retained.[15] Additionally, an attorney also owes certain duties to non-clients. For example, an attorney owes more protracted duties to prospective clients: to not use or disclose confidential information, to protect any property of the prospective client, and to use reasonable care in any legal services provided.[16] The class of non-clients who most frequently bring criminal malpractice claims are family members of the client.[17] Whether or not these claims will be successful is largely dependent on whether or not a given jurisdiction requires privity of contract (and thus only allows claims by the client).[18] Similarly, assignment of a claim will encounter the same privity hurdle, though assignment is especially rare in the criminal malpractice context.[19]

2. Breach of Duty

The second element of a criminal malpractice claim is a breach of one of the above duties. To prove breach, a malpractice plaintiff must demonstrate that the defendant attorney violated the applicable standard of care.[20] In applying a standard of care, courts seek to measure "the propriety of the lawyer's conduct."[21] Courts apply the same standard in civil and criminal malpractice claims: ordinary care.[22] Several commentators have opined that perhaps criminal attorneys, as specialists, should be held to a higher standard of care.[23] Still, a rather comprehensive search of case law ***335** found no state that currently embraces a heightened standard of care for criminal malpractice actions.[24]

Under ordinary care, an attorney is not liable for any errors made concerning rules--either procedural or substantive--that are unsettled or debatable.[25] This means that that trial decisions will largely be left to the attorney's discretion.[26] In alleging breach under this standard of ordinary care, criminal clients have based their claims on a wide swath of potentially negligent mistakes ranging from pre-trial to post-conviction. It is appropriate to look at these various types of claims to see which ones courts and juries are likely to accept or reject.[27]

Several plaintiffs have alleged breach of duty based on pre-trial actions. In Texas, a plaintiff argued, and a court accepted, a breach based upon his attorney's negligence at a bond hearing that resulted in the client's premature detention.[28] Similarly, another Texas court permitted recovery by a plaintiff who claimed breach due to his attorney's failure to notify him of a pre-trial hearing, when the plaintiff's absence from that hearing resulted in unnecessary bail revocation and detention.[29] Mistakes made by counsel before a grand jury may also give rise to a malpractice claim.[30] Clients also complain with some frequency about their attorneys' delay in investigating charges or defenses in a prosecution.[31] At least one client has unsuccessfully attempted to base his criminal malpractice claim on his attorney's failure to notify him of an offer of immunity.[32] Another client argued that he was harmed by his attorney's negligent advice that he flee ***336** the jurisdiction rather than defend the charges with which he was faced.[33]

A particular form of pretrial mistake that gives rise to a substantial proportion of malpractice claims revolves around plea negotiations and agreements. The most typical alleged breach is that the attorney was negligent in advising the client to accept an offered plea.[34] Although such claims are successful on occasion,[35] they must overcome several obstacles including the transcript of the plea proceedings wherein the client will have pronounced that the plea is voluntary and not coerced,[36] the protection for an attorney's judgment call (so long as the client gave her informed consent),[37] and the defense of in pari delicto--even if the attorney told the client to lie, the client is not blameless because she knowingly chose to lie anyway.[38] Plaintiffs have also premised claims on their attorneys' failure to advise the client of the collateral consequences of a plea,[39] such as aggravated punishment[40] or deportation.[41] Similarly, other clients base their claims on negligent advice that a plea will garner them a certain sentence when they in fact receive a much longer one.[42] Some have even alleged breach based on their attorneys' failure to obtain a plea bargain.[43]

Counsels' mistakes at trial have also led to claims for criminal malpractice. Generally, however, trial decisions are left to a lawyer's discretion.[44] This leeway is partly based on the idea that a lawyer need not get her client's consent on every strategic decision through the course of litigation, particularly those choices that are not destructive to the client.[45] Thus, the attorney will almost surely succeed when a client bases allegations of breach on a failure to produce evidence,[46] stipulations to certain evidentiary issues,[47] or a failure to make a motion to suppress.[48] ***337** Similarly, a client typically cannot base a claim on the lawyer's decision to have the client or any other witness testify or not.[49] On the other hand, clients will be more successful on claims that an attorney's representation during sentencing resulted in a longer sentence than they would have received

otherwise.[50] Finally, perhaps the easiest claims to succeed on are those involving an attorney's conduct. For instance, a client might base a claim for breach on the basis of her attorney's falling asleep during trial, using expletives in front of the jury, or simply refusing to do anything.[51]

After a client is convicted and sentenced, an attorney may still potentially breach a duty to her client. Although generally an appellate attorney has even greater discretion in choosing which arguments to make,[52] a claim will be successful if the plaintiff demonstrates that there was a valid basis for appeal, that counsel refused to raise that argument, and that the claim would have succeeded.[53] Post-conviction breaches upon which clients have attempted to base their claims include failing to obtain a new trial,[54] failing to file a petition for appeal,[55] and improper handling of a motion or appeal.[56]

3. Causation

To prove the causation element of a malpractice claim, a plaintiff must satisfy a two-part inquiry: factual causation and proximate causation.[57] Factual causation involves the traditional "but-for" standard: a client will have to prove that "but for the attorney's negligence, there should have been a better result."[58] In the criminal malpractice context, this means that a client must demonstrate that the outcome of her trial would have been different had the attorney acted differently.[59] As discussed in detail in Part III, the extent to which but-for causation is applied will depend on the jurisdiction--courts may require anything from actual innocence to legal innocence (e.g., though the crime was committed, conviction is improper for some procedural reason) to any advantage the ***338** client would have obtained but for her attorney's actions.[60]

Proximate causation attempts to ascertain the fairness of imposing liability on an attorney for her actions.[61] Thus, even if a malpractice plaintiff proves that the attorney's conduct was a cause in fact of the harm suffered, an attorney may still escape liability if imposing liability would be unfair.[62] This idea of fairness is extremely important in the criminal malpractice context because courts are generally averse to imposing liability on an attorney when the client's intentional criminal act appears to be the true proximate cause of his dilemma.[63] As noted in Part III, attorneys will be quick to defend claims on this basis.[64]

4. Damages

The final element a plaintiff must prove in a legal malpractice action is that of damages.[65] The client has the burden of proving the fact that damages exist as well as the size of the damages to which she is entitled.[66] In civil malpractice claims, damages typically occur in the form of an economic loss that results from some injury to one's property or ability to sue.[67] However, in the context of criminal malpractice, the primary harm suffered by the client is a loss of liberty.[68] Other harms that a criminal client may suffer "include the misery of incarceration, prison violence, loss of family contact, attorney's fees, and lost present and future wages."[69] In the context of plea negotiations, an attorney's failure to transmit a plea offer to her client will harm the client in that she will have to pay avoidable legal expenses and fines.[70] Additionally, the law is unclear as to whether certain collateral consequences of a conviction, including loss of the rights to vote and to carry firearms, can satisfy the damages element of negligence.[71]

A final theory of harm is that of loss of a chance. Loss of a chance initially arose in the medical malpractice context, where some courts decided that the loss of an opportunity to cure a patient could satisfy the damages prong of negligence.[72] However, even in the larger context of all ***339** legal malpractice claims, few cases have examined this theory.[73] Still, the argument has been made on at least one previous occasion in a criminal malpractice case.[74] In comparing criminal malpractice to medical malpractice, the client in Canaan contended that "[a] criminal defendant's 'preexisting injury' is the charge against him, and the attorney's job is to minimize the consequences of that charge."[75] Thus, "[i]f an attorney negligently fails to communicate

a plea offer or immunity offer, the defendant has been harmed by losing the chance for a better outcome."[76] The Canaan court cited one jurisdiction that had adopted this argument,[77] but ultimately chose to reject loss of a chance as the basis for attorney liability.[78] Instead, the court concluded that the public policy reasons counseling against "shifting the consequences of a crime to a third party" outweighed any lost opportunity a guilty client suffered,[79] an argument discussed in greater detail below.[80]

The size of damages a plaintiff may recover will depend almost entirely on the types of damages available to her. Indeed, the damage potential for a criminal malpractice defendant can be "enormous."[81] When compounded with juror anger at particularly "bad" conduct, these damages might increase even more.[82] In general, the types of remedies available to a criminal malpractice plaintiff will be no different than those available to a civil malpractice plaintiff.

Compensatory damages simply compensate a client for any losses suffered due to her attorney's malpractice.[83] Naturally, when the central harm suffered by a plaintiff is a loss of liberty, determining the measure of compensation is fairly difficult.[84] Compensatory damages are also sometimes available in legal malpractice actions when an attorney's intentional conduct harms the client's reputation.[85] An improper guilty ***340** verdict would seem to fall into this category. However, it is important to remember that even though the attorney's conduct may be a cause in fact of the harm to the client's reputation, the plaintiff will also have to demonstrate her injury was proximately caused by the attorney conduct that was tortious.[86] The only compensable attorney's fees will be those paid to mitigate the consequences of the original attorney's misconduct, not any fees incurred in the malpractice action itself or the original attorney's fees in the underlying suit.[87] In contrast, a plaintiff claiming breach of fiduciary duty, discussed in the next section, might be able to recover the fees she paid for the original attorney's negligent representation.[88]

A malpractice plaintiff will generally not be able to base a claim for compensatory damages on purely emotional harm.[89] This is particularly important in the context of temporary incarceration because the chief injury suffered in such a situation is emotional in nature.[90] The Restatement provides that while "emotional-distress damages are ordinarily not recoverable" in legal malpractice cases, they are recoverable when misconduct causes a client's imprisonment.[91] Still, a plaintiff will likely be unable to recover in those jurisdictions that apply the impact rule, which requires that a plaintiff first show that her emotional damages stem from some physical harm.[92] Some authors, in comparing medical malpractice to legal malpractice, note that while the former usually involves some clear physical injury, the latter typically only involves jail time.[93] Whether false imprisonment is a sufficient "physical" harm even under this rule is unclear.

Punitive damages are a final form of recovery potentially available to malpractice plaintiffs. They are available when a case involves particularly egregious conduct.[94] Still, there are several obstacles to a successful punitive damages claim.[95] Various states have limited punitive damages recoveries by imposing higher culpability standards (requiring intentional acts of malice),[96] mandating that a plaintiff prove her case under a higher clear and convincing evidence standard in order to recover punitives,[97] or placing caps on the amount a plaintiff may recover.[98] Some ***341** states go so far as to explicitly prohibit an award of punitive damages,[99] or at least severely limit it.[100] The United States Supreme Court has even commented on the proper breadth of punitives, holding that too great an award violates the due process clause.[101] Not surprisingly, no criminal malpractice case has looked to the issue of punitive damages in any detail.[102]

B. Claims Based on Breach of Fiduciary Duty

A second basis upon which a plaintiff might bring a criminal malpractice claim is breach of fiduciary duty. The Restatement lists four fiduciary duties an attorney owes a client: "comply with obligations concerning the client's confidences and property,

avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client."[103] It later adds a fifth duty: following the client's instructions.[104] While criminal malpractice applies the same duties as civil malpractice, several unique issues arise from these duties, issues that are discussed in greater detail below.[105]

Lawyers are simultaneously subject to the duties of both negligence and fiduciary duty at all times.[106] Thus, any difference in potential recovery between the two types of actions can lead to strategic pleading on the part of the malpractice plaintiff. The most important differences deal with statute of limitations issues and attorney's fees. The Restatement itself notes that the statute of limitations may vary between the two types of actions.[107] Which one will be longer and what that length will be varies from jurisdiction to jurisdiction, and thus no blanket statement comparing ***342** the two can be made.[108] Another large difference between the two causes of action is that while a plaintiff in a negligence action will be unable to recover her attorney's fees from the underlying negligent representation,[109] a breach of fiduciary duty claim will have such a remedy available.[110] Depending on the amount of representation, this recovery could be substantial. At the same time, if counsel is appointed, it seems that a court would be very hesitant to award a client fees it never paid.

C. Defenses Potentially Available to the Attorney

A criminal malpractice defendant has a vast array of potential defenses in her arsenal, each of which may shield her from liability. Each of these defenses presents certain issues that are discussed in greater detail in Part III.A. The most prominent defense a criminal attorney will be able to rely upon is the "innocence requirement," which, depending on the jurisdiction, requires that a malpractice plaintiff demonstrate that she was either legally or factually innocent of the charges in the underlying case.[111] A second important defense unique to criminal malpractice is that of collateral estoppel, which precludes a client from relitigating certain issues (particularly ineffective assistance of counsel) in the malpractice case.[112] A third defense is that an attorney was acting within his protected discretion.[113] Fourth, as discussed above, a statute of limitations defense will potentially preclude the imposition of liability on an attorney, both under negligence and breach of fiduciary duty theories.[114] In the criminal malpractice context, this defense presents a number of unique issues-- namely the matter of when the malpractice claim accrues--which are discussed below.[115] Another common defense, also discussed below, is that of attorney immunity--depending on the jurisdiction, a public defender or even appointed private counsel may be protected under theories of immunity.[116]

III. Issues Unique to Criminal Malpractice Claims

There are several issues that arise in a criminal malpractice claim that are wholly absent from other areas of legal malpractice. For ease of ***343** discussion, I have divided these issues into defense issues and ethical issues. The five defenses that come into play most often in the criminal malpractice context (innocence, collateral estoppel, causation, statue of limitations, and immunity) each have their own unique issues that are discussed in detail below. This note also focuses on two types of ethical issues: potential conflicts of interest issues arising from the attorney-client relationship and attorneys' fees issues. Depending on how a particular jurisdiction approaches these issues--and there is a very wide divergence among the states--the contours of malpractice liability a litigant may face will vary considerably.

A. Defense Issues

1. Innocence Requirement

The most unique aspect of criminal malpractice also garners the greatest amount of criticism: the innocence requirement. Although in the typical malpractice action a plaintiff's prior misconduct does not play a major role in her ability to bring suit,

the opposite is true in criminal malpractice cases.[117] The modern contours of the requirement appear to be largely the result of rapid expansion of criminal malpractice claims in the 1970s and 1980s.[118] In response, states began to impose some form of the innocence requirement in droves,[119] with the U.S. Supreme Court even lending tacit support.[120] Today, most jurisdictions require that a criminal malpractice plaintiff prove either legal innocence, factual innocence, or both before she may even bring a criminal malpractice claim in the first place.[121] Therefore, the contours of a jurisdiction's innocence requirement will fall into one of four categories: legal innocence only, actual innocence only, both legal and actual innocence, or neither.

Legal innocence, also known as the "exoneration rule,"[122] simply means that but for the attorney's misconduct, the client would not have been convicted of the crime.[123] Thus, in jurisdictions that apply the exoneration rule, even though a malpractice plaintiff may have actually committed a crime, she will be able to recover damages so long as she can ***344** prove that her conviction, "for whatever reason," has terminated in her favor and that the attorney's misconduct proximately caused the conviction.[124] The premise underlying the doctrine is that a client's misconduct is presumed to be the sole proximate cause of her conviction--the only way a client can "negate the sole proximate cause bar" is to first obtain exoneration.[125] Additionally, courts seek to avoid "assist[ing] . . . participant[s] in . . . illegal act[s] who seek[] to profit from the act's commission."[126]

A plaintiff satisfies a requirement of actual innocence when she demonstrates that she did not actually commit the underlying crime.[127] If a court only looks to actual innocence, legal innocence will not matter--all that matters is whether the client committed the crime, not whether their conviction stood.[128] For example, in jurisdictions imposing the actual innocence requirement, a malpractice plaintiff will not have to demonstrate any form of post-conviction relief, but she will have to provide sufficient evidence that she did not commit the crime.[129]

Most jurisdictions require proof of both legal and actual innocence.[130] These courts believe that neither requirement on its own will be sufficient. Thus, a jurisdiction that already enforced the actual innocence requirement later adopted the exoneration rule, citing a vast array of policy reasons that necessitated an innocent individual also obtaining post-conviction relief.[131] Similarly, a jurisdiction that had historically only required post-conviction relief later adopted an actual innocence requirement as well.[132]

A minority of jurisdictions choose a final option, choosing not to enforce an innocence requirement at all. These jurisdictions generally reject the litany of policy considerations offered for each requirement.[133] Some of these courts also state that the elements necessary for a successful criminal malpractice claim should be no different than those for a civil malpractice claim.[134] At least one court has refused to apply either of the innocence requirements while at the same time barring any malpractice claim where a plaintiff loses a post-conviction claim for ineffective ***345** assistance of counsel.[135]

The policy reasons accepted by the majority of jurisdictions as necessitating either or both innocence requirements appear to be firmly rooted in these courts' jurisprudence. Therefore, it is unlikely that a malpractice plaintiff will be able to convince a court in one of these jurisdictions to depart from prior reasoning, and a defendant attorney will be able to refer the court back to the reasons underlying the requirements' adoption.

The first, most fundamental principle that courts look to is that a guilty individual should be punished, not rewarded, for her culpable conduct.[136] One court has restated this consideration as helping to avoid the "paradoxical difficulties of awarding damages to a guilty person."[137] Other jurisdictions have similarly noted that deterrence and compensation, two of the core principles driving tort liability, counsel against allowing an actually guilty party to recover.[138]

A second policy consideration often cited by courts is that there are already enough safeguards to adequately protect the client.[139] One critic of the innocence requirement labels this justification the doctrine's "single best policy argument" in its favor.[140]

These safeguards include the heightened "beyond a reasonable doubt" standard and the availability of various bases for relief on direct appeal or habeas.[141]

Third, courts look to the fact that a criminal malpractice plaintiff has multiple claims and forums (direct appeal and collateral attacks) for post-conviction relief, whereas a civil malpractice plaintiff usually only has one.[142] One court has taken this policy consideration a step further, partly justifying the innocence requirement on "the potential undermining of the post conviction process" whereby the civil court might make opposite factual and legal determinations from the criminal courts.[143] At least two other courts have similarly cited the potential for conflicting resolutions as a legitimate basis for the innocence requirement.[144]

A fourth justification courts give for requiring proof of legal or actual innocence is that malpractice exposure will affect an attorney's ***346** willingness to take cases or at least her decision-making process once she takes on a case, thus requiring attorneys to represent their clients "on the defensive."[145] One way such a scenario might play out is that the attorney would be constantly concerned with building a record for defending a potential malpractice case rather than just insuring that her client's interests are being best served.[146] Another potential situation would be the lawyer deferring to her client in order to make the client happy with her representation, thereby avoiding a possible malpractice suit instead of pursuing the path that is in the client's best interest.[147]

A final policy consideration that courts are citing with greater frequency is the fact that the generally litigious nature of the criminally convicted will cause a flood of cases in the civil courts and will bog down judicial efficiency.[148] Judicial resources would also be saved by the simple fact that key issues would not be relitigated,[149] such as ineffective assistance of counsel claims. In total these policy reasons stand as a fairly strong shield for defense attorneys, so long as the attorneys are not providing services in one of those jurisdictions that does not have any innocence requirement.

In addition to the various innocence requirements in certain jurisdictions and the policy reasons generally relied upon by courts, there are a couple of other issues that malpractice litigants should examine. First, there is a small amount of variation among courts as to who bears the burden of proving innocence. Such a burden typically falls on the malpractice plaintiff.[150] However, at least one jurisdiction places the burden on the defendant attorney in the form of an affirmative defense.[151] No matter who bears the burden, however, a preponderance of the evidence standard invariably applies.[152]

A second additional point that malpractice litigants should consider is the fact that the innocence requirement is not limited to malpractice actions based on negligence, but also breach of fiduciary duty and even breach of contract.[153] Though breach of contract is a distinct claim from ***347** legal malpractice, it is an alternative theory of recovery available to clients. In the criminal context, however, appointed counsel typically does not have a contract with her client.[154] Thus, breach of contract will typically only be available to those individuals with retained counsel.

