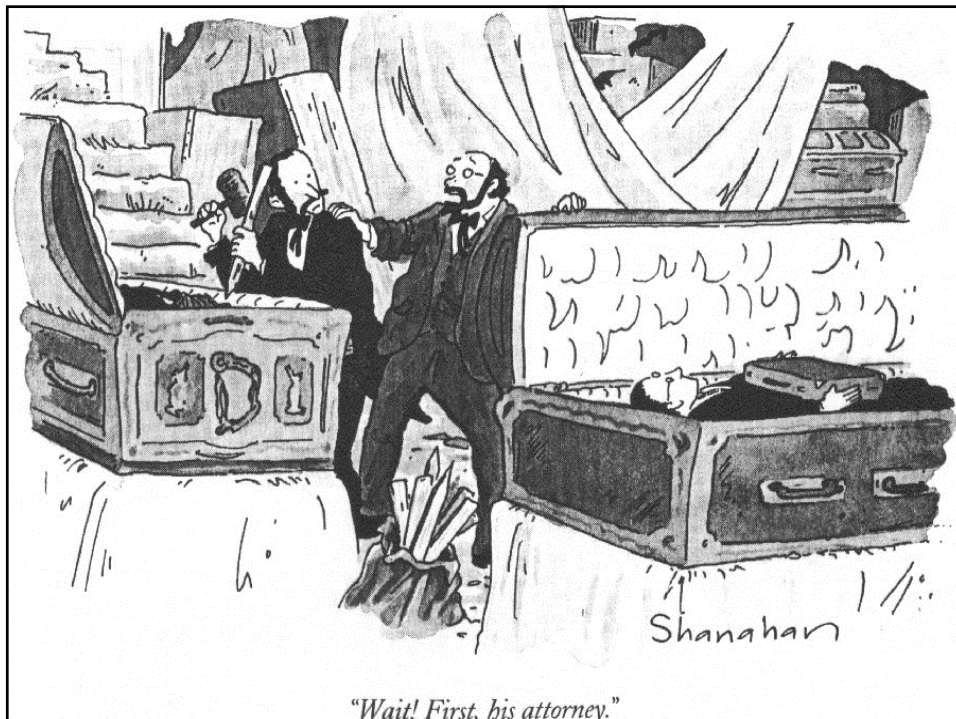


LEGAL MALPRACTICE PRINCIPLES AND LITIGATION STRATEGY

- Lawyers are now targets
 - I. Reported Cases in 70s – 407
 - II. Reported Cases in 80s – 2,633
 - III. Reported Cases in 90s – 6,668
 - IV. Reported Cases since 2000 – 35,000+
- Lawyers are not popular





**LEGAL MALPRACTICE
PRINCIPLES AND
LITIGATION STRATEGY**

Avoiding Legal Malpractice:

**More a matter of communication than
morality**

LEGAL MALPRACTICE PRINCIPLES AND LITIGATION STRATEGY

Elements of a Legal Malpractice Action

- I. Duty
- II. Breach of Duty
- III. Causation/"But For" Rule
- IV. Damages

Duque v. Perez, 95 A.D.3d 937 (2d Dept. 2012)

Duty / Privity

- It is well established with respect to attorney malpractice, absent fraud, collusion, malicious acts, or other special circumstances, that an attorney is not liable to third parties not in privity for harm caused by professional negligence.
- New York adheres to traditional rule.

Estate of Schneider v. Finmann, 907 N.Y.S.2d 119 (2010)

Duty / Privity

- For there to be a cause of action for legal malpractice, there must be an attorney-client relationship.

Nelson v. Roth,
69 A.D.3d 912 (2d Dept. 2010)

- However, there are exceptions....

Duty / Privity

Exceptions:

- Where relationship of attorney to third-party "so close as to approach that of privity."

Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood,
80 N.Y.2d 377 (1992)

- Lender who relies on attorney's certification of title.

Id. at 382.

