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ANOTHER EARLY CHAPTER: ATTORNEY MALPRACTICE AND THE TRIAL WITHIN A TRIAL: *TIME FOR A CHANGE**

*In our jurisprudence, no one cares if you are negligent until you hurt somebody.***

DONALD G. WEILAND***

Lawyering is a unique profession. Lawyers make the rules by which they work. Lawyers police and discipline themselves. Neither laymen nor members of other professions look over lawyers' shoulders. Only other lawyers will determine whether lawyers are educated, granted a degree, licensed, disciplined, or subjected to liability for negligence.

Despite the efforts of legal scholars, professional associations, licensing and accrediting groups, and the courts themselves, the incidence of lawyer incompetence and negligence continues to rise.[1] Escalating malpractice litigation and the resultant costs may not be pleasant topics within the legal community, but these concerns can

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* *See* Kasten, *Attorney Malpractice in Illinois: An Early Chapter in a Book Destined for Great Length*, 13 J. MAR. L. REV. 309 (1980).

** Or to borrow the words of Justice Benjamin Cardozo, "[n]egligence is not a tort unless it results in . . . a wrong." Palsgraf v. Long Island R.R., 248 N.Y. 339, 345, 162 N.E. 99, 101 (1928).

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1. *See* Mahaffey, *Legal Malpractice: An Overview—Part I*, 13 COLO. LAW. 1819 (1984). For the past five years, the frequency of legal malpractice claims has increased at an average annual rate of 18.8%. *Id.* Statistical data concerning the frequency and types of legal malpractice claims is now being compiled by the American Bar Association. Gates, *The Newest Data on Lawyers' Malpractice Claims*, 70 A.B.A. J. 78 (1984) (showing recent breakdowns of legal malpractice claims into areas of law). Some lawyers are concerned that the public, as consumers of legal services, are more aware of their rights to pursue such actions. Other lawyers are concerned that publicity of the increase brings the profession into disrepute. Another group of lawyers, including the author, are concerned that this self-policing profession has not adequately lived up to its responsibilities.

be neither discounted nor ignored. The rising cost of malpractice insurance, the growth of public awareness as consumers and commentators, and the increase of constraints in dealing with clients, necessitates action on the part of this self-policing profession. As the number of legal malpractice cases increases, the members of this profession should increase their concerns about this problem.

Legal malpractice actions are traditionally grounded in the tort of negligence.[2] The party that files a legal malpractice action ("ex-client" or "client/plaintiff") must prove duty, breach, and causation of damages.[3] Of these elements, causation is the most difficult to

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2. *E.g.*, 7A C.J.S. *Attorney & Client* § 255 (1980).

Prior to the nineteenth century, negligence as a tort did not exist. W. PROSSER & W. KEETON, THE LAW OF TORTS, § 28 (5th ed. 1984) [hereinafter cited as PROSSER]. Malpractice, however, did exist in form. *Id.* Those who held themselves out to the public as being "competent" were held to have an obligation to properly perform. *Id.* Thus, public professionals, such as common carriers, blacksmiths, and doctors, could be held liable for breaching the public's confidence. *Id.*

Legal professionals were treated differently from other "public" professionals. Prior to 1791, barristers (nobility who could "stand in the place of others") and solicitor-attorneys (common men of "honest disposition") were liable in contract and tort for their conduct. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 3 (1981) [hereinafter cited as MALLEN]. By 1791, an immunity for barristers had evolved because their fees were categorized as gifts rather than wages. *Id.* A client could not sue if the barrister negligently caused injury because the barrister could not sue to recover unpaid fees (gifts). *Id.* This immunity for barristers still exists in Great Britain. *E.g.*, Rondol v. Worsley, [1969] 1 A.C. 191.

Attorney-solicitors, and their American counterparts, attorneys, were liable for breaches of their client's trust, just as the other public professionals were liable. *Compare* PROSSER, *supra*, § 28 *with* MALLEN, *supra*, § 5. The courts, however, were more atuned to careless conduct rather than judgmental errors, and with negligence emerging as a separate tort, attorney errors were considered unique. MALLEN, *supra*, § 5. An "honest mistake" was not a basis of liability, and liability attached only when the attorney was grossly negligent or had breached the fiduciary attorney/client relationship. *Id.* This immunity for errors of judgment still exists in British and American jurisprudence. *See, e.g.*, Finlay v. Murtagh, [1979] Ir. R. 249; Copeland Lumber Yards, Inc. v. Kincaid, 69 Or. App. 35, 684 P.2d 13 (1984).

Though England maintained this limited tort immunity (liability only for gross negligence or fiduciary breach) for solicitors through 1939, Groom v. Crocker, [1939] 1 K.B. 194, American jurisdictions defined malpractice in terms of the newly created tort of negligence. *E.g.*, Penningtons' Exrs. v. Yell, 11 Ark. 212 (1850). Like negligence, the client had to prove duty, breach, causation and damages to hold the attorney liable. *E.g.*, Savings Bank v. Ward, 100 U.S. 195, 198 (1880). This definition of legal malpractice is used today in both America and England. *See, e.g.*, Romanian Am. Interests, Inc. v. Scher, 94 A.D.2d 549, 464 N.Y.2d 821 (1983); Ross v. Caunter, [1980] Ch. 297.

3. *Ward*, 100 U.S. at 198. A duty exists when an attorney/client relationship is created. *E.g.*, *In re* Bankers Trust Co., 551 F. Supp. 609 (E.D. Pa. 1982), *aff'd in part, rev'd in part*, 659 F.2d 103 (3d Cir. 1981), *cert. denied*, 456 U.S. 961 (1982). *See also* D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 1.1 (1980). Breach exists when the attorney deviates from the customary standard of care of the legal profession. *E.g.*, Kuehn v. Garcia, 608 F.2d 1143 (8th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980). *See also* MEISELMAN, *supra*, § 2.2. Finally, causation of damage of the client must be shown. *E.g.*, McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981). *See also* MEISELMAN, *supra*, § 3.1.

establish.[4] To prove causation of damages, a client/plaintiff must also prove the validity of the underlying claim.[5] That is, in addition to proving causation of damages in the legal malpractice case, the ex-client must show that a viable problem was initially placed in the hands of the attorney.[6] This double burden, which requires proof of

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4. The first element to sustain a legal malpractice action is the existence of an attorney/client relationship. *See supra* note 3 and accompanying text. An attorney/client relationship can exist by written or oral contract, Lynn v. McCann, 226 N.Y. 654, 123 N.E. 877 (1919), mutual understanding of the parties to render professional services, Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897), and even upon preliminary consultations or expressions of the attorney's opinion, Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980). *See also* MALLEN, *supra* note 2, § 101 (duty of the attorney); MEISELMAN, *supra* note 3, § 1.2 (attorney/client relationship).

