8.11 ATTORNEY MALPRACTICE – CASE WITHIN A CASE (CIVIL)

The defendant was the plaintiff’s attorney in a prior case. The plaintiff claims that [he] [she] [it] was harmed because the defendant was negligent in that representation.

To find that the plaintiff is entitled to recover, you must decide that it is more likely true than not true that:

(1) the defendant was negligent in the prior case;

(2) the defendant’s negligence was a legal cause of the plaintiff's harm; and

(3) the plaintiff was actually harmed.

I will now define negligence and legal cause for you and tell you how to determine actual harm.

An attorney is negligent in the representation of a client if the attorney fails to use the skill, prudence, and diligence that other attorneys commonly possess and would exercise under similar circumstances.

A legal cause of harm is an act or failure to act which is a substantial factor in bringing about the harm. An act or failure to act is a substantial factor in bringing about harm if it is more likely true than not true that:

(1) the act or failure to act was so important in bringing about the harm that a reasonable person would regard it as a cause and attach responsibility to it; and

(2) the harm would not have occurred but for the act or failure to act.

To determine whether there was actual harm, you must decide whether the plaintiff would have received more favorable results in the prior case if the defendant had not been negligent. [You have heard expert testimony on this issue.] [Thus, you must decide the outcome of that case as if you were the jury in that case. I will give you instructions later which will tell you how to determine what the outcome of that case would have been.]

# Use Note

This instruction is intended for cases in which the plaintiff alleges that the defendant attorney committed malpractice in connection with the attorney's representation of the client in civil litigation.

Instruction 8.11 states the elements of a malpractice claim, and it defines negligence and legal cause. If this instruction is given, do not give Instructions 3.01, 3.03A, or 3.06, or Instruction 8.10.

The choice of bracketed language depends upon whether the trial court adopts the "trial-within-a-trial" approach, or an approach based on the use of expert testimony. The first bracketed language should be used when the trial judge allows expert testimony as to the likely result. The second bracketed language should be used when the trial judge adopts the "trial-within-a-trial" approach. See discussion below.

# Comment

When a client alleges attorney malpractice in the conduct of litigation, one method of proving the claim is the so-called "trial-within-a-trial" approach, in which the plaintiff must prove what the outcome of the trial would have been, absent the attorney's malpractice. See, e.g., BAJI 6.37.5 (1997 Revision) (requiring proof that the attorney's negligence was a cause of the client's loss of the prior lawsuit, and that proper handling of the prior lawsuit would have resulted in a collectible judgment, or a successful defense) (based on Mattco Forge, Inc. v. Arthur Young & Co., 60 Cal. Rptr. 2d 780, 795 (Cal. App. 1997)).

The Alaska Supreme Court has not expressly adopted the "trial-within-a-trial" approach, and the Court has indicated that in an attorney malpractice case, the trial judge was "not necessarily constrained to use [the trial-within-a-trial approach]." Power Constructors, Inc. v. Taylor & Hintze, 960 P.2d 20, 30 (Alaska 1998). Nevertheless, in Power Constructors, the Court found no error in the trial court's use of a "trial-within-a-trial" instruction. Moreover, the Court acknowledged that in two prior cases, the Court had "approvingly mentioned" the "trial-within-a-trial" approach. Id. (citing Shaw v. State, 861 P.2d 566 (Alaska 1993) and Diamond v. Wagstaff, 873 P.2d 1286 (Alaska 1994)). In a footnote, the Court mentioned another approach, in which an expert witness may be permitted to testify about the probable outcome of the litigation if handled competently. Power Constructors, 960 P.2d at 30 n.11.

The bracketed language at the end of Instruction 8.11 provides options for instructing the jury as to either the trial-within-a-trial approach, or an approach that permits the jury to rely on expert testimony.