Chapter 4

Duty of Care

1. Competence, Diligence, & Communication

Model Rules of Professional Conduct

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment:

Legal Knowledge and Skill

1. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

2. A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

3. In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for illconsidered action under emergency conditions can jeopardize the client's interest.

4. A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

5. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

6. Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

7. When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

8. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 2.2: Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

2. Malpractice

The term "legal malpractice" is sometimes used generally to refer to any claim against an attorney for breach of fiduciary duty, and sometimes more specifically for claims involving the duty of care. The elements of such claims are similar to other torts: the existence of a duty, breach of the duty, and harm caused by the breach. In claims based on the duty of care, the standard of liability is negligence, i.e. failure to exercise the degree of care of a reasonably prudent attorney under similar circumstances. In contrast, attorneys may be strictly liable for breaching the duties of loyalty, impartiality, or confidentiality.

Rest. (2d) of the Law Governing Lawyers

§ 48: Professional Negligence—Elements and Defenses Generally

In addition to the other possible bases of civil liability described in §§ 49, 55, and 56, a lawyer is civilly liable for professional negligence to a person to whom the lawyer owes a duty of care within the meaning of § 50 or § 51, if the lawyer fails to exercise care within the meaning of § 52 and if that failure is a legal cause of injury within the meaning of § 53, unless the lawyer has a defense within the meaning of § 54.

§ 49: Breach of Fiduciary Duty—Generally

In addition to the other possible bases of civil liability described in §§ 48, 55, and 56, a lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty to the client set forth in § 16(3) and if that failure is a legal cause of injury within the meaning of § 53, unless the lawyer has a defense within the meaning of § 54.

§ 50: Duty of Care to a Client

For purposes of liability under § 48, a lawyer owes a client the duty to exercise care within the meaning of § 52 in pursuing the client's lawful objectives in matters covered by the representation.

§ 51: Duty of Care to Certain Nonclients

For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

(1) to a prospective client, as stated in § 15;

(2) to a nonclient when and to the extent that:

(a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and

(b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;

(3) to a nonclient when and to the extent that:

(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

(b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

(4) to a nonclient when and to the extent that:

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

(c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

§ 52: The Standard of Care

(1) For purposes of liability under §§ 48 and 49, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.

(2) Proof of a violation of a rule or statute regulating the conduct of lawyers:

(a) does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty;

(b) does not preclude other proof concerning the duty of care in Subsection (1) or the fiduciary duty; and

(c) may be considered by a trier of fact as an aid in understanding and applying the standard of Subsection (1) or § 49 to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim.

§ 53: Causation and Damages

A lawyer is liable under § 48 or § 49 only if the lawyer's breach of a duty of care or breach of fiduciary duty was a legal cause of injury, as determined under generally applicable principles of causation and damages.

§ 54: Defenses; Prospective Liability Waiver; Settlement with a Client

(1) Except as otherwise provided in this Section, liability under §§ 48 and 49 is subject to the defenses available under generally applicable principles of law governing respectively actions for professional negligence and breach of fiduciary duty. A lawyer is not liable under § 48 or § 49 for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule.

(2) An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable.

(3) The client or former client may rescind an agreement settling a claim by the client or former client against the person's lawyer if:

(a) the client or former client was subjected to improper pressure by the lawyer in reaching the settlement; or

(b) (i) the client or former client was not independently represented in negotiating the settlement, and (ii) the settlement was not fair and reasonable to the client or former client.

(4) For purposes of professional discipline, a lawyer may not:

(a) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(b) settle a claim for such liability with an unrepresented client or former client

without first advising that person in writing that independent representation is appropriate in connection therewith.

§ 55: Civil Remedies of a Client Other Than for Malpractice

(1) A lawyer is subject to liability to a client for injury caused by breach of contract in the circumstances and to the extent provided by contract law.

(2) A client is entitled to restitutionary, injunctive, or declaratory remedies against a lawyer in the circumstances and to the extent provided by generally applicable law governing such remedies.

§ 56: Liability to a Client or Nonclient Under General Law

Except as provided in § 57 and in addition to liability under §§ 48-55, a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances.

§ 57: Nonclient Claims—Certain Defenses and Exceptions to Liability

(1) In addition to other absolute or conditional privileges, a lawyer is absolutely privileged to publish matter concerning a nonclient if:

(a) the publication occurs in communications preliminary to a reasonably anticipated proceeding before a tribunal or in the institution or during the course and as a part of such a proceeding;

(b) the lawyer participates as counsel in that proceeding; and

(c) the matter is published to a person who may be involved in the proceeding, and the publication has some relation to the proceeding.

(2) A lawyer representing a client in a civil proceeding or procuring the institution of criminal proceedings by a client is not liable to a nonclient for wrongful use of civil proceedings or for malicious prosecution if the lawyer has probable cause for acting, or if the lawyer acts primarily to help the client obtain a proper adjudication of the client's claim in that proceeding.

(3) A lawyer who advises or assists a client to make or break a contract, to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not liable to a nonclient for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client's objectives without using wrongful means.

§ 58: Vicarious Liability

(1) A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.

(2) Each of the principals of a law firm organized as a general partnership without limited liability is liable jointly and severally with the firm.

(3) A principal of a law firm organized other than as a general partnership without limited liability as authorized by law is vicariously liable for the acts of another principal or employee of the firm to the extent provided by law.

Model Rules of Professional Conduct

Rule 1.8: Current Clients: Specific Rules

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981)

SCOTT, Justice.

This is an appeal from an order of the Hennepin County District Court in a legal malpractice action brought by the surviving joint tenant against the attorney who drafted the deed. By that order the trial court granted respondent Robert Greenberg's motion for summary judgment on the grounds that plaintiff could not bring the action absent an attorney-client relationship and that the six-year statute of limitations barred the action since the statutory period began to run in 1973 when the alleged negligence occurred. We affirm.

For purposes of this appeal, the facts are uncontested. Appellant's father, Theodore Marker, retained respondent, an attorney, for estate planning services. In December 1972 respondent prepared a will for appellant's father. In August 1973, on behalf of appellant's father, respondent drafted deeds which conveyed certain real estate to appellant's father and appellant as joint tenants.

Appellant's father died on December 24, 1977. Because the real estate in question was held by appellant and his father as joint tenants, its entire value, $120,000, was included in the decedent's gross estate for tax purposes.

Appellant asserts that, if he and his father had held the real estate as tenants in common, $20,858.18 in federal and state taxes would have been saved. Appellant commenced this action to recover the amount of the additional estate taxes, claiming the loss resulted from respondent's negligence in not having the real estate conveyed into tenancy in common.

Appellant was never a client of respondent. Appellant does not allege that he was a beneficiary of his father's estate with respect to this property, but that he was a surviving joint tenant.

The trial court granted summary judgment in favor of the respondent and dismissed the complaint. Therefore, the issue arises as to whether a surviving joint tenant has a cause of action for malpractice against the attorney who drafted the joint tenancy deeds when the surviving joint tenant was never a client of the attorney.

The general rule in legal malpractice is that an attorney is liable for professional negligence only to a person with whom the attorney has an attorney-client relationship and not, in the absence of special circumstances such as fraud or improper motive, to anyone else. Courts have recognized exceptions, however, where strict privity is not required. Exceptions are frequently found in cases involving drafting or executing a will.

Many courts have followed the lead of the California Supreme Court, which declared in *Lucas v. Hamm*, that an intended beneficiary may bring an action for legal malpractice against the decedent's attorney where the attorney's negligent act caused the named beneficiary to lose the intended bequest.

The relaxation of the strict privity requirement is very limited, however. Especially in probate proceedings, this stringent restriction is a necessity to prevent a myriad of causes of action. The will cases listed above which follow *Lucas v. Hamm* are all situations in which the attorney by his actions produced an instrument that failed to carry out the testamentary intent of the testator, either by faulty drafting or by improper attestation. The cases extending the attorney's duty to non-clients are limited to a narrow range of factual situations in which the client's sole pur-

pose in retaining an attorney is to benefit directly some third party. As stated by the Iowa Supreme Court in *Brody v. Ruby*, "It is clear, however, that the third party, in order to proceed successfully in a legal malpractice action, must be a direct and intended beneficiary of the lawyer's services."

In determining the extent of an attorney's duty to a non-client, courts frequently consider the factors expressed by the *Lucas* court:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.

Applying these factors to the deed drafted by respondent for appellant's father reveals that the respondent owed no duty to appellant. This is not a case where the property did not pass to the intended recipient upon the death of the testator. The deed was effective at the time it was recorded in 1973. There was no invalidity in the deed. Appellant does not allege that the disposition of the property was contrary to the intent of his father. The benefit which Theodore Marker wished to give to his son was the joint ownership of the property, and this was accomplished by the documents.

The facts of *Bucquet v. Livingston*, to which appellant compares his situation, are distinguishable. In *Bucquet*, the beneficiaries of an inter vivos trust alleged professional negligence by the defendant attorney in drafting the trust agreement. The complaint alleged that the attorney was employed to plan the settlor's estate and to carry out his intent that the non-marital half of the trust principal would ultimately pass to the beneficiaries free of estate taxes after his wife's death. Because the attorney negligently included a general power of appointment in the instrument, additional taxes were imposed which reduced the corpus of the trust passing to the beneficiaries. In that case the express purpose of the trust was minimization of taxes. No such purpose is alleged in the instant case. In *Bucquet* the desired savings in taxes failed because of the faulty drafting by the attorney. In the present case, there is no allegation that the deed as drafted failed to accomplish the objective of the client as expressed to the respondent.

The facts of the instant case are more similar to those of *Hiemstra v. Huston*. In that case the court recognized the exception established in earlier California cases holding an attorney liable to an intended beneficiary for defects in drafting of a will. The court nevertheless held that the complaint failed to state a cause of action in the allegations that under a will drafted by the defendant attorneys the plaintiff son received a smaller bequest than he would have received under an earlier will of testator. The court noted that plaintiff did not assert any legal deficien-

cy in the will, nor did plaintiff assert either as a conclusion or by allegation of ultimate facts that the will failed to reflect the intent of the testator. The court concluded that if plaintiff was deprived of a substantial part of his father's estate, it was the result not of any negligence on the part of the defendant attorneys but of the testator's intention as expressed in the valid document.

In the case before us, the objective of the deed was to transfer ownership of the real estate to joint tenancy between the father and the son. The complaint alleges no invalidity in the documents and no conflict of the result with decedent's intentions. The estate taxes that were due at Theodore Marker's death were the natural result of the form of ownership chosen by the decedent and not the result of any negligence by respondent. In this case summary judgment was proper. We therefore need not discuss the disputed application of the statute of limitations.

Ishmael v. Millington, 241 Cal.App.2d 520 (Cal. Ct. App. 1966)

FRIEDMAN, J.

This is a legal malpractice action in which the plaintiff-client appeals from a summary judgment granted the defendant-attorney. The factual narrative will possess heightened significance against a backdrop of general doctrine:

Actionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence: duty, breach of duty, proximate cause, damage. Touching the first element, duty, the general rule is that "the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."

In this case the defense is that the client sought no advice from the attorney and was given none; by the client's express admission, she did not rely on the attorney, thus, that her alleged damage was not proximately caused by the attorney's cause of action.

The facts are presented by summary judgment affidavits, which include extracts from depositions. There is no significant conflict in the evidence. Roberta Ishmael, the plaintiff, was formerly married to Earl F. Anders. The couple had three children. They lived in Gridley, where Mr. Anders was a partner in a family trucking business. Domestic difficulties resulted in a separation, and Mrs. Anders moved to Sacramento where she secured employment. She and her husband agreed upon a divorce and property settlement. She knew that she was entitled to one-half the marital property.