Finally, it is important to note that the innocence requirement may not apply when the harm alleged is not wrongful conviction but something else, like the severity of one's sentence.[155] The idea is that the innocence requirement by definition assumes that there has been a conviction from which innocence must be proved. Still, claims not based upon wrongful conviction will face the additional hurdles discussed in the subsequent sections.[156]

2. Collateral Estoppel and Ineffective Assistance of Counsel

The second major defense that attorney defendants rely upon in criminal malpractice cases is collateral estoppel. Similar to the innocence requirement, this defense is (at least in one application) unique to criminal malpractice as opposed to any other type of legal malpractice.[157] Collateral estoppel will apply when two cases contain the same issue, the issue was "actually litigated"

in the prior proceeding, and the prior determination was "conclusive" as to that issue.[158] There are three ways in which the doctrine of collateral estoppel might apply in a criminal malpractice suit: (1) collateral estoppel based on a lack of innocence; (2) collateral estoppel based on an unsuccessful ineffective assistance of counsel claim; and (3) a pseudo collateral estoppel based upon a policy against dual-recovery.

The first type of collateral estoppel goes hand-in-hand with the innocence requirement employed in most jurisdictions. If a plaintiff cannot demonstrate some form of legal or actual innocence (depending on an individual jurisdiction's requirements), a court may determine that the matter has already been decided, and thus the malpractice claim is precluded.[159] In states requiring legal innocence, the judgment of conviction precludes parties from establishing innocence in the criminal ***348** malpractice action.[160] However, when a malpractice plaintiff successfully achieves vacation of the conviction, collateral estoppel will not apply.[161] In states that require proof of actual innocence, a plaintiff has to prove his innocence in the malpractice action because the prior adjudication of guilt in the underlying suit stands as a preclusive determination for the civil courts until proven otherwise.[162] In those jurisdictions, even an acquittal will not necessarily overcome the preclusive affect of the earlier pronouncement of guilt.[163]

Collateral estoppel based on innocence raises particular questions in the context of plea agreements. The first question is whether a plea or admission of guilt before a trial judge will preclude an individual from later asserting her legal or actual innocence. Some courts hold that even if the plaintiff is later able to demonstrate actual innocence, uncoerced testimony of guilt from the guilty plea will preclude the later claim.[164] Other jurisdictions, however, instead employ a special exception to collateral estoppel for guilty pleas.[165] The second question is how a plea of no contest later affects a malpractice action. Although case law is relatively underdeveloped on this issue, at least one jurisdiction chooses to treat no contest pleas the same as a guilty plea on the basis of the similar consequences and procedure for each plea.[166] Still, in those jurisdictions that allow for no contest pleas and apply only the actual innocence requirement, it is entirely foreseeable that a court might not find such a plea preclusive of the malpractice claim.

The second type of collateral estoppel claim defendant attorneys commonly rely upon is based on the malpractice plaintiff's earlier failure on a claim for ineffective assistance of counsel. Most courts adopt this form of the defense,[167] reasoning that the plaintiff has already litigated and lost the issues of inadequate representation and resultant harm on a prior occasion, which are issues that are determinative in a negligence claim.[168] A criminal defendant alleging ineffective assistance of counsel post-conviction must satisfy a two-part test: first, that her attorney's representation was inadequate and second, that she was prejudiced by counsel's mistakes.[169] In a subsequent criminal malpractice case, collateral estoppel may be based on either prong. First, courts generally conclude that a client may not ***349** relitigate the issue of adequacy of counsel because the standard of care in a malpractice action is very similar to the standard of deficient performance in an ineffective assistance proceeding.[170] At the same time, if the standards differ in a particular jurisdiction, collateral estoppel very well might not apply.[171] Second, courts also find that the prejudice requirement of ineffective assistance is the same as the harm element of a negligence claim.[172] It is important to note, however, that prejudice is not a required element of ineffective assistance claims in every jurisdiction, and thus there will not always be a prejudice hurdle to collateral estoppel.[173]

One large issue that arises due to this interplay between ineffective assistance proceedings and a criminal malpractice claim is whether judicial findings dealing with ineffective assistance are later admissible in the malpractice trial. Commentators argue that such findings should be inadmissible because holding otherwise would discourage trial counsel from helping their clients obtain post-conviction relief.[174] Defense attorneys would fear "creating the civil malpractice case against themselves" by pointing out their own errors at trial.[175] The issue would be compounded even further when a lawyer represented the client both at trial and on appeal because the attorney would have a "perverse incentive" not to raise the issue of ineffective assistance.[176]

The third type of collateral estoppel claim, though not technically collateral estoppel at all, is very similar to the other two types. This pseudo type of estoppel comes in two forms. First, whereas the second type of collateral estoppel applies when a plaintiff has been unsuccessful in its ineffective assistance claim, a number of jurisdictions state that a plaintiff is similarly precluded from malpractice recovery when she is successful in obtaining post-conviction relief.[177] The idea is that whatever remedy is granted for ineffective assistance (most likely a new trial) is adequate for the harm of deficient representation.[178] It therefore seems that the only time an attorney will potentially face criminal malpractice liability is when the client does not make an ineffective assistance claim at all. The second form of pseudo collateral estoppel is also based on the idea that a malpractice plaintiff should not receive more than one adequate recovery, but has ***350** nothing to do with ineffective assistance. Instead, this defense arises when a convicted client later receives a payout from the government for wrongful imprisonment.[179] For example, a Texas exoneree recently received $4.1 million from the state for his wrongful sexual assault and burglary conviction in 1982 on the basis of DNA evidence that was not available over twenty-five years ago.[180] Although jurisdictions might vary as to whether these clients could subsequently recover damages from their attorneys as well, such claims could still face a statute of limitations defense.[181] Still, if the statute of limitations had not run on a plaintiff's claim, a defendant attorney could attempt to assert this form of pseudo collateral estoppel to prevent liability.

3. Proximate Causation, Discretion, and Informed Consent

Since causation is one of the four elements that must be satisfied in order for a criminal malpractice plaintiff to succeed, a defendant attorney will vigorously attack claims that her misconduct caused the client's harm. Fortunately for the attorney, the law provides several ways to defeat causation, two of which are discussed in this section. First, there seems to be a general presumption in favor of the attorney when the client has been convicted of the crime. The very basis of both innocence requirements is the simple fact that any harm suffered by a client is presumed to be principally due to the client's misconduct, not any attorney error.[182] Thus, without first obtaining post-conviction relief or proving actual innocence, the client's actions are “presumed” to be the proximate cause of any injury.[183] Similar reasoning undergirds courts' general refusal to impose liability on the attorney when the client either pleads guilty or no contest, as that plea serves to “break” any chain of proximate causation in a superseding fashion.[184]

The second causation issue unique to criminal malpractice involves the interplay between a client's informed consent and attorney discretion. As discussed above, an attorney generally has a lot of discretion during the course of litigation.[185] This discretion is even greater for appellate attorneys.[186] At the same time, an attorney is generally required to act with the client's informed consent.[187] The interplay between discretion and ***351** informed consent can be particularly tricky in a criminal malpractice action. When an attorney fails to raise a defense that would have entitled her client to a favorable judgment as a matter of law, proximate cause is naturally satisfied.[188] However, when a malpractice plaintiff attempts to prove that the jury would have been persuaded by an omitted defense, the task of proving causation will become much more difficult,[189] and the attorney will be able to rely on any general protections such as discretion available for that type of omission. Still, if the client is nevertheless able to prove that the attorney failed to consult with the client or acted against the client's wishes as to some fundamental decision, the attorney could be liable.[190] These decisions include whether to plead guilty, waive a jury, testify, or take an appeal.[191] Practically, the interplay between these competing interests is equally muddled: the client should have a right to make sure she is being represented how she wants to be, whereas the more legally savvy attorney will often know the best course for protecting the client's interests. It will be easy to determine whether an attorney's error is the proximate cause of her client's harm when the attorney negligently omits a defense that would have resulted in a favorable judgment at trial.

4. Accrual of a Criminal Malpractice Claim and the Statute of Limitations Defense

Running of the statute of limitations is a fourth defense that commonly comes into play in criminal malpractice suits. In the criminal malpractice context, the defense provides defendants with a “fair opportunity to defend themselves,” helps to allay

the uncertainty of decades-old, still-pending claims, and prevents stale claims where evidence will be hard to come by.[192] The length of the limitations period varies depending on the jurisdiction and the type of claim.[193] The biggest issue that malpractice litigants must be aware of in terms of this defense is when the claim "accrues" for statute of limitations purposes. Depending on the jurisdiction, litigants will be subject to either a one-track approach or a two-track approach.

Under the one-track approach, a claim does not accrue (and the statute of limitations does not begin to run) until the malpractice plaintiff first receives post-conviction relief.[194] Jurisdictions adopting the one-track ***352** approach are concerned that a malpractice plaintiff will be prejudiced if her claim accrues at the time of sentencing because the pursuit of post-conviction relief might last longer than the limitations period.[195] Naturally, the tradeoff with applying a later accrual date is that the defense attorney will have a potential claim hanging over his head for a protracted amount of time.[196]

The two-track approach states that the malpractice claim accrues upon sentencing in the underlying criminal suit,[197] but the malpractice plaintiff may simultaneously pursue post-conviction relief and criminal malpractice claim in civil court.[198] A client is put on notice of her harm when her injury, the judgment of conviction, occurs.[199] The policy reason underlying the two-track approach is identical to the one-track approach: preventing situations where a claimant would be precluded from later bringing a malpractice action if the limitations period expires during the pendency of post-conviction relief.[200] A few jurisdictions apply an altered form of the two-track approach, holding that the malpractice claim accrues at either the point where the plaintiff discovers her attorney's misconduct or the termination of the attorney's representation, whichever is sooner.[201] Other jurisdictions apply a third variation of the two-track approach, holding that though the statute of limitations accrues at sentencing, the limitations period is tolled while the client pursues post-conviction relief.[202]

5. Sovereign and Official Immunity

A final potential defense available to defendant attorneys is official immunity. Privately retained counsel by definition does not have any type of governmental immunity available to her. Conversely, state statutes often grant public defenders and state public defenders' offices official and sovereign immunity, respectively, though the availability of such a defense varies from state to state.[203] Of even more debate is the question of whether ***353** or not appointed counsel should enjoy the projections of official immunity. Although most courts generally do not grant immunity to court-appointed counsel,[204] some courts have granted immunity.[205] The U.S. Supreme Court has stated that court-appointed counsel is not protected from a malpractice claim by immunity under federal law, though it stated that states may provide such protection if they so desire.[206] Interestingly, the reasons offered for protecting court-appointed counsel largely mirror two justifications offered for the innocence requirement--allowing attorneys to focus only on pursuing the course of litigation in their clients' best interests and protecting against repetitive litigation.[207] Finally, some state statutes place a condition on sovereign and state immunity in criminal malpractice cases, applying it when the wrongfully convicted person has already been compensated under the applicable statute.[208]

B. Ethical Issues

1. Client Confidentiality and Conflicts of Interest

The first ethical issue that might arise in a malpractice action relates to an attorney's disclosure or use of information obtained from a client's confidential communication. Such communications potentially impact a criminal malpractice action in two ways. First, during testimony in the malpractice case itself, courts will allow an attorney to disclose prior communications in the underlying criminal defense in order to rebut a plaintiff's claim of actual or legal innocence.[209]

Second, an attorney's knowledge gained through confidential communications with her client may create a conflict of interest when the attorney encounters the former client in a later proceeding[210] or attempts to represent multiple parties at one time or later. If and when an attorney represents a client despite a conflict of interest or fails to raise the fact that ***354** opposing counsel has such a conflict, that attorney opens herself up to a subsequent malpractice action on the basis of a breach of the duty of undivided loyalty in the former case and negligence in the latter. Thus, it is important for criminal litigants to be aware of the most common situations in which this type of conflict will arise.

In terms of representing multiple clients at the same time, such a practice occurs most commonly in the context of grand jury proceedings where the accused parties often share a common interest.[211] The fear in terms of confidential information and the duty of loyalty is that the attorney may use information gathered from one accused client and detrimentally use it to aid another. Further complicating a conflicts analysis, representation of multiple clients by the same attorney is often funded by a single source, such as an employer or union.[212] In these types of cases, it is often questionable whether the attorney is representing the accused's best interests or the entity that is paying him. Courts are very skeptical of multiple representation situations--even though an attorney might first obtain written agreements to waive any future claim based on conflict, courts usually ignore such a document.[213] Another situation where a multiple representation conflict might arise is when a current client of the attorney is a prosecution witness in a trial against another current client.[214] A conflict naturally arises in such a situation because the attorney will have to breach his duty of loyalty to one of them during the trial.

Conflicts of interest that can ultimately form the basis of a criminal malpractice action are also common when the interests of a former client conflict with those of a current client.[215] Termed “adverse representation,” this situation might occur when a defense attorney moves into the prosecutor's office or vice versa, or when she has previously represented a witness, co-defendant, or victim.[216] A prosecutor cannot resign and defend an accused whom he had prosecuted in the same case.[217] Therefore, when a defense attorney moves into a prosecutor's office, he will be precluded from participating in a related case,[218] presumably because of the confidential information she is privy to. This is true even if the attorney merely acts in a supervisory capacity.[219] Courts are similarly concerned with an attorney's use of confidential communications when a former client serves as a prosecution witness.[220] Furthermore, when the victim is a former client, the ***355** attorney will most often be conflicted out of the case.[221]

Importantly, adverse representation conflicts may also preclude an entire body of attorneys from representing a client when those attorneys work with the conflicted attorney in the same law firm[222] or government office.[223] Proper conflicts screening procedures will shield government offices from liability, but usually not private law firms.[224] It is therefore a good idea for prosecutors' offices, public defenders' offices, and criminal defense firms to make sure that their conflicts databases are sufficient and up to date. This safeguard will ensure that clients are represented ethically, that judicial resources will be conserved (with fewer convictions being overturned on appeal on conflicts grounds), and that the attorneys themselves are protected from a potential malpractice action based upon the conflict.

2. Attorney's Fees and Property Issues

Another issue germane to criminal malpractice actions involves the potential recovery of attorneys' fees or property that is in the possession of the attorney. As discussed above, a malpractice claim based on breach of fiduciary duty can seek attorneys' fees from the underlying criminal suit,[225] whereas a claim based upon negligence cannot.[226] Furthermore, the innocence requirement stands as a potential hurdle in a claim for breach of fiduciary duty.[227] It seems unfair or unethical for an attorney to be able to keep her client's money or property and hide behind the shield of the innocence requirement, and courts recognize this. In California, for instance, the requirement of actual innocence does not extend to some claims for attorneys' fees in which guilt or innocence

is wholly irrelevant.[228] California also holds that the innocence requirement will not apply to a client's malpractice claim that is based upon an attorney's mishandling of a client's seized property that had been returned to the attorney by the state.[229]

*356 IV. Useful Pointers for Defense Counsel in Seeking to Avoid Claims

In determining how to best navigate the litany of potential liabilities and defenses discussed above, criminal attorneys can and should look to how their civil counterparts are dealing with such claims. Though criminal law firms are typically much smaller than large civil firms, these civil firms have adopted several practices that are nonetheless helpful in the criminal arena as well. Despite the multitude of unique defenses available only to criminal attorneys, a malpractice claim can still be costly, even when the law wholly protects the defendant attorney. The mere filing of a suit can result in a drain of time and money from the attorney or firm. Of course, the easiest way to avoid a malpractice suit is to merely avoid the mistakes discussed above. However, since these mistakes almost always involve negligent conduct, by definition they are hard to knowingly avoid. Instead, a criminal attorney or law firm should hedge themselves from liability by (1) adopting an effective, modern risk management system; (2) instituting more stringent administrative standards; and (3) securing malpractice insurance if they do not already have it.

A. Instituting An Effective Risk Management System

In order to combat the wide variety of malpractice claims based upon conflicts of interest, criminal attorneys should follow their civil brothers in adopting more modern risk management practices. The best system is one based on an extensive conflicts database that is reinforced by regular, informal attorney communications.

In creating a successful conflicts database, it is important to first realize that a conflict can arise in any one of a number of situations.[230] Thus, an attorney or firm must keep a record of every attorney and staff person that has ever worked for them. A criminal attorney or firm should particularly focus on all clients, witnesses, co-defendants, and victims.[231] They must also account for any confidential information that has been shared by prospective or declined clients.[232] In the criminal context, this could especially arise in the context of multiple defendants where the attorney has already spoken to a co-defendant before agreeing to represent the other. Depending upon the state in which the attorney or firm practices, an effective conflicts database should also account for former employers of attorneys, staff, or both.[233] Finally, a thorough database will also include ***357** opposing counsel (in case she moves to your firm in the future).[234]

With the information-gathering system itself, practitioners must strike a careful balance between being thorough and not spending so much time inputting information as to lose business or productivity. This balance can only develop through trial and error over a long period of time. However, there are several pointers an attorney or firm should consider from the outset. First, due to the potential conflicts arising out of a divulgence of confidential communication, an attorney should proceed reservedly when first meeting with clients. Instead of trying to obtain as much information as possible right away (even for purposes of filling into a database profile), the attorney must exercise discretion. A better course to follow is to add information to the database over time as the attorney-client relationship develops. Just as an attorney should add information over time, she should also frequently check to insure that new information has not suddenly created a conflict with that client. Although a conflicts check prior to disclosure of any confidential information is the most important, subsequent checks after retention can be valuable as well. Finally, with long-term clients (whether that be a client who is constantly in trouble with the law or a corporate client who pays for all of their employees' criminal defense) an attorney or firm should be leery of potential conflicts that might arise with any new matter.[235]

Due to the smaller nature of criminal firms, the person who performs the actual conflict analysis will most likely be one of the attorneys in the firm. The bigger civil firms will have the resources to have an in-house or outside ethics attorney oversee or

review a conflicts analysis,[236] whereas an individual criminal attorney or attorneys within a firm will be best suited to determine the presence of a conflict.

The need for an electronic database stems from the fact that no one has a perfect memory.[237] The fact that criminal defense attorneys can represent vast numbers of clients within any given year only compounds the memory issue. At the same time, these databases have their own failures--they are only as comprehensive as the information an attorney inputs.[238] Thus, the most important feature of an effective risk management system for criminal attorneys will often be the informal communications that go on within the firm. Especially in small offices like criminal law firms, these communications can occur through email whenever an attorney begins a new matter. This form of a human "database" will hopefully catch any errors the more formal system does not.

***358 B. Implementing Administrative Procedures**

Criminal attorneys can also protect themselves from future malpractice suits by instituting better administrative procedures. First, attorneys and law firms should adopt time-management practices. According to a recent American Bar Association survey, 28.5% of legal malpractice claims primarily arise out of a missed client appointment.[239] With today's seemingly infinite number of electronic calendars and scheduling programs, this figure should be much lower. Even if a handwritten appointment book is a way of life for certain attorneys, they should at the very least adopt some form of additional electronic reminders of meetings or ask an assistant to do so.

