

**WSBA NW Sidebar**

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## **Alaska and Oregon Speak to “Actual Innocence” Requirement for Malpractice Claims**

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The “actual innocence” requirement in legal malpractice claims against criminal defense counsel generally requires a plaintiff to prove that they did not commit the crime which led to the criminal case in which they contend their lawyers were negligent. In most jurisdictions, the requirement is an additional element of a legal malpractice claim that a plaintiff must establish and is traditionally rooted in public policy considerations. In Washington, *Ang v. Martin*, 154 Wn.2d 477, 114 P.3d 637 (2005), states the basic requirement and *Piris v. Kitching*, 185 Wn.2d 856, 375 P.3d 627 (2016), discusses a very narrow exception for situations where the negligence led to the imposition of a sentence beyond what was authorized. On a practical level, the actual innocence requirement makes it very difficult to successfully sue a criminal defense lawyer for malpractice.

Alaska and Oregon recently spoke to their versions of the actual innocence requirement. While generally similar to Washington’s approach, the decisions reflect their own jurisdictional nuances.

*Marino v. State*, 577 P.3d 992 (Alaska App. 2025), wasn’t a malpractice case. Rather, it involved a petition for post-conviction relief focusing on the word “innocent” as used in the applicable Alaska statute. In parsing that term,

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however, the Alaska Court of Appeals included a lengthy discussion of the actual innocence requirement from malpractice law—principally *Shaw v. State, Dept. of Administration*, 861 P.2d 566 (Alaska 1993). *Marino* notes that under *Shaw* a criminal defendant must first obtain post-conviction relief as a predicate to a subsequent malpractice claim and must also prove that they would have been found innocent of the charges. *Marino* also notes that under *Shaw* a defendant in a malpractice case can raise an affirmative defense that the plaintiff was guilty of the charges involved. While *Marino* doesn't add to this body of law in Alaska, it offers a succinct contemporary summary.

*Moore-Reed v. Griffin*, 374 Or. 596, \_\_\_ P.3d \_\_\_ (2025), by contrast, creates a wrinkle to Oregon's approach that is difficult to predict where it will lead. Under *Stevens v. Bispham*, 316 Or. 221, 851 P.2d 556 (1993), Oregon had followed a path similar to Washington's approach in *Ang*. *Moore-Reed* involved an unusual situation where a murder charge had been dismissed but the plaintiff had been convicted of manslaughter in the alternative. The plaintiff argued that she was pursuing her malpractice claim based on her former lawyer's handling of the murder charge that was dismissed rather than the manslaughter charge for which she was ultimately convicted. The Oregon Supreme Court agreed—effectively sidestepping *Stevens* without overruling it. The Oregon Supreme

Court also noted that the plaintiff claimed damages—such as emotional distress—that she alleged were independent of the conviction. While the Oregon Supreme Court predicted that this latter situation would arise “infrequently,” it remains to be seen if *Moore-Reed* is a narrow exception to *Stevens* or in practice becomes the proverbial exception that swallows the rule.

#### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar’s *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark’s telephone and email are 503.860.2163 and [Mark@frllp.com](mailto:Mark@frllp.com).