Mr. Anders called upon defendant Robert Millington, a Gridley attorney who had for some time represented him and his trucking firm. Mr. Millington advised Anders that if he could establish adulterous conduct by Mrs. Anders, he might be awarded more than one-half the community property. For one reason or another there was a decision that the wife rather than the husband would apply for divorce. At Anders' request Mr. Millington agreed to act as the wife's attorney, to prepare the necessary papers and to file a divorce action for her. He drew up a complaint and a property settlement agreement and handed these documents to Mr. Anders, who took them to Sacramento and had his wife sign them. She knew that Mr. Millington had represented her husband in the past. Faulty recall prevents ascertainment whether Mrs. Anders ever met personally with the attorney before the papers were drawn. She did not discuss the property settlement agreement with the attorney before she signed it. Mr. Millington believed the divorce and property settlement arrangements were "cut and dried" between the husband and wife; he "assumed that she knew what she was doing;" he believed that she was actually getting half the property but made no effort to confirm that belief.

In her deposition the former Mrs. Anders testified that in signing the complaint and property settlement agreement she relied solely on her husband and did not rely on the attorney. Later, when so instructed, she traveled to the courthouse at Oroville, where she and her corroborating witness met Mr. Millington. He escorted her through a routine ex parte hearing which resulted in an interlocutory divorce decree and judicial approval of the property settlement.

According to her complaint, the former Mrs. Anders discovered that in return for a settlement of $8,807 she had surrendered her right to community assets totaling $82,500. Ascribing her loss to the attorney's negligent failure to make inquiries as to the true worth of the community property, she seeks damages equivalent to the difference between what she received and onehalf the asserted value of the community.

By the very act of undertaking to represent Mrs. Anders in an uncontested divorce suit, Mr. Millington assumed a duty of care toward her, whatever its degree. Described in terms traditionally applicable to the attorney-client relationship, the degree of care exacted by that duty was that of a figurative lawyer of ordinary skill and capacity in the performance of like tasks.

The degree of care is related to the specific situation in which the defendant found himself. The standard is that of ordinary care under the circumstances of the particular case. A lawyer owes undivided loyalty to his client. Minimum standards of professional ethics usually permit him to represent dual interests where full consent and full disclosure occur. The loyalty he owes one client cannot consume that owed to the other. Most descriptions of professional conduct prohibit his undertaking to represent conflicting interests at all; or demand that he terminate the threeway relationship when adversity of interest appears. Occasional state-

ments sanction informed representation of divergent interests in "exceptional" situations. Even those statements demand complete disclosure of all facts and circumstances which, in the attorney's honest judgment, may influence his client's choice, holding the attorney civilly liable for loss caused by lack of disclosure.

Divorces are frequently uncontested; the parties may make their financial arrangements peaceably and honestly; vestigial chivalry may impel them to display the wife as the injured plaintiff; the husband may then seek out and pay an attorney to escort the wife through the formalities of adjudication. We describe these facts of life without necessarily approving them. Even in that situation the attorney's professional obligations do not permit his descent to the level of a scrivener. The edge of danger gleams if the attorney has previously represented the husband. A husband and wife at the brink of division of their marital assets have an obvious divergence of interests. Representing the wife in an arm's length divorce, an attorney of ordinary professional skill would demand some verification of the husband's financial statement; or, at the minimum, inform the wife that the husband's statement was unconfirmed, that wives may be cheated, that prudence called for investigation and verification. Deprived of such disclosure, the wife cannot make a free and intelligent choice. Representing both spouses in an uncontested divorce situation (whatever the ethical implications), the attorney's professional obligations demand no less. He may not set a shallow limit on the depth to which he will represent the wife.

The general standard of professional care is appropriate to the garden variety situation, where the attorney represents only one of several parties or interests. It falls short of adequate description where the attorney's professional relationship extends to two clients with divergent or conflicting interests in the same subject matter. A more specific statement of the same rule is needed to guide the fact trier to the law's demands when the attorney attempts dual representation. In short, an attorney representing two parties with divergent interests must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation.

In view of the degree of care imposed by law on an attorney in defendant's position, a fact trier might reasonably find him negligent in failing to disclose to plaintiff the limited representation she was receiving and in failing to point to the possibility of independent legal advice. The question of breach was thus a triable issue which could not be resolved on a summary judgment motion.

Legal malpractice may consist of a negligent failure to act. The attorney's negligence, whether consisting of active conduct or a failure to act, need not be the sole cause of the client's loss. Here the attorney is charged not with erroneous advice, but with failure to advise, failure to investigate, failure to disclose. The wife's reliance on her husband's alleged misrepresentations is not at all inconsistent

with the claim that her loss was the result of the attorney's negligent failure. A jury might find that the husband's misrepresentations were a realizable likelihood which made the attorney's inaction negligent, thus forming a concurrent (and not superseding) cause of harm. Causation was a jury question which could not be resolved as a matter of law.

Contributory negligence on plaintiffs part was specially pleaded and, if established, would bar malpractice recovery. Plaintiff, as she testified, relied on her husband's list of assets; apparently did not trouble to investigate or even to inquire whether she was getting her share of property; was seemingly content to let her husband take charge; accepted his attorney for the limited purpose of piloting her through the divorce formalities. A court, however, cannot say that reasonable jurors would inevitably characterize her conduct as contributory negligence. That issue was a triable issue of fact.

Thus, notwithstanding the lack of conflict in the evidence, the summary judgment rests on the determination of issues reserved for decision by a fact trier and which could not be resolved as a matter of law. Since triable issues of fact existed, the motion should have been denied.

Equitania Ins. v. Slone & Garrett, 191 S.W.3d 552 (Ky. 2006)

Wintersheimer, Justice

This appeal is from an opinion of the Court of Appeals which affirmed a judgment of the circuit court based on a summary judgment/jury verdict that rejected the claim of the Equitania Insurance Company and its Vimont shareholder group for legal malpractice against Garrett and her law firm.

The major issues are whether the proper standard for proving liability in a legal malpractice case was followed and whether the instructions given by the trial judge to the jury regarding specific factual issues violated the rule in favor of barebones jury instructions.

Two groups of shareholders, the Vimont group, composed of four of the shareholders, and the Pavenstedt group, composed of a group of shareholders led by Johann Pavenstedt began to vie for control of Equitania, an insurance company which provided insurance for horse owners. After the Vimont group bought out the Pavenstedt group, the company continued to decline in its efforts to return a profit. Vimont eventually entered an agreement to sell the book of business to Markel Insurance Company. That deal was closed in January 1995. In March of

that year, the Vimont group filed a civil action in circuit court, seeking to rescind the agreement between them and the Pavenstedt group. That case was assigned to Fayette Circuit Judge Gary Payne. A judgment was rendered against the Vimont group and it was upheld by the Court of Appeals in an unpublished opinion.

Laurel Garrett and the law firm of Slone & Garrett represented the Vimont group in its attempt to gain control of the company prior to Vimont buying the shares of Pavenstedt. As a result of that representation, Vimont filed a civil action against Garrett in circuit court in February of 1997, alleging legal malpractice by Garrett in connection with her representation. That case was assigned to Fayette Circuit Judge John R. Adams and it is the principal subject of this appeal. Judge Adams ruled against Vimont and the Court of Appeals upheld that decision. This appeal followed.

This case is a complex legal malpractice claim brought by Vimont against Garrett alleging that she negligently advised them during the midst of the shareholder dispute. They claim that Garrett negligently failed to properly advise them as to how to retain control of the corporation; that the methods she advised violated the insurance code; violated a fiduciary duty to shareholders; was unethical, and was substantially more expensive. The circuit judge granted Garrett a partial summary judgment based on his interpretation of the contract which was different from the interpretation made by the circuit judge in the earlier civil case. The other portion of the claim was resolved in favor of Garrett by a jury verdict. The Court of Appeals upheld the decision of the circuit court, and this Court granted discretionary review.

I. Jury Instructions

Correct instructions are absolutely essential to an accurate jury verdict. The fundamental function of instructions is to tell the jury what it must believe from the evidence in order to resolve each dispositive factual issue in favor of the party who has the burden of proof on that issue.

We should note it is well recognized that the function of instructions is only to state what the jury must believe from the evidence. There should not be an abundance of detail but the jury instructions should provide only the “bare bones” of the question for the jury. The bare bones may then be fleshed out by counsel during closing argument.

The jury instructions given by the trial court over the objection by Vimont were not an accurate statement of the law regarding legal malpractice in Kentucky. Vimont objected to the instructions and tendered instructions of their own which were not used. The instructions given follow:

> Instruction No. 2: It was the duty of Defendant, Laurel Garrett, in undertaking the legal representation of the plaintiffs, to possess to an ordinary extent the technical knowledge commonly possessed in her profession, to exercise that degree of care and skill which an ordinary, reasonably competent lawyer would exercise under the same or similar circumstances. Provided, however, a lawyer cannot be held responsible for errors in judgment or for advising a course of action even if that course of action ultimately proves to be unsuccessful.

The given instructions were incorrect for several reasons. It was properly preserved because there was an objection to Instruction No. 2 in the submitted instructions.

Kentucky law does not provide for an exception for attorney liability for errors in judgment. A case relied on by the Court of Appeals, *Daugherty v. Runner*, stated that misjudgment of the law will generally not render a lawyer liable. However, *Daugherty* did not state that a lawyer can never be held liable for an error in judgment. The tendered instructions did not advise the jury that it had to be an error of law which precluded liability, nor did it inform the jury that there are circumstances in which misjudgment of the law could be a basis for liability. There can be many circumstances in which lawyers can commit errors of judgment which deviate from the standard of care. Whether an error of judgment is legal malpractice is a question of fact for the jury.

Vimont offered an expert, Manning Warren, to evaluate the methods undertaken by Garrett to assist the company in its shareholders dispute. Specifically, Warren testified that Garrett should have pursued an administrative process with the Department of Insurance to join the Vimont group to the Pavenstedt agreement which, if successful, would have resulted in the shareholders maintaining control of Equitania and would have resolved the issue. This would have avoided a prolonged battle with Pavenstedt and would have avoided spending over two million dollars by buying the stock. They also would have avoided the issues with the Department of Insurance regarding change of control as a result of their purchase. It was their conclusion that Garrett committed ongoing malpractice by failing to advise them of change of control issues. Warren further testified that it was a deviation to fail to pursue this option. However, it is apparently undisputed that the Department of Insurance would not have approved a Pavenstedt sale even if it had been properly submitted.

Kentucky should not allow lawyers to avoid liability for committing errors in judgment which the average reasonably prudent lawyer would not commit. Any avoidance of liability should only be allowed for errors of judgment made in absolute good faith.

Here, Garrett failed to plead or present evidence regarding her alleged errors in judgment so as to justify her decision. The error in judgment instruction indirectly required the jury to define and understand abstract legal principles. The jury could not have reasonably understood the distinction between errors in judgment and legal malpractice. It is of interest to note that the instruction provided by Vimont in this case is similar to the instructions provided in Daugherty.

The proper jury instruction must follow a form similar to that in *Palmore*:

> It was the duty of Defendant in undertaking the legal representation of Plaintiff to exercise the degree of care and skill expected of a reasonably competent lawyer acting under similar circumstances. If you are satisfied from the evidence that Defendant failed to comply with this duty and that such failure was a substantial factor causing the loss, you will find for Plaintiff; otherwise you will find for Defendant.

This instruction form contains the elements prescribed in Daugherty without requiring the jury to understand abstract legal principles. The jury is able to determine from the evidence whether there was a breach of duty and whether that breach caused the loss.

Consequently, under the circumstances regarding the instructions, this matter is reversed and remanded. The decisions of the Court of Appeals and the trial court are reversed and this matter is remanded to the trial court for a jury determination as to all factual issues.