Duty / Privity

- Will Beneficiaries
- Excess Liability Insurer
- Reliance on an Opinion Letter

Standard of Care - Negligence

- Attorney's failure to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession.

Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 19 N.Y.S.3d 488 (2015); NY PJI 2:152

Standard of Care - Negligence

- Mere error in professional judgment is not malpractice.

Geller v. Harris,
258 A.D.2d 421 (1st Dept. 1999)

- Ignorance of the rules may be malpractice.

Kenney v. Zimmerman,
185 A.D.2d 690 (4th Dept. 1992)

Standard of Care – Negligence

- Breach of Fiduciary Duty
Separate cause of action.
(Can be dismissed as duplicative
when negligence is also pled).

*Ulico Cas. Co. v. Wilson, Elser, Moskowitz,
Edelman & Dicker,*
56 A.D.3d 1 (1st Dept. 2012)

Standard of Care – Negligence

- **Statutory Liability / Violations of Disciplinary Rules**
- **Violations of Disciplinary Rules are not necessarily malpractice** (although they may result in a grievance).

Fletcher v. Boies, Schiller & Flexner LLP,
140 A.D.3d 587 (1st Dept. 2016)

Standard of Care – Negligence

- **Conflicts of Interest**
Conflict of interest by itself does not support a malpractice cause of action.

Id.



Breach of professional duty must have caused actual damage.

Causation / "But For" Rule

- **Plaintiff must demonstrate "but for" attorney's negligence, plaintiff would have prevailed in the underlying action. (Case Within the Case)**

Kenney, 185 A.D.2d at 691.

Damages

- If there are no actual damages, attorney will not be liable for malpractice.

Fielding v. Kupferman,
104 A.D.3d 580 (1st Dept. 2013)

- Measure of plaintiff's damages: value of lost claim.

Stein v. Levine,
8 A.D.3d 652 (2d Dept. 2004)

Damages – Collectibility

- **Must the Plaintiff prove ability to collect judgment in underlying action?**

- *Lindenman v. Kreitzer*, 7 A.D.3d 30 (1st Dept. 2004), holds that it is the burden of the defendant's attorney to prove that the plaintiff is not able to collect.

Damages - Punitive

- "Defendants' conduct is so outrageous as to evince a high degree of moral turpitude and showing wanton dishonesty."

Zarin v. Reid & Priest,
184 A.D.2d 385 (1st Dept. 1992).

- Attorneys are not liable for loss of punitive damage claim since punitive damages against lawyer will not punish or deter underlying wrongdoer.

Summerville v. Lipsig
270 A.D.2d 213 (1st Dept. 2000)

Damages - Attorneys' Fees

- Attorneys' fees are ordinarily not recoverable, however, attorney does not get credit for fees he would have charged against client's recovery.

Campagnola v. Mulholland, Minion & Roe,
76 N.Y.2d 38 (1990)

Damages – Guilty Client

- A guilty client may not sue his attorney for malpractice.
- *Sgambelluri v. Ironman*, 78 A.D.3d 924 (2d Dept. 2010)
- No economic damages
- *Dombrowski v. Bulson*, 19 N.Y. 3d 347 (2012)

Statute of Limitations – Claim Accruals

- Claim accrues when all facts necessary to the cause of action have occurred and an injured party can obtain relief in court. N.Y.C.P.L.R 214(6) (McKinney 1996)
- Attorney malpractice claims have no "discovery rule."
- *Gerschel v. Christensen*, 143 A.D.3d 555 (1st Dept. 2016)

Statute of Limitations - Claim Accruals

- Statute of Limitations is 3 years regardless of whether underlying theory is in contract or in tort. N.Y.C.P.L.R 214(6)
- Legislature overruled *Santulli v. Englert, Reilly & McHugh*, 78 N.Y.2d 700 (1992)-statute of limitations was 6 years for a breach of contract claim.

