

PROFESSIONAL LIABILITY UPDATE

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CALIFORNIA LAW

**Michael Piscitelli v. Robert Friedenberg** 01 C.D.O.S. 2093

by Joseph P. McMonigle, Kathleen M. Ewins and Jennifer A. Becker

*The Fourth Appellate District has ruled on five significant legal malpractice issues. First, there is a constitutional right to a jury trial in legal malpractice cases, even if a court or arbitrator would have decided the underlying case. Second, expert testimony on the likely result of an underlying case invades the province of the jury and is not admissible. Third, as the substitute arbiter of the underlying case, the legal malpractice jury is entitled to instruction on the rules and regulations that would have been considered in the underlying forum. Fourth, evidence admissible in the underlying action is admissible in the legal malpractice action with proper limiting instructions, if necessary. Fifth, punitive damages that would have been awarded against an underlying tortfeasor are not a compensable loss in a legal malpractice action.*

In 1986 Prudential recruited Piscitelli to sell limited partnership interests that it misrepresented were as safe as long term certificates of deposit and would yield a return of 15 to 20 percent. After selling a significant number of the partnership interests to his clients, Piscitelli perceived problems with the investments. He turned his emphasis to arranging money management services.

Investors who had purchased the limited partnerships made numerous complaints against Piscitelli between 1992 and 1996. Prudential defended the claims and paid settlements, but the complaints became part of Piscitelli's permanent broker record. Because of the complaints, Piscitelli could not find another brokerage job.

Piscitelli retained Robert Dreher to represent him in an NYSE arbitration against Prudential. Dreher received a copy of a class action complaint filed by investors against Prudential. When Mr. Dreher changed firms and could not take the case, Piscitelli retained Friedenberg and his firm to represent him. The evidence showed that Friedenberg received Dreher's file containing the class action complaint. In addition, Piscitelli made Friedenberg aware of the class action lawsuit and, on two occasions, told him about a deadline for opting out of a class settlement. Friedenberg told Piscitelli he would take care of the matter but did nothing.

When Prudential raised the class action settlement as a defense to Piscitelli's

claims, Friedenbergr moved for permission for Piscitelli to opt out after the deadline. The court found that Piscitelli had inquiry notice and denied relief.

In the subsequent legal malpractice lawsuit, the jury rendered a verdict in Piscitelli's favor. It found that Piscitelli would have been awarded \$2,435,160 in general and special damages. After the verdict, the jury determined that the arbitrators would have awarded \$221,389,400 in punitive damages against Prudential.

The court granted Freidenbergr a new trial on damages unless Piscitelli consented to a remittitur of the punitive damages award. It reasoned that the award was not supported by the evidence and that the jury failed to consider other penalties that had been paid by Prudential as a result of the investments. The trial court found that the jury erroneously believed it was sending a message to Prudential. Piscitelli did not accept the remittitur and both parties appealed.

### **The Right To A Jury Trial**

The *Piscitelli* court considered whether the plaintiff was entitled to a jury trial because the underlying action was to be heard by an arbitration panel, not a jury. The Court confirmed the plaintiff's constitutional right to a jury trial in "actions at law". The Court's decision is consistent with other jurisdictions which have decided the issue not on the basis of whether a judge or jury tried the case-within-the-case, rather whether the underlying case presented issues of law

or fact. If the case involves issues of fact, a "jury" trier of fact can replace the underlying trier of fact even if a judge or arbitrator would have served in that role in the underlying case. This ruling is consistent with *Ceriale v. Superior Court* (1996) 48 Cal.App.4th 1629.

### **The Use of Experts In The Trial-Within-The-Trial**

The court held that it was an abuse of discretion for the court to allow Piscitelli's expert to opine as to Piscitelli's probability of prevailing in an NSYE arbitration. Piscitelli's expert testified, of course, that Piscitelli would have won. The court followed *Summers v. A.L. Gilbert* (1999) 69 Cal.App.4th in finding that allowing an expert to express a belief as to the ultimate issue, that is, how the underlying case would have been decided, shifts responsibility for the decision to witnesses and is of no real value to the trier of fact.

In California, the question in the trial-within-the-trial is not what an underlying trier of fact would have done, but rather, what it should have done. The jury's role in the malpractice case is that of an objective factfinder. Properly administered, the trial-within-the-trial in *Piscitelli* would have required the jurors to step into the shoes of the arbitrators, consider the facts of Piscitelli's claims and determine their merits.

It is clear that attempting to shortcut the trial-within-the-trial through competing expert opinions will not be permitted. The merits of the underlying proceeding must be fully and fairly determined

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within the context of the legal malpractice trial.

### **Properly Instructing A Jury In A Trial-Within-The-Trial**

The trial court refused to provide the jury with instructions setting forth NASD rules governing broker conduct, obligations and fiduciary duties. The appellate court found that the trial court's failure to provide the requested rules and regulations deprived the jury of the ability to "step into the shoes of a reasonable NYSE panel". The jury, therefore, lacked the necessary tools to reach a decision.

Though the court recognized that it might be "burdensome and complicated" to require a jury to consider all rules that would have applied in an underlying case, it stated "that is the nature of the case-within-a-case format". The court's message is that California law requiring a "trial-within-a-trial" is being literally interpreted to require a determination of the merits in a close approximation of the form of proceeding that the underlying matter would have taken. Counsel in legal malpractice actions must prepare instructions necessary for both the underlying and malpractice actions.

### **Admissibility Of Evidence In The Trial-Within-The-Trial**

Recognizing that evidence is liberally admitted in NYSE arbitrations, the court of appeal found no error in the trial court's admission of evidence of, among other things, Prudential's offer of settlement with the SEC and Department

of Corporations consent orders. In admitting the documents, the court properly attempted to replicate an NYSE arbitration. The court noted, however, that admitting the documents would not allow the jury to rely on them for any purpose. A court must properly instruct a jury to give admitted documents the appropriate legal significance and effect.

In view of the liberal admissibility of evidence in arbitrations, the trial court erred in excluding written statements of claims by investors against Piscitelli and Prudential. The statements were relevant to Piscitelli's knowledge of investment risks, whether his representations to clients were consistent with his alleged knowledge, and whether Piscitelli was responsible for some of the damages he claimed. The jury should have had the opportunity to consider the statements.

The *Piscitelli* trial court was overly restrictive in applying the California Rules of Evidence in an "arbitration-within-a-trial" context. The evidentiary rules governing a "trial-within-the-trial" will be dictated, at least in part, by the rules that would have been applied in an underlying proceeding.

### **Punitive Damages May Not Be Awarded Through A Trial-Within-A-Trial**

The court noted the general rule that the value of damages in a legal malpractice case is "the value of the claim lost." However, punitive damages are not compensation for loss, but are imposed to punish a wrongdoer and deter future misconduct. No societal purpose is

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served by imposing punitive damage burdens on a defendant who did not act oppressively, maliciously or fraudulently.

The court disagreed with the reasoning of *Merenda v. Superior Court* (1992) 3 Cal.App.4th 1 which held that lost punitive damages in an underlying case are transformed into compensatory damages in a subsequent legal malpractice action because they were “proximately caused” by the attorney’s

negligent conduct. Proximate cause determinations are not evaluated strictly by actual causation but by public policy considerations that limit an actor's responsibility for his conduct where it would be unjust to hold him responsible. Such considerations are present where a plaintiff seeks to hold a defendant liable for the malicious, oppressive, or fraudulent conduct of a third party.

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