Daugherty v. Runner, 581 S.W.2d 12 (Ky. Ct. App. 1978)

HAYES, Judge.

This appeal is from a judgment entered pursuant to a jury verdict which exonerated the appellee, an attorney, from the charges of legal malpractice. The charges of the legal malpractice claim arose from a medical malpractice cause of action on behalf of the deceased, Lula Daugherty Roach. This type of action is commonly referred to as a "suit within a suit." The basis for the legal malpractice claim is that appellee Runner, while representing the deceased Roach for injuries sustained in an automobile accident, failed to pursue a medical malpractice claim by the estate of Roach against the hospital where Roach was treated for her injuries after her accident and against the doctors who treated her, until her claim was barred by the statute of limitations.

The jury found for Runner on the legal malpractice claim and additionally found that the appellant would have recovered on the medical malpractice case, if suit had been timely filed, in the amount of $146,123.75. Both parties appealed.

The appellant contends that the trial court erred in submitting the issue of Runner's negligence to the jury and in failing to instruct the jury properly.

Appellee's cross-appeal is of a protective nature wherein it is contended that if we reverse the trial court based on appellant's assignments of error, then appellee believes the jury verdict awarding appellant $146,123.75 on his medical malpractice claim is erroneous because of improperly admitted evidence.

We will not reach the claim of appellee on cross-appeal since we affirm the judgment of the lower court.

On February 22, 1972, Mrs. Roach and her husband Russell were involved in an automobile accident near Richmond, Kentucky. After receiving emergency medical treatment in Richmond, Mrs. Roach was transferred to St. Joseph Hospital in Lexington, Kentucky. She was admitted on February 22, 1972, under the care of an orthopedic doctor, George Gumbert, Jr. Mrs. Roach died in the hospital on March 17, 1972. The official cause of death listed on the certificate of death was bronchial pneumonia due to, or as a consequence of, generalized peritonitis and bacterial endocarditis. On the date of Mrs. Roach's death, her husband Russell, individually and as executor of the estate of Mrs. Roach, entered into a contract with attorney Runner to the effect that Runner was to "institute a claim for damages against any and all responsible parties as a result of injuries received upon the 22nd day of February, 1972." The contract was a standard contract approved by the Louisville Bar Association.

A later contract, dated July 28, 1973, was entered into between James Russell Roach and another attorney, whereby this "second attorney" was to represent Roach, individually and as administrator of the estate of Lula Roach, in the medical malpractice claim. James Russell Roach was a nonresident, so the present appellant, Byrd E. Daugherty, was appointed ancillary administrator.

Suit was filed on August 1, 1973, in Fayette Circuit Court on behalf of Daugherty by his present attorney, against St. Joseph Hospital and others based on the medical malpractice claim. The trial court in that case granted a summary judgment against Daugherty and the estate of Lula Roach because the suit was not filed within the period of limitations.

Runner testified he was not hired to represent the estate of Lula Roach on a medical malpractice claim; made an investigation of the facts surrounding the auto accident; filed suit on same in Federal Court for the Eastern District of Kentucky at Lexington against the driver of the other auto in the accident, and never suspected the possibility of a medical malpractice claim.

Appellant contends it is what Runner did not do that makes him liable for malpractice. It is asserted he did not examine the hospital records until after the statute of limitations had run on any medical malpractice claim, and that he never advised his client that he did not handle medical malpractice cases. There was also testimony on behalf of appellant that Russell Roach, who had died prior to the trial, had telephoned Runner in January, 1973, inquiring of Runner the status

of any medical malpractice investigation Runner was conducting. Runner denied ever having such a conversation. It is uncontradicted, however, that appellant hired the "second attorney" on March 15, 1973, to represent him in the medical malpractice claim against St. Joseph Hospital and others.

The Fayette Circuit Court had determined that the statute of limitations began to run on the medical malpractice claim "on March 17, 1972, and certainly no later than July 20, 1972, when the record of the decedent's treatment was fully complete." From the evidence in the record and the legal briefs filed on behalf of the parties, it is unclear why the second attorney, who accepted a retainer fee, did not file the medical malpractice claim within the period of time permitted by the statute and case law of this Commonwealth.

The appellant contends that the trial court erred in (1) submitting the question of the attorney's negligence to the jury; (2) allowing an expert opinion to be presented to the jury based upon improper evidence; and, (3) in failing to instruct the jury that the fact that other hired counsel might have been able to toll the statute of limitations was no defense to appellee Runner.

The standard of care is generally composed of two elements—care and skill. The first has to do with care and diligence which the attorney must exercise. The second is concerned with the minimum degree of skill and knowledge which the attorney must display.

In determining whether that degree of care and skill exercised by the attorney in a given case meets the requirements of the standard of care aforementioned, the attorney's act, or failure to act, is judged by the degree of its departure from the quality of professional conduct customarily provided by members of the legal profession.

As it would be in negligence cases generally, the question of whether the conduct of the attorney meets the standard of care test is one for the trier of the facts to determine.

Having determined that the standard of care an attorney owes his client is not that of a "reasonable man" under the circumstances, but is that care and skill as men of the legal profession commonly, or ordinarily, possess and exercise under the circumstances, and having determined that this is generally a question for the trier of the facts, we look now at the facts of the instant case.

The appellant Daugherty contends the trial court erred in submitting the negligence of appellee Runner to the jury. He in effect is saying he, Daugherty, was entitled to a directed verdict on this point because Runner was negligent as a matter of law.

Appellant was required to prove in the legal malpractice suit (1) that Runner was employed by appellant; (2) that he neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that such negligence resulted in and was the substantially contributing factor in the loss to the client.

The appellant has presented two theories in support of his argument that he was entitled to a directed verdict on the question of Runner's negligence. The first is that Runner was retained to bring all possible legal actions resulting from the injuries and death of Mrs. Roach, including a medical malpractice action, if appropriate, and that he failed to carry out this duty. This argument is clearly without merit. The written contract between the parties recited that Runner was retained "to institute a claim for damages against any and all responsible parties, as a result of injuries received upon the 22 day of February, 1972." While there was some testimony about a conversation with Runner regarding a medical malpractice action, the evidence was disputed on that matter, and the question of whether Runner had any duty to handle any medical malpractice case was certainly one for the jury.

Appellant's second theory in support of his directed verdict argument seems to be that even if Runner was not employed specifically to pursue a medical malpractice action, that he nevertheless had a duty to obtain and examine the medical records of the patient, to investigate the treatment procedures administered to her, and to inform his client that there may have been some question about the medical care and treatment she received, but that he did not handle medical malpractice. Appellee's contention on this issue is simply that Mr. Runner was not retained under the contract to handle a medical malpractice case, and he therefore had no duties in that regard.

We are not ready to hold that Mr. Runner had absolutely no duties to his client with regard to a medical malpractice action simply because the written contract did not specifically mention a malpractice suit. To do so would require the client, presumably a layman who is unskilled in the law, to recognize for himself all potential legal remedies. An attorney cannot completely disregard matters coming to his attention which should reasonably put him on notice that his client may have legal problems or remedies that are not precisely or totally within the scope of the task being performed by the attorney.

On the other hand, we certainly cannot say that Mr. Runner was neglectful as a matter of law. There was considerable testimony concerning Runner's negligence, or lack of it. There was expert testimony from two attorneys, one for each side.

Runner's testimony, in summary, was that he was hired to represent the Roaches only for the injuries Mrs. Roach sustained as a result of the automobile collision of February 22nd. He testified that he did not handle medical malpractice claims because he was not competent to do so. He had never processed one. He testified that the fact Mrs. Roach entered the hospital with, according to the hospital admission report, multiple contusions and abrasions, a fractured nose, fractured right shoulder and a compressed fracture of the spine, and that she died in the hospital some thirty (30) days later, did not arouse his suspicion of a medical malpractice claim. He did not review the hospital records until he filed the wrongful death action on behalf of Mrs. Roach in Federal Court in Lexington, Kentucky, on June 9, 1972. Runner's law associate, who actually reviewed the medical records on June 9, 1972, testified the records were incomplete as there was no autopsy report in the medical records on June 9th.

Runner further testified that no one representing the deceased Mrs. Roach ever called to his attention the possibility of a medical malpractice claim until the "second attorney" previously mentioned contacted him some few days before the statute of limitations ran on the medical malpractice claim. Runner's testimony was that he told this other attorney to "go ahead" with the medical malpractice claim.

Appellant offered proof that Runner was contacted by members of Mrs. Roach's family concerning the medical malpractice case long before the statute ran. They were concerned with what Runner was doing about the medical malpractice case. The appellant produced expert testimony from a local lawyer to the effect that Runner's failure to inquire into the cause of death of Mrs. Roach and his failure to review the medical records was not consistent with good legal practice and, in fact, was a substantial departure therefrom.

The other important testimony was that the Roach family, including Daugherty, a brother of Mrs. Roach, had discussed, among themselves, the medical malpractice case as early as December, 1972. They had in fact contacted two attorneys in Lexington, who declined the case. They were aware of the statute of limitations.

The family then proceeded to northern Kentucky, where on March 15, 1973, they employed the "second attorney" to represent the estate in the medical malpractice case. He filed no complaint.

Some time after July 28, 1973, he turned the case over to the appellant's current attorney, who on August 1, 1973, filed a medical malpractice claim in Fayette Circuit Court which was subsequently dismissed as barred by the statute of limitations.

Under these circumstances the question of whether Runner had exercised the degree of care and skill expected of a reasonably competent attorney was a question for the jury to decide.

This is true especially in light of the fact that there was disputed testimony concerning whether the possibility of a medical malpractice action had been discussed with Runner.

The issue of Runner's negligence was submitted to the jury under the following instructions:

> (1) It was the duty of the defendant, E. Michael Runner, Attorney at Law, in undertaking the legal representation of the Estate of Lula Daugherty Roach, to exercise that degree of care and skill expected of a reasonably competent lawyer acting in the same or similar circumstances about which you have heard evidence, and this general duty, included the following specific duties:
>
> > (a) Not to undertake representation in a legal matter in which he knew or should have known he was not competent without associating with himself a lawyer that was competent to handle it;
> >
> > (b) Not to undertake representation in a legal matter without preparation adequate in the circumstances.
>
> (2) The Jury will answer the following interrogatory: Do you believe from the evidence that the defendant, E. Michael Runner, failed in one or more of the duties imposed upon him by instruction number 4, and such failure was the substantial factor in the Estate of Lula Daugherty Roach not recovering the award set out in instruction number 3 and incorporated in Verdict A?

Nine of the jurors answered the question in the negative. While we may have found differently had we sat as jurors in this case, we believe there is sufficient evidence to support this jury's verdict, and we therefore will not disturb it. Based upon the conflicting evidence, we fail to see how Runner was negligent as a matter of law.

We note that the trial court's instruction mistakenly required the jury to find that Runner's breach of duty, if any, was "the" substantial factor in the plaintiffs failure to recover. The instruction should have read, "a" substantial factor. However, the trial court was not made aware of the error by objection, and it has not been raised on appeal, nor could it be. For this reason we are not able to review the question. In any event, it does not appear to be so substantial as to have caused the plaintiff any prejudice.

In conclusion, we would add that we do agree somewhat with a statement appellant makes in his well-written brief. Appellant states thusly:

> Perhaps the issue that is involved in this case is far beyond the instant action, and must be laid at the doors of the Bar as a whole and more specifically, appellee. Maybe we, as a profession, have not discharged our responsibility to inform the public as a whole, and more specifically, Mr. Roach, that we specialize and limit our practice. However, in the end result, the effect on the client is the same; the public expects, and has the right to demand, that their legal affairs will be approached with expertise and initiative and anything short of that is a violation of the trust and confidence reposed in a member of our profession.