Statute of Limitations Continuous Representation Doctrine

- "Tolls the statute of limitations until the completion of the attorney's ongoing representation concerning the matter out of which the [legal] malpractice claim arises."

Griffin v. Brewington,
300 A.D.2d 283, 284 (2d Dept. 2002)

Statute of Limitations – Concealment and Discovery

- Statute of Limitations in legal malpractice action is not tolled or affected by the fact that the malpractice is not revealed to the client by the attorney.

McCoy v. Feinman,
99 N.Y.2d 295 (2002)



Statute of Limitations – Concealment and Discovery

- Attorney's failure to disclose malpractice does not give rise to a separate fraud claim.

Weiss v. Manfredi,
83 N.Y.2d 974 (1994)



Ripeness

- Often a legal malpractice action is subject to dismissal for lack of ripeness.

Parametric Capital Management, LLC v. Lacher
15 A.D.3d 301, (1st Dept. 2005)

- Where underlying claim is still pending, a legal malpractice complaint may be dismissed without prejudice.

Flintock Const. Services, LLP v. Rubin, Fiorella & Friedman LLP, 110 A.D.3d 426 (1st Dept. 2013)

Collateral Estoppel and *Res Judicata*

- Where clients submit a dispute against attorneys to binding arbitration, and there is a decision in favor of the attorneys, the subsequent malpractice action against the attorney is dismissed.

Altamore v. Friedman,
193 A.D.2d 240 (2d Dept. 1993)

Collateral Estoppel and *Res Judicata*

- In the *Matter of Sackler*, 222 A.D.2d 9 (2d Dept. 1996) a client who failed to raise legal malpractice claim in the course of prior proceeding to fix legal fees, ran the risk of Collateral Estoppel.

Release and Waiver

- During their representation, attorneys may not ask their clients to sign a release that limits attorneys' liability to their clients.

Swift v. Choe,
242 A.D.2d 188 (1st Dept. 1998)

Trial Tactics and Motion Practice

Jury Selection

- Overcome the public's generally negative attitude toward attorneys.
- Personal dealings with lawyers.
- Can juror follow the law.

Expert Opinion

- "Expert evidence generally is required if the basis for judging the adequacy of professional service is not within the ordinary experience of the fact finder."

Zasso v. Maher,
226 A.D.2d 366 (2d Dept. 1999)

Exceptions to Need for Experts

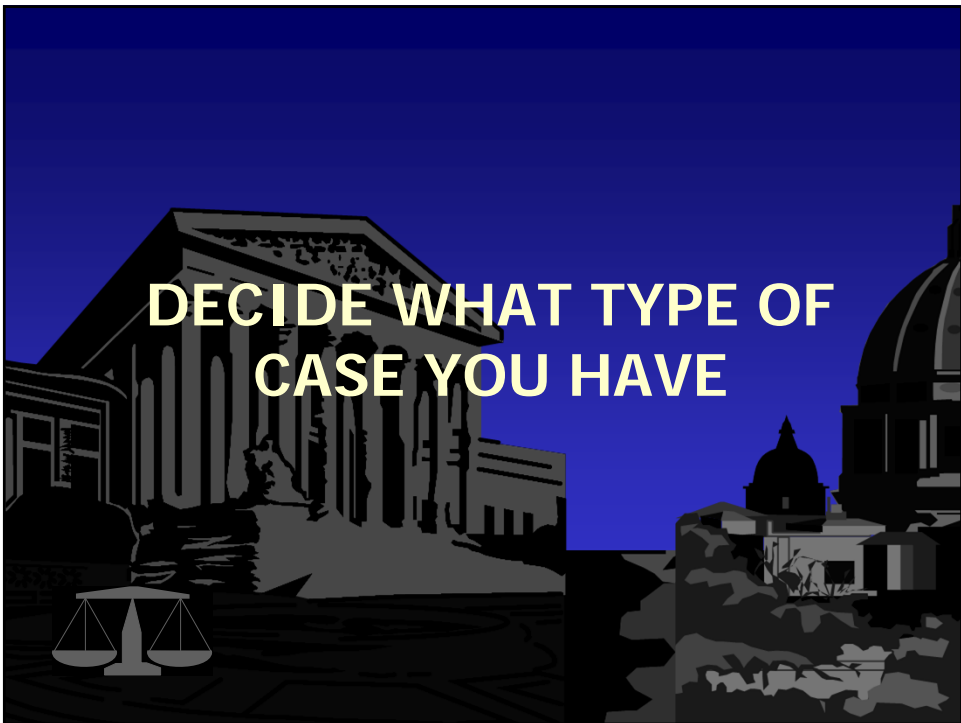
When “the ordinary experience of the fact-finder provides sufficient basis for judging the adequacy of the professional service, or the attorney’s conduct falls below any standard of due care.”

