

V. APPENDIX: EVERY STATE'S APPROACH TO CRIMINAL DEFENSE  
LEGAL MALPRACTICE CLAIMS

The chart below provides a concise overview of the rule in all fifty states and the District of Columbia on criminal defense legal malpractice claims.

State or Territory <sup>201</sup>	Rule on Post-Conviction Relief
Alabama	Alabama has imposed different requirements in different cases, but it seems to require—at a minimum—proof that but for the negligence of the convict's attorney, the outcome at trial would have been different. <sup>202</sup>
Alaska	Post-conviction relief is required before bringing a malpractice claim, but criminal defense attorneys may raise their former clients' actual guilt as an affirmative defense. <sup>203</sup> If an attorney raises actual guilt as a defense, he or she must prove it by a preponderance of the evidence. <sup>204</sup> Proof of a plaintiff's actual innocence is not required to succeed on a claim. <sup>205</sup>
Arizona	The plaintiff must prove that the underlying criminal conviction has been set aside. <sup>206</sup>
Arkansas	Arkansas has no post-conviction, actual innocence, or exoneration prerequisites for criminal malpractice suits. <sup>207</sup>
California	The criminal plaintiff must establish actual

201. See Johanna M. Hickman, *Recent Developments in the Area of Criminal Malpractice*, 18 GEO. J. OF LEGAL ETHICS 797, 797–98 (2005), for a list of states rejecting the exoneration rule.

202. See Bennardo, *supra* note 15, at 343 n.9 (citing contradicting cases imposing this standard and a stricter variant within the state).

203. *Shaw v. State (Shaw II)*, 861 P.2d 566, 569, 572 (Alaska 1993); see Gagnon & Slottee, *supra* note 107, at 13 (“A plaintiff convicted of a crime ‘must obtain post-conviction relief before pursuing an action for legal malpractice against his or her attorney.’” (quoting *Shaw v. State (Shaw I)*, 816 P.2d 1358, 1360 (Alaska 1991))).

204. *Shaw II*, 861 P.2d at 572.

205. *Id.*

206. *Glaze v. Larsen*, 83 P.3d 26, 32–33 (Ariz. 2004) (en banc).

207. Arkansas ordinarily requires proof that but for the attorney's malpractice, the results at trial would have been different. See *Davis v. Bland*, 238 S.W.3d 924, 926 (Ark. 2006).

	innocence by proving a reversal of his or her conviction or other post-conviction relief. <sup>208</sup>
Colorado	Proof of innocence is <i>not</i> required for a convict to prove causation in a legal malpractice action. <sup>209</sup>
Connecticut	The Connecticut Supreme Court has not yet considered the issue, but a federal court ruling on its judgment regarding state law determined that a convicted plaintiff would likely need to seek appellate or post-conviction relief before beginning a malpractice suit. <sup>210</sup>
Delaware	If a criminal defendant has sued his attorney for ineffective assistance of counsel, he cannot then follow suit with a claim for malpractice. <sup>211</sup> Actual innocence or post-conviction relief are not prerequisites for legal malpractice suits. <sup>212</sup>
District of Columbia	Convicts must show that their counsels' negligent "actions caused a legally cognizable injury." <sup>213</sup>

208. *Coscia v. McKenna & Cuneo*, 25 P.3d 670, 673–74 (Cal. 2001) (holding that reversal of a conviction or other exoneration is required to prove actual innocence); *Wiley v. City of San Diego*, 966 P.2d 983, 987 (Cal. 1998) (declining to allow a malpractice claim without proof of actual innocence).

209. *Rantz v. Kaufman*, 109 P.3d 132, 136 (Colo. 2005) (en banc) (rejecting the notion that a criminal must acquire post-conviction relief to bring or establish proximate cause in a criminal malpractice suit); *see Khan, supra* note 82, at 22–23.