To that, we would simply repeat that all the evidence in this case was submitted to a jury of twelve citizens of this community, nine of whom found for the attorney. Even though we may have found differently had we sat as jurors in this case, we cannot disturb their verdict, as it was sufficiently supported by the evidence.

TIG Ins. v. Giffin, Winning, Cohen & Bodewes, 444 F.3d 587 (7th Cir. 2006)

Evans, Circuit Judge

TIG Insurance Company appeals the dismissal of its malpractice case against the Giffin Winning law firm and one of its attorneys, Carol Hansen Posegate.

To explain the malpractice claim we must reach back to the underlying lawsuit, in which Giffin Winning, at least for a time, represented Illinois State University (ISU) in a class-action, gender-discrimination lawsuit brought by several female professors. In the suit, the plaintiffs contended that they were being paid less than male professors and that ISU retaliated against female professors who complained about the discrimination. Their attorney was Joel Bellows. TIG was ISU's liability insurer at the time and it paid the attorney fees which are at the heart of the present malpractice action; TIG, in turn, was reimbursed by its reinsurers.

The malpractice alleged in the present case arose out of discovery problems in the case. The major problem involved Giffin Winning's failure to produce three documents called gender equity studies (two of which are at issue here) in their response to a discovery request. The response was signed in October 1996. A month later the case was stayed. Soon thereafter, the law firm of Latham & Watkins filed an appearance on behalf of ISU and essentially took control of ISU's defense, though Giffin Winning remained of record. Latham had an attorney-client relationship with ISU's insurer TIG. Giffin Winning did not.

The facts show that Giffin Winning received two gender equity studies from ISU in 1994—while the Varner case was still pending before the Equal Employment Opportunity Commission. Two years later, when the law firm received the second request for documents, the subject of the October 1996 response at issue here, they routed the request to William Gorrell, the former executive director for Information Systems and the head of the Planning Policy department at ISU. He did not at that time forward the studies to Giffin Winning for production and the law firm did not produce them on its own. On this point, Judge Mihm later said that Gorrell was the one who "dropped the ball entirely."

During the stay in the case, Bellows talked with Gorrell, who by then was no longer employed by ISU and had his own lawsuit pending against the school for wrongful termination. He independently provided Bellows with the gender equity studies. He also executed an affidavit detailing particulars of a "planning policy database" on which he said the studies were based.

Once the stay was lifted, Bellows confronted Latham with the studies. (The Latham firm was now representing ISU). Bellows demanded that ISU turn over the database on which he alleged the studies were based. Apparently thinking the best defense is a good offense, Latham's first response apparently was to point fingers, saying Bellows had also not adequately complied with discovery requests. Also at this time, Latham began preparing a motion to disqualify Bellows for improperly soliciting privileged information from Gorrell.

For his part, Bellows filed a motion for sanctions against both ISU and Giffin Winning, in part based on the failure to produce the gender equity studies. As relevant here, Bellows' contention in his motion for sanctions was not simply that the studies were not produced. After all, he now had the studies. Rather, he claimed that the gender equity studies were not produced because of a conspiracy to hide the "Planning Policy database." To have produced the studies, he argued, "would have alerted the Varner plaintiffs to the existence of the databases."

We now arrive at the essence of the case—the pivotal facts about the database. At a 4-day hearing on the pending motions, Gorrell testified that the database contained variables relevant to the issue of gender equity and was maintained in a format which enabled a user to prepare comparative studies. He testified that the gender equity studies were prepared from this database. He said he had done one of the studies himself, though he also said he had never personally accessed the database. The actual data processing, he said, was done by his research assistant, Anna Wells, and her preparation of the data for his 1994 study would have taken her no more than a day or two using the database:

> Q How long did it take Anna Wells to compile the information for the 1994 study?
>
> A It could be done in a day or two.

That apparently was news to Wells. She testified that she did not use any database in compiling the data.

> Q Ms. Wells, when you collected the information reflected in these tables, was there a single source that you could go to to collect all the information reflected in the tables?
>
> A No.
>
> Q Was there a single database maintained by the Planning Policy department that contained all of the information reflected in these tables?
>
> A No.

She used hard copy (probably the same 279 banker boxes of material which had, in fact, been produced to Bellows), and it took her "a few weeks, several weeks" to locate the information and format it for use. Why? Because, as Judge Mihm found, there was no database and never had been:

> I don't believe that the plaintiffs have ever established the existence of the kind of database that I thought was being alleged here, that there was some button at ISU that could be punched that would involve a print-out of all this information. That clearly is not true. The nonexistence of the database—which Bellows said there was an alleged conspiracy to hide—is not seriously contested.

Nevertheless, Judge Mihm sanctioned Giffin Winning $10,000 for discovery lapses, a sanction which was later vacated. Judge Mihm, however, wisely denied Bellows' request for a default judgment based on the failure to produce the gender equity studies. He remarked that "I don't believe it was appropriate—but even if I had ordered that, I think that would have been reversed on appeal." In addition, although he denied Latham's motion to disqualify Bellows because of his contact with Gorrell, Judge Mihm sanctioned Bellows $10,000 as well. Ultimately, the case was settled; mercifully, we think.

We now get to the present malpractice action that TIG filed against Giffin Winning in which the damages TIG alleges are the attorney fees it paid Latham to defend against the sanction motion—a whopping $1.2 million, give or take, for the work of 27 attorneys and various paralegals. It seems that when Latham said it took the motion seriously, it meant it. As we said, TIG paid the bill and was subsequently reimbursed by its reinsurers.

The elements of a legal malpractice action in Illinois are well-settled. They are: "(1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause; and (4) damages." A legal malpractice case is similar to any other negligence claim, and traditional principles apply. Proximate cause describes two distinct requirements—cause in fact and legal cause. Cause in fact exists only if the defendant's conduct was a "material element and a substantial factor in bringing about the injury." Legal cause, on the other hand, is largely a question of foreseeability. The relevant inquiry is whether "the injury is of a type that a reasonable person would see as a likely result of his or her conduct." The occurrence must have been "reasonably" foreseeable: "Not what actually happened, but what the reasonably prudent person would then have foreseen as likely to happen, is the key to the question of reasonableness."

This is not the same as (but, in this case, necessarily a bit difficult to distinguish from) a determination as to whether the fees themselves are reasonable. For purposes of proximate cause, if the fees do not reflect work reasonably, foreseeably related to the negligence alleged in the case, it does not matter that in some other sense they might be "reasonable." We draw this distinction in response to TIG's argument, that because the fees were paid, they are *prima facie* reasonable. In this situation, we find the argument breathtaking, say nothing of irrelevant.

Proximate cause is the issue on which this case falters. Having said that, we recognize that the Illinois courts indicate that proximate cause should ordinarily be decided not as a matter or law, but by a trier of fact. However, in a situation in which it is clear as a matter of law that the injury could not have been foreseeable, Illinois courts have upheld summary judgment on the issue. The situation before us is such a case.

The fundamental negligence allegedly committed by Giffin Winning was a failure to produce documents—especially gender equity studies—pursuant to a discovery request. The attorneys had routed the request to Gorrell, who was at that point still employed by ISU. He did not forward the studies to the attorneys. However, the attorneys had copies of the studies, which they also failed to produce. This is a clear breakdown of the discovery process, which we infer was not going at all smoothly on either side of this case.

In this all-too-common situation, the question for us is whether it would be reasonably foreseeable that a failure to produce these documents would result in the injury alleged here. Could the attorneys foresee that Gorrell, who failed to produce the documents when they turned the request over to him, would then, after he became disgruntled with ISU, independently provide the documents to Bellows? Beyond that, would reasonable people foresee that Gorrell would mislead Bellows about a database which did not exist? Would reasonable people then think that, upon hearing Gorrell's story, Bellows' first impulse would be to move for sanctions including default judgment in the case? Would reasonable people foresee that, next, a large law firm, apparently thinking of Judge Mihm as a bit trigger-happy, would jump into high gear out of fear of default judgment and launch an army of 27 attorneys, plus paralegals, to defend against the possibility that Judge Mihm might grant default judgment on the basis of an alleged conspiracy to hide something which does not exist? In other words, was the Latham response to a failure to produce documents and the resulting injury foreseeable?

We think it was not as a matter of law. Our point can be illustrated by a very different sort of negligence action. In *Abrams*, the city failed to send an ambulance for a woman, Abrams (of course), who was in labor. A friend, who then drove her to the hospital, ran a red light and collided with a car driven by a drug-and-alcohol-impaired driver with a suspended license. Abrams was seriously injured and spent 2

weeks in a coma; sadly, her baby died. The court found, however, that as a matter of law there was no proximate cause. The city could not have foreseen the situation that unfolded. Perhaps a bit callously, the court remarked that "millions of women in labor make it safely to the hospital each year by private transportation."

It is also true—though less tragically so—that countless failures to produce documents occur in the federal courts every year. That is not a good thing. But we are not at a point at which it is foreseeable that such a failure will spawn a million-dollar bill for attorney fees. If it were, litigation would become more of a blood sport than it already is. Lawyers would be even more obsessive about irrelevant and tedious details. No good could come of it.

There is, in fact, nothing which distinguishes the failure to produce in this case with countless others. Judge Mihm himself made this point in response to Bellows' argument that this was the worst discovery abuse he had ever seen. Judge Mihm said:

> But you said in your 34 years of practice this was the most shocking thing you had ever seen in terms of this discovery issue. I wonder what kind of practice you've had if that's the case because, boy, in the scheme of things, I've seen things 50 times worse than this.

What is foreseeable as a result of a failure to produce documents is the reasonable procedure set out in Civil Rule of Civil Procedure 37, which provides for sanctions only after other reasonable efforts to work out disagreements fail. It may be that, as Judge Mihm also said, that did not happen enough in this case. But ISU and Giffin Winning could hardly be expected to foresee all this trouble over a phantom database. Why would they? It was ISU's alleged database and Giffin Winning was representing ISU at the time. They knew of no database; they were hiding no database; there was no database. For Giffin Winning's carelessness in failing to produce documents (which Bellows had in his possession), the sanction of $10,000 might well have been sustained on appeal. But as a matter of law, the injury alleged here was not reasonably foreseeable.

3. Ineffective Assistance of Counsel

Strickland v. Washington, 466 U.S. 668 (1984)

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a 10-day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnapping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnapping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. He also stated, however, that he accepted responsibility for the crimes. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." Because he judged that a pre-sentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. Counsel also argued that respondent had no history of criminal activity and that respondent committed the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a co-defendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

[T]he trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances. . . to outweigh the aggravating circumstances." He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts.

[Strickland unsuccessfully challenged the conviction in state court, based on ineffective assistance of counsel. He then brought a habeas corpus action in federal court, again based on ineffective assistance of counsel. The Supreme Court "granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."]

II

In a long line of cases [...] this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance".

The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. 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.

III

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. [...] When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. 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.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reason-

able decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler* v. *Sullivan,* 446 U. S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts

to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."

Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presump-

tively accurate and fair proceeding were present in the proceeding whose result is challenged. An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court, to the extent it independently reweighs the evidence — would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles.

Application of the governing principles is not difficult in this case. The facts as described above make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, nothing in the record indicates [...] that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

Knowles v. Mirzayance, 556 U.S. 111 (2009)

Justice THOMAS delivered the opinion of the Court.

In this case, respondent Alexandre Mirzayance claimed ineffective assistance of counsel because his attorney recommended withdrawing his insanity defense. The California courts rejected this claim on state postconviction review. We must decide whether this decision was contrary to or an unreasonable application of clearly established federal law. We hold that it was not. Mirzayance failed to establish that his counsel's performance was ineffective.

