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Professional Responsibility: Legal Malpractice Standards for Criminal Defense Attorneys in Ohio

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PROFESSIONAL RESPONSIBILITY: LEGAL MALPRACTICE STANDARDS FOR CRIMINAL DEFENSE ATTORNEYS IN OHIO—*Krahn v. Kinney*, 43 Ohio St. 3d 103, 538 N.E.2d 1058 (1989).

I. INTRODUCTION

"The criminal attorney must [have] knowledge and skill not usually expected of the ordinary civil practitioner".[1] This is because criminal law is a unique area subject to rules distinct from those applicable to civil cases.[2] The pleadings and discovery processes in civil and criminal cases are subject to different rules.[3] Likewise, the scope of depositions in criminal cases is not the same as that allowed in civil cases.[4] These and other differences can be attributed to one major source. The civil practitioner's concerns are for the client's economic status while the criminal attorney's concerns are for the client's liberty and, occasionally, the client's life.[5] The inadequacy of criminal defense attorneys compelled one court to comment, "[f]atal or not, legal malpractice in criminal cases is all too common."[6]

Liability for malpractice in criminal defense has not been addressed by many courts, although legal malpractice suits brought against criminal attorneys have increased in the past decade.[7] Courts

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1. 2 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 21.1 (3d. ed 1989).

2. *Id.*

3. *Id.* The scope of discovery is not the same as that allowed in civil cases. *See* United States v. Hancock, 441 F.2d 1285, 1287, *cert. denied*, 404 U.S. 833 (1971). State counterparts to the Federal Rules of Civil Procedure have no application in criminal cases. *See* Bailey v. State, 227 Ark. 889, 892, 302 S.W.2d 796, 798, *cert. denied*, 355 U.S. 851 (1957). A statute authorizing the taking of depositions for the purpose of discovery or for use as evidence by "[a]ny party to any action" does not authorize the taking of depositions by the defendant in a criminal case. Reed v. Allen, 121 Vt. 202, 205, 153 A.2d 74, 76-77 (1959). Similarly, state statutes providing that the rules of evidence in civil actions also shall apply to criminal actions have been held too narrow to include the right to grant discovery in a criminal case under the rule of civil procedure providing for pretrial disclosure in civil cases. *See* Pinana v. State, 76 Nev. 274, 352 P.2d 824 (1960).

4. Except in the limited situations provided by statute where the witness is about to leave the state or is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial, or for conditional examination of witnesses, the defendant is not entitled to take the deposition of a prosecution witness in a criminal case, and the statute providing for taking depositions in civil cases does not apply in criminal cases. Clark v. Superior Court of San Francisco, 190 Cal. App. 2d 739, 742-43, 12 Cal. Rptr. 191, 193 (1961) (defendant may interview prosecution witnesses, and prosecution has no right to instruct such witnesses not to talk to defendant or his attorney).

5. *See* 2 R. MALLEN & J. SMITH, *supra* note 1, at 284.

6. *In re* Greenfield, 11 Cal. App. 3d 536, 544, 89 Cal. Rptr. 847, 851 (1970).

7. *See, e.g.*, Hogan v. Peters, 181 Ga. App. 670, 670, 353 S.E.2d 601, 601 (1987) ("defendant who plead guilty to murder, burglary and forgery and received life sentence plus 30 years,

differ on the rules that should be applied to criminal malpractice actions. Some courts require the same elements of proof for all legal malpractice actions, whether arising from criminal or civil matters.[8] Other jurisdictions have indicated that legal malpractice actions arising from criminal matters should be subject to different rules.[9]

In *Krahn v. Kinney*,[10] the Ohio Supreme Court had its first opportunity to consider the question of an attorney's liability for legal malpractice in the criminal defense context. The court held that a plaintiff does not have to allege a reversal of the underlying criminal conviction in order to state an action for legal malpractice in the criminal context.[11] The court also outlined the elements of a cause of action for legal malpractice arising from criminal proceedings. "To plead a cause of action for attorney malpractice arising from criminal representation, a plaintiff must allege (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach."[12]

This casenote first examines the court's decision to reject the *Weaver v. Carson*[13] rule which required a reversal of conviction as a prerequisite to a criminal malpractice suit. Second, this note examines the court's application of the doctrine of res judicata as a bar to recovery in the *Krahn* case. Third, this note discusses the likely impact of

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brought legal malpractice action against attorney"); Drury v. Fawer, 527 So. 2d 423, 424 (La. Ct. App. 1988) (client alleged that attorney failed to make post-trial motions, and failed to object to the judge's remarks); Knoblauch v. Kenyon, 163 Mich. App. 712, 415 N.W.2d 286 (1987) (defendant who was found guilty of criminal sexual conduct brought malpractice action against attorney for failure to request hearing, to engage in complete discovery and to follow his advice to waive the right to a jury trial).

8. *See, e.g.*, McCord v. Bailey, 636 F.2d 606, 609 (D.C. Cir. 1980) ("the legal standards for ineffective assistance of counsel in McCord's criminal proceeding and for legal malpractice in this action are equivalent"), *cert. denied*, 451 U.S. 983 (1981); Jepson v. Stubbs, 555 S.W.2d 307, 313-14 (Mo. 1977) ("We conclude that it was not a condition to maintaining that suit that the judgment of conviction be set aside."); Tijerina v. Wennermark, 700 S.W.2d 342, 344 (Tex. Ct. App. 1985) ("the same standards applicable to legal malpractice in a civil case would also be applicable to legal malpractice in a criminal case"); *see generally* Snyder v. Baumecker, 708 F. Supp. 1451 (D.N.J. 1989); Bowman v. Doherty, 235 Kan. 870, 686 P.2d 112 (1984).

9. *See, e.g.*, Walker v. Kruse, 484 F.2d 802, 804 (7th Cir. 1973) ("An Illinois court might well hold, as a matter of law, that a criminal conviction cannot support a malpractice claim unless the plaintiff is able to establish his actual innocence."); Carmel v. Lunney, 70 N.Y.2d 169, 173, 511 N.E.2d 1126, 1128 (1987) ("To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence . . . of the underlying offense."); Weaver v. Carson, 62 Ohio App. 2d 99, 101, 404 N.E.2d 1344, 1346 (1979) (convicted defendant does not state a claim for malpractice against his attorney unless he alleges a reversal of the conviction); *cf.* Zweifel v. Zenge & Smith, 703 S.W.2d 15, 18 (Mo. Ct. App. 1985) (allegations of reversal noted).

10. 43 Ohio St. 3d 103, 538 N.E.2d 1058 (1989).

11. *Id.* at 106, 538 N.E.2d at 1061.

12. *Id.*

13. 62 Ohio App. 2d 99, 404 N.E.2d 1344 (1979).

Krahn on Ohio law regarding an attorney's liability for malpractice in the criminal defense context. Finally, this note proposes a solution to attorney incompetence that can prevent attorney malpractice actions.