210. *See McCurvin v. Law Offices of Koffsky & Walkley*, No. Civ.A.3:98CV182(SRU), 2003 WL 223428, at \*2 (D. Conn. Jan. 27, 2003) (stating that the Connecticut Supreme Court would likely require the plaintiff seek appellate or post-conviction relief prior to a malpractice suit). The decision fails to clarify whether such a plaintiff would need to *prevail* in his post-conviction relief suit. *See id.* A state appellate court *has* ruled, however, that ineffective assistance of counsel is not the same as a malpractice claim. *See Schiff v. Williams*, No. 267512, 1991 WL 29349, at \*4–5 (Conn. Super. Ct. Feb. 7, 1991).

211. *See Rose v. Modica*, No. 285, 2002, 2002 WL 31359867, at \*1 (Del. Oct. 18, 2002) (upholding dismissal of legal malpractice claim filed after denial of ineffective assistance of counsel claim); *Sanders v. Malik*, 711 A.2d 32, 34 (Del. 1998) (barring legal malpractice claim because plaintiff previously litigated an ineffective assistance of counsel claim).

212. *See Tanya E. Pino, State of Delaware, in THE LAW OF LAWYERS' LIABILITY, supra* note 107, at 80 (citing *Sanders v. Malik*, 711 A.2d 32, 34 (Del. 1998)).

213. *See McCord v. Bailey*, 636 F.2d 606, 610–11 (D.C. Cir. 1980) (holding that a prior hearing for an ineffective assistance of counsel claim is not required for collateral estoppel to bar a later malpractice claim); *Smith v. Pub. Def. Serv. for D.C.*, 686 A.2d 210, 211–12 (D.C. 1996) (holding that collateral estoppel barred a malpractice suit following a failed ineffective assistance of counsel suit but stating that failed ineffective assistance of counsel claims do not “automatically” bar subsequent malpractice claims because the standards for each differ.); *Bennardo, supra* note 15, at 343 n.9 (citing *Brown v. Jonz*, 572 A.2d 455, 457

Florida	The plaintiff must prove legal and actual innocence <sup>214</sup> and prove that the final disposition of the underlying criminal case was in the plaintiff's favor. <sup>215</sup>
Georgia	Legal malpractice claims require proof that the plaintiff would have prevailed but for the defendant's alleged negligence. <sup>216</sup> As a result, a client who has admitted guilt cannot sue his or her attorney for malpractice. <sup>217</sup>
Hawaii	No reported cases require the plaintiff to prove innocence before bringing suit. <sup>218</sup>
Idaho	The Idaho Supreme Court recently rejected the actual innocence requirement <sup>219</sup> while simultaneously embracing the exoneration rule, meaning that a convict's cause of action for malpractice does not accrue until he has received post-conviction relief. <sup>220</sup>
Illinois	The plaintiff must prove actual innocence, which requires that his or her conviction

n.7 (D.C. 1990).

214. See *Schreiber v. Rowe*, 814 So. 2d 396, 398–400 (Fla. 2002) (upholding a rule that criminal defendants must prove innocence for a viable legal practice claim); *Steele v. Kehoe*, 747 So. 2d 931, 932–33 (Fla. 1999) (holding that a “convicted criminal defendant must obtain appellate or post-conviction relief as a precondition to maintaining a legal malpractice action”).

215. *Cocco v. Pritcher*, 1 So. 3d 1246, 1248 (Fla. Dist. Ct. App. 2009) (requiring “final disposition of the underlying criminal case in [the defendant’s] favor” (citing *Cira v. Dillinger*, 903 So. 2d 367, 371 (Fla. Dist. Ct. App. 2005))).

216. See *Gomez v. Peters*, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996) (“[A] plaintiff must show that he would have prevailed in the underlying litigation if the defendant had not been negligent . . .” (citing *McDow v. Dixon*, 226 S.E.2d 145, 146 (1976) (“[T]he plaintiff’s proof of damages effectively requires proof that he would have prevailed in the original litigation.”))).