I

Mirzayance confessed that he stabbed his 19-year-old cousin nine times with a hunting knife and then shot her four times. At trial, he entered pleas of not guilty and not guilty by reason of insanity (NGI). Under California law, when both of these pleas are entered, the court must hold a bifurcated trial, with guilt determined during the first phase and the viability of the defendant's NGI plea during the second. During the guilt phase of Mirzayance's trial, he sought to avoid a conviction for first-degree murder by obtaining a verdict on the lesser included offense of second-degree murder. To that end, he presented medical testimony that he was insane at the time of the crime and was, therefore, incapable of the premeditation or deliberation necessary for a first-degree murder conviction. The jury nevertheless convicted Mirzayance of first-degree murder.

The trial judge set the NGI phase to begin the day after the conviction was entered but, on the advice of counsel, Mirzayance abandoned his NGI plea before it commenced. He would have borne the burden of proving his insanity during the NGI phase to the same jury that had just convicted him of first-degree murder. Counsel had planned to meet that burden by presenting medical testimony similar to that presented in the guilt phase, including evidence that Mirzayance was insane and incapable of premeditating or deliberating. Because the jury rejected similar evidence at the guilt phase (where the State bore the burden of proof), counsel believed a defense verdict at the NGI phase (where the burden was on the defendant) was unlikely. He planned, though, to have Mirzayance's parents testify and thus provide an emotional account of Mirzayance's struggles with mental illness to

supplement the medical evidence of insanity. But on the morning that the NGI phase was set to begin, Mirzayance's parents refused to testify. After consulting with co-counsel, counsel advised Mirzayance that he should withdraw the NGI plea. Mirzayance accepted the advice.

After he was sentenced, Mirzayance challenged his conviction in state postconviction proceedings. Among other allegations, he claimed that counsel's recommendation to withdraw the NGI plea constituted ineffective assistance of counsel under *Strickland*. The California trial court denied the petition, and the California Court of Appeal affirmed without offering any reason for its rejection of this particular ineffective-assistance claim. Mirzayance then filed an application for federal habeas relief, which the District Court denied without an evidentiary hearing. The Court of Appeals reversed the District Court and ordered an evidentiary hearing on counsel's recommendation to withdraw the NGI plea. During that evidentiary hearing, a Magistrate Judge made factual findings that the District Court later adopted.

According to the Magistrate Judge, counsel's strategy for the two-part trial was to seek a second-degree murder verdict in the first stage and to seek an NGI verdict in the second stage. This strategy faltered when the jury instead convicted Mirzayance of first-degree murder. In the circumstances of this case, the medical evidence that Mirzayance planned to adduce at the NGI phase essentially would have duplicated evidence that the jury had necessarily rejected in the guilt phase. First-degree murder in California includes any killing that is "willful, deliberate, and premeditated." To prove NGI, a defendant must show that he was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong at the time of the offense. Highlighting this potential contradiction, the trial judge instructed the jury during the guilt phase that "the word 'deliberate,'" as required for a first-degree murder conviction, "means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."

When the jury found Mirzayance guilty of first-degree murder, counsel doubted the likelihood of prevailing on the NGI claim. According to the Magistrate Judge:

> The defense suspected that a jury's finding, beyond a reasonable doubt, that Mirzayance had "deliberated" and "premeditated" his killing of the victim as a practical matter would cripple Mirzayance's chances of convincing the jury later, during the sanity phase, that Mirzayance nevertheless "was incapable of knowing or understanding the nature and quality of his act and of distinguishing right from wrong at the time of the commission of the offense." Any remaining chance of securing an NGI verdict now depended (in counsel's view) on presenting some "emotional impact" testimony by Mirzayance's parents, which counsel had viewed as key even if the defense had secured a second-degree murder verdict at the guilt phase.

But, as the Magistrate Judge found, on the morning that the NGI phase was set to begin, Mirzayance's parents effectively refused to testify:

> The parents at least expressed clear reluctance to testify, which, in context, conveyed the same sense as a refusal.

Although the parties disputed this point, the parents' later actions supported the Magistrate Judge's finding that the parents' reluctance to testify amounted to refusal:

> Corroborating the Court's finding that Mirzayance's parents indicated a strong disinclination to testify at the NGI phase are the facts that (1) they did not testify later at his sentencing hearing, and (2) the reason for their choosing not to do so is that it would have been "too emotional" for them. If weeks after the guilty verdict and the withdrawal of their son's NGI plea, Mirzayance's parents' emotions still prevented them from testifying at the sentencing hearing, then surely those emotional obstacles to their testifying in the NGI phase would have been at least as potent, and probably more so.

The Magistrate Judge found that counsel made a carefully reasoned decision not to go forward with the NGI plea:

> Counsel carefully weighed his options before making his decision final; he did not make it rashly. Counsel's strategy at the NGI phase depended entirely on the heartfelt participation of Mirzayance's parents as witnesses. Moreover, counsel knew that, although he had experts lined up to testify, their testimony had significant weaknesses. Counsel's NGI-phase strategy became impossible to attempt once Mirzayance's parents expressed their reluctance to testify. All counsel was left with were four experts, all of whom reached a conclusion—that Mirzayance did not premeditate and deliberate his crime—that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof. The experts were subject to other impeachment as well. Counsel discussed the situation with his experienced cocounsel who concurred in counsel's proposal that he recommend to Mirzayance the withdrawal of the NGI plea.

Based on these factual findings, the Magistrate Judge stated that, in his view, counsel's performance was not deficient.

Despite this determination, the Magistrate Judge concluded that the court was bound by the Court of Appeals' remand order to determine only whether "there were tactical reasons for abandoning the insanity defense." Even though the Magistrate Judge thought that counsel was reasonable in recommending that a very weak claim be dropped, the Magistrate Judge understood the remand order to mean that counsel's performance was deficient if withdrawing the NGI plea would achieve no tactical advantage. The Magistrate Judge found that "Mirzayance had nothing to lose" by going forward with the NGI phase of the trial, and thus held, under the remand order, that counsel's performance was deficient. As to prejudice, the Magistrate Judge concluded the court was similarly bound by the remand order because the Court of Appeals described the NGI defense as remaining "viable and strong." Accordingly, the Magistrate Judge found prejudice and recommended granting the writ of habeas corpus. The District Court accepted this recommendation and granted the writ.

The Court of Appeals affirmed. It first stated that the lower court had misunderstood its remand order, which it described as requiring an examination of "counsel's reason for abandoning the insanity defense," rather than as mandating that the District Court must find deficient performance if it found counsel had "nothing to lose" by pursuing the insanity defense. Nonetheless, the Court of Appeals affirmed the finding of deficient performance. According to the court, Mirzayance's "parents did not refuse, but merely expressed reluctance to testify." And because they may have been willing, "competent counsel would have attempted to persuade them to testify, which counsel here admits he did not." The Court of Appeals also "disagreed that counsel's decision was carefully weighed and not made rashly."

Furthermore, even though it had suggested that the District Court unnecessarily evaluated counsel's strategy under a "nothing to lose" standard, the Court of Appeals affirmed the District Court in large part because Mirzayance's "counsel did not make a true tactical choice" based on its view that counsel had nothing to gain by dropping the NGI defense. The court held that "reasonably effective assistance would put on the only defense available, especially in a case such as this where there was significant potential for success." The Court of Appeals also found prejudice because, in its view, "if counsel had pursued the insanity phase of the trial, there is a reasonable probability that the jury would have found Mirzayance insane."

We granted the petition for writ of certiorari.

III

Even if Mirzayance's ineffective-assistance-of-counsel claim were eligible for de novo review, it would still fail. *Strickland* requires a defendant to establish deficient performance and prejudice. Mirzayance can establish neither.

Mirzayance has not shown "that counsel's representation fell below an objective standard of reasonableness."

> The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.

Here, Mirzayance has not shown that his counsel violated these standards. Rather, his counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed to fail. The jury had already rejected medical testimony about Mirzayance's mental state in the guilt phase, during which the State carried its burden of proving guilt beyond a reasonable doubt. The Magistrate Judge explained this point:

> All counsel was left with were four experts, all of whom reached a conclusion—that Mirzayance did not premeditate and deliberate his crime—that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof. The experts were subject to other impeachment as well.

In fact, the Magistrate Judge found that counsel "convincingly detailed ways in which the experts could have been impeached, for overlooking or minimizing facts which showcased Mirzayance's clearly goal-directed behavior."

In the NGI phase, the burden would have switched to Mirzayance to prove insanity by a preponderance of the evidence. Mirzayance's counsel reasonably believed that there was almost no chance that the same jury would have reached a different result when considering similar evidence, especially with Mirzayance bearing the burden of proof. Furthermore, counsel knew he would have had to present this defense without the benefit of the parents' testimony, which he believed to be his strongest evidence. Counsel reasonably concluded that this defense was almost certain to lose.

The Court of Appeals took the position that the situation was not quite so dire because the parents "merely expressed reluctance to testify." It explained that "competent counsel would have attempted to persuade them to testify." But that holding is in tension with the Magistrate Judge's findings and applies a more demanding standard than *Strickland* prescribes. The Magistrate Judge noted that the parents "conveyed the same sense as a refusal." Indeed, the Magistrate Judge found that the parents "did not testify later at Mirzayance's sentencing hearing" because it "would have been 'too emotional' for them." Competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded. Counsel's acceptance of the parents' "conveyance of a refusal" does not rise to the high bar for deficient performance set by *Strickland*.

Mirzayance's failure to show ineffective assistance of counsel is confirmed by the Magistrate Judge's finding that "counsel carefully weighed his options before making his decision final; he did not make it rashly." The Magistrate Judge explained all of the factors that counsel considered—many of which are discussed above—and noted that counsel "discussed the situation with his experienced co-counsel" before making it. In making this finding, the Magistrate Judge identified counsel's decision as essentially an informed decision "made after thorough investigation of law and facts relevant to plausible options." As we stated in *Strickland*, such a decision is "virtually unchallengeable."

Without even referring to the Magistrate Judge's finding, the Court of Appeals "disagreed that counsel's decision was carefully weighed and not made rashly." In its view, "counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea." But courts

of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous. Here, the Court of Appeals failed even to mention the clearly-erroneous standard, let alone apply it, before effectively overturning the lower court's factual findings related to counsel's behavior.

In light of the Magistrate Judge's factual findings, the state court's rejection of Mirzayance's ineffective-assistance-of-counsel claim was consistent with *Strickland*. The Court of Appeals insisted, however, that "'reasonably effective assistance' required here that counsel assert the only defense available." But we are aware of no "prevailing professional norms" that prevent counsel from recommending that a plea be withdrawn when it is almost certain to lose. And in this case, counsel did not give up "the only defense available." Counsel put on a defense to first-degree murder during the guilt phase. Counsel also defended his client at the sentencing phase. The law does not require counsel to raise every available nonfrivolous defense. Counsel also is not required to have a tactical reason—above and beyond a reasonable appraisal of a claim's dismal prospects for success—for recommending that a weak claim be dropped altogether. Mirzayance has thus failed to demonstrate that his counsel's performance was deficient.

In addition, Mirzayance has not demonstrated that he suffered prejudice from his counsel's performance. To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." To prevail on his ineffective-assistance claim, Mirzayance must show, therefore, that there is a "reasonable probability" that he would have prevailed on his insanity defense had he pursued it. This Mirzayance cannot do. It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase.

IV

Mirzayance has not shown that the state court's conclusion that there was no ineffective assistance of counsel "was contrary to, or involved an unreasonable application of, clearly established Federal law." In fact, he has not shown ineffective assistance at all. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to deny the petition.