Breach of the attorney's duty occurs when the attorney deviates from the standard of professional care. *See supra* note 3 and accompanying text. Usually, expert testimony is required to show that the attorney's conduct fell below the standard of care that the legal profession exercises. *E.g.*, Bent v. Green, 39 Conn. Supp. 416, 466 A.2d 322 (1983). However, if the conduct is so obviously negligent that laypersons can determine that a breach has occurred without expert testimony, expert testimony may not be required. Glidden v. Terranova, 12 Mass. App. 597, 427 N.E.2d 1169 (1981). *See also* MALLEN, *supra* note 2, § 665 (establishing liability through use of experts); MEISELMAN, *supra* note 3, § 9.4 (use of expert testimony). *See generally* Annot., 17 A.L.R. 4th 170 (1985) (use of expert testimony to show standard of care and negligence in legal malpractice actions).

The client/plaintiff may only recover those damages proximately caused. *See supra* note 3 and accompanying text. To prove proximate causation, the client must show that the attorney's negligence created a loss which otherwise would not have occurred. Maryland Casualty Co. v. Price, Smith, Spilman & Clay, 224 F. 271 (S.D.W. Va. 1915), *aff'd*, 231 F. 397 (4th Cir. 1916). *See also* MALLEN, *supra* note 2, § 102 (causation of damages); MEISELMAN, *supra* note 3, § 3.1 (proximate cause in legal malpractice actions). Compared to the difficulty of proving duty and breach, causation is the most difficult obstacle to legal malpractice recovery. MEISELMAN, *supra* note 3, § 3.3.

5. *E.g.*, Campbell v. Magana, 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (1960). Causation of a loss must be proven to hold an attorney liable in malpractice. Maryland Casualty Co. v. Price, 231 F. 397, 401-02 (4th Cir. 1916). If the original lawsuit was nonmeritorious, the client is not injured when the original claim is lost. *Id.* at 402. Therefore, if the original claim is not valid, the attorney's negligence when losing that claim does not cause injury to the client. *Id.* Without injury, no malpractice liability exists. *Id.*

In some jurisdictions, further proof of validity may be required. For example, it may be required that damages be proven with certainty, that is, without speculation. Coon v. Ginsberg, 32 Colo. App. 206, 509 P.2d 1293 (1973). Proof may also be required that the original claim's defendant could have paid any judgment rendered. Taylor Oil Co. v. Weisensee, 334 N.W.2d 27 (S.D. 1983). These concerns involving the validity of the underlying claim's *damages* will not be treated within the scope of this article, for this article deals with the proof of *causation* problem.

Furthermore, the topic of this article precludes an in-depth analysis of the degrees of proof required when proving the malpractice case. This topic is fairly settled in American jurisprudence. *See, e.g.*, MEISELMAN, *supra* note 3, § 3.2 (degree of proof is generally "preponderance of the evidence."). Similarly, the problem of multiple causation need not be discussed further. *Id.* (the attorney's negligence must be *a* proximate cause of the injury rather than *the* proximate cause).

6. The client/plaintiffs must prove that the attorney/defendant was employed to correct a valid legal claim, and that had the attorney/defendant acted prudently, the claim would have been meritoriously resolved. *See Maryland Casualty*, 231 F. at 401-02. *See also* Coggin, *Attorney Negligence . . . A Suit Within A Suit*, 60 W. VA.

a viable original claim to establish causation in the malpractice action, has been called the "trial within a trial" requirement.[7]

This article addresses the dual causation phenomenon and discusses the inadequacy of its use in American jurisprudence today. To solve the problem that the dual causation phenomenon causes, the author suggests the use of equitable estoppel and a shifting of the burden of proof. By these means the profession can remedy the harsh result of the "trial within a trial" double impediment.[8] Because the "trial within a trial" requirement is a prime example of the failure of this profession to police itself, the legal profession must remove this double impediment and thereby take an affirmative step to improve its self-image and the image presented to the public.

"But For": The Traditional Test

Because the legal malpractice action is a negligence tort,[9] a client/plaintiff has the burden of proving the validity of the claim which the attorney was originally retained to assert.[10] To show proximate causation of injury, the ex-client must prove that "but for" the attorney's negligence, a favorable judgment would have been obtained.[11] This traditional "but for" causation test is the degree of

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L. Rev. 225 (1958) (the client's original cause of action which has been lost must be tried in the suit against the attorney).

7. Coggin, *Attorney Negligence . . . A Suit Within A Suit*, 60 W. Va. L. Rev. 225 (1958). Although Coggin is the first author to coin the term "suit within a suit," the concept of requiring a determination in one suit to determine the validity of another, underlying lawsuit precedes the Coggin article. *See Maryland Casualty*, 231 F. at 402 (holding that an attorney is not liable in the malpractice suit unless the client can prove the validity of the original suit).

Subsequent articles and decisions have used the terms "suit within a suit," "trial within a trial" and "case within a case" interchangeably to describe this dual causation element. *Cf.* Coggin, *supra*, at 235 (suit within a suit); Collins v. Greenstein, 61 Hawaii 26, 38, 595 P.2d 275, 282 (1979) (trial within a trial); Cabot, Cabot & Forbes v. Brian, Simon, Peragine, Smith & Redfearn, 568 F. Supp. 371, 373 (E.D. La. 1983) (case within a case).