217. See *Gomez*, 470 S.E.2d at 695.

218. See *Portnoy & Olson*, *supra* note 133, at 118.

219. See *Molen v. Christian*, 388 P.3d 591, 596 (Idaho 2017). In reaching this decision, the court reasoned as follows:

Requiring a criminal malpractice plaintiff to prove actual innocence is contrary to the fundamental principle that a person is presumed innocent until proven guilty beyond a reasonable doubt. Further, a criminal defendant can be harmed separately from the harm he or she incurs as a result of being guilty of a crime. Additionally, as a practical matter, requiring actual innocence would essentially eliminate a defense attorney’s duty to provide competent counsel to a client he or she knows to be guilty.

*Id.* at 596 (citation omitted).

220. See *id.* at 595–96 (reasoning that adoption of the exoneration rule can help in avoiding multiple lawsuits and wasting judicial resources).

	has been overturned. <sup>221</sup> An exception to the actual innocence requirement applies if the attorney intentionally sought his client's conviction. <sup>222</sup>
Indiana	A convict's legal malpractice action accrues upon discovery of counsel's malpractice; post-conviction relief or exoneration is irrelevant. <sup>223</sup>
Iowa	A plaintiff must secure relief from a conviction before bringing a legal malpractice claim. <sup>224</sup>
Kansas	Actual innocence is not required, <sup>225</sup> but post-conviction relief is a requirement. <sup>226</sup>
Kentucky	Post-conviction relief is required, and the criminal must prove innocence by a preponderance of the evidence. <sup>227</sup>
Louisiana	Exoneration is not required; <sup>228</sup> criminal defense attorneys are held to the same standard to which ordinary defense

221. *Paulsen v. Cochran*, 826 N.E.2d 526, 530 (Ill. App. Ct. 2005) (citing *Kramer v. Dirksen*, 695 N.E.2d 1288, 1290 (Ill. App. Ct. 1998)).

222. *Id.* at 531 (quoting *Morris v. Margulis*, 718 N.E.2d 709, 720–21 (Ill. App. Ct. 1999)).

223. *See Godby v. Whitehead*, 837 N.E.2d 146, 151 (Ind. Ct. App. 2005) (“[A] criminal defendant does not have to prove his innocence before he files a legal practice claim.” (citing *Silvers v. Brodeur*, 682 N.E.2d 811, 818 (Ind. Ct. App. 1997) (holding that a malpractice action must be filed “within two years of discovering the malpractice”)); *Leisinger*, *supra* note 90, at 707 (citing *Silvers*, 682 N.E.2d at 818); *Hickman*, *supra* note 201, at 799–800 (citing *Silvers*, 682 N.E.2d at 818)).

224. *See Barker v. Capotosto*, 875 N.W.2d 157, 166 (Iowa 2016) (“We find the approach taken by the Restatement and like-minded jurisdictions to be persuasive. The prerequisite that the malpractice plaintiff obtain judicial relief from her or his conviction, which the Restatement endorses and which we adopted in *Trobaugh* after ‘considering all of the issues presented and the wealth of commentary on this issue,’ serves as an important screen against unwarranted claims and ‘preserves key principles of judicial economy and comity.’ But we do not think an additional actual innocence screen is appropriate. Such a prerequisite goes beyond respecting the criminal process—i.e., ‘judicial economy and comity’—and interposes an additional barrier to recovery that other malpractice plaintiffs do not have to overcome.” (citation omitted) (quoting *Trobaugh v. Sondag*, 668 N.W.2d 577, 583 (Iowa 2003))).

225. *Mashaney v. Bd. of Indigents’ Def. Servs.*, 355 P.3d 667, 687 (Kan. 2015).

226. *Canaan v. Bartee*, 72 P.3d 911, 913 (Kan. 2003) (adopting a rule that post-conviction relief is a prerequisite to a malpractice action).

227. *See Ray v. Stone*, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (quoting *Peeler v. Hughes & Luce*, 868 S.W.2d 823, 832 (Tex. App.—Dallas (1993), *aff’d*, 909 S.W.2d 494 (Tex. 1995))).