Lee v. United States, 137 S.Ct. 1958 (2017)

Chief Justice ROBERTS delivered the opinion of the Court.

Petitioner Jae Lee was indicted on one count of possessing ecstasy with intent to distribute. Although he has lived in this country for most of his life, Lee is not a United States citizen, and he feared that a criminal conviction might affect his status as a lawful permanent resident. His attorney assured him there was nothing to worry about—the Government would not deport him if he pleaded guilty. So Lee, who had no real defense to the charge, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial.

Lee's attorney was wrong: The conviction meant that Lee was subject to mandatory deportation from this country. Lee seeks to vacate his conviction on the ground that, in accepting the plea, he received ineffective assistance of counsel in violation of the Sixth Amendment. Everyone agrees that Lee received objectively unreasonable representation. The question presented is whether he can show he was prejudiced as a result.

I

Jae Lee moved to the United States from South Korea in 1982. He was 13 at the time. His parents settled the family in New York City, where they opened a small coffee shop. After graduating from a business high school in Manhattan, Lee set out on his own to Memphis, Tennessee, where he started working at a restaurant. After three years, Lee decided to try his hand at running a business. With some assistance from his family, Lee opened the Mandarin Palace Chinese Restaurant in a Memphis suburb. The Mandarin was a success, and Lee eventually opened a second restaurant nearby. In the 35 years he has spent in the country, Lee has never returned to South Korea. He did not become a United States citizen, living instead as a lawful permanent resident.

At the same time he was running his lawful businesses, Lee also engaged in some illegitimate activity. In 2008, a confidential informant told federal officials that Lee had sold the informant approximately 200 ecstasy pills and two ounces of hydroponic marijuana over the course of eight years. The officials obtained a search warrant for Lee's house, where they found 88 ecstasy pills, three Valium tablets, $32,432 in cash, and a loaded rifle. Lee admitted that the drugs were his and that he had given ecstasy to his friends.

A grand jury indicted Lee on one count of possessing ecstasy with intent to distribute. Lee retained an attorney and entered into plea discussions with the Government. The attorney advised Lee that going to trial was "very risky" and that, if he pleaded guilty, he would receive a lighter sentence than he would if convicted at

trial. Lee informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings. The attorney told Lee that he would not be deported as a result of pleading guilty. Based on that assurance, Lee accepted the plea and the District Court sentenced him to a year and a day in prison, though it deferred commencement of Lee's sentence for two months so that Lee could manage his restaurants over the holiday season.

Lee quickly learned, however, that a prison term was not the only consequence of his plea. Lee had pleaded guilty to what qualifies as an "aggravated felony" under the Immigration and Nationality Act, and a noncitizen convicted of such an offense is subject to mandatory deportation. Upon learning that he would be deported after serving his sentence, Lee filed a motion to vacate his conviction and sentence, arguing that his attorney had provided constitutionally ineffective assistance.

At an evidentiary hearing on Lee's motion, both Lee and his plea-stage counsel testified that "deportation was the determinative issue in Lee's decision whether to accept the plea." In fact, Lee explained, his attorney became "pretty upset because every time something comes up I always ask about immigration status," and the lawyer "always said why are you worrying about something that you don't need to worry about." According to Lee, the lawyer assured him that if deportation was not in the plea agreement, "the government cannot deport you." Lee's attorney testified that he thought Lee's case was a "bad case to try" because Lee's defense to the charge was weak. The attorney nonetheless acknowledged that if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial. Based on the hearing testimony, a Magistrate Judge recommended that Lee's plea be set aside and his conviction vacated because he had received ineffective assistance of counsel.

The District Court, however, denied relief. Applying our two-part test for ineffective assistance claims from *Strickland v. Washington*, the District Court concluded that Lee's counsel had performed deficiently by giving improper advice about the deportation consequences of the plea. But, "in light of the overwhelming evidence of Lee's guilt," Lee "would have almost certainly" been found guilty and received "a significantly longer prison sentence, and subsequent deportation," had he gone to trial. Lee therefore could not show he was prejudiced by his attorney's erroneous advice. Viewing its resolution of the issue as debatable among jurists of reason, the District Court granted a certificate of appealability.

The Court of Appeals for the Sixth Circuit affirmed the denial of relief. On appeal, the Government conceded that the performance of Lee's attorney had been deficient. To establish that he was prejudiced by that deficient performance, the court explained, Lee was required to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Lee had "no bona fide defense, not even a weak one," so he "stood to gain

nothing from going to trial but more prison time." Relying on Circuit precedent holding that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence," the Court of Appeals concluded that Lee could not show prejudice. We granted certiorari.

II

The Sixth Amendment guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding," including when he enters a guilty plea. To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation "fell below an objective standard of reasonableness" and that he was prejudiced as a result. The first requirement is not at issue in today's case: The Government concedes that Lee's plea-stage counsel provided inadequate representation when he assured Lee that he would not be deported if he pleaded guilty. The question is whether Lee can show he was prejudiced by that erroneous advice.

A

A claim of ineffective assistance of counsel will often involve a claim of attorney error "during the course of a legal proceeding"—for example, that counsel failed to raise an objection at trial or to present an argument on appeal. A defendant raising such a claim can demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

But in this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place."

We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding to which he had a right." When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

The dissent contends that a defendant must also show that he would have been better off going to trial. That is true when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession.

Not all errors, however, are of that sort. Here Lee knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected Lee's understanding of the consequences of pleading guilty. The Court confronted precisely this kind of error in *Hill*. Rather than asking how a hypothetical trial would have played out absent the error, the Court considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial. The Court rejected the defendant's claim because he had "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty."

Lee, on the other hand, argues he can establish prejudice under Hill because he never would have accepted a guilty plea had he known that he would be deported as a result. Lee insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States. The Government responds that, since Lee had no viable defense at trial, he would almost certainly have lost and found himself still subject to deportation, with a lengthier prison sentence to boot. Lee, the Government contends, cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to an acquittal.

B

The Government asks that we, like the Court of Appeals below, adopt a per se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. As a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea. But in elevating this general proposition to a per se rule, the Government makes two errors. First, it forgets that categorical rules are ill suited to an inquiry that we have emphasized demands a "case-by-case examination" of the "totality of the evidence." And, more fundamentally, the Government overlooks that the inquiry we prescribed in *Hill v. Lockhart* focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. It is instead because defendants obviously weigh their prospects at trial in deciding whether to accept a plea. Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.

But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Here Lee alleges that avoiding deportation was the determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a "Hail Mary" at trial.

The Government urges that, in such circumstances, the possibility of an acquittal after trial is "irrelevant to the prejudice inquiry," pointing to our statement in *Strickland* that "a defendant has no entitlement to the luck of a lawless decisionmaker." That statement, however, was made in the context of discussing the presumption of reliability we apply to judicial proceedings. As we have explained, that presumption has no place where, as here, a defendant was deprived of a proceeding altogether. In a presumptively reliable proceeding, "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like" must by definition be ignored. But where we are instead asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking.

C

"Surmounting Strickland's high bar is never an easy task," and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.

In the unusual circumstances of this case, we conclude that Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. There is no question that "deportation was the determinative issue in Lee's decision whether to accept the plea deal." Lee asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified at the evidentiary hearing below that Lee would have gone to trial if he had known about the deportation consequences.

Lee demonstrated as much at his plea colloquy: When the judge warned him that a conviction "could result in your being deported," and asked "does that at all affect your decision about whether you want to plead guilty or not," Lee answered "Yes, Your Honor." When the judge inquired "how does it affect your decision," Lee responded "I don't understand," and turned to his attorney for advice. Only when Lee's counsel assured him that the judge's statement was a "standard warning" was Lee willing to proceed to plead guilty.

There is no reason to doubt the paramount importance Lee placed on avoiding deportation. Deportation is always "a particularly severe penalty," and we have "recognized that 'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" At the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens. In contrast to these strong connections to the United States, there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child.

The Government argues, however, that a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." The Government contends that Lee cannot make that showing because he was going to be deported either way; going to trial would only result in a longer sentence before that inevitable consequence.

We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? Almost certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Lee's claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence. Accordingly we conclude Lee has demonstrated a "reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Justice THOMAS, with whom Justice ALITO joins except for Part I, dissenting.

The Court today holds that a defendant can undo a guilty plea, well after sentencing and in the face of overwhelming evidence of guilt, because he would have chosen to pursue a defense at trial with no reasonable chance of success if his attorney had properly advised him of the immigration consequences of his plea. Neither the Sixth Amendment nor this Court's precedents support that conclusion. I respectfully dissent.

I

A

The Court and both of the parties agree that the prejudice inquiry in this context is governed by *Strickland v. Washington*. The Court in *Strickland* held that a defendant may establish a claim of ineffective assistance of counsel by showing that his "counsel's representation fell below an objective standard of reasonableness" and, as relevant here, that the representation prejudiced the defendant by "actually having an adverse effect on the defense."

To establish prejudice under *Strickland*, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* made clear that the "result of the proceeding" refers to the outcome of the defendant's criminal prosecution as a whole. It defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." And it explained that "an error by counsel does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."

The parties agree that this inquiry assumes an "objective" decisionmaker. That conclusion also follows directly from *Strickland*. According to *Strickland*, the "assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." It does not depend on subjective factors such as "the idiosyncrasies of the particular decisionmaker," including the decisionmaker's "unusual propensities toward harshness or leniency." These factors are flatly "irrelevant to the prejudice

inquiry." In other words, "a defendant has no entitlement to the luck of a lawless decisionmaker." Ibid. Instead, "the assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."

When the Court extended the right to effective counsel to the plea stage, it held that "the same two-part standard" from *Strickland* applies. To be sure, the Court said—and the majority today emphasizes—that a defendant asserting an ineffectiveness claim at the plea stage "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." But that requirement merely reflects the reality that a defendant cannot show that the outcome of his case would have been different if he would have accepted his current plea anyway. In other words, the defendant's ability to show that he would have gone to trial is necessary, but not sufficient, to establish prejudice.

The Hill Court went on to explain that *Strickland*'s two-part test applies the same way in the plea context as in other contexts. In particular, the "assessment" will primarily turn on "a prediction whether," in the absence of counsel's error, "the evidence" of the defendant's innocence or guilt "likely would have changed the outcome" of the proceeding. Thus, a defendant cannot show prejudice where it is "inconceivable" not only that he would have gone to trial, but also "that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received." In sum, the proper inquiry requires a defendant to show both that he would have rejected his plea and gone to trial and that he would likely have obtained a more favorable result in the end.

To the extent *Hill* was ambiguous about the standard, our precedents applying it confirm this interpretation. In *Premo v. Moore*, the Court emphasized that "strict adherence to the *Strickland* standard" is "essential" when reviewing claims about attorney error "at the plea bargain stage." In that case, the defendant argued that his counsel was constitutionally ineffective because he had failed to seek suppression of his confession before he pleaded no contest. In analyzing the prejudice issue, the Court did not focus solely on whether the suppression hearing would have turned out differently, or whether the defendant would have chosen to go to trial. It focused as well on the weight of the evidence against the defendant and the fact that he likely would not have obtained a more favorable result at trial, regardless of whether he succeeded at the suppression hearing.

The Court in *Missouri v. Frye*, took a similar approach. In that case, the Court extended *Hill* to hold that counsel could be constitutionally ineffective for failing to communicate a plea deal to a defendant. The Court emphasized that, in addition to showing a reasonable probability that the defendant "would have accepted the earlier plea offer," it is also "necessary" to show a "reasonable probability that the

end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." In short, the Court did not focus solely on whether the defendant would have accepted the plea. It instead required the defendant to show that the ultimate outcome would have been different.

