

# Judicial Estoppel in Legal Malpractice Defense: Protecting Law Firms From Contradictory Client Claims

June 24, 2025

**D**isputes between law firms and their former clients are an unfortunate reality. These situations become even more frustrating when former clients take contradictory positions across related legal proceedings. When a law firm or lawyer faces such inconsistency in an action brought against them, the doctrine of judicial estoppel emerges as a potentially helpful defense. This doctrine prevents litigants from playing “fast and loose” with the judicial system by asserting—and getting a court to accept—a contradictory position in a different case. The doctrine serves both to protect the integrity of courts and, under certain circumstances, to shield law firms and lawyers from claims based on contradictory positions asserted by former clients.

### Understanding Judicial Estoppel as a Defense Strategy

Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in a legal proceeding that directly contradicts



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**Christopher R. Blazejewski of Sherin and Lodgen.**

a position they successfully maintained in a separate prior proceeding. The doctrine aims “to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system,” and may therefore be applied “when a litigant is playing fast and loose with the courts.” See *Otis v. Arbella Mutual Insurance*, 443 Mass. 634, 642 (2005).

While specific elements required for judicial estoppel vary by jurisdiction, the doctrine

typically requires two core elements: the party to be estopped has asserted a position directly contrary to a position asserted in a prior case; and the party succeeded in convincing the prior court or tribunal to accept their position. Unlike other estoppel or preclusion doctrines, judicial estoppel does not necessarily require a final judgment. A party may be estopped if they successfully convinced a court to accept their position on an issue in an earlier proceeding, even if that case has not concluded. The application of the doctrine is equitable in nature, making it fact-dependent and involving a weighing of the equities to protect judicial integrity.

Applying the doctrine of judicial estoppel to legal malpractice, breach of fiduciary duty, or other claims asserted against lawyers and law firms can be an effective law firm defense strategy depending on the allegations in the case.

### **Application of Judicial Estoppel in Legal Malpractice Defense**

The Massachusetts Supreme Judicial Court's decision in *Otis* presents a classic example of the application of judicial estoppel in a legal malpractice case where a party attempts to assert positions diametrically opposed to those successfully advanced in prior litigation.

The case originated from an accident where John Otis was struck by Todd Cusick's vehicle. After winning a \$4 million verdict against Cusick based on the theory that he was not comparatively negligent, Otis obtained an assignment of Cusick's potential malpractice claims against Cusick's insurer and attorneys, then sued them alleging negligent representation.

The court highlighted the dramatic reversal in Otis' factual assertions between cases. In his original lawsuit, Otis successfully argued he was not negligent because he had stopped short of the center line, with Cusick's vehicle swerving into his lane. However, in the subsequent legal malpractice action, Otis claimed the opposite—that he had actually been standing several feet beyond the center line in Cusick's lane, and that competent representation would have established his comparative negligence, resulting in no recovery against Cusick. Otis also reversed his position on a key evidentiary ruling, now claiming evidence he previously argued was properly admitted was actually prejudicial error warranting reversal.

In rejecting Otis' arguments against applying judicial estoppel, the court was unpersuaded by his status as an assignee, finding that this did not change the fact that he was bringing claims in his own name. The court also rejected his argument that he had made no inconsistent statements under oath, clarifying that judicial estoppel applies more broadly to inconsistent positions, including those taken by attorneys. Ultimately, the court ruled that allowing Otis to pursue claims contradicting his successful prior position would undermine judicial integrity, as it would create "the appearance that either the first court has been misled or the second court will be misled," regardless of how he came to possess the claims.

In Connecticut, troubled by the public policy implications of the assignment of a legal malpractice action to an adversary in the underlying litigation and relying in part on judicial estoppel cases from other jurisdictions, the Connecticut Supreme Court followed

Texas and Washington state courts in barring such assignments. See *Gurski v. Rosenblum & Filan*, 276 Conn. 257 (2005).

Law firms and lawyers have successfully deployed judicial estoppel in cases across the country under the right circumstances. Recent cases demonstrate how this doctrine can effectively shield attorneys from malpractice claims when clients take inconsistent positions.