228. *See Schwehm v. Jones*, 872 So. 2d 1140, 1147 n.7 (La. Ct. App. 2004) (declining to adopt the exoneration rule).

	attorneys are held. <sup>229</sup>
Maine	Unsettled. <sup>230</sup> At least the civil malpractice requirements must be met, <sup>231</sup> and one court has suggested that the state supreme court would require actual innocence if a case arose before it. <sup>232</sup>
Maryland	Post-conviction relief is required before recovery in a malpractice suit. However, the “criminal plaintiff need not obtain [post-conviction] relief prior to the initiation of a criminal malpractice action, so long as the criminal plaintiff has initiated a [post-conviction] action.” <sup>233</sup>
Massachusetts	Actual innocence is required, <sup>234</sup> but exoneration is not yet required. <sup>235</sup> If the plaintiff pled guilty in the preceding suit, the “claimant should be precluded from proclaiming his innocence and his lawyer’s negligence in a legal malpractice action unless he has succeeded in withdrawing or

229. *See id.* at 1144 (stating that an attorney who does not meet “the standard of competence and expertise usually exercised by other attorneys in handling such matters” is liable for his actions).

230. *See* Saturley & Russell, *supra* note 134, at 204–05 (“Whether criminal-malpractice plaintiffs in Maine must prove innocence is an unsettled question of law.” (citing *Brewer v. Hagemann*, 771 A.2d 1030, 1031–32 (Me. 2001) (“We have not yet had occasion to determine whether legal malpractice based on negligent representation in a criminal case should be treated differently from legal malpractice arising from representation in a civil matter.”))).

231. *See Brewer*, 771 A.2d at 1033 (“The situation presented by this case does not require us to consider departing from the standard elements that every legal malpractice plaintiff must prove.”).

232. *Whitmore v. O’Brien*, No. CV-09-224, 2010 Me. Super. LEXIS 52, at \*15–16 (Me. Super. Ct. May 14, 2010) (citing *Hilario v. Reardon*, 960 A.2d 337, 344–45 (N.H. 2008)).

233. *Berringer v. Steele*, 758 A.2d 574, 597 (Md. Ct. Spec. App. 2000) (emphasis omitted).

234. *Marchetti v. Atwood*, No. 17–00749, 2017 WL 6210752, at \*5 (Mass. Super. Ct. Nov. 21, 2017) (mem. op.) (“[C]ivil recovery by a guilty plaintiff is not warranted without proof of innocence.” (quoting *Correia v. Fagan*, 891 N.E.2d 227, 233 n.13 (Mass. 2008))). This actual innocence requirement imposes a higher standard on the plaintiff than a legal innocence requirement would. *See Browning & Rames*, *supra* note 2, at 61 (arguing that proof of actual innocence “set[s] the bar even higher” than post-conviction relief). Indeed, “[b]ecause of the heavy burden of proof in a criminal case [in another Massachusetts court ruling which also applied the actual innocence standard], an acquittal did not suffice to satisfy the actual innocence requirement.” *Id.*

235. *See Labovitz v. Feinberg*, 713 N.E.2d 379, 384 n.11 (Mass. App. Ct. 1999) (“We do not consider whether a criminal defendant must also be exonerated before being permitted to bring a civil malpractice action . . .”).

	vacating his guilty plea on direct appeal or through [post-conviction] proceedings.” <sup>236</sup>
Michigan	Securing post-conviction relief is not a prerequisite for initiating a malpractice suit over the actions of criminal defense counsel. <sup>237</sup> If the plaintiff pled guilty to the underlying offense, the plaintiff may still sue for malpractice, assuming the claims “allege injuries other than . . . incarceration.” <sup>238</sup>
Minnesota	Post-conviction relief is a prerequisite for a convict’s malpractice suit. <sup>239</sup> Also, public defenders may not be sued for legal malpractice. <sup>240</sup>
Mississippi	As of November 29, 2018, exoneration is a prerequisite for bringing a criminal malpractice action. <sup>241</sup>
Missouri	Actual innocence is required for a convict to bring a legal malpractice claim. <sup>242</sup>
Montana	Innocence is not required for a convicted

236. *Id.* at 383–84.