Criminal attorneys should also adopt better documentation standards. Retained and appointed counsel alike should give their clients formal engagement letters that address the scope of the attorney's representation, including what work the attorney will perform, what work others will perform, by what means the attorney and client will communicate (which will be limited if the client is in detention), and how the client will be paying, if at all.[240] When an attorney either refuses to represent a client or the client indicates that she does not desire an attorney's services, the attorney should also document the decision with a non-engagement letter. This letter should make perfectly clear that the attorney is not the client's legal representative. Finally, if a client decides to use another attorney or proceed pro se at any point during the course of representation, a criminal attorney should ensure that the former client receives a written termination letter.[241] This letter should state outright that the attorney refuses to render any further services and remind the client of potential file destruction.

C. Securing Malpractice Insurance

Finally, despite the extra protections afforded criminal defense attorneys in a malpractice action, these attorneys should obtain malpractice insurance in similar numbers to civil attorneys. Incredibly low rates of criminal attorneys presently possess malpractice insurance. However, criminal attorneys are especially vulnerable to malpractice suits, particularly in jurisdictions that do not apply any innocence requirement given the greater number of clients and the large dissatisfaction with one's loss of liberty.[242]

There are three types of insurance policies available to criminal ***359** attorneys: commercial, captive, and state-mandated.[243] Which ones are available will depend on where the attorney practices. A commercial policy is coordinated by a for-profit company.[244] As such, the company's commitment to a given legal market depends on its profitability.[245] A captive policy is owned, in part at least, by the insureds themselves.[246] Finally, some states have state-mandated policies wherein the state administers a mandatory, 100% participation program.[247] Although few states have such a system, an increasing number of states require that attorneys disclose to clients whether or not they carry malpractice insurance.[248] Virginia recently rejected this disclosure requirement,[249] and the question is currently pending in Texas.[250]

While coverage will largely depend on the individual policy, the insurer will generally cover the negligent actions of the firm itself, any partner or associate at the firm, staff, and former partners.[251] Coverage may also cover predecessor firms and contract attorneys.[252] Nearly all malpractice coverage only protects negligence on a claims-made basis.[253] This means that though an attorney's negligence might occur while he has malpractice insurance, if the client brings the claim a year later and the attorney no longer has malpractice insurance, the previous policy will not shield her from liability.[254] Because of this limitation, as soon as an attorney is aware of potential malpractice, she should disclose the activity to her insurance carrier.[255] With the large amount of turnover in criminal dockets, it is all the more important that attorneys carry, and that firms continue to cover, malpractice insurance.

V. Conclusion

Criminal malpractice claims present several liabilities and defenses that are both unique and confounding when compared to civil malpractice ***360** actions. At the same time, both types of claims center upon the same general framework: negligence and breach of fiduciary duty. Thus, despite significant differences between the two, each can be very helpful in shedding insight into the practice and procedure of the other. Since scholarship has focused much more on civil malpractice, that area of the law illuminates the relatively silent treatment of criminal malpractice. Such comparisons indicate that the criminal attorney too should institute more modern risk management systems, implement more effective administrative procedures, and secure malpractice insurance with greater frequency. These steps, when combined with the defenses discussed above, will allow any criminal defense attorney to rest at ease knowing that so long as he ethically strives to represent his clients to the best of his abilities, he will likely be shielded from liability.

Footnotes

a1 Law Clerk to the Honorable Jane J. Boyle, United States District Judge, Northern District of Texas. J.D., University of Texas School of Law, 2010; B.A. with high honors, University of Texas, 2006. I would like to thank my wife Kelsey for her ceaseless love and support and Professor Jett Hanna for his help and guidance.

1 Restatement (Third) of the Law Governing Lawyers (2000) [hereinafter Restatement].

2 See Susan Saab Fortney & Vincent R. Johnson, Legal Malpractice Law: Problems and Prevention 21 (2007) (“Although negligence continues to be the most common theory alleged in legal malpractice lawsuits, plaintiffs increasingly assert fiduciary-duty claims.”). This Note only briefly deals with breach of contract, as that theory of liability adds very little to the criminal malpractice discussion. See infra note 153 and accompanying text.

3 Fortney & Johnson, supra note 2, at 35.

4 David H. Potel, Comment, Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel, 1981 Duke L.J. 542, 543-45 (1981).

5 See Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §27:1 (2009) (listing distinct discovery rules, constitutional limits to admissibility of evidence, the heightened burden of proof, and due process requirements as factors that distinguish criminal malpractice actions from civil ones).

6 Restatement, supra note 1, §16.

7 Id. §16(1).

8 See infra Part III.A.3.

9 Restatement, supra note 1, §16(2).

10 See infra Part II.A.2.

11 Restatement, supra note 1, §16(3).

12 See infra Part II.B (addressing honest dealing and breach of fiduciary duty); Part III.B.1 (discussing confidentiality and conflicts of interest).

13 Restatement, supra note 1, § 16(4).

14 See, e.g., Potel, supra note 4, at 544 ("No separate standard of care has been established for criminal malpractice cases.").

15 Id.

16 Restatement, supra note 1, §15.

17 Mallen & Smith, supra note 5, §27:12.

18 Compare Holliday v. Jones, 264 Cal. Rptr. 448, 449 (Cal. Ct. App. 1989) (refusing to allow claim by non-client), and Rayford v. Maselli, 73 S.W.3d 410, 411 (Tex. App. 2002) (refusing to allow the claim of a "non-consumer"), with Zweifel v. Zenge and Smith, 703 S.W.2d 15 (Mo. Ct. App. 1985) (allowing claim by non-client wife--along with client husband--though without any discussion of the issue).

19 Mallen & Smith, supra note 5, §27:12.

20 Fortney & Johnson, supra note 2, at 51.

21 Mallen & Smith, supra note 5, §27:14.

22 Id. §27:4.

23 See, e.g., Susan M. Treyz, Criminal Malpractice: Privilege of the Innocent Plaintiff?, 59 Fordham L. Rev. 719, 721 (1991) ("Moreover, as a 'specialist' the criminal defense attorney may have a duty to use greater skill in his area of expertise than would a general practitioner."); see also Mallen & Smith, supra note 5, §27:4 ("The increasing recognition by various states of the criminal attorney as a specialist lends credence to the contention that an error in the practice of criminal law should be measured by the skill and knowledge ordinarily possessed by those attorneys experienced in the practice of criminal law.").

24 A similar issue is whether any attorney or criminal attorney can be an expert in a criminal malpractice case or whether it must be some form of general criminal law specialist or even a particular sub-specialty of criminal law. See Mallen & Smith, supra note 5, §27:4.

25 Id. § 27:3.

26 Id.; see also infra Part III.A.3.

27 Quite a few of the cases listed in the following section, as well as several others, are discussed in Mallen & Smith, supra note 5, §§27:13-14.

28 See Satterwhite v. Jacobs, 26 S.W.3d 35, 37 (Tex. Ct. App. 2000) (reversing the trial court's grant of summary judgment to the defendant on the professional negligence claim), rev'd, Jacobs v. Satterwhite, 65 S.W.3d 653 (Tex. 2001) (per curiam). The Texas Supreme Court reversed the Court of Appeals on this point, holding that the plaintiff did not preserve the professional negligence claim for appeal. See Satterwhite, 65 S.W.3d at 655 (holding that the plaintiff could proceed with his breach of contract claim but that the professional negligence claim was not preserved for appeal).

29 Macias v. Moreno, 30 S.W.3d 25, 26 (Tex. App. 2000).

30 See Burks v. Peck, Shaffer & Williams, 671 N.E.2d 1023, 1026-27 (Ohio Ct. App. 1996) (overruling grant of summary judgment in favor of defendant attorney for malpractice claim based on grand jury's return of true bill, implying that liability could potentially arise out of such a situation). The typical remedy, however, is simply disqualification of the attorney. Mallen & Smith, supra note 5, §27:9.

31 See, e.g., Tibor v. Superior Court, 61 Cal. Rptr. 2d 326 (Cal. Ct. App. 1997) (rejecting a plaintiff's attempt to recover for delay).

32 Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995).

33 Miller v. Ginsberg, 159 N.W. 950, 951 (Minn. 1916).

34 Mallen & Smith, supra note 5, §27:15.

35 See, e.g., St. Paul Fire & Marine Ins. Co. v. Chong, 787 F. Supp. 183, 185 (D. Kan. 1992) (acknowledging the parties' stipulation that an attorney's recommendation that defendants accept a plea bargain was negligent), aff'd, 979 F.2d 858 (10th Cir. 1992); Vahila v. Hall, 674 N.E.2d 1164, 1167-68 (Ohio 1997) (reversing summary judgment in favor of defendant).

36 See Tijerina v. Wennermark, 700 S.W.2d 342, 345 (Tex. App. 1985), overruled on other grounds by Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989).

37 See Hughes v. Malone, 247 S.E.2d 107, 111-12 (Ga. Ct. App. 1978).

38 See Blain v. Doctor's Co., 272 Cal. Rptr. 250, 254-55 (Cal. Ct. App. 1990).

39 See, e.g., Chong, 787 F. Supp. at 185; Rogers v. Williams, 616 A.2d 1031, 1032 (Pa. Super. Ct. 1992).

40 See Lawson v. Nugent, 702 F. Supp. 91, 94 (D. N.J. 1988) (allowing the plaintiff to present evidence of emotional distress based on counsel's negligence in recommending that plaintiff plead guilty to two aggravated counts charging him with using a weapon during the commission of a robbery without inquiring into the factual basis of the plea).

41 See Chong, 787 F. Supp. at 185; Rogers, 616 A.2d at 1037.

42 See, e.g., Gibson v. Trant, 58 S.W.3d 103, 105 (Tenn. 2001).

43 See, e.g., Wright v. Lewis, 777 S.W.2d 520, 521 (Tex. App. 1989).

44 Mallen & Smith, supra note 5, §27:3.

45 See id. §27:14 ("An attorney has the inherent tactical discretion for matters, such as evidentiary stipulations, which are not so destructive of the client's position to require consent.").

46 See, e.g., Simko v. Blake, 532 N.W.2d 842, 848 (Mich. 1995).

47 See, e.g., People v. Adams, 862 P.2d 831, 836 (Cal. 1993).

48 See, e.g., Hibbett v. City of Cincinnati, 446 N.E.2d 832, 836 (Ohio Ct. App. 1982).

49 See Herring v. Parkman, 631 So. 2d 996, 1002 (Ala. 1994).

50 See, e.g., Geddie v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 718, 719 (La. Ct. App. 1978).

51 A thorough search of case law did not garner any results with these particular conduct breaches. Perhaps this is because such claims would form the basis of an ineffective assistance of counsel defense, which would preclude a later malpractice suit. See infra Part III.A.2.

52 See Mallen & Smith, supra note 5, §27:14 ("An appellate attorney may exercise judgment and need not raise every non-frivolous issue urged by a client.").

53 Id.

54 See, e.g., Godby v. Whitehead, 837 N.E.2d 146, 148 (Ind. Ct. App. 2005).

55 See, e.g., Veneri v. Pappano, 622 A.2d 977, 978 (Pa. Super. Ct. 1993).

56 See, e.g., Anderson v. Clark, 775 So. 2d 749, 750 (Ala. 1999).

57 Fortney & Johnson, supra note 2, at 79.

58 Mallen & Smith, supra note 5, §27:14.

59 Meredith J. Duncan, Criminal Malpractice: A Lawyer's Holiday, 37 Ga. L. Rev. 1251, 1278 (2003).

60 See infra Part III.A.1.

61 Fortney & Johnson, supra note 2, at 94.

62 Id.

63 See, e.g., Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995); Adkins v. Dixon, 482 S.E.2d 797, 802 (Va. 1997).

64 See infra Part III.A.3.

65 Fortney & Johnson, supra note 2, at 35.

66 Id. at 181.

67 Mallen & Smith, supra note 5, §27:16.

68 Id.

69 Kirk R. Hall, Elements of a Criminal Malpractice Claim: Are Exoneration and Proof of Innocence Required?, 1998 Prof. Law. 125, 131 (1998).

70 Mallen & Smith, supra note 5, §27:16.

71 Id.

72 See Fortney & Johnson, supra note 2, at 89.

73 Id.

74 Canaan v. Bartee, 72 P.3d 911, 918 (Kan. 2003). At least two other courts have discussed the concept of "lost opportunities" while deciding criminal malpractice claims. See Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989); Peeler v. Hughes & Luce, 909 S.W.2d 494, 497-98 (Tex. 1995).

75 Canaan, 72 P.3d at 918.

76 Id.

77 See Krahn, 538 N.E.2d at 1061 ("[T]he injury in such a situation 'is not a bungled opportunity for vindication, but a lost opportunity to minimize her criminal record.'").

78 Caanan, 72 P.3d at 918-19.

79 Id. (quoting Peeler, 909 S.W.2d at 498).

80 See infra notes 133138 and accompanying text.

81 Hall, supra note 69, at 131.

82 Id. Professor Jett Hanna also frequently cites the element of anger in connection with its impact on a plaintiff's ultimate recovery. Professor Hanna is an adjunct professor of law at the University of Texas at Austin as well as a Senior Vice President at Texas Lawyers' Insurance Exchange in Austin, Texas. See Jett L. Hanna--Faculty Profile, The University of Texas School of Law, http://www.utexas.edu/law/faculty/profile.php?id=hannajl (last visited Nov. 7, 2010); TLIE Staff, Texas Lawyers' Insurance Exchange, http://www.tlie.org/about/tlie-staff.php (last visited Nov. 7, 2010).

83 Fortney & Johnson, supra note 2, at 182.

84 See Mallen & Smith, supra note 5, §27:16; Duncan, supra note 59, at 1282-83.

85 Fortney & Johnson, supra note 2, at 185.

86 See id.

87 Id. at 186. But see Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 122 (Tex. 2009) (rejecting this "American Rule" and stating that "[t]he better rule...is that a malpractice plaintiff may recover damages for attorney's fees paid in the underlying case to the extent the fees were proximately caused by the defendant attorney's negligence.").

88 Fortney & Johnson, supra note 2, at 112.

89 Id. at 183.

90 Johanna M. Hickman, Recent Developments in the Area of Criminal Malpractice, 18 Geo. J. Legal Ethics 797, 805 (2005).

91 Restatement, supra note 1, §53 cmt. g.

92 Hickman, supra note 90, at 805.

93 Id.

94 Fortney & Johnson, supra note 2, at 188.

95 Id.

96 Id.

97 Id. at 189. At least twenty-four states have adopted this more stringent standard. Id. (quoting Colo. Rev. Stat. Ann. § 13-25-127(2) (West 2007)).

98 Id. at 189.

99 Id. at 191 (citing Neb. Const. art. VII, §5; Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1074-75 (Wash. 1891)).

100 Id. (citing N.H. Rev. Stat. Ann. §507:16 (2007) (stating that punitive damages are generally not available unless provided by statute); Kan. Stat. Ann. §60-3702 (2007) (providing that only a judge may decide a punitive damages claim, not a jury); Triangle Sheet Metal Works, Inc. v. Silver, 222 A.2d 220, 225 (1966) (limiting punitive damages to an amount no greater than litigation expenses minus taxable costs).

101 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (holding that an award of $145 million in punitive damages was "excessive" and violated the due process clause, where the underlying compensatory damages only amounted to $1 million).

102 A Westlaw search of all state and federal cases that include the terms "criminal malpractice" and "punitive damages" returned only 24 results. None of these cases treated the application of punitive damages in this context.

103 Restatement, supra note 1, §16(3).

104 Id. § 49 cmt. b.

105 See infra Part III.A.3 (dealing, in part, with the issue of gaining a client's informed consent); Part III.B.1 (discussing attorney handling of client confidences and resultant impermissible conflicts).

106 Fortney & Johnson, supra note 2, at 102.

107 Restatement, supra note 1, §49 cmt. c.

108 Id.

109 Fortney & Johnson, supra note 2, at 186.

110 Id. at 112.

111 See infra Part III.A.1.

112 See infra Part III.A.2.

113 See infra Part III.A.3.

114 See Restatement, supra note 1, § 49 cmt. c.

115 See infra Part III.A.4.

116 See infra Part III.A.5.

117 Mallen & Smith, supra note 5, §27:13.

118 See Justin D. Wear, Case Note, Tort Law--Criminal Malpractice-- Criminal Defendant's Ability to Sue His Defense Attorney for Legal Malpractice, 70 Tenn. L. Rev. 905, 907-08 (2003).

119 Id. at 908-12; see also Mallen & Smith, supra note 5, §27:13 ("Today, the courts generally have accepted the principle that guilt or innocence can be relevant to pleading and proving a legal malpractice cause of action."); Hickman, supra note 90, at 798 ("The overall trend ... seems to be moving in the direction of universal application of [the] 'exoneration rule.'").

120 See Heck v. Humphrey, 512 U.S. 477, 487 (1994) (stating that a §1983 plaintiff, by seeking damages for an allegedly unlawful conviction, implicitly asserts his legal innocence).

121 Duncan, supra note 59, at 1266-68.

122 See Hickman, supra note 90, at 798; see also Canaan v. Bartee, 72 P.3d 911 (Kan. 2003).

123 See Mallen & Smith, supra note 5, §27:13.

124 See, e.g., Glaze v. Larsen, 83 P.3d 26, 33 n.4 (Ariz. 2004) (en banc).

125 See Peeler v. Hughes & Luce, 909 S.W.2d 494, 497 (Tex. 1995).

126 See, e.g., Adkins v. Dixon, 482 S.E.2d 797, 801 (Va. 1997) (quoting Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990)).

127 See Mallen & Smith, supra note 5, §27:13.

128 Id.

129 See, e.g., Rodriguez v. Nielsen, 650 N.W.2d 237, 240 (Neb. 2002).

130 Mallen & Smith, supra note 5, §27:13; see Wiley v. County of San Diego, 966 P.2d 983, 985 n.2 (Cal. 2001).

131 Coscia v. McKenna & Cuneo, 25 P.3d 670, 674-76 (Cal. 2001).

132 Shaw v. State, 861 P.2d 566, 571-72 (Alaska 1993). As discussed below, this case presents an interesting burden of proof scheme. See infra note 151.

133 See, e.g., Rantz v. Kaufman, 109 P.3d 132, 134-37 (Colo. 2005) (en banc).

134 See, e.g., Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989).

135 See, e.g., Rose v. Modica, No. 285, 2002, 2002 WL 31359867, at *1 (Del. Oct. 18, 2002).

136 Mallen & Smith, supra note 5, §27:13 (citing Peeler v. Hughes & Luce, 868 S.W.2d 823 (Tex. App. 1993)); Duncan, supra note 59, at 1284-85.

137 Canaan v. Bartee, 72 P.3d 911, 916 (Kan. 2003).

138 See, e.g., Wiley v. County of San Diego, 966 P.2d 983, 990 (Cal. 1998); Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991).

139 See, e.g., Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987); see also Mallen & Smith, supra note 5, §27:13.

140 Duncan, supra note 59, at 1291.

141 Mallen & Smith, supra note 5, §27:13; Duncan, supra note 59, at 1291.

142 Mallen & Smith, supra note 5, §27:13.

143 Canaan v. Bartee, 72 P.3d 911, 916 (Kan. 2003). This policy reason goes hand in hand with the discussion of collateral estoppel discussed infra in Part III.A.2.