II. FACTS AND HOLDING

In *Krahn v. Kinney*,[14] the Shaffer Amusement Company operated a gambling device in the High Spirits Lounge,[15] a bar owned by High Spirits, Inc., and managed by Lynn Krahn.[16] Krahn was charged with misdemeanor gambling offenses arising from payments made to players who received credits on the machine.[17] High Spirits was cited for a violation of the regulations of the Ohio Department of Liquor Control.[18]

Lynn Krahn and the owners of the bar hired Winfield Kinney to represent them.[19] During pretrial negotiations with Kinney, the prosecutor offered to dismiss charges against Krahn if she would testify against the Shaffer Amusement Company.[20] Kinney, however, failed to inform Krahn of the prosecutor's offer of dismissal.[21] Kinney also canceled Krahn's request for a trial by jury.[22]

On the day of the trial, Kinney advised Krahn that the charge against her was a minor misdemeanor and that she should change her plea from not guilty to guilty.[23] Krahn took Kinney's advice and the other charges were dismissed.[24] Krahn later learned, however, that the charge was not a minor misdemeanor as Kinney had told her. Rather, the charge to which she was advised to plead guilty was a first degree misdemeanor.[25]

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14. 43 Ohio St. 3d 103, 538 N.E.2d 1058 (1989).

15. *Id.* at 103, 538 N.E.2d at 1059.

16. *Id.*

17. *Id.* The bar was raided by the police and they seized the gambling device. Krahn v. Kinney, No. 86-10413 (Ohio Ct. App. Dec. 22, 1987) (LEXIS, States library, Ohio file).

18. 43 Ohio St. 3d at 103, 538 N.E.2d at 1059.

19. *Id.* Krahn was charged with two first degree misdemeanors and one minor misdemeanor. *Id.*

20. *Id.*

21. *Id.* at 104, 538 N.E.2d at 1059.

22. *Id.* Kinney did not appear at a hearing before the Ohio Liquor Commission to defend the violation notice against High Spirits. *Id.* at 104, 538 N.E.2d at 1060. The Commission entered a default order requiring High Spirits to pay $2,100 or have its license suspended for twenty-one days. *Id.* High Spirits hired new counsel who took action which ultimately reduced the fine from $2,100 to $1,400 and reduced the suspension alternative from twenty-one days to fourteen days. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* Krahn and High Spirits did not know that Kinney also was representing the Shaffer Amusement Company in its efforts to recover the machine. *Id.* at 103, 538 N.E.2d at 1059. Krahn was fined $100 as a result of her guilty plea. Krahn v. Kinney, No. 86-10413 (Ohio Ct. App. Dec. 22, 1987) (LEXIS, States library, Ohio file).

Krahn subsequently hired another attorney who filed a motion to vacate the judgment based upon Kinney's failure to communicate the prosecutor's offer to dismiss charges in exchange for Krahn's testimony.[26] The motion was denied.[27]

Lynn Krahn sued attorney Kinney and the law firm of Kinney & Coughlin for malpractice.[28] She alleged that, as a result of Kinney's actions, she was convicted of a first degree misdemeanor, suffered the disgrace of a criminal conviction involving moral turpitude, had her good name and reputation damaged, and suffered emotional distress.[29] "The trial court granted summary judgment to the [defendants] and dismissed the complaint because . . . Krahn failed to set forth a claim upon which relief could be granted since she did not" claim that she had obtained a reversal of her conviction based on ineffective assistance of counsel.[30] Lynn Krahn challenged the summary judgment in favor of the defendant.[31] The appellate court reversed the trial court's judgment,[32] and certified the record to the Supreme Court for review and final resolution in light of conflict with a decision of the Court of Appeals for Cuyahoga County in *Weaver v. Carson*.[33]

In a unanimous decision, the Ohio Supreme Court affirmed the appellate court's ruling.[34] The supreme court determined that the same elements of proof are applicable to "all legal malpractice actions, whether arising from criminal or from civil representation."[35] The court also determined that to state a cause of action for legal malpractice arising from criminal representation, a plaintiff does not have to claim that his or her conviction has been reversed.[36] Finally, the court

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26. 43 Ohio St. 3d at 104, 538 N.E.2d at 1060.

27. *Id.*

28. *Id.* at 103, 538 N.E.2d at 1059.

29. *Id.* at 104, 538 N.E.2d at 1060.

30. *Id.* Another reason the trial court granted summary judgment to the defendants was because "the denial of Krahn's motion to vacate the criminal judgment acted as res judicata to bar the determination of the issues raised in the attorney malpractice action." *Id.*

31. *Id.*

32. *Id.*

33. 62 Ohio App. 2d 99, 404 N.E.2d 1344 (1979). The appellate court determined that the facts of this case placed Krahn's claim outside the rule of *Weaver v. Carson*. Krahn v. Kinney, No. 86-10413 (Ohio Ct. App. Dec. 22, 1987) (LEXIS, States library, Ohio file). The rule is not justified when the plaintiff does not assert her innocence, but rather asserts instead that her attorney's misconduct deprived her of an opportunity to have the charges against her dismissed in return for her cooperation in another case. *Id.* The court noted that in the context of a claim of innocence, the rule of *Weaver v. Carson* may be appropriate. *Id.* Finally, the court determined that under the circumstances of this case, an appeal would not have been useful. *Id.* The court stated that "Krahn's damage is not a bungled opportunity for vindication, but a lost opportunity to minimize her criminal record." *Id.*

34. 43 Ohio St. 3d at 108, 538 N.E.2d at 1063.

35. *Id.* at 105, 538 N.E.2d at 1061.

36. *Id.* at 106, 538 N.E.2d at 1061.

determined that the facts in *Krahn* prevented the use of collateral estoppel as a bar to Krahn's cause of action.[37]

III. BACKGROUND

The historical development of an attorney's liability for malpractice was influenced by the English common law of negligence[38] that first emerged within the context of individuals who claimed to be competent in their professions.[39]

Although a right of action for attorney negligence was recognized as early as the eighteenth century, the concept initially remained relatively dormant,[40] due partly to judicial belief that members of their profession had to be protected from liability.[41] This thinking gave way in the 1767 decision of *Pitt v. Yalden*,[42] in which the court addressed whether an attorney could be liable for an error of judgment.[43]

In *Pitt*, the court recognized that an attorney did not guarantee results but it had difficulty devising plausible explanations for why an error or mistake should not be adequate for liability. As a result, the court held that the attorney could be liable only for "gross negligence" and not for an "honest mistake."[44] The standard of care applicable to attorneys developed into the distinction between an error of judgment, which was characterized as an honest mistake, and "gross or culpable negligence," which was the basis for liability.[45] This dichotomy was recognized in an early English case by Chief Justice Abbott when he stated that "God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law . . . ."[46]

A more precise standard of care finally emerged in *Lanphier v. Phipos*[47] where the court stated:

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37. *Id.* at 107, 538 N.E.2d at 1063.

38. Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959).

39. *Id.*

40. Comment, *The Attorney's Liability for Negligence: An Alabama Perspective*, 7 CUMB. L. REV. 69 (1976).

41. *Id.*

42. 98 Eng. Rep. 74 (1767).

