8.12 ATTORNEY MALPRACTICE – CASE WITHIN CASE (CRIMINAL)

The defendant was the plaintiff’s attorney in a prior case. The plaintiff claims that [he] [she] was convicted of a crime 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; and

(2) the defendant’s negligence was a legal cause of the plaintiff's conviction.

I will now define negligence for you and tell you how to determine whether the defendant’s negligence was a legal cause of the plaintiff’s conviction.

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.

To prove that the defendant’s negligence was a legal cause of [his] [her] conviction, the plaintiff must prove that it is more likely true than not true that, but for the defendant’s negligence, the jury would not have found the plaintiff guilty beyond a reasonable doubt. [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 for use in an attorney malpractice case where plaintiff claims to have been convicted of a criminal offense due to the professional negligence of defendant. It is an omnibus instruction which incorporates the elements of negligence, definition of attorney negligence, definition of legal cause, and should be used in place of instructions 3.01, 3.06, and 8.10 in cases where plaintiff was convicted after trial.

The bracketed section accommodates the alternative methods of proof. The first bracketed language should be used when the court allows expert testimony as to the reasonably probable result in the prior case. The second bracketed language should be used when the court allows the case-within-a-case approach.

# Comment

Shaw v. State, 861 P.2d 566, 573 (Alaska 1993), held that a criminal defendant whose conviction is overturned may maintain an action against the defense attorney for malpractice. The court explained the elements of proof for plaintiff and defendant in such an action. Id. at 573. The plaintiff must prove his or her “legal innocence,” meaning that “but for the negligence of his attorney, the jury could not have found him guilty.” Id. The defendant may raise, as an affirmative defense, the plaintiff’s “actual guilt,” meaning that the plaintiff engaged in the criminal conduct charged in the underlying criminal proceeding. Id. at 570 n.3 & 573. In proving legal innocence, the plaintiff is limited to the procedural and evidentiary rules applicable to criminal proceedings and trials, but the defendant is not so limited. Id. at 573. The defendant is free to use “all confidential communications, as well as otherwise suppressible evidence of factual guilt.” Id. Both the claim and the affirmative defense must be proved by a preponderance of the evidence. Id.

This instruction may not be appropriate in a case in which the plaintiff is arguing that he or she would have been convicted of a lesser offense but for the attorney's negligence. See Howarth v. State*,* 925 P.2d 1330, 1336 (Alaska 1996).

The committee omitted the element of proof of actual harm because a conviction would be actual harm in and of itself. The first prong of the substantial factor test in Instruction 3.06 was also omitted. If the plaintiff proved that the conviction would not have occurred but for the defendant's negligent conduct, reasonable people would attach responsibility to that conduct. See Shaw, 861 P.2d at 573.

Shawdicta also suggests that the trial-within-a-trial approach is mandatory. 861 P.2d at 573 (“Shaw, as most civil malpractice plaintiffs, will have to present a ’trial within a trial.’”) (Citation Omitted.) But in a more recent decision, the court stated that the approach has never been formally adopted, and that the trial court has discretion regarding its use. Power Constructors, Inc. v. Taylor & Hintze, 960 P.2d 20, 30 (Alaska 1998) (“Given that we have never formally embraced the approach, the trial court was not necessarily constrained to use it.”). The bracketed language of the instruction is consistent with the trial court’s discretion to choose the trial-within-a-trial approach or to limit proof to expert testimony.