

ATTORNEY'S RIGHT TO A BENCH TRIAL IN LEGAL MALPRACTICE CASES

**BY
PHILLIP E. SELTZER ***

While most attorneys stand steadfastly by a code of ethics, there's no denying the powerful negative perception of attorneys. Public comment for the "legal process" grew palpable during the O.J. Simpson criminal trial. Too often, lawyers are viewed as hired guns, prepared to go to any extent to defend a client.

In today's popular culture, lawyers continue to be vilified in the movie industry and the media. From a Jurassic Park dinosaur gobbling up the sniveling lawyer cowering in the mens room, to the latest lawyer joke that usually places rattlesnakes, rats or other lowly creatures in a higher pantheon of respect, lawyers continue to suffer a negative public image.

In legal malpractice suits, plaintiffs hope to exploit such anti-lawyer prejudices to a lay jury--all of whom carry the baggage of our popular culture, to one degree or another, into the jury deliberation room. Although a defense attorney will try to ascertain anti-lawyer prejudice during the jury selection process and attempt to remove the more virulently prejudiced jurors, such a process is often hit and miss. Many individuals will conceal real animosity or fail to confront it until they are in a jury room deliberating the case. Given the limitations by some courts with regard to the extent to which lawyers are permitted to question and challenge prospective jurors during *voir dire*, a defense counsel's ability to discover and remove prejudiced jurors is often limited. A judge, on the other hand, may be more neutral in his views concerning "lawyers," in light of his or her daily professional pursuits in dealing with attorneys and in recognizing the problems that they face in prosecuting and defending actions, civil or criminal.

When a lawyer gets sued, therefore, it is critical to determine whether the lawyer has a right to avoid a jury trial altogether and insist on a bench trial of the malpractice claims. Recent rulings by the Michigan Supreme Court and Michigan Court of Appeals underscore that there may be a significant number of cases that can only be tried by a judge, not a jury. While not all malpractice cases mandate a bench trial, today's careful practitioner should become familiar with these cases and a recent trend in the country to require certain malpractice actions to be tried by a judge.

* ***PHILLIP E. SELTZER, a Principle Equity Partner at the law firm of Lipson, Neilson, Cole, Seltzer & Garin, P.C. in Bloomfield Hills, Michigan, defends lawyers in legal malpractice cases and represents insurers in coverage disputes.***

In Charles Reinhart Co v Winiemko, 444 Mich 579 513 NW2d 773 (1993), the Michigan Supreme Court was asked to rule on a claim that an attorney failed to properly initiate an appeal. The plaintiff contended that if its attorney would have filed a timely appeal, then the outcome of the case would have been more favorable. The Winiemko Court had to determine whether this proximate cause issue should be decided by a judge or jury in the malpractice case, i.e., to determine whether a juror should be asked to serve as a reasonable appellate judge to rule on the merit of appeal, an issue traditionally decided only by an expert judge.

The Michigan Supreme Court held that the question of proximate cause in the context of alleged appellate malpractice is a question of law for the trial judge, not a question of fact for the jury in the malpractice case. The court reasoned that the question of whether an appeal would have been successful depends on an analysis of the law and procedural rules -- something a judge is clearly in a better position to evaluate than lay jurors. Resolving legal issues on appeal is an area exclusively within the province of judges, and a court is qualified in a way that a jury is not to determine the merits and probable outcome of an appeal. In so ruling, the Michigan Supreme Court stated:

(W)e hold that the question of whether a court or a jury should determine whether the underlying appeal would have been successful is reserved to the court because whether an appeal would have been successful intrinsically involves issues of law within the exclusive province of the judiciary. 444 Mich at 608.

The Winiemko court specifically held that having the trial judge make the proximate cause determination did not deprive the litigant of any “right to a jury trial.”

At no time has the right to a jury trial in any fashion been understood to displace the authority and duty of the judiciary to determine legal issues. For as long as the right to a jury has been recognized, the exclusive province of the court to rule on matters of law has been acknowledged Hence, the right to a jury trial is in no manner infringed when the court proceeds to evaluate the legal merits of an underlying appeal in a legal malpractice action alleging negligence in the pursuit of the appeal. 444 Mich at 607.

Since Winiemko, the Michigan Court of Appeals applied the same reasoning in upholding a judge’s determination of damages in an alleged malpractice case involving an attorney’s failure to accept a mediation award in a timely manner. In Dean v Tucker, 205 Mich App 547, 517 NW2d 835 (1994), the court ruled “...because the decision to award mediation sanctions **intrinsically involves issues of law within the exclusive province of the courts**, we believe that the issue of plaintiff’s damages, i.e., the mediation sanctions, was one to be resolved by a trial court, not the jury.”

The Winiemko and Dean rulings could be applied to any issue that a trial judge, as opposed to a jury, would traditionally resolve in the underlying matter making up the legal malpractice claim. For example, cases involving purely equitable issues, family law cases, declaratory judgment cases and virtually any case tried before an administrative tribunal where the right to a jury trial does not exist.

Other states have also recognized that certain issues relating to proximate cause should be determined by a judge where the underlying case would have required a determination by a judge in the first instance. For example, in Harline v Barker, 912 P2D 433 (Utah 1996), the Supreme Court of Utah held that it was inappropriate for a jury in a legal malpractice proceeding to decide a proximate cause issue that would have been determined by the bankruptcy proceeding to decide a proximate cause issue that would have been determined by the bankruptcy law judge:

We see no reason why a malpractice plaintiff should be able to bootstrap his way into having a lay jury decide the merits of the underlying "suit within a suit" when, by statute or other rule of law, only an expert judge could have made the underlying decision. It is illogical, in effect, to make a change in the law's allocation of responsibility between judge and jury and the underlying action when that action is revisited in legal malpractice actions and thereby distort the "suit within a suit" model It makes far more practical sense to apply the rule that if the underlying case could have been tried by the judge, then this aspect of the malpractice claim -- the "suit within a suit" -- must likewise be tried by a judge. Id. at 440.

This judicial reasoning could be applied to a wide spectrum of legal issues traditionally determined by a trial judge in the underlying action. For instance, in divorce cases where judges essentially sit in equity and determine division of marital property, child custody issues and other issues. All such cases should be the subject of a bench trial in a subsequent legal malpractice case. See e.g., McLeod v Fechtel 821 F2D 1388 (CA9 1987) (issue of how "reasonable judge" would have divided marital property in underlying divorce case raised question of law for judge, not jury).

In the last decade, malpractice cases have mushroomed. The unspoken rule that one would not speak badly of one's brethren has been discarded. Regardless of profession, everyone is fair game for a malpractice suit.

For their part, attorneys should learn more about how to protect themselves against a legal malpractice suit. Attend seminars and seek the advice of legal malpractice insurers who provide "peer review" services and assist law offices in adopting internal procedures to help prevent malpractice cases.

However, if the worst happens and a malpractice suit is filed, an attorney should

identify those issues in the underlying case that “inherently involve issues of law within the exclusive province of the courts.” In such circumstances, to the extent the alleged malpractice arises out of such issues, the matter will generally be one to be resolved by a trial court, not a jury, in the legal malpractice case.

PHILLIP E. SELTZER, a partner at the law firm of Lipson, Neilson, Cole, Seltzer & Garin, P.C. in Troy, Michigan, defends lawyers in legal malpractice cases and represents insurers in coverage disputes.