237. *See* Gebhardt v. O’Rourke, 510 N.W.2d 900, 906 n.13 (Mich. 1994) (Unis, J., concurring) (remarking tongue in cheek that “persons convicted of a crime will be astonished to learn that, even if their lawyers’ negligence resulted in their being wrongly convicted and imprisoned, they were not harmed when they were wrongly convicted and imprisoned but, rather, that they are harmed only if and when they are exonerated” (quoting Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993))).

238. *See* Schlumm v. Terrence J. O’Hagan, P.C., 433 N.W.2d 839, 847 (Mich. Ct. App. 1988) (affirming the denial of summary judgment for the plaintiff’s breach of contract and fraudulent misrepresentation claims against his former attorney).

239. *See* Noske v. Friedberg, 670 N.W.2d 740, 744 (Minn. 2003) (noting that a legal malpractice claim cannot withstand a motion to dismiss unless the plaintiff receives post-conviction relief prior to the claim).

240. *Dziubak v. Mott*, 503 N.W.2d 771, 773 (Minn. 1993).

241. *Trigg v. Farese*, No. 2015-CA-00045-SCT, 2018 WL 6241322, at \*8 (Miss. Nov. 29, 2018) (“To be clear, when we say a defendant must be ‘exonerated,’ we mean he must obtain a more favorable disposition of his conviction or sentence through direct appeal, postconviction relief, habeas corpus, or similar means within the criminal justice process. At that point, the malpractice suit may be initiated even if the underlying criminal case has not yet been finally resolved.” (footnote omitted)). Before *Trigg*, Mississippi required that the plaintiff show that but for his attorney’s negligence, “he would today be a free man.” *Singleton v. Stegall*, 580 So. 2d 1242, 1246 (Miss. 1991).

242. *See* *Costa v. Allen*, 323 S.W.3d 383, 387 (Mo. Ct. App. 2010) (quoting *State ex. rel. O’Blennis v. Adolf*, 691 S.W.2d 498, 503 (Mo. Ct. App. 1985)); *see also* Scott, D. Hofer, *Missouri*, in A SURVEY OF THE LAW OF LEGAL MALPRACTICE, 71, 73 & n.3 (2016) (citing *Costa*, 323 S.W.3d at 387), [https://www.primerus.com/wp-content/uploads/2016/03/PRI\\_02\\_16\\_PDICompendium\\_LegalMalpractice\\_FNL3v1.pdf](https://www.primerus.com/wp-content/uploads/2016/03/PRI_02_16_PDICompendium_LegalMalpractice_FNL3v1.pdf) [<https://perma.cc/6L9Q-PX4C>]

	plaintiff to bring a malpractice claim. <sup>243</sup>
Nebraska	The plaintiff must prove that he or she would have been successful in the underlying action but for the attorney's negligence. <sup>244</sup>
Nevada	Post-conviction or appellate relief is required, <sup>245</sup> and the plaintiff must also "prove actual innocence of the underlying charge." <sup>246</sup> Court-appointed private attorneys and public defenders are immune from legal malpractice claims, <sup>247</sup> but federal civil rights claims may be brought against public defenders for improper representation of criminal defendants when they "engage[] in a conspiracy with the state to deprive [a defendant in a criminal case] of his civil rights." <sup>248</sup>
New Hampshire	A criminal legal malpractice claim accrues once the criminal defendant receives post-conviction relief. <sup>249</sup> Convicted plaintiffs must "prove, by a preponderance of the evidence, actual innocence" of the underlying offense to bring criminal legal malpractice claims. <sup>250</sup> That is, unless: (1) the claim is based on representation after the plea and sentencing, (2) the claim has no bearing on the plaintiff's convictions,

243. See *Spencer v. Beck*, 245 P.3d 21, 24 (Mont. 2010) (allowing a legal malpractice claim against an attorney who failed to pursue post-conviction relief that might have led to the overturning of the plaintiff's conviction); *Hauschulz v. Michael Law Firm*, 30 P.3d 357, 360 (Mont. 2001) (holding that an attorney's "failure to consult with his client prior to entering a guilty plea on his behalf could" form a sufficient basis for a valid malpractice claim).