8. *See infra* text accompanying notes 94-112.

9. *See supra* note 2 and accompanying text.

10. The client/plaintiff must plead, and prove, every essential element to the malpractice action. Malloy v. Sullivan, 415 So. 2d 1059 (Ala.), *cert. denied*, 459 U.S. 974 (1982). Therefore, the client/plaintiff must prove the validity of the underlying claim because that validity will establish causation in the malpractice claim. *See supra* note 6 and accompanying text.

11. Maryland Casualty Co. v. Price, 231 F. 397, 402 (4th Cir. 1916) (client must show that judgment would have been entered notwithstanding attorney's conduct); Penningtons' Exrs. v. Yell, 11 Ark. 212, 228 (1850) (attorney's negligence must be affirmatively shown by proving existence of a valid, underlying claim); Priest v. Dodsworth, 235 Ill. 613, 617, 85 N.E. 940, 942 (1908) (but for the attorney's negligence, the client's valid claim would not have been lost). This has also been called the "*sine qua non*" rule, for the Latin meaning "without which not." *Sine qua non* is defined as "that without which the thing cannot be," or "an indispensable requisite or condition." Black's Law Dictionary 1242 (5th ed. 1979).

proof required in most American jurisdictions.[12] A classic example of the "but for" test is found in *Cook v. Gould*.[13]

In *Cook*, the client/plaintiff retained Gould to file suit against a municipality for injuries sustained in a motorcycle accident.[14] Gould failed to file the action within the statute of limitations,[15] and lied to Cook about his handling of the case.[16] When Cook brought suit against Gould for malpractice, Gould admitted liability on all issues except proximate cause.[17] As a result, any evidence concerning Gould's handling of the original suit became irrelevant, unduly prej-

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12. Stuart v. Hall, 770 F.2d 1267 (4th Cir. 1985) (applying Va. law); Skinner v. Stone, Raskin & Israel, 724 F.2d 264 (2d Cir. 1983) (applying N.Y. law); Woodruff v. Tomlin, 616 F.2d 924 (6th Cir.) (applying Tenn. law), *cert. denied*, 449 U.S. 888 (1980); Better Homes, Inc. v. Rodgers, 195 F. Supp. 93 (N.D.W. Va. 1961); Hall v. Thomas, 456 So. 2d 67 (Ala. 1984); Arizona Management Corp. v. Kallof, 142 Ariz. 64, 688 P.2d 710 (Ct. App. 1984); Ashley v. Eisele, 247 Ark. 281, 445 S.W.2d 76 (1969); Coon v. Ginsberg, 32 Colo. App. 206, 509 P.2d 1293 (1973); Palmieri v. Winnick, 40 Conn. Supp. 144, 482 A.2d 1229 (1984); McClain v. Faraone, 369 A.2d 1090 (Del. Super. Ct. 1977); Weiner v. Moreno, 271 So. 2d 217 (Fla. Dist. Ct. App. 1973); Ware v. Durham, 246 Ga. 84, 268 S.E.2d 668 (1980); Collins v. Greenstein, 61 Hawaii 26, 595 P.2d 275 (1979); Makin v. Liddle, 102 Idaho 705, 639 P.2d 3 (1981); Cook v. Gould, 109 Ill. App. 3d 311, 440 N.E.2d 448 (1982); Webb v. Pomeroy, 8 Kan. App. 2d 246, 655 P.2d 465 (1982); Mitchell v. Transamerica Ins. Co., 551 S.W.2d 586 (Ky. Ct. App. 1977); Schneider v. Richardson, 411 A.2d 656 (Me. 1979); Kirgan v. Parks, 60 Md. App. 1, 478 A.2d 713 (1984); Glidden v. Terranova, 12 Mass. App. 597, 427 N.E.2d 1169 (1981) ("but for" rule used when attorney fails to prosecute client's claim); Basic Food Ind., Inc. v. Grant, 107 Mich. App. 685, 310 N.E.2d 26 (1981); Virsen v. Rosso, Beutel, Johnson, Rosso & Ebersold, 356 N.W.2d 333 (Minn. Ct. App. 1984); Hutchinson v. Smith, 417 So.2d 926 (Miss. 1982); Eddleman v. Dowd, 648 S.W.2d 632, (Mo. Ct. App. 1983); R.H. Schwartz Constr. Specialties v. Hanrahan, _Mont._, 672 P.2d 1116 (1983); Smith v. Ganz, 219 Neb. 432, 363 N.W.2d 526 (1985); Sorenson v. Pavlikowski, 94 Nev. 440, 581 P.2d 851 (1978); McLaughlin v. Sullivan, 123 N.H. 335, 461 A.2d 123 (1983); Rorrer v. Cooke, 69 N.C. App. 305, 317 S.E.2d 34 (1984); Martinson Bros. v. Hjellum, 359 N.W.2d 865 (N.D. 1985); Riley v. Montgomery, 11 Ohio St. 3d 75, 463 N.E.2d 1246 (1984); Allred v. Rabon, 572 P.2d 979 (Okla. 1977); Sola v. Closterman, 67 Or. App. 468, 679 P.2d 317 (1984); Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983); Forrow v. Arnold, 22 R.I. 305, 47 A. 693 (1900); Shealy v. Winters, 273 S.C. 330, 256 S.E.2d 739 (1979); Taylor Oil Co. v. Weisensee, 334 N.W.2d 27 (S.D. 1984); Liles v. Phillips, 677 S.W.2d 802 (Tex. Ct. App. 1984); Dunn v. McKay, Burton, McMurray & Thurman, 584 P.2d 894 (Utah 1978); Brown v. Kelly, 140 Vt. 336, 437 A.2d 1103 (1981); Sherry v. Diercks, 29 Wash. App. 433, 628 P.2d 1336 (1981); Helmbrecht v. St. Paul Ins. Co., 122 Wisc. 2d 94, 362 N.W.2d 118 (1985); Burk v. Burzynski, 672 P.2d 419 (Wyo. 1983).