Finally, the Court's decision in *Lafler v. Cooper* is to the same effect. In that case, the Court concluded that counsel may be constitutionally ineffective by causing a defendant to reject a plea deal he should have accepted. The Court again emphasized that the prejudice inquiry requires a showing that the criminal prosecution would ultimately have ended differently for the defendant—not merely that the defendant would have accepted the deal. The Court stated that the defendant in those circumstances "must show" a reasonable probability that "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."

These precedents are consistent with our cases governing the right to effective assistance of counsel in other contexts. This Court has held that the right to effective counsel applies to all "critical stages of the criminal proceedings." Those stages include not only "the entry of a guilty plea," but also "arraignments, postindictment interrogation, and postindictment lineups." In those circumstances, the Court has not held that the prejudice inquiry focuses on whether that stage of the proceeding would have ended differently. It instead has made clear that the prejudice inquiry is the same as in *Strickland*, which requires a defendant to establish that he would have been better off in the end had his counsel not erred.

B

The majority misapplies this Court's precedents when it concludes that a defendant may establish prejudice by showing only that "he would not have pleaded guilty and would have insisted on going to trial," without showing that "the result of that trial would have been different than the result of the plea bargain." In reaching this conclusion, the Court relies almost exclusively on the single line from *Hill* that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." For the reasons explained above, that sentence prescribes the threshold showing a defendant must make to establish *Strickland* prejudice where a defendant has accepted a guilty plea. In *Hill*, the Court concluded that the defendant had not made that showing, so it rejected his claim. The Court did not, however, further hold that a defendant can establish prejudice by making that showing alone.

The majority also relies on a case that arises in a completely different context, *Roe v. Flores-Ortega*. There, the Court considered a defendant's claim that his attorney failed to file a notice of appeal. The Court observed that the lawyer's failure to file the notice of appeal "arguably led not to a judicial proceeding of disputed reliability," but instead to "the forfeiture of a proceeding itself." The Court today observes that petitioner's guilty plea meant that he did not go to trial. Because that trial "never took place," the Court reasons, we cannot "apply a strong presumption of reliability" to it. And because the presumption of reliability does not apply, we may not depend on *Strickland*'s statement "that a defendant has no entitlement to the luck of a lawless decisionmaker." This point is key to the majority's conclusion that petitioner would have chosen to gamble on a trial even though he had no viable defense.

The majority's analysis, however, is directly contrary to *Hill*, which instructed a court undertaking a prejudice analysis to apply a presumption of reliability to the hypothetical trial that would have occurred had the defendant not pleaded guilty. After explaining that a court should engage in a predictive inquiry about the likelihood of a defendant securing a better result at trial, the Court said: "As we explained in *Strickland v. Washington*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" That quote comes from the same paragraph in *Strickland* as the discussion about the presumption of reliability that attaches to the trial. In other words, *Hill* instructs that the prejudice inquiry must presume that the foregone trial would have been reliable.

The majority responds that *Hill* made statements about presuming a reliable trial only in "discussing how courts should analyze predictions of the outcome at a possible trial," which "will not always be necessary." I agree that such an inquiry is not always necessary—it is not necessary where, as in *Hill*, the defendant cannot show at the threshold that he would have rejected his plea and chosen to go to trial. But that caveat says nothing about the application of the presumption of reliability when a defendant can make that threshold showing.

In any event, the Court in *Hill* recognized that guilty pleas are themselves generally reliable. Guilty pleas "rarely" give rise to the "concern that unfair procedures may have resulted in the conviction of an innocent defendant." That is because "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." Guilty pleas, like completed trials, are therefore entitled to the protections against collateral attack that the *Strickland* prejudice standard affords.

Finally, the majority does not dispute that the prejudice inquiry in *Frye* and *Lafler* focused on whether the defendant established a reasonable probability of a different outcome. The majority instead distinguishes those cases on the ground that they involved a defendant who did not accept a guilty plea. According to the ma-

jority, those cases "articulated a different way to show prejudice, suited to the context of pleas not accepted." But the Court in *Frye* and *Lafler* (and *Hill*, for that matter) did not purport to establish a "different" test for prejudice. To the contrary, the Court repeatedly stated that it was applying the "same two-part standard" from *Strickland*.

The majority today abandons any pretense of applying *Strickland* to claims of ineffective assistance of counsel that arise at the plea stage. It instead concludes that one standard applies when a defendant goes to trial (*Strickland*); another standard applies when a defendant accepts a plea (*Hill*); and yet another standard applies when counsel does not apprise the defendant of an available plea or when the defendant rejects a plea (*Frye* and *Lafler*). That approach leaves little doubt that the Court has "opened a whole new field of constitutionalized criminal procedure"—"plea-bargaining law"—despite its repeated assurances that it has been applying the same *Strickland* standard all along. In my view, we should take the Court's precedents at their word and conclude that "an error by counsel does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."

III

Applying the ordinary *Strickland* standard in this case, I do not think a defendant in petitioner's circumstances could show a reasonable probability that the result of his criminal proceeding would have been different had he not pleaded guilty. Petitioner does not dispute that he possessed large quantities of illegal drugs or that the Government had secured a witness who had purchased the drugs directly from him. In light of this "overwhelming evidence of guilt," the Court of Appeals concluded that petitioner had "no bona fide defense, not even a weak one." His only chance of succeeding would have been to "throw a 'Hail Mary' at trial." As I have explained, however, the Court in *Strickland* expressly foreclosed relying on the possibility of a "Hail Mary" to establish prejudice. *Strickland* made clear that the prejudice assessment should "proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."

In the face of overwhelming evidence of guilt and in the absence of a bona fide defense, a reasonable court or jury applying the law to the facts of this case would find the defendant guilty. There is no reasonable probability of any other verdict. A defendant in petitioner's shoes, therefore, would have suffered the same deportation consequences regardless of whether he accepted a plea or went to trial. He is thus plainly better off for having accepted his plea: had he gone to trial, he not only would have faced the same deportation consequences, he also likely would have received a higher prison sentence. Finding that petitioner has established prejudice in these circumstances turns *Strickland* on its head.

IV

The Court's decision today will have pernicious consequences for the criminal justice system. This Court has shown special solicitude for the plea process, which brings "stability" and "certainty" to "the criminal justice system." The Court has warned that "the prospect of collateral challenges" threatens to undermine these important values. And we have explained that "prosecutors must have assurance that a plea will not be undone years later," lest they "forgo plea bargains that would benefit defendants," which would be "a result favorable to no one."

The Court today provides no assurance that plea deals negotiated in good faith with guilty defendants will remain final. For one thing, the Court's artificially cabined standard for prejudice in the plea context is likely to generate a high volume of challenges to existing and future plea agreements. Under the majority's standard, defendants bringing these challenges will bear a relatively low burden to show prejudice. Whereas a defendant asserting an ordinary claim of ineffective assistance of counsel must prove that the ultimate outcome of his case would have been different, the Court today holds that a defendant who pleaded guilty need show only that he would have rejected his plea and gone to trial. This standard does not appear to be particularly demanding, as even a defendant who has only the "smallest chance of success at trial"—relying on nothing more than a "Hail Mary"—may be able to satisfy it. For another, the Court does not limit its holding to immigration consequences. Under its rule, so long as a defendant alleges that his counsel omitted or misadvised him on a piece of information during the plea process that he considered of "paramount importance," he could allege a plausible claim of ineffective assistance of counsel.

In addition to undermining finality, the Court's rule will impose significant costs on courts and prosecutors. Under the Court's standard, a challenge to a guilty plea will be a highly fact-intensive, defendant-specific undertaking. Petitioner suggests that each claim will "at least" require a "hearing to get the facts on the table." Given that more than 90 percent of criminal convictions are the result of guilty pleas, the burden of holding evidentiary hearings on these claims could be significant. In circumstances where a defendant has admitted his guilt, the evidence against him is overwhelming, and he has no bona fide defense strategy, I see no justification for imposing these costs.

4. Malpractice in Criminal Cases

Ang v. Martin, 114 P.3d 637 (Wash. 2005)

Owens, J.

We are asked to determine whether plaintiffs in a malpractice action against their former criminal defense attorneys were properly required to prove by a preponderance of the evidence that they were actually innocent of the underlying criminal charges. The Court of Appeals concluded that, as an element of their negligence claim, plaintiffs were required "to prove innocence in fact and not merely to present evidence of the government's inability to prove guilt." We affirm the Court of Appeals.

Facts

Psychiatrist Jessy Ang and his wife Editha jointly owned Evergreen Medical Panel, Inc., a company that provided the Washington State Department of Labor and Industries with independent medical examinations of injured workers. As a result of Dr. Ang's contact with a target of a governmental task force investigating social security fraud, Dr. Ang himself became a person of interest. In February 1994, the task force executed a search warrant on Dr. Ang's office and seized copies of two sets of signed tax returns that reported conflicting amounts of income. The Angs were arrested in April 1996, following the execution of a search warrant at their residence. A year later, the Angs were indicted on 18 criminal counts, including conspiracy to defraud the United States, bank and tax fraud, and filing false statements.

The Angs retained defendants Richard Hansen and Michael G. Martin for flat fees of $225,000 and $100,000, respectively. Attorneys Hansen and Martin engaged in a round of plea negotiations prior to trial, but the Angs rejected the plea bargain. The case proceeded to a jury trial before Judge Tanner in federal district court in December 1997. On the fifth day of trial, just prior to the conclusion of the government's case, Hansen and Martin recommended that the Angs accept another proffered plea, one that the Angs viewed as the least attractive of any agreement previously presented. After Dr. Ang was allegedly told that Mrs. Ang could face sexual assault in prison, the Angs agreed to plead guilty to two of the 18 counts.

The Angs then engaged attorney Monte Hester to review the plea discussions and provide a second opinion. Hester concluded that the government had not met its burden of proof and that the plea agreement provided the Angs with no material benefit. Retaining Hester and Keith A. MacFie to represent them, the Angs successfully moved to withdraw the pleas, which Judge Tanner had never formally accepted. In September 1999, the matter again proceeded to trial before Judge Tanner, with the Angs waiving their right to a jury. Although the government offered another plea bargain prior to trial, one requiring no plea on Dr. Ang's part, a misdemeanor or felony for Mrs. Ang, and a $500,000 fine, the Angs rejected the plea and were acquitted on all 18 counts.

The Angs, along with Evergreen Medical, filed the present legal malpractice action against Hansen and Martin in May 2000 in Pierce County Superior Court. The complaint stated claims for legal malpractice and for violations of the Washington Consumer Protection Act. The trial court denied the defendants' motion for summary judgment, and a jury trial began in November 2001. The trial court instructed the jury that the Angs had to prove by a preponderance of the evidence that they were innocent of the underlying criminal charges. On January 11, 2002, responding to the initial two questions on a special verdict form, the jury found that the Angs had not "proven by a preponderance of the evidence they were innocent of all the criminal charges against them." As to the verdict form's third question, asking whether "any of the defendants had been negligent," the jury made a finding of negligence against Martin only.

The plaintiffs appealed, but the Court of Appeals affirmed. This court granted the plaintiffs' petition for review.

Issues

Where a legal malpractice suit stems from the representation of clients in a criminal prosecution, must plaintiffs who were acquitted of the criminal charges prove their actual innocence of the crimes, or does their acquittal satisfy the innocence element of their malpractice action?