43. *Id.* at 75.

44. *Id.*

45. *Id.* Lord Mansfield stated:

> [t]hat part of the profession which is carried on by attornies [sic] is liberal and reputable, as well as useful to the public, when they conduct themselves with honour and integrity: and they ought to be protected where they act to the best of their skill and knowledge. But every man is liable to error: and I should be very sorry that it should be taken for granted, that an attorney is answerable for every error or mistake . . . .

Id.

46. Montrious v. Jefferys, 172 Eng. Rep. 51, 53 (1825).

47. 173 Eng. Rep. 581 (K.B. 1838).

> Every person who enters a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case . . . nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantage than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill . . . .[48]

Thus it appeared that English courts were willing to hold attorneys to a reasonable degree of skill and care.

In the United States, the first reported case of legal malpractice was the 1776 decision in *Stephens v. White*.[49] The defendant attorney argued that he had not been paid for his work and thus no duty had arisen. The court rejected his argument by stating that "the appellee *undertook to conduct the suit*, and in his *management* of it, was guilty of such a neglect of his duty as to subject the plaintiff to a loss; after this, it is not competent to him to allege a want of consideration."[50] The result of *Stephens* was that plaintiffs were not required to allege payment of a fee in order to state a cause of action for legal malpractice.[51]

The American theory was further developed in 1879. In *Savings Bank v. Ward*,[52] the defendant attorney was hired by a real estate buyer to examine the grantor's title to determine whether the property was sufficient security for a loan.[53] The attorney informed the plaintiff-bank that the title was good.[54] The bank accepted the property as security and loaned the alleged owner $3,500.[55] Thereafter, the bank was informed that the borrower was insolvent and did not own the property.[56] The court held that since there was no fraud or collusion by the attorney nor privity of contract between the attorney and the bank, the attorney was not liable for any loss sustained by reason of the loan.[57]

In *Ward*, Justice Clifford set forth the professional liability standard for all attorneys:

> When a person adopts the legal profession, and assumes to exercise its

48. *Id.* at 583.
49. 2 Va. (2 Wash.) 260 (1796).
50. *Id.* at 269-70.
51. *See, e.g.*, Glenn v. Haynes, 192 Va. 574, 575, 66 S.E.2d 509, 512 (1951) (attorney who voluntarily agrees to render services without immediate compensation is liable for results of improper practices and is estopped from alleging lack of consideration as a defense).
52. 100 U.S. 195 (1879).
53. *Id.* at 196.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 205-06.

> duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties; and if injury results to the client from a want of such a degree of reasonable care and skill, the attorney may be held to respond in damages to the extent of the injury sustained.[58]

The court outlined two requirements for professional liability. The first was privity.[59] The second was representation only to the best of the attorney's knowledge.[60] Because the latter was a subjective standard that took each attorney's individual ability into consideration, Justice Clifford attempted to clarify:

> Unless the client is injured by the deficiencies of his attorney, he cannot maintain any action for damages; but if he is injured, *the true rule is that the attorney is liable for the want of such skill, care, and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment.*
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> . . . .
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> Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party . . . .[61]

The significance of *Ward* is two-fold. First, it established a professional liability standard based upon the concept of duty; for an attorney to be liable, there must be a breach of the duty owed by the attorney to his client with the result being some form of damages.[62] Second, the case was highly influential; the standard was widely accepted without alteration for approximately eighty years.

Since the 1960s, the doctrine of legal malpractice has developed alongside other doctrines of negligence. Since legal malpractice encompasses the negligent rendering of professional services, courts generally

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58. *Id.* at 198. Justice Clifford added:

> Proof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the action; but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is that if he acts with a proper degree of skill, and with reasonable care and to the best of his knowledge, he will not be held responsible.

Id.

59. *Id.* at 200. The rule that emerged from the United States Supreme Court in this case was that an attorney was only liable to those with whom he was in privity of contract. *Id.* The Supreme Court refused to allow recovery to injured third parties because it believed that elimination of the privity requirement would expose attorneys to unlimited liability. *Id.* at 202. However, some courts have disagreed with the Supreme Court and have extended the attorney's liability to injured third parties. *See, e.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); Bucquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976); Hansen v. Wightmann, 14 Wash. App. 78, 538 P.2d 1238 (1975).

60. *Ward*, 100 U.S. at 199-200.

61. *Id.* (emphasis added).

62. *Id.*

agree that legal malpractice is a form of negligence.[63] Modern courts consistently have held that if a malpractice action is brought in negligence, the client must prove: (1) there was an attorney-client relationship giving rise to a duty, (2) a breach of that duty, (3) a causal relationship and (4) damages.[64]

A. An Attorney-Client Relationship Giving Rise to a Duty

The purpose of liability for attorney malpractice was to protect and compensate clients who were denied effective representation due to the negligence of their attorneys.[65] As one author noted, "the attorney's liability for negligence arises out of the attorney-client relationship."[66]

The relationship between attorney and client establishes the attorney's duty to possess and exercise reasonable care, skill and diligence.[67] This duty is often referred to as a standard of care.[68] The standard of care that a lawyer must meet is determined by the conduct of a reasonable person in the same or similar circumstances.[69] This reasonableness standard has been expressed in several ways. First, reasonableness has been expressed as the use of "such skill, care and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment."[70] Second, reasonableness has been defined as the use of "a reasonable degree of care or skill and to possess to a

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63. *See, e.g.*, Woodruff v. Tomlin, 593 F.2d 33, 43 (6th Cir. 1979) ("An attorney, like any other professional, is liable for acts of negligence in the conduct of his professional work."); Lipscomb v. Krause, 87 Cal. App. 3d 970, 975, 151 Cal. Rptr. 465, 468 (1978) ("It is the current view in California that a legal malpractice suit is but one variety of negligence action and is governed by the general doctrines of pleading and proof prevailing in negligence actions."). There are other legal malpractice actions cognizable in some jurisdictions under appropriate circumstances. Legal malpractice actions can be brought in contract. *See* Wade, *supra* note 38, at 756. In some instances, an action for intentional infliction of emotional distress may be maintained. *See, e.g.*, Timms v. Rosenblum, 713 F. Supp. 948 (E.D. Va. 1989) (emotional distress action allowed under Virginia law only where outrageous conduct causes physical injury), *aff'd*, 900 F.2d 256 (1990).

64. *See, e.g.*, Sammons v. Garner, 284 Ala. 131, 133, 222 So. 2d 717, 718 (1969); Shehade v. Gerson, 148 Ill. App. 3d 1026, 1029, 500 N.E.2d 510, 512 (1986), *appeal denied*, 106 Ill. Dec. 56, 505 N.E.2d 362 (1987); Harding v. Bell, 265 Or. 202, 205, 508 P.2d 216, 217 (1973); Trice v. Mozenter, 356 Pa. Super. 510, 515 A.2d 10, 13 (1986).

65. Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292 (1963).