13. 109 Ill. App. 3d 311, 440 N.E.2d 448 (1982).

14. *Id.* at 313, 440 N.E.2d at 449. Cook lost control and was injured, when his motorcycle skidded on an oil spill in the city of Joliet, Illinois. *Id.*

15. *Cook*, 109 Ill. App. 3d at 313, 440 N.E.2d at 449.

16. Gould told Cook that he had attempted to file the personal injury suit, but that the court clerk had lost the papers or that the documents had been lost in the mail. *Id.* Gould advised his client that there could be no personal injury claim because of the missing papers, and nothing further could be done to vindicate that claim. *Id.*

17. Prior to trial, Gould admitted liability as to duty, breach and damages, but specifically denied proximate causation. *Cook*, 109 Ill. App. 3d at 313, 440 N.E.2d at 449. Gould's theory at the malpractice trial was that no loss had been caused because the underlying personal injury claim against the city of Joliet was worthless. *Id.*

udicial, and inadmissible on the issues of causation or damages, because the only remaining issue was the extent of damages caused.[18]

Applying the traditional "but for" test, the *Cook* court determined that the client/plaintiff had to show that the original tort claim against the municipality would have been meritorious.[19] The court found that the attorney caused no damages when he failed to timely file the original claim because the client/plaintiff could not show that the city had breached any duty.[20] The neglectful attorney, therefore, successfully defended the negligence action on the ground that his ex-client would not have won the underlying claim had it been filed on time.[21] In reaching its decision, the *Cook* court rejected the client/plaintiff's contentions that the law should shift the burden of proof on damages to the negligent attorney, or that the estoppel doctrine should apply.[22]

The *Cook* decision shows that the ex-client could not recover damages for the attorney's negligence because the attorney can, under the "but for" test, defend on the grounds that the original suit was worthless.[23] This inequitable result of the "but for" test, whether viewed as a roadblock established in law to protect legal professionals, a safety device designed to guard against frivolous litigation, or a legacy of traditional law since changed, is unduly burdensome and too protective of the negligent attorney. Attorneys who breach their client's trust, using confidential information both as a sword on behalf of the client and as a shield when the client is wronged,[24] should not be so ably fortified. Attorneys and their mal-

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18. Gould had admitted liability on all issues except causation. *See supra* note 17 and accompanying text. Any evidence concerning the attorney's lies related to the manner of the attorney's breach, an issue already admitted. *Cook*, 109 Ill. App. 3d at 315, 440 N.E.2d at 450. Therefore, any evidence of the attorney's misconduct would be prejudicial and impugn the attorney's character. *Id.* The evidence was therefore properly excluded. *Id.* at 315, 440 N.E.2d at 451.

19. *Cook*, 109 Ill. App. 3d at 314, 440 N.E.2d at 450.

20. Cook could not show that the city of Joliet had any actual or constructive notice of the oil slick. *Id.* at 315-16, 440 N.E.2d at 451. The city therefore did not breach its duty to correct defective or dangerous road conditions. *Id.* Without notice, there was not breach, and the underlying claim of negligence was worthless. *Id.*

Therefore, Gould caused no loss when failing to file the underlying claim because the underlying claim was valueless. *Id.*

21. Cook's original negligence claim against the city was valueless. *See supra* note 19 and accompanying text. Thus, the *Cook* court affirmed the trial court's finding that Gould did not cause any loss to Cook, for Cook would have lost anyway. *Cook*, 109 Ill. App. 3d at 315-16, 440 N.E.2d at 451. Gould was therefore not liable for malpractice. *Id.* at 316, 440 N.E.2d at 451.

22. *See Cook*, 109 Ill. App. 3d at 314-15, 440 N.E.2d at 450.

23. *See supra* notes 14-21 and accompanying text.

24. An attorney must preserve the client's confidences and secrets to insure that the client will reveal all pertinent information concerning the matter. Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1384 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973). However, an attorney is allowed to divulge client confidences to preserves his or her own rights in a controversy against the client. International Elec. Corp. v.

practice insurers are the only beneficiaries of this "trial within a trial" requirement.[25]

The harsh effect of the "but for" rule demands correction. Some jurisdictions have recognized this inequitable situation and have eradicated or modified the requirement.[26] Compelling reasons exist for other jurisdictions to follow this lead.

UNIQUE PROFESSIONAL RELATIONSHIP

While the traditional analogy between legal malpractice and other negligence actions exists, the underlying relationship is unlike any other.[27] The client entrusts his lawyer and counsellor with confidences concerning property, family, life, and legal rights and obligations. This is a fiduciary relationship[28] in many respects and is analogous to the relationship between priest and confessor. This profession must fulfill its duty to bolster the reputation of the attorney/client relationship because its reputation has eroded in recent years.[29]

Flanzer, 527 F.2d 1288, 1292 (2d Cir. 1975).

Similarly, the American Bar Association allows an attorney to betray client confidences when the client sues in malpractice. For example, the A.B.A. Code of Professional Responsibility allows an attorney to reveal information "likely to be detrimental to the client" when defending accusations of wrongful conduct. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1981). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6, comment 19 (1983) (rule of confidentiality does not prevent lawyer from defending charges of wrongful conduct).

An attorney may therefore use confidential information gained, and which would otherwise remain confidential, to defend malpractice allegations.

25. Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 690 (1977) (to ease the burden of recovery for legal malpractice plaintiffs, the risk of loss is shifted to the party best able to insure against it).

26. *See infra* note 32 and accompanying text.

27. Both bar associations and judges have proclaimed the special place of the legal profession in American society and the importance of high standards of care for attorneys. But high standards of care do not safeguard that special place if a high standard of proof of causation makes malpractice recovery virtually impossible. Moreover, because of its control of the judiciary and dominance of the legislatures, the legal profession is self-protected. To the population in general and to the medical profession in particular, the legal profession appears to advocate a double standard. Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 680 (1978).

28. Bridgman, *Legal Malpractice-A Consideration of the Elements of a Strong Plaintiff's Case*, 30 S.C.L. Rev. 213, 238 (1979).