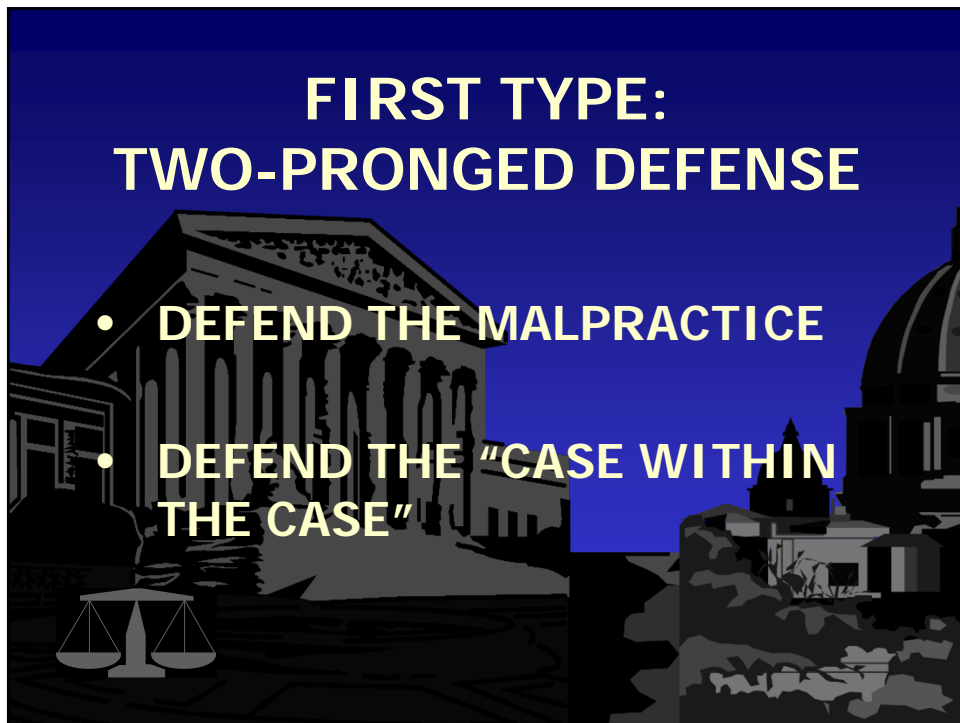
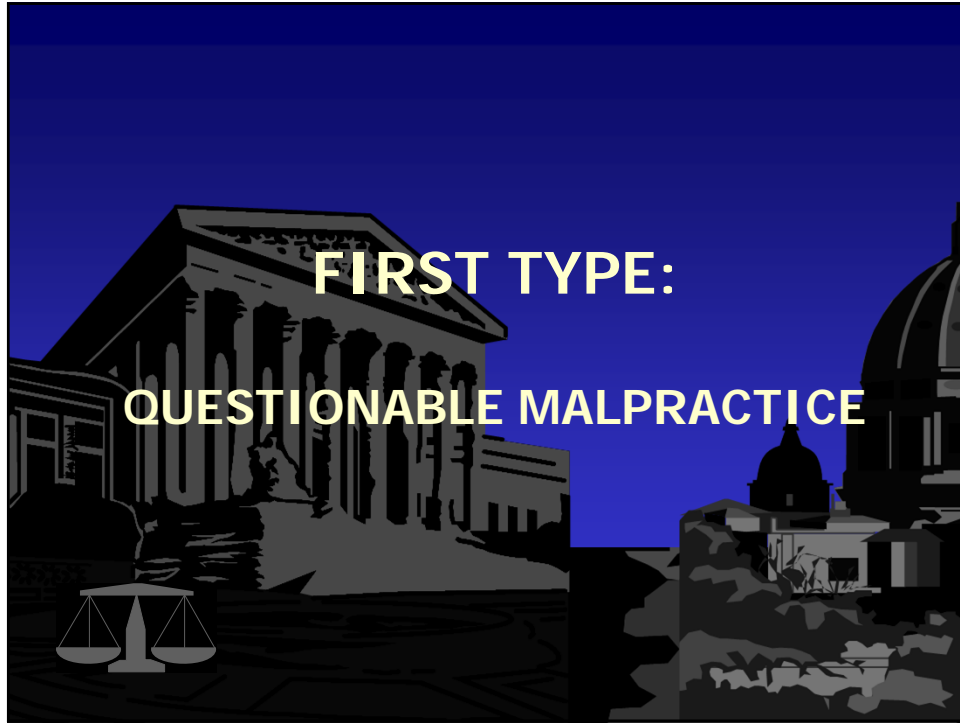
Green v. Payne, Wood and Littlejohn,
197 A.D.2d 664 (2d Dept. 1993)