Analysis

Essential Elements of Legal Malpractice Claims against Criminal Defense Counsel. A plaintiff claiming negligent representation by an attorney in a civil matter bears the burden of proving four elements by a preponderance of the evidence:

> (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

The fourth element, proximate causation, includes "cause in fact and legal causation." Cause in fact, or "but for" causation, refers to "the physical connection between an act and an injury." In a legal malpractice trial, the "trier of fact will be asked to decide what a reasonable jury or fact finder in the underlying trial or 'trial within the trial' would have done but for the attorney's negligence." Legal causation, however, presents a question of law: "It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact." To determine whether the cause in fact of a plaintiff's harm should also be deemed the legal cause of that harm, a court may consider, among other things, the public policy implications of holding the defendant liable. In "criminal malpractice" suits, two elements related to proximate causation have been added. In *Falkner v. Foshaug*, the Court of Appeals "concluded that postconviction relief is a prerequisite to maintaining a criminal malpractice suit and proof of innocence is an additional element a criminal defendant/malpractice plaintiff must prove to prevail at trial in his legal malpractice action."

The trial court in the present case thus instructed the jury as follows on the elements of the Angs criminal malpractice claims:

> To prove their legal malpractice claims, the plaintiffs bear the burden of proving by a preponderance of the evidence each of the following:
>
> First, that there is an attorney-client relationship giving rise to a duty owed by a defendant to a plaintiff;
>
> Second, that plaintiffs have obtained a successful challenge to their convictions based on their attorneys failure to adequately defend them;
>
> Third, that plaintiff was innocent of the crimes charged;
>
> Fourth, that there is an act of omission by a defendant that breached the duty of care of an attorney;
>
> Fifth, that a plaintiff was damaged; and
>
> Sixth, that a breach of duty by a defendant is a proximate cause of a plaintiff's damages.

The Angs assigned error to this instruction, contending that their undisputed acquittal of the criminal charges met not only the additional element of postconviction relief but also the innocence requirement.

By successfully withdrawing their guilty pleas and receiving an acquittal on all charges, the Angs unquestionably received the equivalent of postconviction relief, but contrary to their contention, they did not thereby satisfy the innocence requirement. The Angs mistakenly claim that they were simply required to prove legal innocence, not actual innocence." Legal guilt or innocence is that determination made by the trier of fact in a criminal trial," whereas "actual guilt is intended to refer to a determination in a civil trial, by a preponderance of the evidence, that the defendant engaged in the conduct he was accused of in the prior

criminal proceeding." But the *Falkner* court referred explicitly to the "actual innocence requirement" and at no point equated the innocence requirement with legal innocence. Plainly, a requirement of legal innocence would have been redundant alongside the additional, unchallenged requirement of postconviction relief and would have necessitated a confusing overlay of standards of proof, requiring the malpractice jury to consider whether the Angs had proved by a preponderance of the evidence that they would not have been found guilty beyond a reasonable doubt in the underlying criminal trial.

Moreover, proving actual innocence, not simply legal innocence, is essential to proving proximate causation, both cause in fact and legal causation. Unless criminal malpractice plaintiffs can prove by a preponderance of the evidence their actual innocence of the charges, their own bad acts, not the alleged negligence of defense counsel, should be regarded as the cause in fact of their harm. Likewise, if criminal malpractice plaintiffs cannot prove their actual innocence under the civil standard, they will be unable to establish, in light of significant public policy considerations, that the alleged negligence of their defense counsel was the legal cause of their harm. Summarizing the policy concerns, the *Falkner* court observed that, "requiring a defendant to prove by a preponderance of the evidence that he is innocent of the charges against him will prohibit criminals from benefiting from their own bad acts, maintain respect for our criminal justice systems procedural protections, remove the harmful chilling effect on the defense bar, prevent suits from criminals who may be guilty, but could have gotten a better deal, and prevent a flood of nuisance litigation."

In the alternative, the Angs argue that, if a plaintiff's actual guilt or innocence has any place in a criminal malpractice suit, the issue should be raised as an affirmative defense, not as an element of the plaintiffs cause of action. The Angs find support in *Shaw II*, the only decision adopting the actual innocence requirement and shifting to the criminal malpractice defendant "the burden of proof by a preponderance of the evidence as to the actual guilt of the plaintiff." As respondent Martin explained, however, "the criminal defendant/malpractice plaintiff is in a far better position to bear the burden of establishing innocence," since, unlike his defense attorney, he "knows if he is actually innocent," "was, presumably, present or involved in the underlying events which led to the criminal charges," "has unlimited access to the information about his own acts necessary to prove innocence," "would know what, if any, inculpatory facts he withheld from his lawyer," and would have the "opportunity to accept a plea, potentially an Alford plea which could preserve his malpractice claim, before all facts and witness testimony have been developed or are known to his or her attorney." We find this practical analysis persuasive and thus decline to adopt the minority position of *Shaw II*.

In sum, we conclude that the Angs were properly required to prove by a preponderance of the evidence that they were actually innocent of the underlying criminal charges. We therefore affirm the Court of Appeals.

Conclusion

We conclude that, as plaintiffs in a criminal malpractice action, the Angs were properly required to prove by a preponderance of the evidence that they were actually innocent of the underlying criminal charges. We find no persuasive reasons for this court to follow the minority position and shift the burden to the defendant attorneys to prove that their former clients were actually guilty of the charged crimes.

SANDERS, J. (dissenting).

I dissent because the malpractice standard for criminal cases should be the same as civil. There is no reason to invite malpractice in criminal cases by heightening the plaintiff's burden to prove postconviction relief and actual innocence. In every situation a client should rightfully expect competent legal representation.

We have clearly stated the standard for legal malpractice:

> To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

This rule does not suggest the additional requirements the majority adds to cases of criminal malpractice, namely, postconviction relief and proof of actual innocence. I see no reason to add them.

The majority cites a Court of Appeals case, *Falkner v. Foshaug*, to support additional elements. The Court of Appeals opinion *Falkner* is not binding authority, nor is case law from other jurisdictions upon which *Falkner* is based. Nor am I persuaded by its logic. Attorneys who negligently represent their clients should be responsible for any harm that results from the misconduct. It does not matter if the subject matter of the case is civil or criminal. Forcing criminal defendants to prove actual innocence does not serve any purpose except to frustrate the client's right to competent representation.

Citing a "public policy" present in the minds of the individuals in the majority, the majority argues the defendant's acts should be viewed as the cause of any harm unless he demonstrates his innocence. However, our constitution sets the "public policy" which entitles criminal defendants to adequate representation. I prefer that policy as my guide.

The issue is causation. Under our precedent, cause in fact is determined by the jury as a question of fact. Cause in fact is a minimum threshold that asks but for the lawyer's negligence would the client have been harmed. In other words, would the result be different if the lawyer had used reasonable care?

Legal causation is a subsequent inquiry, asking as a matter of law whether liability should attach. The majority argues a criminal defendant should not profit from his crimes, and hence the defense attorney should not be liable for his negligence unless the defendant first proves his own innocence. I disagree. The criminal defendant is equally entitled to competent representation, and the negligent attorney should take responsibility for his malpractice. The majority's rule simply invites malpractice since the defense attorney knows he is held to a lower standard. Proving innocence is impossible since a negative cannot be proved.

Here the Angs's defense attorneys, Michael Martin and Richard Hansen, recommended a particular plea agreement. The Angs initially agreed but later withdrew the plea on recommendation from new counsel and were acquitted on all charges at a subsequent trial. They sued their former defense attorneys and a jury found that Martin alone was negligent even though it found the Angs had not proved their innocence by a preponderance of the evidence. Since the latter consideration should be irrelevant, Martin should bear the responsibility for his negligence. I would reverse as to Martin, and remand for a trial on damages.

ALEXANDER, C.J. (concurring in dissent).

I agree with Justice Sanders that the trial court erred in instructing the jury that Jessy and Editha Ang had to prove that they were actually innocent of the crime charged in order to prevail in their legal malpractice claim against attorneys Richard Hansen and Michael Martin. For that reason, we should reverse the Court of Appeals and remand to the trial court for a new trial on the Angs' claim against Martin.

I write separately because, in my view, we should not stop with a determination that the trial court erred but should go further to indicate that the defendant attorney may raise the issue of the plaintiff's actual guilt in the criminal case as an affirmative defense. That was the position taken by the Supreme Court of Alaska in a similar case, *Shaw v. Department of Administration*. There, the court said that because plaintiffs in such actions must already bear the burden of proving that they have obtained postconviction relief from their criminal convictions, they should not have to prove their "actual innocence." The court went on to indicate, however, that the defendant may raise the issue of the plaintiff's "actual guilt" as an affirmative defense and seek to establish it by a preponderance of the evidence. Although the Alaska court did not engage in an extensive discussion of its reasons for placing the burden on the defendant to establish this affirmative defense, it did indicate that putting the burden there is consistent with the requirement that defendants establish traditional affirmative defenses that look to plaintiffs' actions such as contributory/comparative negligence and assumption of the risk. The Alaska rule makes perfect sense to me for that reason and for the additional reason that it is consonant with the traditional notion that one is presumed in-

nocent until proven guilty beyond a reasonable doubt. Furthermore, shifting the burden to the defendant relieves the plaintiff of the almost impossible burden of proving innocence while at the same time addressing the policy concern noted by the majority, that criminals should not benefit from "their own bad acts."

CHAMBERS, J. (concurring in dissent).

I concur in Justice Sanders' dissent but write separately to express my indignation that this court, based upon the policy of protecting lawyers, would carve out a special protection for criminal defense attorneys whose acts of professional negligence are harmful to their clients. Under this logic, it is not enough for the injured client to prove actual harm from the attorney's failure to meet professional standards; the injured client must also prove that her hands were always clean. Under this logic, why not give immunity to accountants for professional negligence unless the accountant's client can prove he or she never understated income or requested an unavailable deduction, even when the accountants' bad acts caused actual harm to their clients or society? Surely tax dodgers should not profit from their misdeeds. Under this logic, why not give immunity to health care providers who harm their patients unless the patient can prove perfect good health but for the negligence of the provider? Surely the unhealthy should not profit from their illness.

But this logic ignores the fact that professionals owe a duty to the sick as well as the healthy; to the scrupulously honest business woman as well as the one looking for the angle; to the guilty as well as the innocent. Those of us caught in the grip of the law are always entitled to competent legal representation whether or not we are totally innocent. The heart of the criminal defense lawyer's job is often not to prove absolute innocence; the irreducible core of the job is to make the state prove its case and make the best case for the defendant possible. Often the sole issue is the level of culpability and the sanction to be imposed upon the client. The government may seek multiple counts where a single count is appropriate, seek charges of a higher degree than the evidence supports, or seek a sentence disproportionate to the offense. The negligence of her lawyer may cost her client her fortune, her liberty, or her life. The "actual innocence" requirement is impractical and harmful in the area of criminal malpractice law; it creates an almost impossible burden and provides almost absolute immunity to criminal defense lawyers.

The most troubling aspect of the actual innocence requirement announced by the majority lies with its origin. It is based upon a policy to protect lawyers from lawsuits. Tort actions are maintained for a variety of reasons, including the deterrence of wrongful conduct. As a matter of basic policy, accountability, compensation, and deterrence of wrongful conduct should trump protecting lawyers from lawsuits.

Second, while it may be true that a majority of courts that have reached the issue require the plaintiff to establish actual innocence, the numbers do not appear to be great. Only Missouri, New York, Massachusetts, Alaska, Pennsylvania, California, New Hampshire, Nebraska, Illinois, Florida, and Wisconsin require either proof of actual innocence or that the conviction was set aside on postconviction relief. This is hardly a national consensus.

This court should protect the public from lawyers' misdeeds, not the other way around. A plaintiff who is not categorically innocent seeking compensation under ordinary principles of tort law faces no light burden. Such a guilty plaintiff must prove a duty, a breach of that duty, injuries proximately caused by the breach, and the amount of his damages. I see no reason to provide additional protections for lawyers.