29. The articles, commentaries and references supporting this proposition are numerous. For some recent discussions of the public's opinion of the legal profession, written by members of the profession, see Warren, *A Profession Under Review*, 57 N.Y. ST. B.J. 15 (Jan. 1985); Zunker, *Public Perception of the Legal Profession*, 48 TEX. B.J. 78 (1985).

> Much of the bar has belatedly accepted that lawyers are not, and ought not be, above the law. We, like all persons, should be accountable for our neglect. In these times when our image is tarnished by the aftermath of Watergate, this accountability is a healthy sign. To regain the public trust, it is fitting that the profession say a *mea culpa*.

To this end, the legal profession, perhaps through the courts, must narrow the scope of protection accorded a negligent attorney. The attorney who is accused of malpractice, as in *Cook*, is at a distinct advantage for several reasons. The attorney is privy to information unavailable to others because of the attorney/client relationship. Furthermore, the attorney, who was once champion of the ex-client's cause, is now free to disparage the worth of that endeavor and use the ex-client's confidences in the process.[30]

The legal profession, like any other, has the ability to spread the risk of malpractice liability. The profession also has the duty to face the real cause of the malpractice insurance crisis. Frivolous lawsuits are not the cause of any real or perceived insurance crisis. Rather the cause is the inability or refusal to discipline or remove the frequent violators and the incompetent practitioners. Responsibly correcting the inequitable effect of the "but for" standard does not require the imposition of strict liability. It does, however, require a position that, in appropriate instances, the "trial within a trial" impediment will no longer be imposed upon client/plaintiffs. Disciplinary action is also clearly called for, but such action alone is insufficient protection for those who have been injured as a result of attorney malpractice.

The "trial within a trial" doctrine is indicative of the legal profession's failure to police itself in the malpractice situation. It is simply bad public relations to allow a negligent attorney to avoid liability through the use of a rule of law which, in the eyes of the public, amounts to no more than a technicality that flies in the face of equity. While attempting to foster the confidence of the general public, the legal profession is not prudent in allowing this rule of law to retain its viability.[31]

Discontent With the "But For" Rule

Several jurisdictions have tried to remedy the harshness of the traditional "but for" rule.[32] Although commonly labelled as differing

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Bridgman, *supra* note 28, at 216.

30. *See supra* note 24 and accompanying text.

31. One commentator has observed: "If the profession is to improve its overall image and provide increasingly competent legal service to the general public, the negligent attorney must be held accountable for his failure to meet the standards of the legal community." Note, *A Modern Approach to the Legal Malpractice Tort*, 52 Ind. L.J. 689, 709 (1977).

32. Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), *rev'd sub nom. on other grounds, In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Winter v. Brown, 365 A.2d 381 (D.C. Ap. Ct. 1976); Baker v. Beal, 225 N.W.2d 106 (Iowa 1975); Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So. 2d 1109 (La. 1982); Fuschetti v. Bierman, 128 N.J. Super. 290, 319 A.2d 781 (1974).

standards of causation,[33] these modern standards comprise, in varying degrees, a two-step approach. Under each standard, there is a presumption that the attorney/defendant who breached the standard of care caused harm to the client/plaintiff.[34] The attorney, however, is allowed an opportunity to rebut the presumption.[35] Also common to each of these standards is the fact that although each attempts to correct the inequity of the "but for" rule, none completely eliminates the problem.[36]

Shifting the Burden

In 1976, the District of Columbia departed from the traditional "but for" test of causation. In *Winter v. Brown*,[37] the plaintiffs' original attorneys refused to file a medical malpractice claim against a county hospital.[38] The plaintiffs, who were parents of an infant allegedly injured during delivery, then retained other counsel to bring

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33. *E.g.*, MEISELMAN, *supra* note 3, §§ 3.6-3.11 (modern approaches to the traditional rule defined as "presumption of validity," "shifting of the burden," "lost opportunity," "bifurcation," and "lost substantial opportunity"). Each of these modern standards is described below. *See infra* notes 37-95 and accompanying text.

34. An inference of causation is made in the "shifting of the burden" test when the client proves duty, breach and damage. Winter v. Brown, 365 A.2d 381 (D.C. App. Ct. 1976). *See also infra* note 43 and accompanying text. A rebuttable presumption of causation is inferred in the "presumption of validity" standard. Baker v. Beal, 225 N.W.2d 106 (Iowa 1975). *See also infra* notes 66-67 and accompanying text. In the "bifurcation" standard, total causation is inferred and proof of causation does not exist. Fuschetti v. Bierman, 128 N.J. Super. 290, 319 A.2d 781 (1974). *See also infra* text accompanying note 74. An inference of causation is made in the "lost opportunity" standard. Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), *rev'd sub nom. on other grounds, In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). *See also infra* note 86 and accompanying text. An inference of causation is also made in the "lost substantial opportunity" proposal. *See* Note, *supra* note 27, at 680. *See also infra* note 92 and accompanying text.

35. Smith v. Lewis, 13 Cal.3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (attorney can rebut causation inference in the "lost opportunity" standard), *rev'd sub nom. on other grounds, In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Winter v. Brown, 365 A.2d 381 (D.C. App. Ct. 1976) (attorney has burden of proving no causation in "burden shifting" standard); Baker v. Beal, 225 N.W.2d 106 (Iowa 1975) (attorney allowed to rebut "presumption of validity"). *See also* Note, *supra* note 27, *passim* (attorney can rebut causation in "lost substantial opportunity" proposal). *But see* Fuschetti v. Bierman, 128 N.J. Super. 290, 319 A.2d 781 (1974) (total causation inferred in "bifurcation," so attorney cannot rebut causation).

36. *See infra* note 96 and accompanying text.

37. 365 A.2d 381 (D.C. App. Ct. 1976).