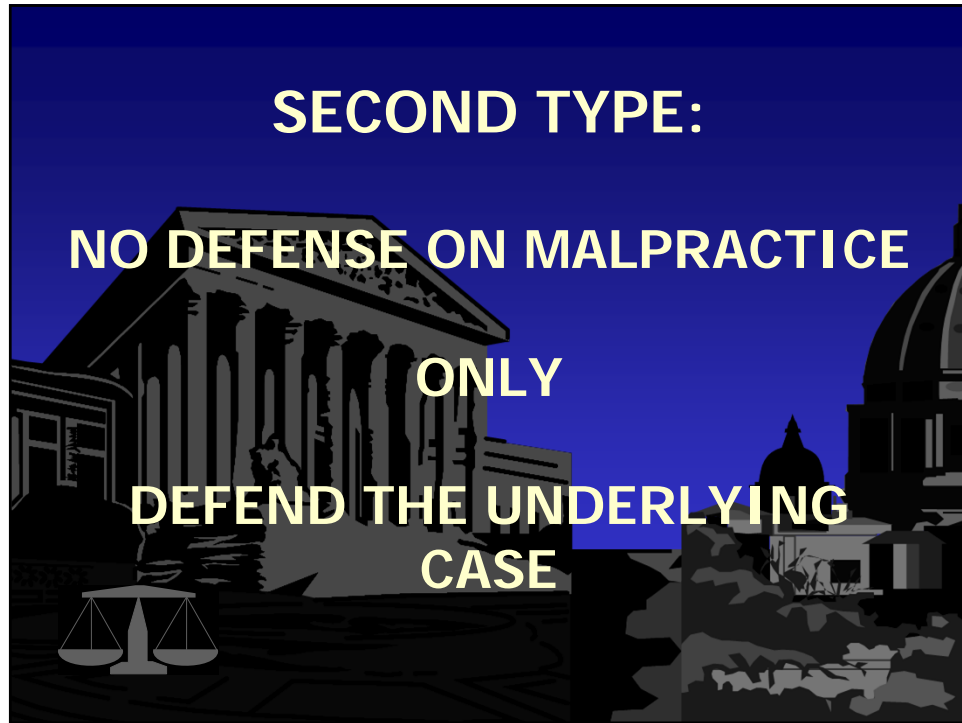


What To Do Next









DEFENDING MALPRACTICE

- Proof:
- Attorney/Defendant – Reasonable Basis, then
- Expert Testimony that the Attorney/Defendant Met the Standard of Care.