244. See *McVaney v. Baird, Holm, McEachen, Pedersen, Hamann, & Strasheim*, 466 N.W.2d 499, 507 (Neb. 1991) (citing *Eno v. Watkins*, 429 N.W.2d 371, 372 (Neb. 1988)).

245. *Clark v. Robison*, 944 P.2d 788, 790 (Nev. 1997) (citing *Morgano v. Smith*, 879 P.2d 735, 737 (Nev. 1994)).

246. *Morgano*, 879 P.2d at 738 (citing *Glenn v. Aiken*, 569 N.E.2d 783, 788 (Mass. 1991)).

247. NEV. REV. STAT. ANN. §§ 41.0307(4)(b), 41.032 (2016); *Morgano*, 879 P.2d at 736–37 (citing *Ramirez v. Harris*, 773 P.2d 343, 344–45 (Nev. 1989)).

248. See *Ramirez*, 773 P.2d at 345 (noting that civil rights claims against public defenders are not viable unless the complainant makes these allegations).

249. *Therrien v. Sullivan*, 891 A.2d 560, 564 (N.H. 2006).

250. *Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A.*, 727 A.2d 996, 998–99 (N.H. 1999).

	and (3) “the plaintiff does not argue that but for his attorney’s negligence he would have obtained a different result in the criminal case.” <sup>251</sup>
New Jersey	Exoneration is required to bring a criminal malpractice claim. <sup>252</sup>
New Mexico	Post-conviction relief or exoneration are not required for initiation of criminal malpractice suits. <sup>253</sup>
New York	Actual innocence of the underlying offense is required, and a plaintiff’s admission of guilt may undermine his or her ability to bring a malpractice suit. <sup>254</sup>
North Carolina	North Carolina requires a higher burden of proof to establish proximate causation in criminal legal malpractice claims. <sup>255</sup> An appellate court held that this standard was not met when there was strong circumstantial evidence of guilt; the plaintiff did not allege that the attorney’s actions caused him damages or claim “actual innocence in his complaint.” <sup>256</sup>
North Dakota	Innocence or post-conviction relief or exoneration is not required. <sup>257</sup>

251. *Hilario v. Reardon*, 960 A.2d 337, 345 (N.H. 2008) (citing *Mahoney*, 727 A.2d 996).

252. *See Rogers v. Cape May*, 31 A.3d 934, 939 (N.J. 2011) (affirming that a legal malpractice claim does not accrue until the plaintiff is exonerated (citing *McKnight v. Office of Pub. Def.*, 962 A.2d 482, 483 (N.J. 2008) (per curiam))). Exoneration may include: (1) “vacation of a guilty plea and dismissal of the charges,” (2) “entry of judgment on a lesser offense after spending substantial time in custody following conviction for a greater offense,” or (3) “any disposition more beneficial to the criminal defendant than the original judgment.” *See McKnight*, 962 A.2d at 483 (quoting *McKnight v. Office of Pub. Def.*, 936 A.2d 1036, 1056 (N.J. Super. Ct. App. Div. 2007) (Stern, J., dissenting), *rev’d*, 962 A.2d 482 (2008)).

253. *See Duncan v. Campbell*, 936 P.2d 863, 865 (N.M. 1997) (holding that the statute of limitations for a legal malpractice claim begins upon discovery of the injury (citing *Sharts v. Natelson*, 885 P.2d 642, 645 (N.M. 1994))).