144 See, e.g., Glaze v. Larsen, 83 P.3d 26, 32 (Ariz. 2004) (en banc); Coscia v. McKenna & Cuneo, 25 P.3d 670, 675 (Cal. 2001).

145 Duncan, supra note 59, at 1288; see also Mallen & Smith, supra note 5, §27:13.

146 Duncan, supra note 59, at 1288; see also Wiley v. County of San Diego, 966 P.2d 983, 991 (Cal. 1998); Bailey v. Tucker, 621 A.2d 108, 114 (Pa. 1993).

147 Duncan, supra note 59, at 1282-89 (citing Bailey, 621 A.2d at 114). One such foreseeable situation would be a client desiring to testify despite an attorney's informed belief that it would be to the client's detriment.

148 Mallen & Smith, supra note 5, §27:13 (citing in particular the large number of civil rights actions filed in propria persona against defense counsel as empirical evidence of litigiousness).

149 Canaan v. Bartee, 72 P.3d 911, 916 (Kan. 2003).

150 Mallen & Smith, supra note 5, §27:14; see also Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987); Bailey v. Tucker, 621 A.2d 108, 113 (Pa. 1993).

151 See, e.g., Shaw v. State, 861 P.2d 566, 572 (Alaska 1993). Interestingly, Alaska only places the burden on the defendant attorney with the actual innocence requirement. Id. It still places the burden of proving legal innocence on the plaintiff. Id.

152 See, e.g., id.; Bailey, 621 A.2d at 113.

153 See, e.g., Lynch v. Warwick, 115 Cal. Rptr. 2d 391, 395 (Cal. Ct. App. 2002) (holding that the actual innocence requirement applies to claims for breach of fiduciary duty and breach of contract because both seek recovery on the basis of the attorney's allegedly inadequate representation in the criminal proceedings); Van Polen v. Wisch, 23 S.W.3d 510, 514-15 (Tex. App. 2000).

154 See Mallen & Smith, supra note 5, §27:17.

155 Id. §27:13.

156 See infra Part III.A.3 in particular for discussion of defenses based on a lack of proximate causation.

157 See Potel, supra note 4, at 551 (stating that ineffective assistance collateral estoppel cannot apply in civil malpractice claims because a party in a civil suit never has the opportunity to challenge the adequacy of its counsel during the underlying suit). Similarly, collateral estoppel based on innocence can only occur in criminal malpractice claims because the innocence requirement only applies in criminal cases. See Mallen & Smith, supra note 5, § 27:13.

158 Restatement (Second) of Judgments §§ 27, 27 cmt.b (1982).

159 Mallen & Smith, supra note 5, §27:13.

160 Id.

161 Id. §27:17.

162 See, e.g., Wiley v. County of San Diego, 966 P.2d 983, 985-88 (Cal. 1998).

163 Mallen & Smith, supra note 5, §27:13.

164 See, e.g., Gomez v. Peters, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996).

165 See, e.g., Mrozek v. Intra Fin. Corp., 699 N.W.2d 54, 64 (Wis. 2005).

166 See Brown v. Theos, 550 S.E.2d 304, 306 (S.C. 2001).

167 Duncan, supra note 59, at 1270-71; Treyz, supra note 23, at 725-27.

168 Duncan, supra note 59, at 1271; see also Kevin Bennardo, Note, A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims, 5 Ohio St. J. Crim. L. 341, 345 (2007); Potel, supra note 4, at 551.

169 Strickland v. Washington, 466 U.S. 668, 687 (1984).

170 See, e.g., Knoblauch v. Kenyon, 415 N.W.2d 286, 288 (Mich. Ct. App. 1987); Krahn v. Kinney, 538 N.E.2d 1058, 1062 n.8 (Ohio 1989). See also Mallen & Smith, supra note 5, §27:17 ("[T]he standard for relief from a criminal conviction for ineffective representation usually coincides with that for professional negligence.").

171 Mallen & Smith, supra note 5, §27:17. One commentator has suggested that this would be the case in jurisdictions that only find ineffective assistance where counsel's mistakes were so atrocious as to create a "farce and mockery of justice." Potel, supra note 4, at 553-54.

172 Duncan, supra note 59, at 1271.

173 Potel, supra note 4, at 554-55.

174 See Hall, supra note 69, at 130.

175 Id. at 128.

176 See Bennardo, supra note 168, at 346.

177 Id. at 354.

178 Id.

179 See Mary Alice Robbins, Contingent Fee Spurs Two Suits, Texas Lawyer, Sept. 28, 2009, 2009 WLNR 21610887.

180 Id.

181 See infra Part III.A.4.

182 See, e.g., Canaan v. Bartee, 72 P.3d 911, 916 (Kan. 2003).

183 See id.

184 Duncan, supra note 59, at 1279-80.

185 See supra notes 44-50 and accompanying text.

186 See supra note 52 and accompanying text.

187 See Mallen & Smith, supra note 5, §27:3 (discussing a variety of situations in which an attorney is expected to first gain her client's informed consent, including steps for post-conviction relief).

188 Potel, supra note 4, at 561.

189 Id.

190 See Mallen & Smith, supra note 5, §27:3.

191 Id.

192 Duncan, supra note 59, at 1274-75.

193 See Mallen & Smith, supra note 5, §27:17 (implying that the limitations period may be different for claims sounding in tort versus contract). It is notable that when the injury claimed is a loss of liberty (as often is the case in criminal malpractice) a contract theory will not be available. See id.

194 See, e.g., Shaw v. State, 816 P.2d 1358, 1360 (Alaska 1991); Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999); Noske v. Friedberg, 670 N.W.2d 740, 744-45 (Minn. 2003); Therrien v. Sullivan, 891 A.2d 560, 563 (N.H. 2006); Adkins v. Dixon, 482 S.E.2d 797, 801 (Va. 1997).

195 Mallen & Smith, supra note 5, §27:17.

196 Duncan, supra note 59, at 1276.

197 Mallen & Smith, supra note 5, §27:17 (speaking generally of most malpractice claims); see also Coscia v. McKenna & Cuneo, 25 P.3d 670, 679-80 (Cal. 2001); Morrison v. Goff, 91 P.3d 1050, 1055-56 (Colo. 2004); Ereth v. Cascade County, 81 P.3d 463, 469 (Mont. 2003).

198 Ereth, 81 P.3d at 468.

199 Mallen & Smith, supra note 5, §27:17.

200 Duncan, supra note 59, at 1276.

201 Id. at 1275.

202 Mallen & Smith, supra note 5, §27:13.

203 Compare Dontigney v. Conn. Chief Pub. Defender's Office, No. CV084017246S, 2009 WL 1706905, at *5-6 (Conn. Super. Ct. May 29, 2009) (applying sovereign immunity in malpractice suit brought against state public defender's office because plaintiff did not allege reckless or malicious conduct), and Thorp v. Strigari, 800 N.E.2d 392, 398 (Ohio Ct. App. 2003) (holding that malpractice plaintiff could not recover from public defender who represented him at trial because of immunity provided by statute), with Coronado Police Officers Ass'n v. Carroll, 131 Cal. Rptr. 2d 553, 564 (Cal. Ct. App. 2003) (refusing to afford public defender immunity from criminal malpractice claim).

204 Mallen & Smith, supra note 5, §27:17.

205 See, e.g., Minns v. Paul, 542 F.2d 899 (4th Cir. 1976), cert. denied 429 U.S. 1102 (1977); Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973).

206 Ferri v. Ackerman, 444 U.S. 193, 198-201 (1979) (holding that, under Illinois law, a court could bar a malpractice claim against appointed attorney on grounds of immunity).

207 See Potel, supra note 4, at 558.

208 Mallen & Smith, supra note 5, §27:17; see also supra note179 and accompanying text.

209 Hall, supra note 69, at 130; see Wiley v. County of San Diego, 966 P.2d 983, 990 (Cal. 1998) (stating that that the defendant attorney may offer "any and all confidential communications, as well as otherwise suppressible evidence of factual guilt" (quoting Bailey v. Tucker, 621 A.2d 108, 115 n. 12 (Pa. 1993))); see also Restatement, supra note 1, §80 (providing for waiver of the attorney-client privilege when a claim of inadequate representation is brought).

210 See, e.g., Morris v. Margulis, 718 N.E.2d 709, 720 (Ill. App. Ct. 1999) (stating that a conflict of interest would exist and a breach of fiduciary duty would lie if, on remand, the fact-finder determined that law firm had previously entered into attorney client relationship with plaintiff, only to later testify against him at criminal trial and help prosecution prepare cross-examination), rev'd on other grounds 754 N.E.2d 314 (Ill. 2001).

211 Mallen & Smith, supra note 5, §27:9.

212 Id.

213 Id.

214 Id. §27:7.

215 Id. §27:11.

216 Id.

217 Id.

218 Id,

219 Id.

220 Id.

221 Id.

222 Id.; see also Restatement, supra note 1, §123 (stating that a conflict applies to "affiliated lawyers" who "are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association").

223 Mallen & Smith, supra note 5, §27:8; see also Restatement, supra note 1, §123 (including attorneys who "(3) share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office" in the list of affiliated attorneys to whom a conflict extends).

224 See Restatement, supra note 1, §§123, 124(3); see also Mallen & Smith, supra note 5, §27:11.

225 See supra note 87 and accompanying text.

226 See supra notes 88 & 110 and accompanying text.

227 See supra note 153 and accompanying text.

228 See Bird, Marella, Boxer & Wolpert v. Superior Court, 130 Cal. Rptr. 2d 782, 788-89 (Cal. Ct. App. 2003); Brooks v. Shemaria, 50 Cal. Rptr. 3d 430, 434 (Cal. Ct. App. 2006).

229 Shemaria, 50 Cal. Rptr. 3d at 435-36.

230 See supra Part III.B.1; see generally Susan Saab Fortney & Jett Hanna, Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest, 33 St. Mary's L. J. 669 (2002).

231 Fortney & Hanna, supra note 230, at 682.

232 Id. at 683.

233 Id. Some states distinguish between attorneys and staff, only requiring vicarious disqualification if an attorney's former employer is involved and allowing for the construction of "Chinese Walls" with staff members. See, e.g., Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 833-35 (Tex. 1994).

234 Fortney & Hanna, supra note 230, at 684.

235 Fortney and Hanna touch on the potential dangers of conflicts arising with preexisting clients when they mention Vinson & Elkins' representation of Enron. See id. at 687-88.

236 See id. at 699 (suggesting such oversight is ideal).

237 See id. at 689.

238 See id. at 690-91.

239 ABA Standing Comm. on Lawyers' Prof'l Liab., Profile of Legal Malpractice Claims 2004-2007, at 4 tbl.1 (2008).

240 See Fortney & Hanna, supra note 230, at 702-03.

241 Id. at 715.

242 See supra notes 133-135 and accompanying text.

243 Andrew S. Hanen & Jett Hanna, Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues,33 S. Tex. L. Rev. 75, 124 (1992).

244 Id.

245 Id.

246 Id.

247 George M. Cohen, Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions, 4 Conn. Ins. L. J. 305, 323 n.65 (1997).

248 Fortney & Johnson, supra note 2, at 404.

249 See generally Devin S. Mills & Galina Petrova, Modeling Optimal Mandates: A Case Study on the Controversy over Mandatory Professional Liability Coverage and Its Disclosure, 22 Geo. J. Legal Ethics 1029 (2009).

250 See generally Chuck Herring & Bill Miller, Pro/Con Professional Liability Insurance Disclosure, 72 Tex. Bus..J. 822 (2009).

251 Susan Saab Fortney, Legal Malpractice Insurance: Surviving the Perfect Storm, 28 J. Legal Prof. 41, 45 (2004).

252 Id.

253 Id. at 43-44.

254 Id. at 43.

255 Id.

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Comment

Joseph H. Ricks[a1]

*1115 RAISING THE BAR: ESTABLISHING AN EFFECTIVE REMEDY AGAINST INEFFECTIVE COUNSEL

I. Introduction

Allen Aldrich made two mistakes. First, while intoxicated, he drove his pickup truck through a crosswalk and slammed into a disabled woman in a wheelchair.[1] She died in the hospital shortly thereafter.[2] Second, Aldrich hired a terrible attorney.

Not only did Aldrich's attorney fail to convey a plea bargain under the mistaken belief that it was unethical to discuss the plea bargain with his client,[3] but he also repeatedly recognized the need for defense experts yet failed to timely designate a single one.[4] What is more, Aldrich's counsel lacked a basic understanding of simple discovery procedures.[5] For example, despite repeated correction from both the prosecutor and the court, he persisted in his assertion that he did not have to do any investigation, perform any witness interviews, or make any attempt to obtain discovery under the misguided belief that that was all the State's responsibility.[6]

But things got much worse once the trial began. Aldrich's counsel did not know how to question witnesses.[7] He did not understand the rules of evidence.[8] And the defense theories that he presented were strange and offensive.[9] For instance, the bulk of ***1116** defense counsel's cross-examination consisted of eliciting testimony that the victim's death was not an accident caused by a drunk driver, but was an assisted suicide attempt -- that the victim was trying to kill herself or that the victim's husband had intentionally pushed his wife into the path of the speeding car.[10]

Not surprisingly, on appeal the court found Allen Aldrich's counsel constitutionally ineffective and Aldrich received a new trial.[11] But what is surprising is that nothing happened to Aldrich's counsel.[12] There was no disciplinary hearing, no formal reprimand, nor any consequence for the defense attorney's extremely deficient and "bizarre" performance.[13] In fact, the deficient attorney was never ***1117** even named in the appellate court opinion.[14] The attorney continued to practice and continued to give incompetent representation in other cases.[15]

This scenario is not uncommon.[16] Rarely, if ever, are defense attorneys reprimanded after being found constitutionally deficient.[17] Rarely, if ever, are defense attorneys named by the court that finds the counsel ineffective.[18] As a result, the practice of law sets its "sights on the embarrassing target of mediocrity."[19] And when mediocrity becomes the "prevailing standard of practice,"[20] society loses faith in the system itself. So what can be done?

This Comment explores this question. Part II discusses the standard of ineffectiveness, as established by *Strickland*, and how the Supreme Court inadvertently created the framework for the current ***1118** lack of any remedy against ineffective counsel. Part III develops the issues that *Strickland* raised and discusses the lack of any real or substantive repercussions against a

constitutionally deficient attorney, explores the reasons why that is, and discusses why a remedy beyond that of a new trial is important. Part III also discusses why the available "remedies" -- the fear of malpractice claims or the fear of harming professional reputation -- are unrealistic, difficult to prove, and unlikely to affect an attorney's performance. Part IV then examines the beginning of the solution and the central thesis -- that a violation of *Strickland* is a violation of the Model Rules. To arrive at this conclusion, this Comment first explores the link between a defendant's right to effective assistance and a lawyer's duty under the Model Rules of Professional Conduct. Specifically, it looks at how courts have used the Model Rules to define the *Strickland* standard itself. As a result of that link, Part V suggests a solution -- make it a mandatory requirement to report an attorney to the bar when a court finds that counsel has been constitutionally deficient. Part VI concludes.

II. *Strickland v. Washington* -- The Beginning of the Problem

To understand how ineffective assistance of counsel is applied today and why ineffective attorneys face no real repercussions, it is first necessary to understand the seminal case that defined the rule for determining ineffective assistance -- *Strickland v. Washington.* In *Strickland*, David Leroy Washington planned and committed three groups of gruesome crimes including three brutal stabbings, murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft.[21] But against the advice of his court appointed attorney, William Tunkey,[22] Washington confessed to the first two murders, waived his right to a jury trial, and pleaded guilty to all charges.[23] As a result, Tunkey "experienced a sense of hopelessness."[24] After Washington pleaded guilty, his counsel further advised him to invoke his right under Florida law to an advisory jury ***1119** at his capital sentencing hearing.[25] But again, Washington rejected the advice and waived the right.[26]

All Tunkey did to prepare for the sentencing hearing was to speak a single time with Washington's mother and wife on the telephone after making one unsuccessful effort to meet with them.[27] But he did not otherwise seek out character witnesses, request a psychiatric examination, or look for further evidence concerning Washington's character or emotional state.[28] The judge sentenced Washington to death on each of the three counts of murder along with prison terms for the other crimes.[29]

On appeal and in collateral proceedings Washington challenged his counsel's assistance in several respects.[30] He asserted various claims of ineffective assistance and "submitted 14 affidavits from friends, neighbors, and relatives, stating that they would have testified if asked to do so."[31] He also submitted a psychiatric report and a psychological report, both of which stated that Washington was "chronically frustrated and depressed because of his economic dilemma" when the crimes were committed.[32]

The Supreme Court denied Washington relief. In doing this, the Court also established the now well-recognized two-part test for determining whether an attorney was so ineffective and incompetent as to have violated a defendant's constitutional rights. First, the defendant must have shown that his "counsel's representation fell below an objective standard of reasonableness."[33] Second, the Court ***1120** stated that the "defendant must show that the deficient performance prejudiced the defense."[34] Applying this standard, the Court held that Tunkey's strategy choices were within the range of professionally reasonable judgments and the choice not to seek more character evidence was reasonable.[35] The Court went on to say that there was no reasonable probability that the evidence the defendant said his trial counsel should have offered would have altered the outcome of the trial and sentencing hearing.[36]

Washington was executed July 13, 1984, two months after the decision.[37]

William Tunkey continued to practice.[38] Tunkey's name was never even mentioned in the Supreme Court decision.[39] As far as the author can tell, no malpractice claims or formal complaints against Tunkey were ever filed.[40] Thus began the days of *Strickland*. And its critics.[41] But while many have criticized the standard itself in that it ***1121** creates an almost impossible

hurdle for defendants to overcome, few have addressed the hidden issue -- one *Strickland* also failed to address -- what happens to an attorney who is found constitutionally ineffective.[42]

III. Ineffective Attorneys Face no Real Repercussions

As the system stands, a criminal defendant has no real remedy against an attorney who has violated his Sixth Amendment right. As one Assistant Attorney General in Utah stated, "If a defendant demonstrates that his trial counsel was ineffective, the defendant does not receive *anything* from the lawyer as a remedy. Rather, what the defendant receives is a reversal of his criminal conviction or sentence."[43] Certainly, no reasonable attorney would want to be found constitutionally ineffective, especially after having put in the substantial amount of time, effort, and resources required to defend a client. But the increasing number of successful ineffective assistance claims demonstrates that whatever reasons attorneys currently may have to not be found ineffective are not enough to have any actual impact.[44]

This Part begins by establishing that there is no real remedy against the ineffective attorney beyond that of a new trial. Further, it will explore how the available "remedies" of malpractice claims, harm to professional reputation, and court sanctions are not realistic and are difficult to prove.[45] Next, this Part will discuss the increase in ineffective assistance claims, the increase in their success, and possible explanations for that increase. Following that discussion, it will then explore why a remedy is needed as well as the many problems that arise because of the lack of a remedy. These problems include an ***1122** increase in frivolous claims, a decrease in professional norms due to attorneys falling on their sword, and a rise in ineffective attorneys who continue to practice. Finally, this Part will explore possible reasons for a lack of any real repercussion from the state bar.