DEFENDING MALPRACTICE

- Proof:
- Attorney/Defendant – Reasonable Basis, then
- Expert Testimony that the Attorney/Defendant Met the Standard of Care.

DEFENDING MALPRACTICE

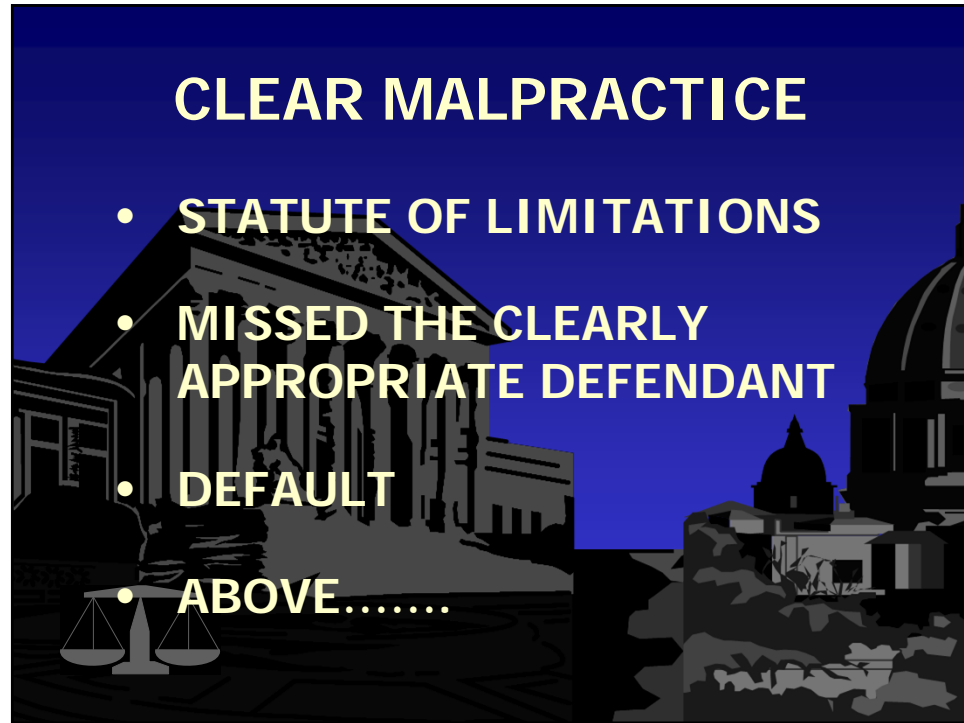
YOU NEED BOTH!

- A client who presents well with a credible story.
- A solid expert who “tie” your client’s story to the standard of care.

