8.12A ATTORNEY MALPRACTICE - CASE WITHIN CASE (CRIMINAL) – AFFIRMATIVE DEFENSE OF ACTUAL GUILT

The plaintiff claims that [he] [she] was convicted of a crime because the defendant was negligent in representing the plaintiff in a prior criminal prosecution. The defendant denies liability for plaintiff’s conviction on the ground that plaintiff actually committed [the crime of which [he] [she] was convicted] [the crime of ].

To decide whether the plaintiff actually committed this crime, you must decide whether each of the following elements is more likely true than not true:

[*For the elements of the criminal offense, see the Criminal Pattern Jury Instructions.*]

If you decide that each of these elements is more likely true than not true, then the plaintiff is not entitled to relief and you must find for the defendant in this case, even if the defendant was negligent in representing the plaintiff in the prior criminal prosecution.

# Use Note

This instruction sets out the affirmative defense of actual guilt for use in a malpractice case where the plaintiff claims to have been convicted of a criminal offense due to the professional negligence of the defendant. It should be used with instruction 8.12.

The first bracketed language at the end of the first paragraph should be used when the defendant claims that the plaintiff actually committed the crime of which he was convicted. The second bracketed language should be used when the defendant claims that the plaintiff committed another crime that would have resulted in the plaintiff’s incarceration. Seealso Comment to this Instruction.

# Comment

Shaw v. State, 861 P.2d 566, 573 (Alaska 1993), held that in a malpractice action where the plaintiff alleges criminal conviction due to the defendant’s malpractice, the defendant may raise, as an affirmative defense, plaintiff’s “actual guilt” or that the plaintiff engaged in the criminal conduct charged in the underlying criminal proceeding. Id*.* at 570 n.3 & 573. The court reasoned that “if a plaintiff in a criminal malpractice action against his former defense attorney has engaged in the criminal conduct he was accused of in the criminal trial, public policy prevents recovery on his part.” Id*.* at 571. In proving this defense, defendant is not limited to the rules of procedure and evidence applicable to criminal prosecutions, but is free to use “all confidential communications, as well as otherwise suppressible evidence of factual guilt” because the “justifications supporting the rules of procedure and evidence applicable in the criminal setting are not present in the civil arena.” Id*.* at 573.

*Howarth v. State,* 925 P.2d 1330, 1332 (Alaska 1996), held that a plaintiff may not recover for malpractice where his incarceration results from his own criminal acts, even if he was convicted of a more serious crime than (he claims) he should have been. Thus, under *Howarth*, the defendant may defend against a malpractice claim by proving that the plaintiff committed a lesser (though serious) offense which would have resulted in his incarceration. Although not expressly addressed, *Howarth* suggests that the defendant may not use this defense where the offense the plaintiff allegedly actually committed was not a serious one, or where the likelihood of incarceration from its commission is “so remote as not to justify its being considered as a serious offense.” *Id.* at 1334, *quoting Scott v. Robertson,* 583 P.2d 188, 192 n.17 (Alaska 1978).