66. Wade, *supra* note 38, at 756.

67. *Id.* For a general discussion of the elements of a legal malpractice action, see Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408 (1977); Comment, *supra* note 40, at 69.

68. Comment, *supra* note 67, at 409. The author observes that some courts include a subjective element in the standard of care for attorneys—an attorney is required to use his best judgment or act to the best of his knowledge. Other courts include an objective element which compares the attorney's performance against the performance of other lawyers in similar circumstances. *Id.*

69. *See* Comment, *supra* note 67, at 409.

70. *Ward*, 100 U.S. at 200.

reasonable extent the knowledge requisite to a proper performance of his duties."[71] A third statement of an attorney's standard of care was enunciated in *Hodges v. Carter*:[72]

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.[73]

These variations of the attorney's standard of care indicate that courts are not in agreement concerning the standard that should be used.[74]

In determining whether an attorney has the duty of care, courts consider whether the attorney exercised judgment in good faith and in the client's best interest.[75] Diligence and good faith often vitiate an unfavorable result.[76] Good faith does not prevent malpractice recovery, but the lack of good faith occasionally increases the possibility of malpractice liability.[77]

B. Breach of Duty

Courts agree that an attorney does not insure or guarantee the correctness of his or her work.[78] The attorney is liable only for the failure to exercise reasonable care and diligence. Whether an attorney has breached the standard of care is treated by most courts as a question of fact for the jury.[79] The rationale for this approach is that it reduces

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71. Clinton v. Miller, 124 Mont. 463, 483-84, 226 P.2d 487, 498 (1951); *cf.* Cox v. Sullivan, 7 Ga. 144, 148 (1849) ("An attorney is not bound to extraordinary diligence. He is bound to *reasonable* skill and diligence.").

72. 239 N.C. 517, 80 S.E.2d 144 (1954).

73. *Id.* at 519, 80 S.E.2d at 145-46.

74. Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771, 774-75 (1967).

75. *See, e.g.*, Clinton v. Miller, 124 Mont. at 483-84, 226 P.2d at 498; William v. Knox, 10 N.J. Super. 384, 385, 76 A.2d 712, 715 (1950).

76. Talbot v. Schroeder, 13 Ariz. App. 230, 475 P.2d 520, 520 (1970).

77. *See* Strauss v. New Amsterdam Casualty Co., 30 Misc. 2d 345, 347, 216 N.Y.S.2d 861, 864 (N.Y. City Mun. Ct. 1961).

78. *See, e.g.*, McCartney v. Wallace, 214 Ill. App. 618, 624 (1919) ("Attorneys do not guarantee that their judgment is infallible, and are not necessarily negligent because they do not discover all decisions on a subject or may question their finality."); Purves v. Landell, 8 Eng. Rep. 1332, 1337 (H.L. 1845) ("The professional adviser has never been supposed to guarantee the soundness of his advice.").

79. *See, e.g.*, Walker v. Goodman & Mitchell, 21 Ala. 647, 650 (1852) ("The degree of negligence necessary to charge him is a question of fact for the jury."); Hampel-Lawson Merc. Co. v. Poe, 169 Ark. 840, 277 S.W. 29 (1925) (lower court improperly passed on the standard of care issue as a matter of law); Cochrane v. Little, 71 Md. 323, 333, 18 A. 698, 701(1889) (In an

judicial interference with a traditional jury function.[80] In addition, since jurors evaluate the actions of other professionals, they should be able to evaluate the conduct of attorneys.[81] The disadvantage of this approach is that it may allow jurors to make an uninformed judgment based on their non-legal experiences.[82]

Occasionally, a court may indicate that the application of the standard is a question of law to be decided by the court.[83] It is argued that judges are experts in legal matters and are more competent than lay-jurors to determine whether an attorney breached a duty of care.[84] Another argument is that since the judge traditionally controls the conduct of attorneys, liability for legal malpractice—another form of attorney control—also should be handled by the judge.[85] This approach is not without its disadvantages. If judges determine attorney negligence, they may apply the standard of care too lightly because of concern for their colleagues.[86] On the other hand, judges may be harsh in applying the standard of care because they want to maintain a high caliber of attorneys.[87] Ordinarily, in a majority of states, the determination of whether an attorney breached the standard of care is a question of fact for the jury.[88]

C. *Causal Relationship*

Even if an attorney is found to have breached a legally recognized duty, the client still must demonstrate that the breach actually caused his or her injury.[89] A client is required to prove that the result in the prior litigation would have been different "but for" the attorney's negligence.[90] The burden of proof for causation is therefore on the client-

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action of this nature, the court must let the jury determine the attorney's negligence.).

80. Note, *supra* note 74 at 778.

81. *Id.*

82. *Id.*

83. *See, e.g.*, Gimbel v. Waldman, 193 Misc. 758, 760, 84 N.Y.S.2d 888, 891 (Sup. Ct. 1948) ("[N]o question of fact is involved but . . . the matter is one of pure law and . . . it would be improper to submit to a jury of lay persons the question whether the advice was correct, or, if incorrect, whether in view of the state of law on the subject the defendant was guilty of negligence.").

84. *See* Note, *supra* note 74, at 777.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See* cases cited *supra* note 79.

89. For a general discussion of causation see Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666 (1978).

90. *See, e.g.*, Hines v. Davidson, 489 So. 2d 572, 573 (Ala. 1986); Mylar v. Wilkinson, 435 So. 2d 1237, 1239 (Ala. 1983); Piper v. Green, 216 Ill. App. 590 (1920); Cooper v. Simon, 719 S.W.2d 463, 469 (Mo. Ct. App. 1986), *cert. denied*, 482 U.S. 918 (1987); Utterback-Gleason Co. v. Standard Accident Ins. Co., 193 A.D. 646, 652, 184 N.Y.S. 862, 866 (1920), *aff'd*, 233 N.Y.

plaintiff.[91] If the client-plaintiff would have lost the prior suit, notwithstanding the negligence of the attorney, the negligence is not the cause of the injury and the attorney is not liable.[92] If the client-plaintiff lost the prior action, he must show that the prior claim was a valid one.[93] If the prior action was unsuccessful and the attorney negligently failed to appeal, the client is required to show that the appeal would have been successful.[94] If a defense was omitted, the client must show it was a valid one.[95] Although a few courts have held that if a case was lost because of attorney negligence, the burden was on the attorney to show that the cause of action was an invalid one,[96] the law is now settled that the plaintiff has the burden of proof.[97]

D. Damages

If a client proves that an attorney breached the standard of care and that the attorney's negligence was the proximate cause of the client's injuries, the court or jury still is faced with the issue of damages.[98] The measure of damages is compensation for the injury suffered by the plaintiff, and the burden is on the plaintiff to prove the damages.[99]

If the negligence caused the plaintiff to lose title to property, the measure of recovery is the value of the property.[100] If it caused one to overlook an outstanding lien, the measure is the cost of eliminating the lien.[101] If the negligence occurred while conducting litigation, the measure of damages is the amount which would have been recovered "but for" the attorney's negligence.[102]

E. Criminal Malpractice

Criminal defense attorneys like their civil counterparts are held to

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549, 135 N.E. 913 (1922).