In *Brummel v. Grossman*, 2018 IL App (1st) 170516, 121 N.E.3d 970 (Il. App. 2018) before the Illinois state appellate court, the executor of a deceased former client's estate brought a legal malpractice action against attorneys who had represented the former client in a retaliatory discharge and Whistleblower Act case. A key aspect of the legal malpractice claim was the executor's allegation that the attorneys' negligence caused the dismissal of the underlying case, resulting in damages to the client. In the malpractice action, the executor attempted to argue that the client was able to return to work in a less physically stressful job. The former client, however, had previously testified in his deposition and stated in a settlement order with his former employer that he was totally disabled and unable to work, and a Social Security administrative law judge had found that the client was unable to engage in any substantial gainful activity. The court found that the executor was judicially estopped from making this claim for damages in the legal malpractice action based on this inconsistent testimony.

Federal and state appellate courts have also affirmed dismissal of legal malpractice claims under the doctrine of judicial estoppel when

the former client failed to schedule the claims as assets of its estate in bankruptcy. In *In re Jackson*, 574 F. App'x 317 (5th Cir. 2014), the Fifth Circuit Court of Appeals applied judicial estoppel to prevent a debtor from pursuing legal malpractice claims against attorneys who allegedly mishandled patent matters. The debtor had failed to disclose these potential claims during his bankruptcy proceedings, where he obtained no asset discharge. The court noted, "Judicial estoppel is particularly appropriate [when] a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset."

A New York state appellate court agreed in *Moran Enterprises v. Hurst*, 160 A.D.3d 638, 75 N.Y.S.3d 195 (2018), holding that a dissolved corporation was judicially estopped from pursuing malpractice claims that it had failed to disclose in bankruptcy proceedings. The court applied judicial estoppel because "in dismissing the plaintiff's third bankruptcy proceeding, the bankruptcy court expressly relied upon the plaintiff's representation in its asset schedules that it had no assets other than the real property [and accordingly] the bankruptcy court accepted and endorsed the plaintiff's characterization of its assets, and the Supreme Court properly determined that judicial estoppel barred the plaintiff from now maintaining the undisclosed claims."

### **Strategic Considerations for Legal Malpractice Defense**

Law firms and lawyers defending against legal malpractice claims should consider these strategies when evaluating potential judicial estoppel defenses:

- **Identify inconsistent positions:** Review all related litigation involving the client to identify potentially inconsistent positions they may have taken.
- **Document success in prior proceedings:** Gather evidence showing the former client successfully convinced a court to accept their contrary position, even in the absence of a final judgment.
- **Focus on the equities:** Courts apply judicial estoppel as a matter of discretion—emphasize how allowing the inconsistent position would undermine judicial integrity.
- **Highlight prejudice:** While not always required, demonstrating prejudice can strengthen a judicial estoppel argument.
- **Raise the defense early if possible:** Consider bringing judicial estoppel arguments in dispositive motions at the earliest appropriate opportunity.

## Conclusion

Judicial estoppel serves as a potentially useful defense in legal malpractice actions by preventing clients from taking inconsistent positions across different proceedings. The doctrine not only protects attorneys from

unwarranted liability but also preserves the integrity of the judicial system by discouraging litigants from manipulating courts with contradictory claims.

As the cases discussed demonstrate, courts are under the right circumstances willing to apply judicial estoppel in the legal malpractice context, providing a possible shield for attorneys facing claims based on positions that contradict those their clients successfully advanced in prior proceedings. By recognizing and effectively presenting judicial estoppel defenses, attorneys can protect themselves against clients who attempt to play “fast and loose” with the judicial system.

**Christopher R. Blazejewski** is a partner at *Sherin and Lodgen*, representing businesses, law firms, and individuals in complex commercial litigation, legal malpractice defense, and business disputes. He defends national and regional law firms listed on the *AmLaw 100* and *NLJ 500* against legal malpractice, breach of fiduciary duty, and other professional liability claims. For his business clients, *Blazejewski* litigates contract, real estate, and intra-corporate disputes in a wide range of industries.