A. No Real Remedy Exists

Today, there are no real repercussions or remedies against the constitutionally ineffective attorney. As one scholar has noted:

> Assuming the criminal defendant succeeds in securing a new trial, having shown that the lawyer was so negligent that even *Strickland*'s presumptions could not whitewash the incompetence, how do the courts deal with the lawyer? Is malpractice presumed? Is the lawyer automatically subject to some disciplinary action? Is the attorney required to undergo continuing peer review and supervision? Is the lawyer barred from handling criminal cases or required to attend classes? Anything? No.[46]

To be sure, some have disagreed and claimed that there are repercussions and remedies against the ineffective attorney. These so-called "repercussions" come in three forms: harm to the attorney's professional reputation, legal malpractice claims, and court sanctions. But as discussed below, none of these "repercussions" are effective or realistic.

The first claimed "repercussion" is that the attorney who is declared constitutionally ineffective may face humiliation and his professional reputation may be harmed.[47] That "harm" to the attorney's reputation may take several forms including losing credibility in front of the judge who finds them ineffective or possibly losing credibility in front of that judge's colleagues. On the other hand, it may take the form of embarrassment in the presence of other attorneys who may be aware of the court's finding of ineffectiveness. As a result, the ineffective attorney may lose clients, social standing, and prestige. Thus it is claimed that these professional consequences would deter an attorney from giving sub-standard legal assistance to a criminal defendant.

***1123** However, the idea that losing an ineffective assistance claim harms the attorney's reputation is implausible. It rests on the assumption that peers will read the court decision,[48] but it also assumes that anyone reading the decision could identify the defense lawyer who had been accused of being ineffective. Yet, it is not the practice of appellate courts to publicly identify

defense lawyers in written decisions.[49] In fact, one survey of Tenth Circuit opinions over a five-year period showed that hundreds of opinions were issued in criminal cases, but only between three and five of the opinions a year ever named the trial lawyer as part of an ineffective assistance claim.[50]

Another claimed "repercussion" is the possibility of the defendant filing a malpractice claim against his counsel. The fear of a malpractice suit would arguably deter a defense attorney from unprofessionally representing a client. But while fear of malpractice may have some minimal impact on an attorney's behavior, it is not a realistic remedy. Eighty percent of defendants in criminal cases do not have funds to hire a defense attorney.[51] Thus it is idealistic to assume that after years of trial and appeals a defendant would have the funds or even be willing to hire a civil attorney, pay court fees, attorney fees, and risk losing simply to file a malpractice claim. But even if a civil attorney takes a malpractice claim on a contingency fee,[52] winning is unrealistic. Many states have granted public defenders qualified immunity from suit for acts or omissions made in the course of "executing their official duties" regardless of whether the attorney had been found ineffective.[53]

***1124** A further difficulty to any civil malpractice suit as a result of a criminal case is that the majority of courts also require proof of "actual innocence."[54] Some states have even gone far enough to state that a legal malpractice claim cannot succeed unless "the person's conviction has been reversed, whether on appeal or through post-conviction relief, or the person otherwise has been exonerated."[55] Thus, even if an attorney has been declared constitutionally deficient, if the conviction holds, the defendant has no real remedy for a deficient attorney.

One last possible "remedy" would be the court imposing sanctions on the ineffective attorney.[56] When a judge receives information that indicates a substantial likelihood that a lawyer has committed a violation of the rules, he may take "appropriate action" against that attorney.[57] Many courts' local rules are similar.[58] As a result, courts enjoy broad discretion when it comes to determining who may practice before them as well as regulating the conduct of those who appear before them.[59] This power is inherent within the courts.[60] Thus, along with specific statutes that grant authority,[61] ***1125** courts impose sanctions for various offenses including improper certification,[62] improper claims and motions,[63] filing frivolous appeals,[64] and misbehavior,[65] among others.[66] The sanctions themselves may include forcing the attorney to give up the fee he received to represent the client,[67] imposing restitution,[68] limiting the attorney's practice,[69] or requiring the attorney to take remedial classes on how to be an effective attorney.[70] But in practice, rarely, if ever, are attorneys sanctioned after being found constitutionally deficient.[71] In fact, in one study over five years in Utah, the courts did not sanction a single attorney who had been found ineffective under the Sixth Amendment.[72]

***1126** In sum, professional reputation, malpractice claims, and court sanctions are ineffective and unrealistic as remedies because they do not really affect the ineffective attorney. Thus, an attorney faces no repercussions for violating his client's Sixth Amendment rights.

B. The Increase in Successful IAC Claims

The sharp increase in ineffective assistance claims as well as the increase in constitutionally deficient attorneys further demonstrates the need for a remedy. Today, ineffective assistance of counsel claims are the most frequently filed claim in both federal and state post-conviction proceedings.[73] And the number of ineffective assistance claims is rising.[74] As "such claims have become more and more prevalent, claims about other constitutional deprivations have fallen by the wayside,"[75] causing scholars to suggest that these claims predominate because petitioners "perceive[] that courts are receptive to them."[76] To be sure, because the bar has been set so low, it is not difficult for an attorney to meet the *Strickland* standard. Not surprisingly then, in relation to how many claims are filed, only a relative few actually succeed.[77] For example, the Supreme Court of

Wyoming noted that between 1986 and 1993, only three cases were overturned because of ineffective assistance of counsel.[78] And in another study of ineffective assistance claims from California, New York, Texas, and Alabama, it was demonstrated that "although defendants raised ineffective assistance of counsel in 41% of state post-conviction petitions in the targeted years of 1990 and 1992, state courts granted relief in only 8% of the cases."[79]

***1127** But these numbers are dramatically changing in some states. For example, in Utah during the seven-year period between 1998 and 2005, there were only a total of two reported cases where the courts reversed for ineffective assistance.[80] However, in the following seven-year period between 2006 and 2013, the Utah courts found that an attorney's conduct was both prejudicial and constitutionally deficient in at least fifteen cases.[81] Similarly, in Kansas, in the period between 1984 and 2003, there were only a total of three reported cases where the courts reversed for ineffective assistance.[82] But in the following ten-year period between 2004 and 2014, the Kansas courts found that an attorney's conduct was both prejudicial and deficient in at least fourteen cases.[83] One of the most impressive increases comes from the state of Washington. Between 1982 and 1992, there were only four successful claims of ineffective assistance.[84] But in the following ten years, between 1993 and 2003, that number increased to fourteen successful claims.[85] And in the ***1128** next ten years, between 2004 and 2014, the numbers jumped to over twenty-nine successful claims of ineffective assistance of counsel.[86] This same pattern is seen in several other states ranging from California[87] to Alabama.[88]

***1129** There are several possible reasons for the increase in successful ineffective assistance claims. A pessimist might say that attorneys are just getting worse. To be sure, over the years scholars have argued that often many indigent defendants do not receive effective assistance.[89] Indeed some scholars have estimated that from one-third to one-half of the lawyers who appear in court are not qualified to render the assistance guaranteed by the Sixth Amendment.[90] But bad lawyering is nothing new and cannot reasonably explain the large increases over several different states.[91] Other possible reasons to explain the increase in successful claims may include that courts are simply misinterpreting *Strickland* or that new judges are appointed with more lenient ideas of what makes up *Strickland*'s "prevailing professional norms." But again, the fact that in the past twenty years the number of successful ineffective assistance claims is almost universally rising would seem to demonstrate that a newly appointed judge would not be the only answer.[92]

But regardless of the reason, the sharp increase in successful ineffective assistance claims illustrates the need for society to have some remedy against the ineffective attorney -- more than what currently exists. With the increase in successful claims and with no remedy against the deficient attorney, outcomes become less accurate and society loses confidence in the system. It has been said that the adversarial system assumes that "the truth can be served best only if each side is represented by a competent attorney."[93] But what if one ***1130** side is represented by a terrible and incompetent attorney? Will the truth really come out? A further issue is that, like the attorney in *Aldrich*,[94] there is nothing to stop the attorney from acting incompetently again. As a result, society loses confidence in the system.

C. The Problems with No Real Remedy

The problems created by a lack of any repercussions and any real deterrent include that the State is overburdened with frivolous claims, outcomes become less reliable because of defense counsel falling on his sword, and inadequate counsel continues to offer inadequate assistance.

First, one of the major problems with a lack of repercussion against the "ineffective" attorney is that there is no deterrent for filing a frivolous claim against that attorney. Ineffective assistance of counsel is the most common issue raised in habeas petitions and a non-habeas appeal is a "very common -- if not the most common -- claim for relief."[95] Yet only a fraction of

those claims actually win.[96] The ninety-two percent fail-rate for ineffective assistance claims illustrates that there are many attorneys filing frivolous claims.[97]

A further negative outcome of not having any real repercussions against the offending attorney comes in the form of defense counsel "falling on its sword" with no fear of any professional consequences. Falling on the sword refers to the tactic of trial counsel admitting and then arguing that they were constitutionally ineffective in order to have their client receive a new trial.[98] And this tactic is well known ***1131** to judges.[99] But even though it has been heavily criticized,[100] there are still those who support and even encourage this practice.[101] As a result, because counsel suffers few if any consequences for being declared ineffective or constitutionally deficient, attorneys may "see no harm in"[102] or "even see it as their duty"[103] to "fall on their sword."

But regardless of whether this is a commendable practice, this tactic has a negative impact on ineffective assistance jurisprudence by seriously distorting what in fact makes an attorney "ineffective."[104] In other words, counsel who otherwise would be found competent, are found incompetent because they admit ineffectiveness in order to help out a client.[105] The effect is that our jurisprudence fills up with what Judge Kozinski labeled "descriptions of perfectly adequate performance that is assumed to be deficient."[106]

***1132** A final problem with the lack of repercussions is that counsel may continue to represent future defendants and continue to give less than effective assistance to those defendants. As Justice Maura D. Corrigan from Michigan stated, "[T]o protect future defendants, it is important . . . to identify attorneys who may consistently provide ineffective assistance, in order to take any appropriate disciplinary action."[107] Yet without any real remedy against the incompetent counsel, the attorneys, judges, and especially the general public are not really aware of the offending attorney's conduct. Thus the "ineffective" attorney will likely represent other clients. And he may very well give the same quality of assistance that he previously gave.

D. Why Are There No Repercussions from the State Bar?

But why are there no repercussions from the state bar against an attorney who has "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"?[108] There are several possible answers. Among those are: (1) the difficulty in creating a one-size-fits-all solution, (2) the fear of ruining collegial relationships, and (3) simply a weak and underfunded state bar. But each of these explanations fails. Ultimately, there are no repercussions from the state bar because no one reports ineffective attorneys.

First, one possible reason that there currently are no repercussions from the state bar associations is the difficulty of a one-size-fits-all solution. There are many different types of ineffective assistance of counsel. Thus, there may be a difference between what has been called "personal ineffectiveness" and "structural ineffectiveness."[109] For example, there are the attorneys who fall asleep during trial,[110] are under the influence of alcohol or drugs while representing a client,[111] or "are out in the courthouse parking lot while key prosecution witnesses testify."[112] On the other hand, ***1133** there may be ineffective assistance that comes as a direct result of public defender offices that are simply overworked and understaffed.[113] The argument is that because of the huge caseloads, there simply is not enough time to give the attention and effort that is necessary to provide the minimal assistance required by the Constitution. And in recognition of these "structural" problems, courts and legislatures simply turn a blind eye to such problems.

To be sure, because of these differences, state bars may find it difficult to create a blanket one-size-fits-all solution to the problem. Neither sanctions, discipline, nor other repercussions may be appropriate in every case. But the one-size-fits-all approach has

its advantages. Whether the attorney fell asleep during trial or was simply overworked, the defendant's Sixth Amendment rights have been violated. And in both cases, an attorney has acted so incompetently so as to violate that right.

A second possible reason that there are no real repercussions from the state bar against an ineffective attorney is that attorneys and judges may feel that if they report another attorney, it would interfere with their professional relationships. As one scholar noted, "Lawyers may fear being considered a tattletale by their peers within the legal community."[114] Of course there may be the occasional attorney who would be happy to report certain defense attorneys, but because in many respects lawyers depend on their reputation within the community and among members of the bar, the potential negative effects of "being labeled a snitch" could cause many problems in their professional lives.[115] These problems may include collateral effects in subsequent cases that involve the "ineffective" attorney. If one attorney has reported another, it is possible, and even likely, that the reported attorney would feel hostile towards the other.

***1134** But while reporting might carry some social and professional costs, and even may be uncomfortable to do, "the benefits of reporting may often outweigh the costs."[116] Reporting ineffective attorneys would raise the bar for what is a "reasonable" attorney. And assuming the bar did anything after the attorney was reported, it would deter attorneys who have been found ineffective from continuing to give sub-par assistance to yet another defendant. Further, it would increase the public's faith in other attorneys and the system itself.

The third and most viable reason that there may not be any current repercussions against the offending attorney is the inherent weaknesses of state bar associations in regulating attorney conduct. In fact, over the years there have been many critics of the state bar's capacity to prosecute potential rule violations.[117] And although attorneys are required to "conform their behavior to these state codes,"[118] one commentator has noted the following:

> [S]tudy after study has shown that the current rules of professional conduct are not enforced. Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another.[119]

However, at least in theory, a criminal defense attorney's actions and violation of state rules could lead to disciplinary action and proceedings to address the alleged misconduct.[120] In reality, it does not happen.[121] But it is unfortunate that it does not happen. The ***1135** state bar associations seem the ideal place to begin ensuring competence among lawyers. State bars already have established rules and guidelines for attorney conduct. State bars already have established means for enforcing those guidelines. And state bar associations are already accessible to anyone -- anyone can file a claim.[122] In fact, state bar associations have even been labeled as "the most easily accessible means by which criminal defendants can begin to be protected against bad lawyering."[123] And while some critics have stated that "state bar associations seem loathe to recommend any meaningful sanction,"[124] state bar associations impose over 5,600 sanctions annually.[125] But if so many sanctions are imposed each year, how is it that the bar association could be perceived as weak? And why would ineffective attorneys not be sanctioned?

One of the major weaknesses of state bars is that the disciplinary boards generally rely on complaints before taking action.[126] Seldom do state bars initiate independent investigations.[127] Further, defendants file relatively few complaints against trial attorneys in ***1136** criminal cases.[128] And even fewer judges and lawyers file complaints.[129]

The solution, therefore, rests on establishing a vehicle by which claims of ineffective assistance of counsel can be reported and corrected.

IV. A Violation of a Defendant's Right to Effective Assistance Is a Violation of a Lawyer's Duty Under the Professional Rules to Provide Competent Assistance.

The vehicle by which claims of ineffective assistance of counsel can be reported and corrected comes from the inherent relationship between the ABA Rules of Professional Conduct and a defendant's right to effective assistance under the Sixth Amendment. Because of that relationship, a violation of *Strickland* implies a violation of the Professional Rules. The idea that there is a link between the two is not difficult to see. Nor is the idea novel. In fact, in 1986 even the Supreme Court recognized the increasing need to rely on this relationship and the potential need to rely more on these standards. The Supreme Court stated that in "some future case . . . we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct."[130] And since that date, many courts began to define the scope and limits of effective assistance by looking to the canons of ethics and the professional codes.[131]

***1137** This inherent link between the ABA standards and *Strickland* demonstrates that a violation of the defendant's right to effective assistance is also a violation of the professional rules to provide competent assistance. This Part will first discuss how over the years the ABA Standards have come to define *Strickland*'s "prevailing professional norms." Following that discussion, it will examine the idea that because of the inherent link and because so many courts rely on the ABA standards, a violation of a constitutional right necessarily implies a violation of the Rules of Professional Conduct. Finally, this Part will explore how the link between the ABA standards and *Strickland*'s "professional norms" has been applied to cases outside the Sixth Amendment. These cases will further enforce that a violation of *Strickland* violates the Rules sufficiently for the attorney to be reported to the state bar.

A. The ABA Standards Help Define Strickland *'s "Professional Norms"*

The Supreme Court has "long . . . recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable.'"[132] Thus, because they "reflect the . . . norms of the legal profession,"[133] the ABA standards "act as guides in determining the reasonableness of counsel's assistance."[134] And these standards are frequently cited by courts in determining whether counsel's representation was objectively unreasonable.[135] Thus, "the use of ethical standards to illuminate whether a lawyer has provided ineffective assistance is not novel or overreaching, but well established."[136]

***1138** For example, courts have used the ABA standards to evaluate counsel's "duty to investigate"[137] and to determine whether counsel's "pretrial investigation and preparation" was sufficient.[138] Courts have used the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct in determining ineffective assistance of counsel regarding "multiple representation,"[139] zealous representation,[140] false statements,[141] and whether counsel was obligated to challenge the search of a vehicle.[142]

Moreover, courts have often considered and invoked these ethical standards "recognizing that fidelity to those standards implicates not only the interests of the defendants, but the credibility of the system, its integrity, and the institutional interests in the rendition of just verdicts."[143] These standards and professional norms "illuminate" the question of whether a lawyer has provided effective assistance.[144] And using these guidelines, standards, and rules has the positive effect of "draw[ing] lawyers attention to specific duties and tasks which are integral to effective representation."[145]

B. A Violation of Strickland *Implies a Violation of the Rules*

Because so many courts have looked to the ABA's standards to determine the "professional norms" relevant to ineffective assistance claims, when an attorney is found ineffective under *Strickland*, it necessarily implies a violation of the Model Rules. The ABA Model Rules of Professional Conduct, which every state has adopted in one form or another specifically state that "[a] lawyer shall provide ***1139** competent representation to a client."[146] And "competent representation" requires that an attorney act with "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[147] Or, in other words, competent representation means that an attorney will act with at least the minimal ability of a reasonable practitioner.[148] The official comments further clarify that "competent handling" of a matter includes analysis of the factual and legal elements of an issue, sufficient preparation, and use of methods and procedures that meet the standards of other competent practitioners.[149]

Based on the same language of ABA Rule 1.1, courts have determined in disciplinary hearings that attorneys were not competent for repeatedly filing and then dismissing cases when responses were due,[150] "failing to address a potential bar to any patent in a patentability opinion,"[151] failing to consult with a client and inform him of a plea agreement,[152] filing frivolous claims,[153] failing to examine title or record documents,[154] failing to obtain training to defend a capital murder case,[155] failing to conduct a thorough investigation of the facts,[156] failing to investigate alibi witnesses,[157] failing to submit a judgment of default to the court for several months,[158] failing to file an appropriate and sufficient post-conviction petition,[159] failing to examine the physical evidence,[160] ***1140** failing to interview witnesses who may have been helpful to the defense,[161] and failing to produce evidence that would have reduced a sentence.[162]

Just as the Professional Rules define competence in terms of what is "reasonable" representation, so too *Strickland* defines "competent assistance" as "*reasonableness* under prevailing professional norms."[163] And "reasonableness" under *Strickland* means that an attorney cannot be ineffective unless the court finds that no other attorney would have made the same tactical decisions at trial or on appeal.[164] Further, *Strickland*' s "prevailing professional norms" are guided by the Professional Rules themselves.[165] Thus, even though the Professional Rules are "guides, and not inexorable commands,"[166] when an attorney has acted in such a manner that no other attorney would act, and the court has determined that the attorney has fallen below the "prevailing professional norms," he has necessarily failed to act with "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[167] In other words, when an attorney has violated *Strickland*, he has also violated the Model Rules' standard of competence. That being said, one scholar has noted that "ethical violations and ineffective assistance of counsel are not usually seen as one and the same."[168] But because courts have consistently used the ABA Guidelines and Rules of Professional Responsibility in establishing what in fact makes an attorney ineffective, when a court ***1141** finds an attorney so incompetent so as to violate his client's Sixth Amendment rights, the court has also necessarily determined that the attorney has violated his duties under the Professional Rules.