91. *See* Wade, *supra* note 38, at 770.

92. *See* Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. VA. L. REV. 225, 235-36 (1958).

93. *See* Piper v. Green, 216 Ill. App. 590 (1920).

94. *See* Spangler v. Sellers, 5 F. 882, 894-95 (S.D. Ohio 1881); General Accident Fire & Life Assurance Corp. v. Cosgrove, 257 Wis. 25, 42 N.W.2d 155, 158 (1950).

95. *See* Roehl v. Ralph, 84 S.W.2d 405, 409 (Mo. Ct. App. 1935); *cf.* Haggerty v. Watson, 302 N.Y. 707, 709, 98 N.E.2d 586, 586 (1951).

96. *See* Grayson v. Wilkinson, 13 Miss. 268, 288 (1845); Harter v. Morris, 18 Ohio St. 493, 496 (1869).

97. *See* Wade, *supra* note 38, at 770.

98. *See* Note, *supra* note 65, at 1307.

99. *See* Quinn v. Van Pelt, 56 N.Y. 417, 419 (1874).

100. *See* Whitney v. Abbott, 191 Mass. 59, 64, 77 N.E. 524, 525 (1906).

101. *See* Hill v. Cloud, 48 Ga. App. 506, 173 S.E. 190 (1934); Bayerl v. Smyth, 117 N.J.L. 412, 189 A. 93 (1937).

102. *See* McLellan v. Fuller, 226 Mass. 374, 115 N.E. 481 (1917).

a duty of reasonable care and must exercise ordinary skill, knowledge and diligence.[103] A client also must prove that the attorney's negligence was the proximate cause of the injury resulting from the underlying criminal proceeding.[104]

Where the plaintiff's malpractice action is grounded on the criminal defense attorney's failure to achieve an acquittal on one or more charges, the fact that there is a basis for a finding of plaintiff's guilt on the record generally has been deemed to be sufficient to deny the malpractice claim.[105] As a California court of appeals recognized, "a criminal defendant whose conviction has not been reversed, or whose sentence has not been modified after a challenge has been made on competency-of-counsel grounds, has a seemingly insurmountable obstacle to overcome in trying to show any damage resulted from the alleged malpractice."[106]

Where the malpractice action has nothing to do with the former client's guilt or innocence, however, the attorney may have proximately caused the client's injury despite the client's supposed guilt.[107] Some courts, however, have held that the client failed to establish the element of proximate cause. The Supreme Court of Oklahoma, for example, held that "proximate cause" was not established where clients asserted the negligent failure of their defense attorneys to appeal a denial of bond, but failed to show that they could have posted the bond if it had in fact been set.[108]

Furthermore, the Federal District Court for New Jersey, the New

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103. The discussion here involves actions for negligence and does not include claims for ineffective assistance of counsel. There is a difference between the two concepts. Ineffective assistance of counsel involves a denial of due process of law under the fifth and fourteenth amendments, or the right to assistance of counsel under the sixth amendment. United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973). A malpractice action involves only the determination of negligence as the proximate cause of the client's injuries. Lange v. Marshall, 622 S.W.2d 237, 238 (Mo. Ct. App. 1981). Although the standards for determining ineffective assistance of counsel differ among jurisdictions, some courts now use a standard similar to that used in attorney malpractice actions. *Compare* Hodges v. Carter, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954) (legal malpractice action holding attorneys to a standard of "reasonable skill and diligence") *with* DeCoster, 487 F.2d at 1202 (ineffective assistance of counsel action holding that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate") (emphasis omitted).

104. *See, e.g.*, McCord v. Bailey, 636 F.2d 606, 611 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); Tijerina v. Wennermark, 700 S.W.2d 342, 344 (Tex. Ct. App. 1985).

105. Hughes v. Malone, 146 Ga. App. 341, 247 S.E.2d 107 (1978); Claudio v. Heller, 119 Misc. 2d 432, 463 N.Y.S.2d 155 (N.Y. Sup. Ct. 1983).

106. Bledstein v. Superior Court, 162 Cal. App. 3d 152, 174, 208 Cal. Rptr. 428, 442 (1984).

107. *See, e.g.*, Newman v. Silver, 553 F. Supp. 485, 495 (S.D.N.Y. 1982) (malpractice claim with respect to criminal defense attorney's excessive fee), *aff'd in part* and *vacated in part*, 713 F.2d 14 (1983).

108. Wabaunsee v. Harris, 610 P.2d 782 (Okla. 1980).

Hampshire Supreme Court, and the Pennsylvania Superior Court all have held that a defendant's act of suicide following a criminal conviction cannot be causally linked to the defense counsel's alleged negligence as a matter of law.[109] The Pennsylvania Superior Court reasoned that suicide is "an act so extraordinary as not to be reasonably foreseeable and thus . . . it is not the type of harm that can proximately result from [criminal defense counsel's] ordinary negligence."[110]

Some courts have imposed an additional requirement on plaintiffs alleging negligence in criminal representation. In addition to proving proximate cause, the client also must prove his or her actual innocence as an element of legal malpractice in order to recover.[111] In some jurisdictions, the client must obtain a reversal of the underlying criminal conviction as a prerequisite to bringing a legal malpractice action.[112]

F. Defenses to Criminal Malpractice

Historically, the most common defense to a cause of action for malpractice has been the statute of limitations.[113] Additionally, the defense of contributory negligence on the client's part occasionally prevents recovery.[114] An increasingly common defense to criminal malpractice, however, is collateral estoppel based upon the judgment of conviction.[115] A client may be precluded from suing the attorney for malpractice if the client unsuccessfully raised the issue of the attorney's negligence in a prior suit. A number of jurisdictions have held that the client is barred because the issue already has been adjudicated.[116]

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109. Snyder v. Baumecker, 708 F. Supp. 1451 (D.N.J. 1989); McLaughlin v. Sullivan, 123 N.H. 335, 461 A.2d 123 (1983); McPeake v. Cannon, 381 Pa. Super 227, 553 A.2d 439 (1989).

110. *McPeake*, 381 Pa. Super at 234, 553 A.2d at 442.

111. Walker v. Kruse, 484 F.2d 802, 804 (7th Cir. 1973); Carmel v. Lunney, 70 N.Y.2d 169, 173, 511 N.E.2d 1126, 1128 (1987).

112. *E.g.*, Weaver v. Carson, 62 Ohio App. 2d 99, 101, 404 N.E.2d 1344, 1346 (1979); *see also* Zweifel v. Zenge & Smith, 703 S.W.2d 15, 18 (Mo. Ct. App. 1985).

113. *See, e.g.*, Wallach & Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA L. REV. 257 (1970); Comment, *The Commencement of the Statute of Limitations in Legal Malpractice Actions*, 15 UCLA L. REV. 320 (1967).

114. *See, e.g.*, Ishmael v. Millington, 241 Cal. App. 2d 520, 530, 50 Cal. Rptr. 592, 598 (1966); Theobald v. Byers, 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864, 866 (1961).