38. *Id.* at 382. Maryland required that, prior to filing a medical malpractice claim against a county hospital, notice had to be given to the county within 180 days of the injury's occurrence. MD. ANN. CODE art. 57, § 18 (1957) (repealed 1978). The client, Brown, retained Winter to seek redress of injury received at a county hospital approximately 120 days after the injury occurred. *Winter*, 365 A.2d at 382. After investigation of the claim, but before the 180 day notice period ran, Winter told Brown that no cause of action existed. *Id.*

Brown then retained other counsel, who did file suit. *Id.* However, because the 180 day notice period had run, that action against the hospital was dismissed. *Id.*

an action against the county hospital. That action was dismissed due to the running of a statutory notice requirement, so plaintiffs filed suit for legal malpractice against their original attorneys for the lost action.[39] Significantly, the doctor was not sued in Maryland though he was available to be sued there. The attorney/defendants argued that no injury had been caused because a valid medical malpractice action still existed against the doctor.[40] According to this argument, the attorneys were not liable for malpractice.[41]

The *Winter* court did not accept the defendant's argument, noting that the difficulty in determining client/plaintiff's damages was due to the attorney/defendant's actions.[42] Instead, the court allowed an inference of causation. This inference required the negligent attorneys to bear the consequences of their actions.[43] Thus, the court held that the attorney/defendants had the burden of proving which damages they did not cause.[44]

This burden shifting approach was first used for legal malpractice cases in *Winter*,[45] but it is not new to negligence actions. The reasoning derives from a doctrine established almost 40 years ago in

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39. *Winter*, 365 A.2d at 382-83. Brown brought suit against their initial counsel for their failure to prosecute and pursue claims and actions against the hospital. *Id.* The attorneys' alleged negligence in failing to pursue the hospital claim thus deprived the clients of a cause of action which could have been pursued. *Id.* at 383.

40. The attorneys contended that Brown could still sue the doctor and hospital employees because the Maryland statute pertained only to county liability. *Winter*, 365 A.2d at 383. Thus, the cause of action had not been lost, and no injury ensued. *Id.*

Winter also argued that the client had failed to mitigate damages because the medical malpractice action against the doctor and hospital employees still existed. *Id.* Therefore, even if the attorneys were liable, a calculation of the damages caused could not be made. *Id.*

41. Maryland precedents held that no legal malpractice action existed until the client suffered a loss: the traditional "but for" rule. *Winter*, 365 A.2d at 384-85. The attorneys were therefore not liable in malpractice because the client had not suffered a loss. *See supra* note 40 and accompanying text.

42. "[T]he difference in value between the cause of action . . . [the attorneys] deprived [as against the hospital] and the cause of action still retain[ed] against [the] hospital agents or employees" cannot be measured or calculated because of the attorney's actions. *Winter*, 365 A.2d at 385. Although the attorneys caused some damage, their actions made calculation of the client's underlying damages impossible. *Id.*

43. The attorneys created a situation in which their actions caused some damage, but calculation of the amount of the damage caused was not possible. *See supra* note 42 and accompanying text. The *Winter* court therefore inferred total causation of damages. 365 A.2d at 385.

44. *Winter*, 365 A.2d at 385. The court found this "shifting of the burden" to be more equitable than having the client prove the underlying claim's validity because the traditional rule would require the client to sue all possible defendants to the underlying suit before suing the attorneys in legal malpractice. *Id.* at 385-86. Such a burden would make legal malpractice actions unlikely. *Id.*

Interestingly, the court noted that if Winter was found liable in malpractice, the attorneys may have a right of subrogation to the non-exercised causes of action that the client still possessed as against the doctor and hospital employees. *Id.* at 386, n.8.

45. Note, *supra* note 27, at 674-75.

Summers v. Tice.[46] Although the *Summers* burden shifting doctrine applies when multiple, independent causes result in one injury to the plaintiff, the *Winter* court used the doctrine where two independent causes, creating two independent injuries, were inextricably intertwined.[47] The *Winter* court, recognizing the inequity of the "champion/challenger" position, which an allegedly negligent attorney enjoyed, imposed an assumption of total causation and shifted the burden of proof to the attorney thereby forcing him/her to prove which damages he or she did not cause. In effect, the court eliminated the "but for" rule when it substituted an assumption of causation that the attorney had to affirmatively rebut.

Several other jurisdictions have adopted the *Winter* standard of causation.[48] In *Jenkins v. St. Paul Fire & Marine Insurance Co.*,[49] the Louisiana Supreme Court allowed an inference of causation once the client/plaintiff proved duty and breach.[50] The attorney/defend-

46. 33 Cal. 2d 80, 199 P.2d 1 (1948). *Summers* is the classic tort case in which two hunters negligently fired their weapons towards the plaintiff, but only one of them injured the plaintiff's eye. Both were held liable, and the two defendants were held to have the burden of proving which one was liable between themselves. *Id.* *Summers* therefore stands for the proposition that when it is difficult to prove allocation of causation because of the nature of the defendants' conduct, the negligent defendants must prove their respective allocations of causation.

47. In *Winter*, the county was allegedly negligent in its treatment of the plaintiff's child. 365 A.2d at 382. The attorney/defendants were also allegedly negligent in their failure to pursue claims against the county. *Id.* at 383. The damage that the attorneys caused was to be measured by the damage the county caused, and were so intertwined that, though causing separate injuries, determination of one required adjudication of the other. *Id.*

48. Miller v. Sears, 636 P.2d 1183 (Alaska 1981); Donato v. Dutton, Kapes & Overman, 154 Ind. App. 17, 288 N.E.2d 795 (1972); Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So. 2d 1109 (La. 1982); Glidden v. Terranova, 12 Mass. App. 597, 427 N.E.2d 1169 (1981) (shifting the burden used when attorney allegedly failed to defend client's claim).

This shifting of the burden has caused some commentators to describe this standard as a *res ipsa loquitur* approach. Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689 (1977). *Res ipsa loquitur* is a doctrine in which causation is assumed because the injury or accident which has occurred usually does not occur in the absence of negligence. BLACK'S LAW DICTIONARY 1173 (5th ed. 1979). It was proposed that once an attorney/client relationship is shown, and that the attorney negligently lost the client's original claim, the burden of proof should shift to the attorney to prove that the original action was not valid. Note, *supra*, at 701. This is because the attorney once championed the client's action, and the loss of the claim would not normally occur absent some degree of negligence. *Id.* The author named this approach a modified *res ipsa loquitur* because, although true *res ipsa loquitor* occurs only when the accident would not happen without total negligence, this approach infers causation when the injury usually occurs with less than total negligence. *Id.*

For another commentator's discussion of *res ipsa loquitur* in legal malpractice actions, see MALLEN, *supra* note 2, § 669.