However, the relationship or link between constitutionally effective assistance and the Professional Rules does not necessarily go both ways.[169] Just because an individual has violated an ethical rule does not necessarily mean he has violated the right to effective counsel. For example, in *Smith v. State* an attorney had been suspended for failing to pay his bar dues but had still represented a defendant, thus subjecting the attorney to professional discipline.[170] On appeal the defendant claimed that because his attorney had violated a Rule of Professional Conduct, he was constitutionally ineffective.[171] But the court held that a violation of a Professional Rule was not a per se violation of the defendant's right to counsel.[172] What was important was whether the "representation was sufficiently incompetent to violate the client's right to effective assistance of counsel."[173]

Thus, it is possible to violate a professional rule without raising a question of ineffective assistance of counsel. But that does not change the fact that a violation of a client's Sixth Amendment right would be a violation of the Rules. To be sure, the Supreme Court has also stated that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation."[174] But as one scholar has stated, "[w]hile the Sixth Amendment may not have been designed

to improve the quality of legal representation, neither should it serve to lessen the quality of that representation."[175] Thus, even though there may be some differences between the Sixth Amendment ineffectiveness and the ***1142** Professional Rules, it would be naïve to think that the former does not impact the latter.[176]

Certainly, there are some differences between competence as defined by *Strickland* and competence under the Professional Rules. For example, while a violation of the Professional Rules is a claim against the attorney, an ineffective assistance claim is technically against the State.[177] Even though ineffective assistance claims may rise on direct appeal or in a collateral attack based on a state or federal statute, in both cases the parties are the government and the defendant -- not the defendant and his prior "ineffective" counsel.[178] Thus, what a defendant is alleging when he raises an ineffective assistance claim is that the government unconstitutionally convicted him because he did not receive effective assistance of counsel as guaranteed by the Constitution.[179] Because an ineffective assistance claim is not technically a claim against the defendant's attorney, there are procedural differences that arise. For example, a lawyer has a right to participate in his own disciplinary counsel, whereas he does not necessarily have that right in an ineffective assistance claim.[180] Therefore, under a claim arising out of a violation of the Professional Rules, the attorney has the right to defend himself, whereas that is not necessarily the case in an ineffective assistance claim.

But all that is required for a judge to report an attorney to a state bar association is knowledge that the attorney has violated a Professional Rule.[181] Thus, even though there may be differences that might impact the nature of a disciplinary sanction, the differences do not change whether or not a judge has sufficient knowledge to report an attorney for violating the Rules of Professional Conduct.

A further difference between the Rules and a defendant's Sixth Amendment right to counsel is that in some states the standard of proof at a disciplinary counsel may be higher and mitigating factors ***1143** may exist and be taken into account.[182] For example, in Arizona the defendant must establish by a preponderance of the evidence that a constitutional defect has occurred and then the state has the burden of proving that the defect was harmless beyond a reasonable doubt.[183] But Arizona's grounds for discipline require bar counsel to establish allegations by clear and convincing evidence.[184] Other states are similar.[185] But again, neither of these differences impacts whether or not the judge has knowledge sufficient to report an attorney. As Justice Martone from the Arizona Supreme Court has stated, "[T] he conduct which results in a denial of effective assistance of counsel necessarily implicates a denial of competent representation."[186] In other words, even though there may be mitigating factors, and even though the standard of proof may be different, those factors do not impact whether a judge has knowledge that a violation has occurred, only the extent of the sanction imposed.[187]

In sum, because of the relationship between the Model Rules and *Strickland*, when an attorney violates his client's Sixth Amendment right, he also has sufficiently violated the Professional Rules for a court to have the duty to report the attorney.

***1144** *C. Ineffective Assistance and Asylum*

Moreover, this type of connection between a constitutional right violation as a result of counsel's ineffectiveness and the Professional Rules has already been applied in other similar cases. Take, for example, the case of asylum. Granted, it is important to note at the outset of this discussion that an ineffective assistance claim for asylum arises not out of the Sixth Amendment right to counsel, but out of the "due process guarantees of the Fifth Amendment."[188] But the requirements to establish ineffective assistance under the Fifth Amendment are remarkably similar to those of the Sixth Amendment.[189] Thus it is very instructive of how Sixth Amendment violations should be applied.

Similar to a Sixth Amendment ineffective assistance claim, where the defendant is claiming that his attorney was so terrible that he deprived his client of a fair trial,[190] when an alien files an ineffective assistance of counsel claim under the Fifth Amendment, he is claiming that "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case."[191] And similar to a *Strickland* claim, the petitioner must show (1) "that counsel failed to perform with sufficient competence," and (2) "that she was prejudiced by counsel's performance."[192] But unlike a *Strickland*claim, before an alien is allowed to file an ineffective assistance claim, he or she is expected to comply with several procedural guidelines.

***1145** First, the alien must submit an affidavit that includes and explains "the agreement that was entered into with former counsel."[193] Second, "former counsel must be informed of the allegations and allowed the opportunity to respond."[194] And finally, "the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not."[195] If an individual fails these procedural requirements, the proceedings may be dismissed.[196]

In sum, the implication of these requirements is that there cannot be ineffective assistance in the constitutional sense unless there is also incompetence in the ABA sense. Thus, by adopting[197] and approving[198] the requirement to file a complaint with the appropriate disciplinary authorities every time a claim of ineffective assistance of counsel is raised, both courts and administrative agencies are recognizing the important and inherent link between the ABA standards and constitutionally effective assistance.

What is interesting about these requirements is not just that the requirements exist, but also their reasoning. Citing *Lozada*, the Sixth Circuit stated:

> The requirement that disciplinary authorities be notified of breaches of professional conduct not only serves to deter meritless claims of ineffective representation but also highlights the standards which should be expected of attorneys who represent persons in ***1146** immigration proceedings, the outcome of which may, and often does, have enormous significance for the person.[199]

And if there is "enormous significance" for asylum, which demands a duty to report the attorney, is there not also "enormous significance" in a capital case? Or when an individual faces life in prison? When an individual's freedom is at stake, as is the case in a criminal prosecution, surely that creates the possibility of consequences that are enormously significant to the defendant. In addition, if the purpose of the *Lozada* requirements are to "deter meritless claims," how much more important would a similar requirement be in criminal cases. Ineffective assistance is the most raised claim,[200] yet only a fraction of those claims are deemed meritorious by the courts.[201] That would indicate many, many meritless claims.

V. The Relationship Between Ineffective Assistance and the Model Rules Creates the Solution -- Mandatory Reporting

This recognized link between the Professional Rules and constitutionally ineffective assistance creates the needed remedy -- make it mandatory for judges to report an attorney to the bar when a counsel has been found ineffective. This would correct the many problems created by the current lack of any remedy against the ineffective counsel.[202]

Because of the self-regulating nature of the legal profession, the Model Rules of Professional Conduct already require an attorney to report another attorney for a violation of those Rules.[203] And judges have a similar duty to report violations. Specifically, when a judge has knowledge that a lawyer has committed a violation of the Rules of Professional Conduct, the judge is required

to report that attorney.[204] Even if a judge receives information that *indicates* a substantial likelihood that a lawyer has committed a violation of the ***1147** Rules, he is required to take "appropriate action" against that attorney.[205]

Yet no one seems to be taking upon himself or herself to report attorneys who have violated a client's constitutional Rights. As one scholar noted, "It seems that trial judges and opposing counsel may be ignoring the fact that incompetence is unethical and judge and lawyer alike are equally culpable for not taking steps to report the particular practitioner."[206] Thus, the solution is simply to require judges and attorneys to report the deficient attorney after he is found ineffective. To be sure, the Rules state that the reporting requirement is only applied when an attorney has committed a violation that raises a "substantial question as to that lawyer's . . . fitness as a lawyer."[207] But the official comments clarify that the term "substantial" refers to "the seriousness of the possible offense."[208] And the more serious the offense, the more reason to report the violation.[209]

Now, when an attorney violates a client's Sixth Amendment right under *Strickland*, it is because the court has determined that he has fallen far below any objective level of reasonableness.[210] In fact, in order for there to be ineffective assistance, the attorney must have "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[211] It follows logically that if counsel has been so deficient to not be functioning as counsel, of course a substantial question arises as to the lawyer's fitness.

I am not suggesting a scheme similar to asylum,[212] where once a claim of ineffective assistance is raised the petitioner is required to ***1148** report the deficient attorney to the bar, but I am suggesting that after the attorney is actually found ineffective, he should be reported. This could be accomplished by simply requiring the court to instruct the clerk to send a copy of the order to the state bar every time the judge finds an attorney ineffective. Because of the relatively low number of ineffective assistance claims that actually win, this would not be a huge burden on any state bar association. But it would show to both the bar as well as to those claiming ineffective assistance the seriousness of their claim -- that the attorney was so incompetent that he was not functioning as counsel.

And if attorneys and judges really understood the seriousness of the claim that they were raising as well as the possible negative consequences against the alleged ineffective attorney, that in turn would have many positive impacts on the judicial system. It would reduce frivolous claims. It would deter attorneys from "falling on their sword." And it would deter ineffective attorneys from continuing to give terrible assistance.[213] In sum, reporting ineffective attorneys would increase society's faith in the judicial system.

VI. Conclusion -- Raising the Bar

It has been stated that "[a]ttorney competence directly affects the fairness of our criminal proceedings."[214] But a system that fails to impose any real repercussions on the attorney who is so ineffective that he is no longer acting as counsel permits society to lose faith in the judicial system itself. However, because of the inherent link between competence, as defined by the ABA Rules, and *Strickland*, simply requiring judges to report constitutionally ineffective attorneys after finding them ineffective presents a workable remedy.

***1149** Doing so will provide an immediate, positive impact on the system. Ineffective attorneys would either improve or be removed, defendants would be more likely to receive a fair trial, and the general level of skill and competence of practicing attorneys would increase. As a result, the low *Strickland* bar may very well rise.

Footnotes

1 Aldrich v. State, 296 S.W.3d 225, 229 (Tex. App. 2009).

2 *Id.*

3 *Id.* at 243 ("Aldrich argues that trial counsel failed to adequately convey the twenty-year plea bargain to him. The record before us contains defense counsel's letter rejecting the plea bargain, and it supports Aldrich's position. The letter specifically sets forth defense counsel's belief that it would be unethical and would constitute malpractice for him to even discuss the proposed plea bargain with Aldrich.").

4 *Id.* at 245.

5 *Id.* at 233.

6 *Id.* at 245 *(*"Instead, even after receiving the benefit of multiple continuances, defense counsel undertook little or no investigation -- until just a few weeks before the July 25, 2005 trial setting -- based on the unreasonable decision that *Kyles* required the State to perform an investigation for him....").

7 *Id.* at 251 ("The record reflects that defense counsel had great difficulty questioning witnesses.").

8 Among other problems, Aldrich's counsel repeatedly asked to have jurors removed from the courtroom to make simple objections to leading questions. *Id.* at 252.

9 *Id.* at 247.

10 *Id.* at 256. One of the bizarre cross examinations of a police officer went as follows:

Q. The thing that she was riding in had four wheels?

A. Yes, sir, I believe it would have.

Q. She was not afoot. She was riding and it was propelled by an electric motor, was it not?

A. Yes, sir.

Q. And is that -- do you know that that's the definition of a motor vehicle?

A. A motor vehicle --

....

Q. Well, let me ask you this. Did you believe in your initial investigation that the -- Mr. Hudson and Mrs. Hudson had made a left turn and started walking across the crosswalk, that they would have seen the oncoming -- this oncoming traffic, the one that before and during and after my client was -- that ultimately hit her, that they deliberately made a left-hand turn to walk across the place where they knew that these cars were going to come? Did you realize that the night you were out there?

A. Do I believe they deliberately stepped in front of your client?

Q. That's for the jury to decide. I'm just asking you, did it -- in your investigation as the senior officer out there, people with long debilitating injuries, sometimes they commit suicide, don't they?

A. In Texas, the people in the crosswalk have the right-of-way.

Q. Well, that's the wrong law, but if that's what you believe, you're incorrect.

....

Q. All right. Now, did you, taking in the scene, the lighting, the ability to see a person that was coming as the Hudsons were, to see oncoming traffic, the realization that they walked right in front of this oncoming car, did you make sure and say, Hey, be sure to question Mr. Hudson about why he did such a thing? Did you mention, suggest, gosh, this guy had the opportunity, looks like he just walked her out there in front of the cars. Did anything like that happen?

Id. at 247-48.

11 *Id.* at 260.

12 *Find a Lawyer: Paul W. Leech*, St. B. Tex., https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template =/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=224590 (last visited Dec. 25, 2014).

13 *See Aldrich*, 296 S.W.3d 225; *Find a Lawyer: Paul W. Leech*, *supra* note 12.

14 *See Aldrich*, 296 S.W.3d 225. The trial attorney's name, Paul Leech, was only discovered after searching the Denton County Court Records. Denton County Records Inquiry, http://justice1.dentoncounty.com/PublicAccessDC/ (follow "District Clerk Criminal Case Records" hyperlink under "Case Records"; then search by defendant for last name "Aldrich" and first name "Allen"; then follow "F-2004-1128-E" hyperlink under "Case Number") (last visited Jan. 23, 2016).

15 In 2007, Paul W. Leech was publicly reprimanded for violating Rule 1.01 (competence) of the Texas Rules of Professional Conduct for failing to attend a hearing while also failing to notify his client of the hearing, which resulted in a default judgment against his client. *Disciplinary Actions*, 70 Tex. B.J. 726, 730 (2007).

16 *See* Burdine v. Johnson, 262 F.3d 336, 340 (5th Cir. 2001) (noting that defense counsel slept through major portions of the trial, but no disciplinary hearings or claims were brought against the attorney for seventeen years). By the time the Fifth Circuit found counsel ineffective, seventeen years after the original trial, counsel was already deceased. But in that seventeen-year period, there is no record of any disciplinary hearings or claims against that attorney. It was also not the first time counsel had fallen asleep during a trial. *See* David R. Dow, *The State, the Death Penalty and Carl Johnson*, 37 B.C. L. Rev. 691, 693-95 (1996). For a discussion of cases of ineffective assistance of counsel post *Wiggins v. Smith*, see Teresa L. Norris, *Summaries of Published Successful Ineffective Assistance of Counsel Claims Post*-Wiggins v. Smith, Cap. Def. Network (Jul. 26, 2013), https://www.capdefnet.org/hat/uploadedFiles/Public/Helpful_Cases/Ineffective_Assistance_of_Counsel/IAC%20PostWiggins%2072613.pdf.

17 *See* Utah State Bar, Ethics Advisory Op. 13-04 para. 16 (Sept. 30, 2013) (Tenney, dissenting) ("The *Utah Bar Journal* publishes a monthly summary of all attorneys who have been professionally disciplined. I have reviewed those summaries for the past five years and cannot find a single instance in which a criminal defense lawyer was sanctioned because a court had concluded that he was ineffective under the Sixth Amendment.").

18 *Id.* para. 15.

19 *See* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 Md. L. Rev. 1433, 1472 (1999) (quoting Stephen B. Bright, *Glimpses at a Dream Yet to Be Realized*, Champion, Mar. 1998, at 65).

20 Geoffrey C. Hazard, Jr. & Angelo Dondi, Legal Ethics: A Comparative Study 135 (2004).

21 Strickland v. Washington, 466 U.S. 668, 671-72 (1984).

22 Washington v. Strickland, 693 F.2d 1243, 1247 (5th Cir. 1982), *rev'd*, 466 U.S. 668 (1984).

23 *Strickland*, 466 U.S. at 672.

24 *Id.*

25 *Id.*

26 *Id.*

27 *See id.* at 672-73. One scholar has even suggested that "counsel did virtually nothing with respect to the sentencing hearing." William S. Geimer, *A Decade of* Strickland *'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 Wm. & Mary Bill Rts. J. 91, 115 (1995).

28 *Strickland*, 466 U.S. at 673.

29 *Id.* at 675.

30 *Id.*

31 *Id.*

32 *Id.* at 675-76.

33 *Id.* at 688. The Court also stated that in determining the objective standard of reasonableness, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. Further, the Court stated that this would require a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

34 *Id.* at 687. In other words, the defendant had to show that his "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

35 *Id.* at 699.

36 *Id.* at 699-700.

37 *Killer Apologizes Before His Execution*, Telegraph, July 13, 1984, at 21, http://news.google.com/newspapers?nid=2209&dat=19840713&id=ZqcrAAAAIBAJ&sjid=9vwFAAAAIBAJ&pg=6811,2282489.

38 *William R. Tunkey*, Robbins Tunkey Ross Ansel Raben & Waxman P.A. (June 19, 2014), http://www.crimlawfirm.com/employee/william-r-tunkey/.

39 *Compare Strickland*, 466 U.S. 668, *with* Washington v. Strickland, 693 F.2d 1243, 1247 (5th Cir. 1982), *rev'd*, 466 U.S. 668 (1984).

40 *William R Tunkey*, Fla. B., http://www.floridabar.org/wps/portal/flbar/home/attysearch/mprofile/!ut/p/a1/jc_LDoIwEAXQT-pthRaWo6mkRazxgdCNYUWaKLowfr_42LioOrtJzs3cYZ41zA_dLfTdNZyH7vjYvTxACM3dBrawxEHlOl3ZqgSEHEE_8sjMoRf-T3zn8RJNQO5BXKtp0AxeYNIRTj-HTx_eJ2Il7ycdg2C6e8_WXgh/dl5/d5/L2dBISEvZ0FBIS9nQSEh/?mid=125153 (last visited Aug. 31, 2015).

41 *See, e.g.*, Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 Brandeis L.J. 435, 441 (2004) ("If there is a problem with the *Strickland* analysis, it is that the test fails to assure even a minimal level of competence or effectiveness."); Jimmy E. Tinsley, *Ineffective Assistance of Counsel*, *in* 5 Am. Jur. 2 d *Proof of Facts* 267 § 2 (1975) ("One judge, in harshly criticizing the standard, has suggested various reasons for the reluctance of appellate courts to adopt a more realistic standard of effectiveness. Among these reasons are the belief that if truly effective assistance were required, half the cases on appeal would require reversal, there would not be enough competent lawyers to provide effective assistance, and the court system would grind to a halt."); Kelly Green, *"There's Less in This Than Meets the Eye": Why* Wiggins *Doesn't Fix* Strickland *and What the Court Should Do Instead*, 29 Vt. L. Rev. 647, 647 (2005) ("Criticism of *Strickland* appeared as soon as the ink of the opinion dried and continues today...."); Bennett L. Gershman, *Judicial Interference with Effective Assistance of Counsel*, 31 Pace L. Rev. 560, 560 (2011) ("However, the standard for 'effective assistance' in defending a client is complex and controversial.").