DEFENDING MALPRACTICE

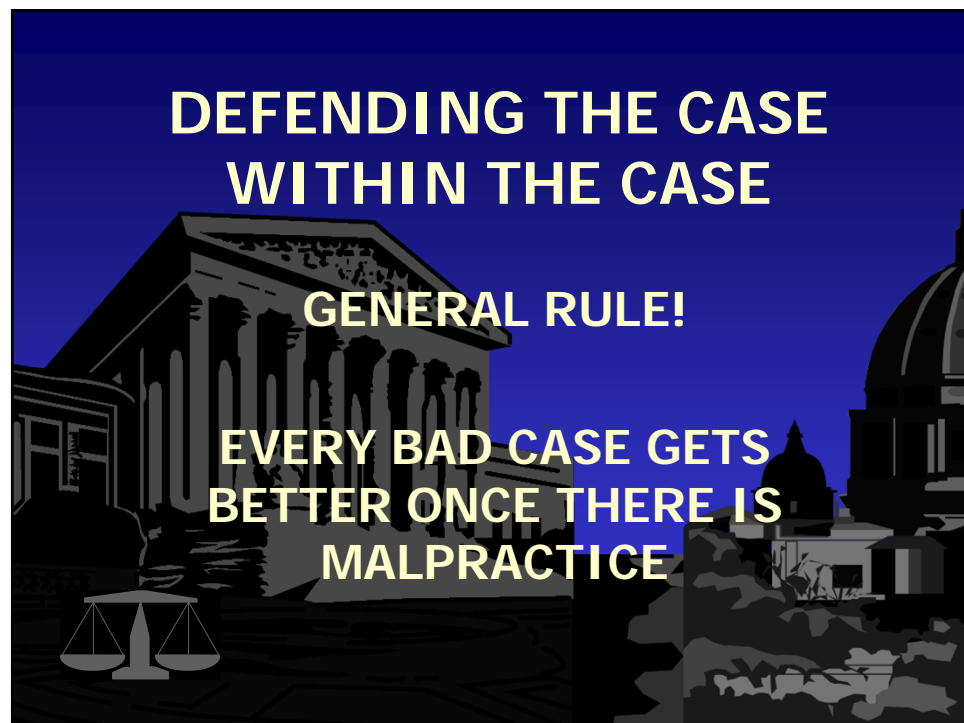
IF YOU DON'T HAVE BOTH

YOU DO NOT HAVE A
DEFENSE TO THE
MALPRACTICE!



CLEAR MALPRACTICE

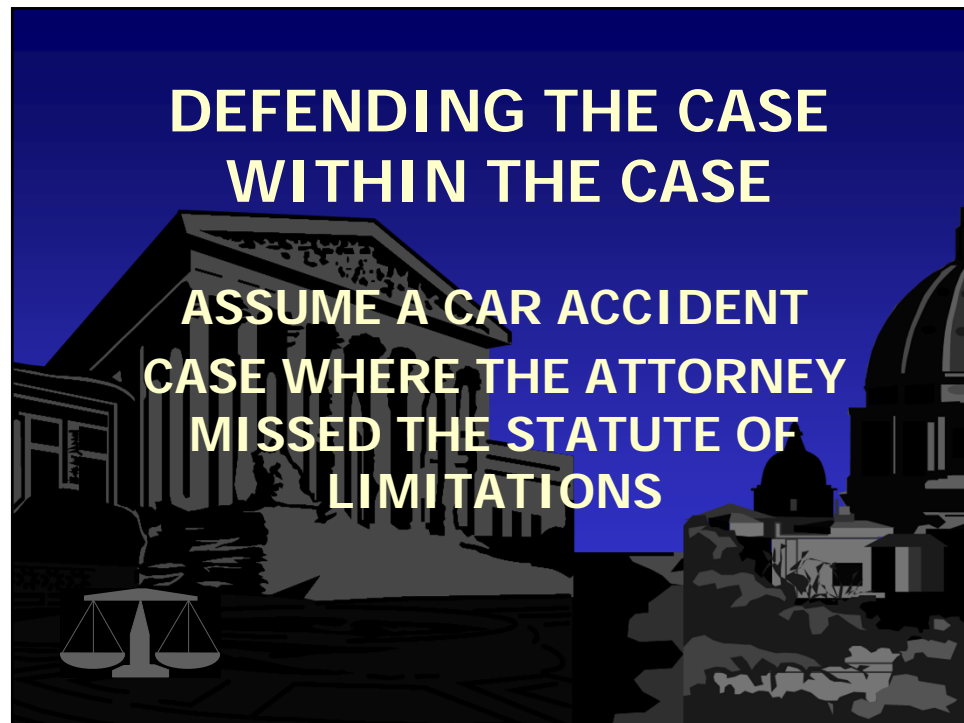
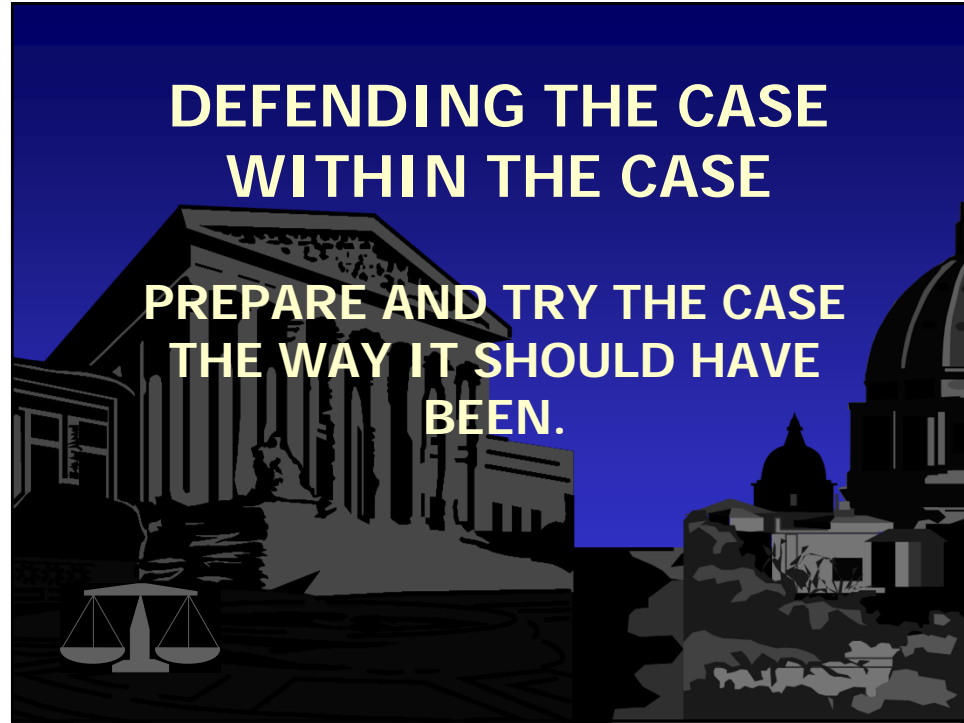
- **STATUTE OF LIMITATIONS**
- **MISSED THE CLEARLY APPROPRIATE DEFENDANT**
- **DEFAULT**
- **ABOVE.....**