49. 422 So. 2d 1109 (La. 1982).

50. In *Jenkins*, the client/plaintiffs was using the attorney because the attorney failed to file the client's claim before the statute of limitations ran. 422 So.2d at 1110. Upon evidence that an attorney/client relationship existed and that the attorney failed to file the claim, the court created an inference of causation. *Id.*

ants were then required to prove that the underlying claim was invalid.[51] This shifting of the burden standard was imposed to remedy the stringent "case within a case" standard.[52]

The burden shifting standard set forth in *Winter* and *Jenkins* does not completely correct the problem that the plaintiff must face for two reasons. First, this standard fails to recognize the realities of a tort litigation system in which over 90% of the personal injury suits are settled without trial.[53] Although the burden shifts to the attorney/defendants to show which presumed damages they did not cause, the client has also lost a substantial opportunity to settle that original claim. The client/plaintiff must be allowed to present evidence not only regarding the probability of success at trial, but also

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51. *Jenkins*, 422 So. 2d at 1110.

52. The attorney should carry the burden of proof because of the difficult and unfair "case within a case" requirement. *Id.* at 1112. The court, however, concluded that the attorney should have had the burden of proof in this case anyway because the client's contributory negligence would have defeated the underlying claim. *Id.* Contributory negligence, like any affirmative defense, is to be proven by the party asserting it. *Id.* at 1110. As the *Jenkins* court noted:

> [O]nce the client has proved that his former attorney accepted employment and failed to assert the claim timely, then the client has established a prima facie case that the attorney's negligence caused him some loss, since it is unlikely the attorney would have agreed to handle a claim completely devoid of merit. In such a situation, a rule which requires the client to prove the amount of damages by trying the 'case within a case' simply imposes too great a standard of certainty of proof. Rather, the more logical approach is to impose on the negligent attorney, at this point in the trial, the burden of going forward with evidence to overcome the client's prima facie case by proving that the client could not have succeeded on the original claim, and the causation and damage questions are then up to the jury to decide. Otherwise, there is undue burden on the aggrieved client, who can prove negligence and causation of some damages, when he been relegated to seeking relief by the only remedy available after his attorney's negligence precluded relief by means of the original claim.

Jenkins, 422 So. 2d at 1110. The *Jenkins* dissent observed:

> I commend the plurality for its improvement in the law by modifying the "case within a case" requirement by placing the burden of going forward with the evidence upon the defendant attorney once his malpractice has been established. This is certainly more just than the former rule of law. However, I think our civil code and justice require that a person whose legal rights have been permanently prejudiced by the wrongful acts of his attorney be afforded a more complete remedy.

Jenkins, 422 So. 2d at 1114 (Dennis, J., dissenting).

53. As one commentator has observed:

> The vast majority of cases litigated are neither totally devoid of merit nor totally meritorious. This is particularly true in tort litigation. Recent studies have shown, for instance, that 92.9% of personal injury suits filed are settled without trial. Presumably many, if not most, of those cases were settled by compromises on the issues of liability. Since proof in civil actions is predicated upon probability and not certainty, logic dictates that it should be sufficient for plaintiff to show the probability and not certainty, of favorable settlement rather than having to win the "case within a case" to prevail. A rule to the contrary seems devoid of logic and smacks of reconstruction of the citadel of privilege.

Bridgman, *supra* note 28, at 234-35 (1979).

regarding the probability of a favorable settlement.[54]

Secondly, the burden shifting standard does not recognize the confidential aspects of the attorney/client relationship. When a client confides in an attorney, that attorney obtains confidential information concerning the claim. The attorney then chooses a course of action to vindicate the client's claim. The attorney, of course, has full knowledge of the legal action, affirmative defenses, and possible roadblocks to recovery. Thus, the attorney is privy not only to the confidential data underlying the case, but also to the information concerning the legal claim as well. This information and knowledge can be used in the malpractice case even though such data is normally confidential and privileged.[55] The allegedly negligent attorney can use the information and knowledge that he or she gained when asserting the ex-client's claim to defeat that very assertion in the malpractice trial.[56]

Simply allowing an inference of causation and requiring the attorney/defendant to disprove the underlying claim is not a signifi-

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54. According to Bridgman, the client/plaintiff should be allowed to recover the value of lost settlement opportunities. He noted in this regard that

> The plaintiff must prove sufficient facts to make his plea for . . . "reasonable settlement value" persuasive. In other words, to overcome strict application the plaintiff must indeed try the "case within a case" to a rather significant extent. Thus when the rule is not strictly applied, counsel should consider the use of experts, such as prominent plaintiff and defense counsel and insurance claims personnel, to establish probable settlement value. The usual defense objection is that such testimony is speculative or conjectural. The answer to that objection is that experts make those professional evaluations daily and settle cases for cash based upon those evaluations. Bearing in mind that a very high percentage of tort lawsuits settle short of trial, the testimony is not speculative, but solidly based upon probability.

Id. at 235-36. This loss to the client led the *Jenkins* court to observe:

> [I]n the interest of justices and the faithful application of our civil code, I would jettison the cases within a case requirement. I would require that the party guilty of malpractice repair the wrong he has done to his client by paying him an amount equal to the value of the right destroyed.
>
> With this approach, we would reach a result under our code similar to that adopted by jurisdictions which have abandoned the case within a case requirement in favor of more modern rules. Additional proposed approaches include the 'lost substantial possibility' test suggested by cases in the medical malpractice arena.

Jenkins, 422 So.2d at 1115 (J. Dennis, dissenting) (citations omitted).

55. *See supra* note 24 and accompanying text.