42 Few scholars have addressed the issue or repercussions against the attorney. However, some scholars have at least mentioned it in passing. *See* Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 Geo. J. Legal Ethics 1, 9-10 (1995) ("The lawyer may experience some degree of humiliation, assuming peers read the court decision reversing the defendant's conviction. But that is it."); *see also* Paul J. Kelly, Jr., *Are We Prepared to Offer Effective Assistance of Counsel?*, 45 St. Louis U. L.J. 1089, 1093 (2001) (citing several examples where counsel "failed to prepare any strategy, arguments were incoherent and that the lawyers failed to attend hearings and call witnesses" and stating that "[t]o the extent that this is true, what is startling is that convictions and death sentences were all affirmed and no one said or did a thing about the lawyers involved").

43 Utah State Bar, *supra* note 17, para. 10 (emphasis added).

44 *See infra* Section III.B.

45 *See infra* Section III.C.

46 Koniak, *supra* note 42, at 9.

47 Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 Hofstra L. Rev. 1181, 1191 (2003) (stating that when defense counsel is found ineffective he will "suffer the ignominy and shame that follows").

48 Koniak, *supra* note 42, at 9-10.

49 *Ethics Advisory Opinion 13-04*, *supra* note 17, paras. 14-15.

50 *Id.* para. 14.

51 Lincoln Caplan, Editorial, *The Right to Counsel: Badly Battered at 50*, N.Y. Times (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html (finding that "at least 80 percent of state criminal defendants cannot afford to pay for lawyers and have to depend on court-appointed counsel").

52 One website notes that when an attorney charges a contingency fee for legal malpractice claims, it is usually between forty and fifty percent. This is much higher than other types of negligence cases because of the difficulty in proving malpractice. *Suing Your Lawyer*, Lawyers.com, http://legal-malpractice.lawyers.com/suing-your-lawyer.html (last visited Jan. 23, 2016).

53 Harold H. Chen, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 Duke L.J. 783, 784, 806 (1996) (stating that several states "shield indigent-defense attorneys from malpractice suits brought by their indigent clients"); *see also* Mooney v. Frazier, 693 S.E.2d 333, 345 (W. Va. 2010) ("[A]n attorney appointed by a federal court to represent a criminal defendant, in a federal criminal prosecution in West Virginia, has absolute immunity from purely state law claims of legal malpractice that derive from the attorney's conduct in the underlying criminal proceedings."); Coyazo v. State, 897 P.2d 234, 238 (N.M. Ct. App. 1995) (discussing state statutes that "provide complete immunity from suit").

54 *See* Wiley v. Cnty. of San Diego, 966 P.2d 983, 985 (Cal. 1998) (citing cases where states have required "actual innocence" before filing a malpractice claim).

55 Stevens v. Bispham, 851 P.2d 556, 561 (Or. 1993).

56 For example, in the case of *In re Warren*, 321 F. App'x 369, 370 (5th Cir. 2009), the court issued sanctions after granting relief on ineffective assistance of counsel grounds.

57 Model Code of Judicial Conduct r. 2.15(D) (Am. Bar Ass'n 2011).

58 *See, e.g.*, Local Crim. R. N.D. Tex. 57.8(b), http://www.txnd.uscourts.gov/pdf/CRIMRULES.pdf ("A presiding judge, after giving opportunity to show cause to the contrary, may take any appropriate disciplinary action against a member of the bar for: (1) conduct unbecoming a member of the bar; (2) failure to comply with any rule or order of this court...."); D.U. R. Practice Civ. R. 83-1.5.1(b), (stating that the court may initiate disciplinary proceedings against attorneys accused of a violation of an ethical or professional standard of conduct.).

59 *See* United States v. Nolen, 472 F.3d 362, 371 (5th Cir. 2006).

60 Resolution Trust Corp. v. Bright, 6 F.3d 336, 340 (5th Cir. 1993) (citing *In re* Snyder, 472 U.S. 634, 643-44 (1985) ("It is beyond dispute that a federal court may suspend or dismiss an attorney as an exercise of the court's inherent powers."); *accord* Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (recognizing the inherent power of the court to impose sanctions when "neither the statute nor the Rules are up to the task").

61 *See* Ronald E. Mallen & Allison Martin Rhodes, 1 Legal Malpractice § 11:4 (2015 ed.) ("A federal court's power to sanction also arises out of the legislative grant to promulgate its own rules."); *see also* Waguespack v. Halipoto, 633 S.W.2d 628, 629 (Tex. App. 1982) *(*"The Rules provide a trial judge with the tools to facilitate the litigation of lawsuits and, to a certain extent, to prevent abuse of the legal process. This discretion is therefore appropriately broad.").

62 Fed. R. Civ. P. 26(g)(3) ("If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.").

63 Fed. R. Civ. P. 11(c). Rule 11(c)(3) also notes that the court may bring these claims on its own initiative.

64 *See* United States v. Najera-Gandara, 438 F. App'x 338 (5th Cir. 2011) (stating that filing frivolous appeals "may subject counsel to sanctions"). Courts have also recognized that sanctions for filing frivolous appeals should only apply in egregious cases so as not to chill the right to appeal. *See* Porco v. Porco, 752 P.2d 365, 369 (Utah Ct. App. 1988).

65 *See* 18 U.S.C. § 401 (2012) (granting a court power to punish by fine or imprisonment for contempt of its authority, including misbehavior).

66 *See, e.g.*, Fed. R. Civ. P. 37(a)(3)(A) (violating disclosure rules); Fed. R. Crim. P. 16(d)(2) (failure to comply).

67 For example, in *In re Warren*, 321 F. App'x 369, 371 (5th Cir. 2009), the court disbarred counsel and required him to disgorge the $3,500 fee he received to represent the defendant.

68 Utah Cts. Jud. Council R. Jud. Admin. R. 14-603(i)(1), https://www.utcourts.gov/resources/rules/ucja/view.html?rule=ch14/06%20Standards%C20for%C20Lawyer%20Sanctions/USB14-603.html.

69 *Id.* R. 14-603(i)(3).

70 *In re* Hawver, 339 P.3d 573, 586 (Kan. 2014) (noting how an attorney and the respondent participated in the attorney diversion program, under Kansas Supreme Court Rule 203(d), for having violated Kansas Rules of Professional Conduct 1.1 (competence)); *see also* Kan. Sup. Ct. R. 3(d) (allowing courts to enroll incompetent counsel into an Attorney Diversion Program). "The purpose of the program is to protect the public by improving the professional competency of, and providing educational, remedial, and rehabilitative programs for, the members of the bar of Kansas." *Id.*

71 *See* Jonathan H. Adler, *When Ineffective Assistance Becomes Malpractice*, Volokh Conspiracy (Nov. 5, 2009, 9:47 AM), http://volokh.com/2009/11/05/when-ineffective-assistance-becomes-malpractice/ (stating that "it is rare that defense attorneys are sanctioned for providing inadequate assistance").

72 *See supra* note 17.

73 Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103, 1118 (1999). Further, reports have stated that "'ineffective assistance of counsel' was the most frequently cited reason for habeas corpus petitions filed by State inmates." *Id.*

74 Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. Rev. 425, 433 (2011).

75 *Id.*

76 *Id.* at 449.

77 *See* Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 Yale L.J. 2428, 2431 n.10 (2013) (noting that in a survey of 3,605 federal habeas petitions from 2005 to 2010 in Michigan, only 100 were granted relief, 45 of those were because of ineffective assistance of counsel and of that 45, 17 of those that had granted relief were overturned on appeal or, in other words, a success rate of 1.3%).

78 Calene v. State, 846 P.2d 679, 693 n.5 (Wyo. 1993).

79 Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 684 n.23 (2007) (citing Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W. L. Rev. 237, 247 tbl.4, 259 tbl.12 (1995)).

80 *See* State v. Maestas, 984 P.2d 376, 382 (Utah 1999); State v. Finlayson, 994 P.2d 1243, 1249 (Utah 2000).

81 *See* State v. Larrabee, 321 P.3d 1136, 1146 (Utah 2013); Gregg v. State, 279 P.3d 396 (Utah 2012); State v. Moore, 289 P.3d 487 (Utah 2012); State v. Ott, 247 P.3d 344 (Utah 2010); Housekeeper v. State, 197 P.3d 636 (Utah 2008); State v. Eyre, 179 P.3d 792 (Utah 2007); State v. Hales, 152 P.3d 321 (Utah 2007); Menzies v. Galetka, 150 P.3d 480 (Utah 2006); State v. Ekstrom, 316 P.3d 435, 444 (Utah Ct. App. 2013); State v. Charles, 263 P.3d 469 (Utah Ct. App. 2011); State v. Fowers, 265 P.3d 832 (Utah Ct. App. 2011); State v. Sellers, 248 P.3d 70 (Utah Ct. App. 2011); State v. King, 248 P.3d 984 (Utah Ct. App. 2010); State v. Moore, 223 P.3d 1137 (Utah Ct. App. 2009); State v. Perez-Avila, 131 P.3d 864 (Utah Ct. App. 2006).

82 State v. Washington, 68 P.3d 134 (Kan. 2003); State v. Carter, 14 P.3d 1138 (Kan. 2000); Mullins v. State, 46 P.3d 1222 (Kan. Ct. App. 2002).

83 Miller v. State, 318 P.3d 155, 164 (Kan. 2014); State v. Brooks, 305 P.3d 634, 636-37 (Kan. 2013); State v. Cheatham, 292 P.3d 318 (Kan. 2013); *In re* Ontiberos, 287 P.3d 855 (Kan. 2012); Albright v. State, 251 P.3d 52 (Kan. 2011); State v. Stovall, 312 P.3d 1271, 1273 (Kan. 2009); State v. Overstreet, 200 P.3d 427 (Kan. 2009); State v. Hemphill, 186 P.3d 777 (Kan. 2008); State v. Patton, 195 P.3d 753 (Kan. 2008); Laymon v. State, 122 P.3d 326 (Kan. 2005); State v. Davis, 85 P.3d 1164 (Kan. 2004); Wilson v. State, 340 P.3d 1213, 1230 (Kan. Ct. App. 2014); Shumway v. State, 293 P.3d 772 (Kan. Ct. App. 2013) King v. State, 154 P.3d 545 (Kan. Ct. App. 2007).

84 *See* State v. Thomas, 743 P.2d 816 (Wash. 1987) (en banc); State v. Tarica, 798 P.2d 296 (Wash. Ct. App. 1990); State v. Carter, 783 P.2d 589 (Wash. Ct. App. 1989); Matter of Frampton, 726 P.2d 486 (Wash. Ct. App. 1986).

85 *See In re* Brett, 16 P.3d 601 (Wash. 2001); *In re* Fleming, 16 P.3d 610 (Wash. 2001) (en banc); State v. Aho, 975 P.2d 512 (Wash. 1999); *In re* Maxfield, 945 P.2d 196 (Wash. 1997) (en banc); State v. Horton, 68 P.3d 1145 (Wash. Ct. App. 2003); State v. Shaver, 65 P.3d 688 (Wash. Ct. App. 2003); State v. Lopez, 27 P.3d 237 (Wash. Ct. App. 2001), *aff'd on other grounds*, 55 P.3d 609 (Wash. 2002); State v. Wicker, 20 P.3d 1007 (Wash. Ct. App. 2001); State v. S.M., 996 P.2d 1111 (Wash. Ct. App. 2000); State v. Klinger, 980 P.2d 282 (Wash. Ct. App. 1999); State v. Klinger, 980 P.2d 282 (Wash. Ct. App. 1999); State v. Saunders, 958 P.2d 364 (Wash. Ct. App. 1998); State v. Doogan, 917 P.2d 155 (Wash. Ct. App. 1996); State v. Stowe, 858 P.2d 267 (Wash. Ct. App. 1993).

86 *See In re* Morris, 288 P.3d 1140 (Wash. 2012) (en banc); State v. Cardwell, 257 P.3d 1114 (Wash. 2011); State v. Sandoval, 249 P.3d 1015 (Wash. 2011); State v. A.N.J., 225 P.3d 956 (Wash. 2010) (en banc); State v. Kyllo, 215 P.3d 177 (Wash. 2009) (en banc); State v. Sutherby, 204 P.3d 916 (Wash. 2009) (en banc); State v. Thiefault, 158 P.3d 580 (Wash. 2007) (en banc); *In re* Pers. Restraint Petition of Dalluge, 100 P.3d 279 (Wash. 2004) (en banc); *In re* Davis, 101 P.3d 1 (Wash. 2004) (en banc); *In re* Orange, 100 P.3d 291 (Wash. 2004) (en banc); State v. Reichenbach, 101 P.3d 80 (Wash. 2004) (en banc); State v. Fedoruk, 339 P.3d 233, 242 (Wash. Ct. App. 2014); State v. Hamilton, 320 P.3d 142 (Wash. Ct. App. 2014); State v. Hassan, 336 P.3d 99, 105 (Wash. Ct. App. 2014); *In re* D'Allesandro, 314 P.3d 744 (Wash. Ct. App. 2013); State v. Phuong, 299 P.3d 37 (Wash. Ct. App. 2013); *In re* Wilson, 279 P.3d 990 (Wash. Ct. App. 2012); State v. Martinez, 253 P.3d 445 (Wash. Ct. App. 2011); State v. Adamy, 213 P.3d 627 (Wash. Ct. App. 2009); *In re* Pers. Restraint Petition of Crawford, 209 P.3d 507 (Wash. Ct. App. 2009); State v. Powell, 206 P.3d 703 (Wash. Ct. App. 2009); State v. Smith, 223 P.3d 1262 (Wash. Ct. App. 2009); *In re* Dependency of G.A.R., 150 P.3d 643 (Wash. Ct. App. 2007); State v. Hendrickson, 158 P.3d 1257 (Wash. Ct. App. 2007), *aff'd on other grounds*, 198 P.3d 1029 (Wash. 2009); *In re* Hubert, 158 P.3d 1282 (Wash. Ct. App. 2007); State v. Horton, 146 P.3d 1227 (Wash. Ct. App. 2006); State v. Meckelson, 135 P.3d 991 (Wash. Ct. App. 2006); State v. Pittman, 166 P.3d 720 (Wash. Ct. App. 2006); State v. Saunders, 86 P.3d 232 (Wash. Ct. App. 2004).

87 California's successful ineffective assistance claims increased from six reported cases between 1993 and 2003 to fourteen reported cases between 2004 and 2014. *See In re* Hardy, 163 P.3d 853 (Cal. 2007); *In re* Lucas, 94 P.3d 477 (Cal. 2004); *In re* Sanders, 981 P.2d 1038 (Cal. 1999); *In re* Jones, 917 P.2d 1175 (Cal. 1996); *In re* Neely, 864 P.2d 474 (Cal. 1993); People v. Hussain, 179 Cal. Rptr. 3d 679, 686 (Ct. App. 2014); People v. Speight, 174 Cal. Rptr. 3d 454, 469 (Ct. App. 2014); *In re* Brown, 160 Cal. Rptr. 3d 822, 824 (Ct. App. 2013); People v. Smith, 152 Cal. Rptr. 3d 142 (Ct. App. 2013); *In re* Hill, 129 Cal. Rptr. 3d 856 (Ct. App. 2011); People v. Roberts, 125 Cal. Rptr. 3d 810 (Ct. App. 2011); People v. Peyton, 98 Cal. Rptr. 3d 243 (Ct. App. 2009); *In re* Edward S., 92 Cal. Rptr. 3d 725 (Ct. App. 2009); People v. Gayton, 40 Cal. Rptr. 3d 40 (Ct. App. 2006); People v. Le, 39 Cal. Rptr. 3d 146 (Ct. App. 2006); People v. Thimmes, 41 Cal. Rptr. 3d 925 (Ct. App. 2006); People v. Callahan, 21 Cal. Rptr. 3d 226 (Ct. App. 2004); People v. Donaldson, 113 Cal. Rept. 2d 548 (Ct. App. 2001); People v. Burnett, 83 Cal. Rptr. 2d 629 (Ct. App. 1999); People v. Denison, 79 Cal. Rptr. 2d 524 (Ct. App. 1998).

88 In Alabama, successful claims of ineffective assistance of counsel increased from five between 1993 and 2003, to twelve between 2004 and 2014. *See Ex parte* Pierce, 851 So. 2d 618 (Ala. 2002); State v. Ziegler, 159 So. 3d 96, 104 (Ala. Crim. App. 2014); Frost v. State, 76 So. 3d 862 (Ala. Crim. App. 2011); Stith v. State, 76 So. 3d 286 (Ala. Crim. App. 2011); State v. Gamble, 63 So. 3d 707 (Ala. Crim. App. 2010); State v. Smith, 85 So. 3d 1063 (Ala. Crim. App. 2010); Powers v. State, 38 So. 3d 764 (Ala. Crim. App. 2009); McCombs v. State, 3 So. 3d 950 (Ala. Crim. App. 2008); Nickens v. State, 981 So. 2d 1165 (Ala. Crim. App. 2007); Reeves v. State, 974 So. 2d 314 (Ala. Crim. App. 2007); State v. Hamlet, 913 So. 2d 493 (Ala. Crim. App. 2005); Bargeron v. State, 895 So. 2d 385 (Ala. Crim. App. 2004); Cobb v. State, 895 So. 2d 1044 (Ala. Crim. App. 2004); Strickland v. State, 771 So. 2d 1123 (Ala. Crim. App. 1999); Grace v. State, 683 So. 2d 17 (Ala. Crim. App. 1996); State v. Williams, 679 So. 2d 275 (Ala. Crim. App. 1996); Walker v. State, 684 So. 2d 170 (Ala. Crim. App. 1996).

89 Primus, *supra* note 79, at 684 n.23 (citing David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1, 2 (1973) ("[A] great many -- if not most -- indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment.")).

90 *See id.* (citing Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 234 (1973) (stating that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation" and some judges have even claimed that number is "as high as 75 percent")).

91 *See* Burger, *supra*, note 90 at 234.

92 *See supra* notes 80-88.

93 Kelly, *supra* note 42, at 1096.

94 *See supra* Part I.

95 Aaron K. Friess, *Soothsaying with a Foggy Crystal Ball: A Critique of the U.S. Supreme Court's Remedy for Ineffective Assistance of Counsel When a Criminal Defendant Rejects a Plea Bargain [*Lafler v. Cooper *, 132 S. Ct. 1376 (2012)]*, 52 Washburn L.J. 147, 168 (2012); *see also supra* notes 34-36.

96 *See* Primus, *supra* note 79, at 682 n.13; State v. Finlayson, 994 P.2d 1243, 1249 (Utah 2000); State v. Maestas, 984 P.2d 376, 382 (Utah 1999).

97 *See supra* note 79.

98 *See* Hendricks v. Calderon, 70 F.3d 1032, 1039-40 (9th Cir. 1995) ("To support this conclusion, Hendricks cites Berman's admission at the evidentiary hearing that he would have presented Dr. Carson's testimony in the guilt phase if he had done a more thorough investigation."); Boyle v. United States, No. 13 Cv. 7958(CM), 2014 WL 1744256, at *1 (S.D.N.Y. Apr. 28, 2014) ("Boyle's motion is supported by self-critical affidavits from his three trial attorneys: Marc Fernich, Martin Geduldig and Diarmuid White; each attorney falling on his sword -- claiming that the failure to pursue the statute of limitation defenses was not strategic, but oversight.").