254. *See Carmel v. Lunnery*, 511 N.E.2d 1126, 1128 (N.Y. 1987) (finding that failure to successfully challenge the underlying conviction by plea bars a legal malpractice claim (citing *Claudio v. Heller*, 463 N.Y.S.2d 155 (Sup. Ct. 1983))); *Britt v. Legal Aid Soc., Inc.*, 741 N.E.2d 109, 110, 112 (N.Y. 2000) (citing *Carmel*, 511 N.E.2d at 1128).

255. *Dove v. Harvey*, 608 S.E.2d 798, 802 (N.C. Ct. App. 2005) (quoting *Belk v. Cheshire*, 583 S.E.2d 700, 706 (N.C. Ct. App. 2003)).

256. *Id.* at 802.

257. *See Klem v. Greenwood*, 450 N.W.2d 738, 743 (N.D. 1990) (listing the various elements of a legal malpractice claim—not including innocence or post-conviction relief



Ohio	Criminal defendants need not secure exoneration before pursuing legal malpractice claims. <sup>258</sup>
Oklahoma	Actual innocence is required. <sup>259</sup>
Oregon	For a convict to bring a legal malpractice claim against his or her criminal defense <i>trial</i> counsel, the convict must “allege ‘harm’ in that the person has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise.” <sup>260</sup> But to sue <i>post-conviction</i> counsel, “prior exoneration, by means of appeal, post-conviction proceedings, or otherwise, is not a prerequisite . . . .” <sup>261</sup> If the plaintiff’s alleged harm is suffering brought on by continued incarceration, however, the plaintiff “must plead and prove that, if defendants had performed competently in the post-conviction proceeding, plaintiff would have obtained relief in that proceeding, that he would have avoided reconviction in any subsequent proceeding on remand, and that he would have been released from prison.” <sup>262</sup>
Pennsylvania	Requiring post-conviction relief based on attorney error <i>and</i> proof that the attorney acted in “[r]eckless or wanton disregard of the defendant’s interest . . . .” <sup>263</sup>
Rhode Island	The plaintiff must prove that, but for the attorney’s negligence, the plaintiff would not have been convicted. <sup>264</sup>

(citing *Wastvedt v. Vaaler*, 430 N.W.2d 561, 564–55 (N.D. 1988)).

258. See *Krahn v. Kinney*, 538 N.E.2d 1058, 1061 (Ohio 1989); Leisinger, *supra* note 90, at 707 (citing *Krahn*, 538 N.E.2d at 1061).

259. *Robinson v. Southerland*, 123 P.3d 35, 43–44 (Okla. Civ. App. 2005).

260. *Stevens v. Bispham*, 851 P.2d 556, 566 (Or. 1993).

261. *Drollinger v. Mallon*, 260 P.3d 482, 489–90 (Or. 2011) (en banc). The Oregon Supreme Court justified the lesser standard for suing post-conviction counsel, in part, because the state legislature had provided unique protections at the trial level that are not present for those pursuing post-conviction civil claims. *Id.* at 488.

262. *Id.* at 490.

263. *Bailey v. Tucker*, 621 A.2d 108, 114–15 (Pa. 1993).

264. See *Laurence v. Sollitto*, 788 A.2d 455, 459 (R.I. 2002) (requiring the plaintiff

South Carolina	Actual innocence is required, but a no contest plea to the criminal charge is a bar to bringing a criminal malpractice claim. <sup>265</sup>
South Dakota	No cases have yet addressed the topic. <sup>266</sup>
Tennessee	Post-conviction relief is required. <sup>267</sup>
Texas	Exoneration is required before bringing a criminal malpractice claim. <sup>268</sup>
Utah	Post-conviction relief is not required. <sup>269</sup>
Vermont	Unsettled; actual innocence is not yet a prerequisite for criminal malpractice claims and neither is post-conviction relief. <sup>270</sup>
Virginia	Both post-conviction relief and actual innocence are prerequisites for criminal malpractice suits. <sup>271</sup>
Washington	Both post-conviction relief and actual innocence are prerequisites for criminal malpractice suits. <sup>272</sup>
West Virginia	The plaintiff must prove actual innocence of both “the underlying criminal offense for which he was originally convicted and/or

prove that his attorney proximately caused his injury (quoting *Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc.*, 740 A.2d 1262, 1264 (R.I. 1999)).

