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# TRIAL OF A LEGAL MALPRACTICE CASE

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## “CASE WITHIN THE CASE”

- Client slips and falls at a restaurant
  - Hires attorney to handle case
  - Attorney misses the statute of limitations
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## “CASE WITHIN THE CASE”

- *Hummer v. Pulley, Watson, King & Lischer, P.A.* - underlying case tried first; malpractice decides what should have happened
  - *Kearns v. Horsley* – bifurcation approved
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# EXPERT WITNESSES

- Attorney with experience in personal injury cases testifies that plaintiff “probably would have won” slip and fall case.
  - Expert testifies that plaintiff probably would have lost at trial, but probably would have been able to settle the case before trial
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# EXPERT WITNESSES

- *Rorrer v. Cooke* – expert affidavit fails to state how negligence caused plaintiff to lose underlying case
  - *Bamberger v. Bernholz* – Court finds that underlying case had no merit notwithstanding expert affidavits
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# ATTORNEY ADMISSIONS

- “Your case is a winner. We’ll get at least \$100,000.00!”
  - Rule 11 certification that case is well grounded in fact and warranted by existing law
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# ATTORNEY ADMISSIONS

- *Byrd v. Arrowood* – Certification is not an admission that case had merit after discovery

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# ATTORNEY FEES

- Defendant attorney would have received one-third contingent fee from recovery
  - Malpractice attorney also has contingent fee contract
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# ELECTION OF REMEDIES

- Slip and fall plaintiff settles before case is dismissed.



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# ELECTION OF REMEDIES

- Stewart v. Herring – plaintiff who settles underlying case cannot sue for malpractice.



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# ELECTION OF REMEDIES

- Defense attorney makes discovery mistake; defense stricken; then settles

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# ELECTION OF REMEDIES

- *King v. Crawford, Whitaker & Dickins* – no election of remedies because client was not seeking a remedy in underlying case