DEFENDING THE CASE WITHIN THE CASE

GENERAL RULE!

**EVERY BAD CASE GETS
BETTER ONCE THERE IS
MALPRACTICE**



DEFENDING THE CASE WITHIN THE CASE

- **PAPER DISCOVERY FOR:**
 - Malpractice
 - Liability
 - Injuries

DEFENDING THE CASE WITHIN THE CASE

- **DEPOSITIONS:**
 - Malpractice
 - All Drivers / Witnesses
 - Injuries

DEFENDING THE CASE WITHIN THE CASE

- **MEDICAL EVALUATION:**
 - Record Review
 - IME

DEFENDING THE CASE WITHIN THE CASE

- **ANALYZE:**
 - Liability Defenses
 - Serious Injury Defenses

DEFENDING THE CASE WITHIN THE CASE

- **CONSIDER:**
 - Motion Practice
 - Underlying liability
 - Serious Injury
- ADR

DEFENDING THE CASE WITHIN THE CASE

- **DECIDE:**
 - Stipulate to Malpractice and Try the Case Within the Case?
 - Try Both?

DEFENDING THE CASE WITHIN THE CASE

FACTORS:

- Eliminate the “lame excuse.”
- Focus on what really matters.
- Juries appreciate honesty.

FINALLY

**A TIP O' THE HAT
TO
HARRY F. MOONEY**



QUESTIONS?



NICOLE M. MARLOW-JONES, ESQ.
Costello Cooney Fearon, PLLC
(315) 422-1152
nmj@ccf-law.com

MICHAEL F. PERLEY, ESQ.
Hurwitz & Fine, P.C.
(716) 849-8900
mfp@hurwitzfine.com