115. *See, e.g.*, McCord v. Bailey, 636 F.2d 606, 608-09 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); Johnson v. Schmidt, 719 S.W.2d 825, 826-27 (Mo. Ct. App. 1986); Johnson v. Raban, 702 S.W.2d 134, 136 (Mo. Ct. App. 1985); Vavolizza v. Krieger, 33 N.Y.2d 351, 355-56, 308 N.E.2d 439, 442, 352 N.Y.S.2d 919, 923 (1974). Collateral estoppel and estoppel by judgment are two components of the doctrine of res judicata. Whitehead v. General Tel. Co., 20 Ohio St. 2d 108, 112, 254 N.E.2d 10, 13 (1969). Collateral estoppel bars the relitigation of an issue that has been actually litigated and necessarily determined in a prior action. Estoppel by judgment prevents a party from relitigating a cause of action after a prior court has rendered a final judgment on the merits of that cause as to that party. Goodson v. McDonough Power Equip., Inc., 2 Ohio St. 3d 193, 195, 443 N.E.2d 978, 981 (1983).

116. *See, e.g.*, McCord v. Bailey, 636 F.2d 606, 609 (D.C. Cir. 1980) (legal standards for

IV. ANALYSIS

A. *The Ohio Supreme Court's Rejection of* Weaver v. Carson

In *Krahn v. Kinney*,[117] the Ohio Supreme Court rejected the rule of *Weaver v. Carson* that a reversal of an underlying criminal conviction must be obtained before a criminal malpractice action can be maintained:[118]

> we hold that a plaintiff need not allege a reversal of his or her conviction in order to state a cause of action for legal malpractice arising from representation in a criminal proceeding. To plead a cause of action for attorney malpractice arising from criminal representation, a plaintiff must allege (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach.[119]

Krahn met all the traditional requirements for a legal malpractice claim. She had an attorney-client relationship that gave rise to a duty.[120] Kinney breached that duty by failing to inform Krahn of the prosecutor's first offer, canceling her request for a jury trial, failing to show up at the Ohio Liquor Commission's hearing,[121] and failing to inform Krahn that she had an opportunity to receive a lesser sentence.[122] Kinney's inaction was the proximate cause of Krahn's injury which was to plead guilty to a higher charge.[123] Her damages were the damage to her good name, severe emotional distress[124] and a stiffer penalty of $100.[125] The court's rationale focused on the unfairness of the application of the additional requirement of the "reversal" rule.[126] In adopting the language of the court below, the supreme court agreed that it would be unjust to require a plaintiff to obtain a reversal of his or her conviction as a prerequisite to a malpractice suit since the injury in this situation "is not a bungled opportunity for vindication, but a lost

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ineffective assistance of counsel in plaintiff's criminal proceeding are equivalent to legal malpractice standards), *cert. denied*, 451 U.S. 983 (1981); Vavolizza v. Krieger, 33 N.Y.2d 351, 308 N.E.2d 439, 352 N.Y.S.2d 919 (1975) (applying collateral estoppel to plaintiff's charge that defense counsel coerced him into pleading guilty based on the court's earlier denial of the motion to vacate the guilty plea).

117. 43 Ohio St. 3d 103, 538 N.E.2d 1058 (1989).

118. *Id.* at 106, 538 N.E.2d at 1061.

119. *Id.*

120. *Id.* at 103, 538 N.E.2d at 1059.

121. *Id.* at 103-04, 538 N.E.2d at 1059-60.

122. *Id.*

123. *Id.*

124. *Id.* at 104, 538 N.E.2d at 1060.

125. Krahn v. Kinney, No. 86-10413 (Ohio Ct. App. Dec. 22, 1987) (LEXIS, States library, Ohio file).

126. 43 Ohio St. 3d at 105, 538 N.E.2d at 1061.

opportunity to minimize her criminal record."[127]

The breach of duty asserted by Krahn against her attorney Kinney had nothing to do with her guilt or innocence at trial. Her claim focused on the fact that Kinney did not inform her of the prosecutor's offer to dismiss the suit in exchange for her testimony.[128] It was therefore an opportunity to avoid going to trial that was lost to Kinney as a result of her attorney's actions.[129]

The "reversal" test focuses on whether the client would have prevailed in the underlying action[130] and ignores attorney negligence in pre-trial negotiations in the criminal setting and settlement discussions in the civil context. By rejecting the "reversal" test, the supreme court tacitly recognized that malpractice can occur both within and outside the courtroom.

The supreme court in *Krahn* did not, however, completely close the door to the "reversal" requirement. It recognized that failure to obtain a reversal still may be important in certain factual circumstances.[131] The court noted that "in most cases the failure to secure a reversal of the underlying criminal conviction may bear upon and even destroy the plaintiff's ability to establish the element of proximate cause."[132] The court determined that Krahn's failure to set aside her conviction resolved the issue of proximate cause against her with respect to her claim that she pled guilty after receiving poor advice as to the seriousness of the charge.[133]

In rejecting the application of the "reversal" rule, the court undermined the holding of *Weaver v. Carson*.[134] The court in *Weaver* held that in addition to proving the traditional elements of legal malpractice,

> where the claim is that lawyer malpractice caused a criminal conviction, the cause of action is not complete, nor is the statement of it complete, unless the plaintiff alleges two additional facts to establish damage:
>
> (1) that his conviction has been reversed based on the ineffective assistance of counsel; and either
>
> (2) that on the remand for a new trial his case was either dismissed on the merits or tried with a resulting acquittal; or
>
> (3) that his conviction, actually guilty or not, could not have been

127. *Id.* at 106, 538 N.E.2d at 1061. A similar situation in civil litigation occurs when the attorney fails to take advantage of a settlement offer. *Id.*

128. *Id.* at 104, 538 N.E.2d at 1059.

129. *Id.* at 103, 538 N.E.2d at 1059.

130. Weaver v. Carson, 62 Ohio App. 2d 99, 404 N.E.2d 1344 (1979).

131. 43 Ohio St. 3d at 106, 538 N.E.2d at 1062.

132. *Id.*

133. *Id.* at 106 n.7, 538 N.E.2d at 1062 n.7.

134. 62 Ohio App. 2d 99, 404 N.E.2d 1344 (1979).