99 *See* Pinholster v. Ayers, 590 F.3d 651, 701 n.10 (9th Cir. 2009) (Kozinski, J., dissenting) (describing the act of falling on one's sword as "something trial counsel are known to do to help their clients on habeas"), *rev'd sub nom.* Cullen v. Pinholster, 131 S. Ct. 1388 (2011); *see also* Schmitt v. State, 779 A.2d 1004, 1012 (Md. Ct. Spec. App. 2001) (criticizing defense counsel for "falling on his sword" and being "unduly self-abasing"); Becker v. State, 232 P.3d 376, 379 (Mont. 2010) (Nelson, J. concurring) ("Appellate counsel's gratuitously falling on his sword is self-serving...."); Commonwealth v. McSharry, 942 N.E.2d 1018 (Mass. App. Ct. 2011) (describing counsel's affidavit admitting ineffective assistance as "falling on his sword"); LaGrand v. Stewart, 133 F.3d 1253, 1276 (9th Cir. 1998) (discussing remedies for counsel who "in falling on his sword, had admitted he was ineffective").

100 Gideon, *The Sword: Fall on It*, Pub. Defender, (Dec. 1, 2014, 5:29 PM) http://apublicdefender.com/2010/10/05/the-sword-fall-on-it/ (advocating defense attorneys to admit ineffective assistance in order "to assist our clients in any way possible and to remedy any constitutional violation that occurs due to our mishandling of a case").

101 *See* Fox, *supra* note 47, at 1192 (encouraging defense counsel to admit wrongdoing "particularly when a recognition of one's failings may not only make one a better lawyer next time around but provide one's former client with an opportunity to escape a date with the executioner"); *see also* Jeff Gamso, *Especially When It's Hard: Falling on One's Sword*, Gamso - For Def., (July 16, 2014, 12:15 AM), http://gamso-forthedefense.blogspot.com/2014/07/especially-when-its-hard-falling-on.html (advocating that defense attorneys should "[f]all on their sword" and "fess up" when they have done "a terrible job").

102 *Pinholster*, 590 F.3d at 701 n.10.

103 *Id.*

104 *Id.*

105 *Id.*; *see also* Kelly, *supra* note 42, at 1089, 1092 ("In some of these cases, the defendant's trial or appellate counsel will furnish an affidavit essentially admitting the allegations, and equally disconcerting is the fact that the allegations, if true, reflect lawyering totally devoid of that high sense of public service described by Dean Pound" when he described the practice of law as "the pursuit of a learned art, a common calling in the spirit of public service, no less a public service because it is incidentally the means of a livelihood.").

106 *Pinholster*, 590 F.3d at 701 n.10.

107 People v. Henderson, 776 N.W.2d 906, 907 (Mich. 2010) (Corrigan, J., concurring).

108 Strickland v. Washington, 466 U.S. 668, 687 (1984).

109 Primus, *supra* note 79, at 686.

110 Burdine v. Johnson, 262 F.3d 336, 372 (5th Cir. 2001).

111 Gershman, *supra* note 41 at 560 ("A lawyer who is drunk or sleeping during a trial may be unable to render effective advocacy.").

112 Primus, *supra* note 79, at 686 (discussing many instances where defendants have claimed ineffective assistance).

113 *See Indigent Defense*, U.S. Dep't Just.: Off. Just. Programs ((Dec. 2011), http://ojp.gov/newsroom/factsheets/ojpfs_indigentdefense.html (citing a study that found that in 2007, 964 public defender offices nationwide received nearly 6 million indigent defense cases); *see also* Voigts, *supra* note 73, at 1119 ("Court-appointed lawyers are often under-experienced and over-burdened, and frequently the measures courts have adopted to address both those problems have not been particularly successful.").

114 Nikki A. Ott & Heather F. Newton, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 Geo. J. Legal Ethics 747, 752 (2003).

115 *Id.* at 753; *see also* Primus, *supra* note 79, at 732 ("Whatever the reason, members of the Bar seldom report instances of attorney misconduct.").

116 *See* Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 Geo. J. Legal Ethics 259, 285 (2003).

117 *See* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 Tex. L. Rev. 639, 649 (1981) ("Lawyers can hardly present their travesty of a penal system as an effective deterrent.").

118 Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 Iowa L. Rev. 119, 154 (2009).

119 Abel, *supra* note 117, at 648-49 (footnotes omitted).

120 Roberts, *supra* note 118, at 154 (discussing potential sanctions for alleged misconduct including sanctions "ranging from 'no action,' to private reprimand, to disbarment").

121 Utah State Bar, *supra* note 17, para. 16 ("The *Utah Bar Journal* publishes a monthly summary of all attorneys who have been professionally disciplined. I have reviewed those summaries for the past five years and cannot find a single instance in which a criminal defense lawyer was sanctioned because a court had concluded that he was ineffective under the Sixth Amendment.").

122 *See Office of Professional Conduct Frequently Asked Questions*, Utah St. B., http://www.utahbar.org/opc/office-of-professional-conduct-frequently-asked-questions/ (last visited Jan. 26, 2016) (complaints may be filed by a member of the public or by the Bar itself).

123 Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. Rev. 1, 43 (2002).

124 Roberts, *supra* note 118, at 154-55.

125 Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 Geo. J. Legal Ethics 1 (2007). While the number of complaints alleged against the 1.3 million lawyers in the United States far outnumbers the amount where the state bars actually impose sanctions, the fact that many thousands are sanctioned each year illustrates that the bar is not totally defunct.

126 David L. Dranoff, *Attorney Professional Responsibility: Competence Through Malpractice Liability*, 77 Nw. U. L. Rev. 633, 647 (1982) ("[B]oards generally refuse to conduct independent investigations, and instead rely almost exclusively on complaints as a basis for action. Because the boards take a passive role, the system is dependent on the existence of incentives for outside parties to file complaints.") (footnote omitted).

127 *Id.*

128 Primus, *supra* note 79, at 700 ("[V]ery few complaints get filed against trial attorneys in criminal cases. Judges and other lawyers rarely file complaints, and criminal defendants have little incentive to file them, particularly given that defendants are not compensated for lodging complaints.") (footnote omitted).

129 *See id.*; Dranoff, *supra* note 126, at 669 n.79 ("A Michigan study indicated that members of the legal profession filed 8.1% of complaints and that only 1.8% were filed by lawyers who were not involved in some sort of professional relationship with the respondent.").

130 Nix v. Whiteside, 475 U.S. 157, 165-66 (1986).

131 *See infra* Section IV.A; *see also* Ramseyer *ex rel.* Harris v. Blodgett, 853 F. Supp. 1239, 1254 (W.D. Wash. 1994), *aff'd sub nom.* Ramseyer *ex rel.* Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) (noting that ABA standards "are regularly used by courts as guidelines in determining whether an attorney's performance falls below reasonable professional standards").

132 Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (citing Bobby v. Van Hook, 558 U.S. 4, 7 (2009) (per curiam); Florida v. Nixon, 543 U.S. 175, 191 & n.6 (2004); Wiggins v. Smith, 539 U.S. 510, 524 (2003); Williams v. Taylor, 529 U.S. 362, 396 (2000)).

133 State v. Clay, 824 N.W.2d 488, 495 (Iowa 2012).

134 Alvord v. Wainwright, 469 U.S. 956, 960 (1984); *see also* State v. Vance, 790 N.W.2d 775, 785 (Iowa 2010) ("The Supreme Court indicates the American Bar Association standards and like documents reflect the prevailing norms of practice."); Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides.").

135 *See* Paul V. Vapnek et al., California Practice Guide: Professional Responsibility Ch. 6-G (2015); *Harris*, 853 F. Supp. at 1254 ("These standards are regularly used by courts as guidelines in determining whether an attorney's performance falls below reasonable professional standards.").

136 *Clay*, 824 N.W.2d at 502.

137 *Smith*, 539 U.S. at 522.

138 People v. Jones, 111 Cal. Rptr. 3d 745, 761 (Ct. App. 2010).

139 Wheat v. United States, 486 U.S. 153, 159-60 (1988).

140 People v. Cropper, 152 Cal. Rptr. 555, 557 (Ct. App. 1979).

141 *In re* Seelig, 850 A.2d 477, 490 (N.J. 2004) ("The Supreme Court held that a criminal defendant's right to assistance of counsel does not include the right to cooperation in the commission of perjury in violation of the ethical standards established by states to govern attorney conduct.").

142 State v. Vance, 790 N.W.2d 775, 786 (Iowa 2010) ("In our own analysis of whether counsel was ineffective, we have relied on our Code of Professional Responsibility for Lawyers to measure counsel's performance.").

143 People v. DeFreitas, 630 N.Y.S.2d 755, 759 (App. Div. 1995).

144 State v. Clay, 824 N.W.2d 488, 502 (Iowa 2012).

145 *See* Roberts, *supra* note 118, at 161 n.174 (quoting John H. Blume & Stacey D. Neumann, *"It's Like Déjà Vu All Over Again": Williams v. Taylor , Wiggins v. Smith and* Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 Am. J. Crim. L. 127, 159 (2007)).

146 Model Rules of Prof'l Conduct r. 1.1 (Am. Bar Ass'n 2015).

147 *Id.*

148 *Id.* cmt. [5]. While the official comments are not authoritative, they do offer additional insight into the intent of the drafts of the Model Rules.

149 *Id.*

150 State *ex rel.* Okla. Bar Ass'n v. Young, 175 P.3d 371, 377 (Okla. 2007).

151 *In re* Discipline of Peirce, 128 P.3d 443, 445 (Nev. 2006), *reinstatement granted sub nom. In re* Reinstatement of Peirce, No. 62091, 2014 WL 4804214 (Nev. Sept. 24, 2014).

152 *In re* Disciplinary Action against Wolff, 810 N.W.2d 312, 315 (Minn. 2012).

153 *Id.*

154 *In re* Boyce, 613 S.E.2d 538, 539-40 (S.C. 2005).

155 *In re* Hawver, 339 P.3d 573, 577 (Kan. 2014). The attorney was also incompetent for various other reasons, including that the attorney told the jury that they ought to execute the killer. *See id.* at 578.

156 *Id.*

157 *Id.*

158 Baker v. Ky. Bar Ass'n, 935 S.W.2d 612, 613 (Ky. 1996).

159 *In re* Bash, 880 N.E.2d 1182, 1183 (Ind. 2008). The court further stated that this was "because of his lack of understanding of fundamental requirements for obtaining post-conviction relief. As a result, his client may have lost a potentially meritorious challenge to his confinement conviction." *Id.* at 1184.

160 *In re* Wolfram, 847 P.2d 94, 96 (Ariz. 1993). The attorney also failed to interview witnesses, read the transcript of the grand jury proceeding that resulted in his client's indictment, interview prospective witnesses disclosed in the police reports, consult with his client on whether the case should go to the jury on lesser included offenses, and challenge venire persons who stated that they would be uncomfortable sitting as a juror in a child abuse case. *Id.*

161 Matter of Murray, 709 P.2d 530, 532 (Ariz. 1985).

162 *In re* Pankowski, 947 A.2d 1122 (Del. 2007), *reinstatement granted*, 956 A.2d 642 (Del. 2008). Counsel also failed to meet with the defendant before filing the motion and did not investigate the defendant's medical condition. *Id.*

163 Strickland v. Washington, 466 U.S. 668, 688 (1984) (emphasis added).

164 *See, e.g.*, Harvey v. Warden, Union Corr. Inst., 629 F.3d 1228, 1243 (11th Cir. 2011) ("An attorney's actions are sound trial strategy, and thus effective, if a reasonable attorney could have taken the same actions.").

165 *See supra*, Section IV.A.

166 Padilla v. Kentucky, 559 U.S. 356, 367 (2010) (internal citation omitted).

167 Model Rules of Prof'l Conduct r. 1.1.

168 Ellen Henak, *When the Interests of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims*, 33 Am. J. Trial Advoc. 347, 356 (2009).

169 *See* Nix v. Whiteside, 475 U.S. 157, 165 (1986) ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.").

170 Smith v. State, 243 S.W.3d 722, 724 (Tex. App. 2007).

171 *Id.*

172 *Id.*

173 *Id.* at 725.

174 Strickland v. Washington, 466 U.S. 668, 689 (1984) ("Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.").

175 Kelly, *supra* note 42, at 1093.

176 *Id.*

177 Ramirez v. United States, 17 F. Supp. 2d 63, 66 (D.R.I. 1998), *aff'd*, 187 F.3d 622 (1st Cir. 1999) ("It is the government, not the defense attorney, who suffers adverse consequences when a defendant's conviction is vacated due to 'ineffective assistance.'").

178 Utah State Bar, *supra* note 17; *see also* Henak, *supra* note 168, at 371 (stating that the "former lawyer is only a witness, and witnesses do not really 'belong' to any one particular party or side of a case").

179 Utah State Bar, *supra* note 17.

180 *In re* Wolfram, 847 P.2d 94, 105 (Ariz. 1993).

181 *See* Model Rules of Prof'l Conduct r. 8.3.

182 *See infra* notes 183?85

183 Ariz. R. Crim. P. 32.8(c).

184 *Wolfram*, 847 P.2d at 98 n.4.

185 *See, e.g.*, *In re* Collins, 288 P.3d 847, 854 (Kan. 2012) ("Attorney misconduct must be established by clear and convincing evidence."); State *ex rel.* Okla. Bar Ass'n v. Zimmerman, 276 P.3d 1022, 1027 (Okla. 2012) ("Before discipline is imposed, misconduct must be demonstrated by clear and convincing evidence."); Fla. Bar v. Forrester, 916 So. 2d 647, 651 (Fla. 2005) ("Given this fact, we agree with the Bar that the appropriate standard of proof is that which is applicable to attorney disciplinary proceedings in general, clear and convincing evidence."); *In re* Discipline of Lerner, 197 P.3d 1067, 1075 (Nev. 2008) ("[T]o support a rule violation, clear and convincing evidence must support a finding...."). *But see* Ky. Bar Ass'n v. Craft, 208 S.W.3d 245, 262 (Ky. 2006) ("[T]he burden of proof shall rest upon the Association in a disciplinary proceeding, and the facts must be proven by a preponderance of the evidence.") (citation omitted); Office of Disciplinary Counsel v. Cappuccio, 48 A.3d 1231, 1236 (Pa. 2012) ("In attorney disciplinary proceedings, the [Office of Disciplinary Counsel] bears the burden of establishing attorney misconduct by a preponderance of the evidence.").

186 *Wolfram*, 847 P.2d at 106.

187 For example, see Utah Courts. Judicial Council Rules Judicial Administration Rule 14-607, https://www.utcourts.gov/resources/rules/ucja/view.html?rule=ch14/06%20Standards%C20for%C20Lawyer%20Sanctions/USB14-607.html, which states that "[a]fter misconduct has been established, aggravating and mitigating circumstances may be considered and weighed in deciding what sanction to impose." But again, those mitigating factors are considered after the court has determined that a violation has occurred.

188 Mohammed v. Gonzales, 400 F.3d 785, 793 (9th Cir. 2005) (stating that "[a]lthough there is no Sixth Amendment right to counsel in a deportation proceeding, the due process guarantees of the Fifth Amendment 'still must be afforded to an alien petitioner.'" (quoting Singh v. Ashcroft, 367 F.3d 1182, 1186 (9th Cir. 2004))).

189 *Compare* Maravilla v. Ashcroft, 381 F.3d 855, 858 (9th Cir. 2004) (holding that to establish ineffective assistance under the Fifth Amendment petitioners must (1) "demonstrate that counsel [failed to] perform with sufficient competence" and (2) "show that they were prejudiced by their counsel's performance") (internal citation omitted), *with* Strickland v. Washington, 466 U.S. 668, 687 (1984). The prejudice prong of the Fifth Amendment right is slightly different than *Strickland*'s in that under the Fifth Amendment all that

has been required is that the "performance of counsel was so inadequate that it *may* have affected the outcome of the proceedings." Ortiz v. I.N.S., 179 F.3d 1148, 1153 (9th Cir. 1999) (emphasis added).

190 *See* Padilla v. Kentucky, 559 U.S. 356, 385 (2010) (citing *Strickland*, 466 U.S. at 686).

191 *Mohammed*, 400 F.3d at 793 (citation omitted).

192 *Id.*

193 Lozada, 19 I. & N. Dec. 637, 639 (B.I.A. 1988), *overruled by* Compean, 25 I. & N. Dec. 1, 1 (B.I.A. 2009); *see also* 8 C.F.R. § 208.4 (2015); Debeatham v. Holder, 602 F.3d 481, 484 (2d Cir. 2010). It is important to note that not all circuits have required exact compliance with these rules. *See* Castillo-Perez v. I.N.S., 212 F.3d 518, 525 (9th Cir. 2000) ("[F]ailure to comply with *Lozada* requirements is not necessarily fatal to a motion to reopen."); Rojas-Garcia v. Ashcroft, 339 F.3d 814, 824-25 (9th Cir. 2003) (holding that an ineffective assistance of counsel claim may "go forward when there is substantial compliance with *Lozada* such that the purpose of *Lozada* is 'fully served by other means.'") (citation omitted). *But see* Henton v. U.S. Att'y. Gen., 520 F. App'x 801, 805 (11th Cir. 2013) ("We have held that all three of *Lozada*'s procedural requirements must be satisfied.").

194 *Lozada*, 19 I. & N. Dec. at 639.

195 *Id.*

196 *See Henton*, 520 F. App'x at 804; Pepaj v. Mukasey, 509 F.3d 725, 727 (6th Cir. 2007) ("An alien who fails to comply with *Lozada*'s requirements forfeits her ineffective-assistance-of-counsel claim.").

197 *See* 8 C.F.R. § 208.4(a)(5)(iii).

198 *Compean*, 25 I. & N. Dec. at 2 (stating that courts have "acknowledged that the *Lozada* framework had largely stood the test of time, having been expressly reaffirmed by the Board 15 years after its initial adoption") (internal citation omitted).

199 *Pepaj*, 509 F.3d at 727 (quoting *Lozada*, 19 I. & N. Dec. at 639-40).

200 *Supra* notes 75-79.

201 *Supra* notes 75-79.

202 *Supra* Part II.

203 Model Rules of Prof'l Conduct r. 8.3.

204 Model Code of Judicial Conduct r. 2.15.

205 *Id.*

206 Kelly, *supra* note 42, at 1094-95 ("Under the Model Code of Judicial Conduct and the Model Rules of Professional Conduct, the judge and the lawyer have a duty to inform the appropriate professional disciplinary authority when either knows that a practitioner is not fit to practice. All of us must be cognizant of our professional duty to assist in and improve the legal system.") (footnote omitted).

207 Model Rules of Prof'l Conduct r 8.3.

208 *Id.* cmt. 3.

209 Gerard E. Lynch, *The Lawyer as Informer*, 1986 Duke L.J. 491, 539 (1986) ("The more serious the violation, the more likely it is that people will universally agree that there is a moral duty to report it.").

210 Strickland v. Washington, 466 U.S. 668, 689 (1984).

211 State v. Vance, 790 N.W.2d 775, 785 (Iowa 2010) (quoting *Strickland*, 466 U.S. at 687).

212 *Supra* Section III.C.

213 *See* People v. Henderson, 776 N.W.2d 906, 907 (Mich. 2010) (Corrigan, J., concurring) ("Further, referral to the AGC in these cases avoids encouraging attorneys to use this Court to correct for their own ineffective representation at the Court of Appeals.").

214 *In re* Hawver, 339 P.3d 573, 591 (Kan. 2014).

a1 J.D., April 2015, J. Reuben Clark Law School, Brigham Young University. The author would like to thank Daniel McConkie and Ryan Tenney for their assistance with this article.

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