265. *Brown v. Theos*, 550 S.E.2d 304, 306–07 (S.C. 2001).

266. *See Welk & Sutton*, *supra* note 135, at 455.

267. *Gibson v. Trant*, 58 S.W.3d 103, 107 (Tenn. 2001).

268. *See Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497–98 (Tex. 1995) (plurality opinion) (holding that a plaintiff must be exonerated to meet the proximate cause requirement).

269. *See Willey v. Bugden*, 318 P.3d 757, 761 n.5 (Utah Ct. App. 2013) (noting that other states require post-conviction relief or actual innocence but acknowledging no such rule in Utah).

270. *See Bloomer v. Gibson*, 912 A.2d 424, 433 (Vt. 2006) (declining to decide whether to adopt the actual innocence requirement for legal malpractice claims).

271. *See Adkins v. Dixon*, 482 S.E.2d 797, 801–02 (Va. 1997) (“[A]ctual guilt is a material consideration since courts will not permit a guilty party to profit from his own crime.” (citing *Zysk v. Zysk* 404 S.E.2d 721, 722 (1990))). Virginia has also allowed a criminal to sue for malpractice over claims arising from a court’s sentencing errors. *JOHNSON*, *supra* note 29, at 299. As Johnson notes, this approach was exemplified by a case in Virginia involving an attorney who did not object when his client was sentenced to a mistakenly enhanced punishment. *Id.*; *see Jones v. Link*, 493 F. Supp. 2d 765, 769 (E.D. Va. 2007). In *Jones*, the court reasoned that proof of actual innocence was not necessary because “the improper sentence was not the direct result of the plaintiff’s criminal behavior, but rather, it was the proximate result of his attorney’s negligence.” 493 F. Supp. 2d at 770 (citing *Powell v. Associated Counsel for the Accused*, 129 P.3d 831, 833 (Wash. Ct. App. 2006)).

272. *Ang v. Martin*, 114 P.3d 637, 640–41 (Wash. 2005) (en banc). Actual innocence requires the plaintiff to establish by a preponderance of the evidence that he or she did not commit the crimes of which he or she was accused. *Id.* at 642.

	any lesser included offenses involving the same conduct by a preponderance of the evidence.” <sup>273</sup>
Wisconsin	The plaintiff must show that, but for the attorney’s negligence, the plaintiff would have succeeded in the underlying criminal suit in proving his or her innocence of all the charges of which the plaintiff was convicted. <sup>274</sup>
Wyoming	Undecided; Wyoming has apparently heard no criminal malpractice claims on appeal and thus has not yet required innocence or exoneration for criminal malpractice claims. <sup>275</sup>

273. *Humphries v. Detch*, 712 S.E.2d 795, 801 (W. Va. 2011); JOHNSON, *supra* note 29, at 298 (noting that some courts require proof of innocence of both the crime underlying the malpractice claim and the lesser included offenses). If the plaintiff’s suit arises from a conviction over which the plaintiff was granted a new trial but in which the plaintiff pleaded *nolo contendere*, evidence of that plea may be admitted in the legal malpractice suit to evidence the plaintiff’s conviction. *Id.* at 806.

274. *See Tallmadge v. Boyle*, 730 N.W.2d 173, 181 (Wis. Ct. App. 2007) (“[S]uccess here means proving to jury that the convicted criminal is innocent of all charges.”).

275. *See Ortiz*, *supra* note 137, at 558 (“Wyoming does not have an innocence requirement for legal malpractice plaintiffs in criminal cases.”).

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