> achieved but for the ineptitude of his counsel and was unassailable on retrial due entirely to the same cause.[135]

There are several public policy justifications for requiring "reversal of the underlying conviction" as an element of legal malpractice actions.[136] First, the requirement discourages incarcerated persons from occupying their time in prison by pursuing civil actions against their former attorneys.[137] Second, the central issue regarding causation is usually the criminal defendant's guilt or innocence and the criminal justice system with its procedural safeguards minimizes the prejudicial effect of counsel's error.[138]

A major disadvantage of the "innocence" requirement is that the criminal defendant has a burden that his civil counterpart does not. The latter only has to prove that "but for" the attorney's negligence he or she should have achieved a better result.[139]

There is a significant practical difference between these two burdens of proof.[140] In the civil context, the function of the jury is to determine ultimate facts[141] by weighing all the evidence to determine in whose favor the preponderance of evidence lies.[142] The plaintiff, to prevail in a civil malpractice action, need only demonstrate that the *preponderance* of evidence would have been in his favor in the prior suit.[143] The function of the jury in a criminal trial is different.[144] The jury does not determine in whose favor the preponderance of evidence lies, but rather whether "the state has proved that the accused is guilty beyond a reasonable doubt."[145] Therefore, the fact that the jury did not convict a criminal defendant does not necessarily mean that it considered him or her innocent of the crime.[146] All it means is that the state failed to meet its high burden of proof.[147]

The jury in a criminal malpractice action examines the evidence as if it were trying a criminal case.[148] Occasionally, the result may be unfair.[149] An example of an unfair result may occur when a criminal

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135. *Id.* at 101, 404 N.E.2d at 1346.
136. 2 R. MALLEN & J. SMITH, *supra* note 1, § 21.3.
137. *Id.*
138. *Id.*
139. *Id.*
140. Comment, *supra*, note 67, at 446.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 446-47.
148. *Id.* at 447.
149. *Id.*

defense attorney negligently fails "to object to the introduction of illegally seized evidence which would have been held inadmissible under the exclusionary rule."[150] Even though the jury hears evidence that proves the defendant was guilty, the jury in the malpractice action may find that "but for" the attorney's negligence in the prior suit, the guilt of the defendant would not have been proven beyond a reasonable doubt, and thus award him damages.[151]

The rule that a client has to obtain a reversal before suing for legal malpractice is inflexible and treats some clients unfairly when the facts of the case fall outside malpractice in the context of a trial.[152] The overriding element of *Weaver* is an allegation of innocence.[153] This element may be justified when the client claims that he or she would not have been found guilty at trial "but for" the attorney's negligence. However, where the client alleges malpractice outside the trial context, the *Weaver* requirement is not meaningful because innocence is not at issue. The *Weaver* rule places a heavy burden on the criminal defendant to prove his or her actual innocence before recovering any damages.[154] The effect of this rule would be to grant immunity from malpractice liability to any attorney who could prove in a subsequent malpractice action that the client is actually guilty.[155] Furthermore, such immunity could be detrimental, since it may result in laxity and incompetence by criminal defense attorneys.[156]

Unlike the rule of *Weaver*, the *Krahn* rule is flexible and requires a court to focus on the specific facts of the case before it.[157] The *Krahn* rule occasionally may produce an unfair result by allowing a guilty party to sue his or her attorney for malpractice.[158] Such a result may, however, be counterbalanced by the award of minimal damages to the plaintiff-client.[159] Consequently, the guilty client does not profit and the negligent attorney is punished for his or her lack of reasonable skill and care.[160]

B. Res Judicata as a Defense to Criminal Malpractice

It is often asserted by criminal defense counsel in response to a

150. *Id.*
151. *Id.*
152. *See Krahn*, 43 Ohio St. 3d at 106, 538 N.E.2d at 1061.
153. 62 Ohio App. 2d at 101, 404 N.E.2d at 1345.
154. *See* Comment, *supra* note 67, at 447.
155. *Id.*
156. *Id.*
157. 43 Ohio St. 3d at 106, 538 N.E.2d at 1062.
158. *See* Comment, *supra* note 67, at 447.
159. *Id.*
160. *Id.*

former criminal client's claim of legal malpractice that such an action is barred by the doctrine of res judicata.[161] In *Krahn*, the attorney claimed that the malpractice suit was barred by res judicata because the ineffective assistance of counsel issue was conclusively adjudicated when the trial court denied Krahn's motion to vacate the judgment in the criminal proceeding.[162]

Res judicata encompasses the two concepts of "estoppel by judgment" and "collateral estoppel."[163] "Estoppel by judgment" prevents a party from relitigating a cause of action after a prior court has rendered a final judgment on the merits of that action as to that party.[164] When the plaintiff obtains a favorable judgment, the claim "merges" into the judgment and the plaintiff cannot relitigate that claim in a separate action.[165] Conversely, when a judgment is in favor of the defendant, the plaintiff's cause of action is extinguished and the judgment acts as a bar against the plaintiff's suing again on the same claim.[166] The purpose of "estoppel by judgment" is to avoid multiple litigation over the same matter.[167]

The *Krahn* court, applying "estoppel by judgment" determined that an action to vacate a criminal judgment based on ineffective assistance of counsel is not the same as a legal malpractice action.[168] The court noted that a claim for ineffective assistance of counsel is based on constitutional guarantees and seeks reversal of a criminal conviction while legal malpractice is a common-law tort action which seeks monetary damages.[169] The court concluded that the proof of either of these two causes of action does not necessarily establish the other.[170] As a result, "estoppel by judgment" was held not to apply to this case.

The second component of res judicata is "collateral estoppel.[171] Collateral estoppel furthers the public policy of avoiding multiple litigation over the same matter,[172] and acts as a bar to the relitigation of an issue that has been "actually and necessarily litigated and deter-

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161. *See* cases cited *supra* note 116 and accompanying text.

162. 43 Ohio St. 3d at 106-07, 538 N.E.2d at 1062.

163. *See* cases cited *supra* note 116.

164. 43 Ohio St. 3d at 107, 538 N.E.2d at 1062.

165. Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1978). "Estoppel by judgment" is also referred to as "claim preclusion."

166. *Id.*

167. *Id.*

168. 43 Ohio St. 3d at 107, 538 N.E.2d at 1062.

169. *Id.*

170. *Id.*

171. *Id.*

172. Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535-36 (5th Cir. 1978).

mined in a prior action."[173] The *Krahn* court conceded that the issue of an attorney's incompetence resulting in a conviction can be raised and determined in a prior criminal action where a claim of ineffective assistance of counsel has been made.[174] In this situation, collateral estoppel could act as a bar to subsequent litigation on the issue.[175]

The *Krahn* court determined, however, that the facts of the case prevented the application of collateral estoppel as a bar to Krahn's cause of action.[176] The trial court, in denying Krahn's motion to vacate her conviction, "found that Krahn failed to show that her guilty plea was not knowingly, voluntarily and intelligently entered."[177] The trial court did not, therefore, rule on the issue upon which Krahn's malpractice action was grounded:[178] whether the attorney committed an impropriety by failing to inform Krahn of the offer of a plea bargain.[179] The court held that the issues presented in the malpractice claim had not, therefore, been "actually and necessarily litigated and determined" in the denial of Krahn's motion to vacate the criminal judgment against her[180] and the failure of Krahn's motion to vacate the criminal judgment did not act as res judicata to bar the determination of the issues raised in the attorney malpractice action.

C. *The Impact of Krahn*

The *Krahn* court considered the issue of legal malpractice in the criminal context. Some courts apply the same elements to all legal malpractice actions, whether arising out of criminal or civil representation.[181] Other courts have adopted the theory that "innocence" is a required element of the claim of legal malpractice in addition to the traditional elements of negligence.[182] The Ohio Supreme Court has chosen the former view.[183]

The *Krahn* court adopted a flexible rule to analyze legal malpractice claims based on the facts of the particular case.[184] This rule treats clients fairly by assuring that they are not shoved out of court by a theory that is applied across the board without considering the specific

173. 43 Ohio St. 3d at 107, 538 N.E.2d at 1062.
174. *Id.*
175. *Id.*
176. *Id.* at 107, 538 N.E.2d at 1063.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 108, 538 N.E.2d at 1063.
181. *See* cases cited *supra* note 8.
182. *See* cases cited *supra* note 9.
183. 43 Ohio St. 3d at 105, 538 N.E.2d at 1061.
184. *Id.* at 106, 538 N.E.2d at 1062.

facts of each case. Attorneys also are protected since the client must establish proximate cause by proving that the injury would not have occurred "but for" the actions of the attorney.[185]

D. Specialization—A Method to Increase Attorney Competence Before the Injury to the Client Occurs

In *Krahn v. Kinney,* the Ohio Supreme Court outlined the elements of a cause of action for legal malpractice arising from criminal proceedings.[186] The ability of a client to bring a malpractice action against an attorney is therefore one restraint on an attorney's conduct. Malpractice actions, however, do not solve the problem of incompetent attorneys. The solution to the "incompetence" problem may be to increase competence *before* injury to the client occurs.[187]

Incompetent attorneys are found in every substantive field of law, but mediocre trial attorneys present glaring examples of incompetence.[188] In 1932, the United States Supreme Court in *Powell v. Alabama*[189] recognized that a layman cannot have a fair trial without the proper assistance of counsel.[190] The Court's rationale was that a layman lacks the skills necessary to assert fully rights guaranteed under the American system of justice.[191] The constitutional right to effective assistance of counsel established in *Powell* was only applied in capital trials, but the Supreme Court expanded the right to all cases involving a potential loss of liberty,[192] to proceedings in advance of trial,[193] to defendants pleading guilty,[194] and to all indigent defendants.[195]

In criminal cases, procedural safeguards like habeas corpus proceedings exist to minimize injuries caused by incompetent representation, but they are laden with difficult obstacles.[196] A significant obstacle is the burden of proof that is placed on the challenger-client.[197] The same layman whose inability to assert rights was recognized in *Powell* now has to recognize a mistake and prove that it occurred.[198]

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185. *Id.*
186. *Id.* at 106, 538 N.E.2d at 1061.
187. *See generally* Note, *Legal Specialization and Certification,* 61 VA. L. REV. 434, 439 (1975).
188. *Id.* at 436.
189. 287 U.S. 45 (1932).
190. *Id.* at 68-69.
191. *Id.*
192. Argersinger v. Hamlin, 407 U.S. 25 (1972).
193. Miranda v. Arizona, 384 U.S. 436 (1966).
194. Brady v. United States, 397 U.S. 742 (1970).
195. Gideon v. Wainwright, 372 U.S. 335 (1963).
196. Note, *supra* note 188, at 437.
197. *Id.*
198. *Id.*

In civil cases, a client who recognizes an attorney's incompetence may not be able to prosecute a malpractice claim because of the additional time and expense involved in hiring another attorney.[199] Further, the injured client bringing a malpractice action confronts the same obstacles facing a habeas corpus petitioner.[200] The burden of proof is on the client to establish a claim of malpractice.[201]

There are justifications for the obstacles to recovery. First, attorneys cannot function effectively if they are subjected unduly to suits by angry clients who sue every time a case is lost.[202] Second, many clients in both civil and criminal cases expect the lawyer to win the case regardless of its merits.[203] At the same time, it must be recognized that incompetent attorneys injure clients and that solutions aimed at eliminating incompetence are needed.[204]

Formal specialization in the form of state certification can help solve the problem of attorney "incompetence."[205] There are several arguments in favor of specialization. First, it is in the public interest to ensure some minimum level of competence within an organized bar.[206] This goal can be achieved by a number of different methods[207] including performance evaluations by peers or judges, continuing legal education programs and examinations.[208] Second, specialization attempts to satisfy the public's demand for increased efficiency and convenience.[209] The cost of legal service would be decreased because the client would not have to pay the attorney for hours spent researching an area of law with which he is not familiar.[210] Furthermore, a potential client would save time and effort finding an attorney since specialization would allow limited advertising.[211] The attorney's income also would be increased since specialization enhances the attorney's efficiency, thereby allowing him or her to handle a greater number of cases.[212]

Critics argue that specialization may lessen the work load of the non-specialist who sees the public increasingly taking their problems to

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199. *Id.* at 439-40.
200. *Id.* at 440.
201. *Id.*
202. *Id.* at 441.
203. *Id.*
204. *Id.* at 441-42.
205. *See generally* Note, *supra* note 188, at 434.
206. *Id.* at 437.
207. J. MCELHANEY, *Trial Advocacy as a Specialty* in LEGAL SPECIALIZATION 34, 41-42 (1976).
208. *Id.*
209. *See* Note, *supra* note 188, at 444.
210. *Id.*
211. *Id.*
212. *Id.*

those who specialize.[213] The opponents of specialization also argue that acquiring the status of a specialist involves extra time and expense.[214] The final argument is that specialization may increase public expectations which, if not fully met, may breed an increase in malpractice actions.[215]

Specialization, a solution separate and distinct from the malpractice action used to punish the incompetent attorney,[216] operates to reduce the occurrence of injuries resulting from attorney incompetence. Since specialization provides little assistance to the client who is already a victim of the attorney's errors,[217] and does not advance the recovery of damages by an incompetent attorney's victims, both solutions are needed.[218]

V. CONCLUSION

The Ohio Supreme Court in *Krahn v. Kinney* was presented for the first time with the issue of legal malpractice in the criminal context[219] and was asked to determine whether a client must allege a reversal of an underlying conviction to state a claim for legal malpractice.[220] The court's adoption of the rule that imposes the same requirements for all legal malpractice actions—civil and criminal—reflects the court's desire to protect the interests of both the plaintiff-client and the defendant-attorney. The court changed the law in Ohio and rejected the "reversal of a conviction" approach adopted by other jurisdictions in some fairly recent cases.[221]

Because an action for malpractice is a limited solution to the problem of attorney incompetence, the legal profession should encourage "specialization" of criminal attorneys which protects the expectations of clients, satisfies the public's demand for increased efficiency and convenience, and results in decreased costs for legal services. Specialization also benefits attorneys by increasing their efficiency and allowing them to handle a greater number of cases.

Adeniji Akintobi

213. *See* J. MCELHANEY, *supra* note 207, at 39.
214. *Id.*
215. *Id.*
216. *See* Note, *supra* note 187, at 443.
217. *Id.*
218. *Id.* at 444.
219. 43 Ohio St. 3d 103, 538 N.E.2d 1059 (1989).
220. *Id.* at 105, 538 N.E.2d at 1061.
221. *See* cases cited *supra* note 9.