56. *Id.* One commentator noted a twist to the objection that the attorney/defendant unfairly has at his disposal information regarding the client/plaintiff's original lawsuit:

> A more valid objection to the use of the suit within a suit method of ascertaining damages is the fact that the attorney defendant will probably not have at his disposal the evidence which would have been offered by the opposing party in the original action. Again, however, it is submitted that it is more equitable to spread the risk through the use of low-cost insurance rather than deny recovery to the innocent party.

COGGIN, *supra* note 7, at 235. The author suggests the use of a subpoena to obtain the information held by the original defendant if necessary.

cant remedy for the inequity of the "but for" rule. The burden shifting standard requires the attorney/defendant to defeat the original claim, however, he or she can use data gained in asserting the ex-client's claim to defeat that claim. Moreover, the ex-client is still deprived of an opportunity to have settled the original claim. This shifting of the burden of proof, while admittedly changing the "but for" rule, hardly corrects the very problems the new standard was supposed to remedy.

The Presumption of Validity

In *Baker v. Beal*,[57] the Iowa Supreme Court enunciated a new causation standard to replace the traditional legal malpractice test. Similar to the *Winter* inference of causation,[58] a rebuttable presumption of causation was used.[59] In *Baker*, the attorney/defendants argued that the client/plaintiff failed to show the viability of the underlying dram shop claim.[60] According to this argument, because no injury was caused, the "but for" rule vitiated any attorney liability.[61]

The *Baker* court rejected the defendant's "but for" assertion.[62] The court instead relied on the presumption that an attorney who elects to represent a client and file suit has validly discharged his or her duty.[63] The underlying claim is therefore presumed valid.[64] The

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57. 225 N.W.2d 106 (Iowa 1975).

58. *See supra* note 43 and accompanying text.

59. *Baker*, 225 N.W.2d at 110.

60. *Id.* at 109. At the time of the trial, Iowa had two different dram shop provisions. *Id.* at 110. An action could lie against the licensee or permittee of a tavern, *id.* (*citing* IOWA CODE § 123.95 (1963) (amended 1971)), or against the tavern itself if no licensee or permittee existed. *Baker*, 225 N.W.2d at 110 (*citing* IOWA CODE § 129.2 (1966) (repealed 1971)).

In *Baker*, the attorney Beal filed a last minute complaint against the tavern's bartender before the running of the statute of limitations. 225 N.W.2d at 108. The complaint was drafted under the dram shop "licensee or permittee" provision, but failed to allege that the bartender was either. *Id.* The bartender's motion to dismiss was granted, and the trial court refused petition amendment because the statute of limitations had run. *Id.*

Baker then filed a malpractice suit against Beal, but the trial court found that the attorneys were not liable because Baker failed to show that the underlying dram shop action would have been meritorious. *Id.*

61. Although prior Iowa decisions had not specifically adopted the "but for" rule, the *Baker* court noted that such a rule was supported in a 1902 Iowa case. 225 N.W.2d at 109 (*citing* Getchell v. Employers' Liab. Assurance Corp., 117 Iowa 180, 90 N.W. 616 (1902)). Thus, the client/plaintiff had to prove that "absent the lawyer's negligence, the underlying suit would have been successful." *Id.* at 109.

62. *Baker*, 225 N.W.2d at 110.

63. *Id.* It is interesting to note that the *Baker* court used this "discharge of duty" presumption in a radically new context.

Traditionally, the presumption that a person has validly discharged his or her duty was used by attorneys *defending* malpractice actions. *See, e.g.*, Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966).

> There is no presumption that an attorney has been guilty of a want of care, arising merely from his failure to be successful in an undertaking. On the con-

attorney, however, is allowed to prove that the underlying claim was invalid and that no judgment would have been obtained.[65]

The *Baker* presumption is also an inadequate attempt to offset the harshness of the traditional "but for" test. Although the client/plaintiff does not have to prove that the original claim is valid because it is presumed to be valid, this presumption can be rebutted. Thus, in order to escape liability under the *Baker* presumption, the allegedly negligent attorney need only prove that one element of the client/plaintiff's underlying claim does not exist. The attorney/defendant may use the ex-client's confidential information and/or the attorney's personal familiarity with the underlying suit to disprove one of the necessary elements. If the attorney/defendant succeeds, the underlying claim is invalid and no malpractice liability will exist.

Just as the *Winter* inference fails to totally remedy the inequity of the "but for" rule, so too the *Baker* presumption fails. Under each standard, the attorney/defendant is allowed an opportunity to disprove the inferred or presumed valid claim. Using the ex-client's confidential information, and drawing from the knowledge he or she gained when formulating the underlying claim, the attorney/defendant can remove any basis for liability because he or she can establish the absence of a valid underlying claim. Moreover, under the *Baker* standard, as under the *Winter* burden shifting standard, the ex-client is denied the opportunity of settlement.[66]

The Bifurcated Trial

In a radical departure from the "but for" test, a New Jersey court attempted to solve the unfairness inherent in the "trial within a trial" causation requirement. In *Fuschetti v. Bierman*,[67] the New Jersey Superior Court created a Solomon-like technique: rather than a "trial within a trial," two separate trials were held to determine attorney negligence.[68] At the first trial, a determination is made

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trary, he is always entitled to the benefit of the rule that every one is presumed to have discharged his duty, whether legal or moral, until the contrary is made to appear.

Priest v. Dodsworth, 235 Ill. 613, 617, 85 N.E. 940, 942 (1908) (*quoting* 3 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 384 (D. Garland & L. McGehee 2d ed. 1897)).

Baker transformed this presumption into a double-edged sword, for lawyers who depended upon it to vitiate liability may now find that it imposes liability instead. *See* 225 N.W.2d at 110. Attorney conduct assumed as valid for breach purposes must now be disproven for causation purposes. *Id.*

64. *Baker*, 225 N.W.2d at 110.

65. *Id.*

66. *See supra* notes 53-54 and accompanying text.

67. 128 N.J. Super. 290, 319 A.2d 781 (1974).

68. *Id.* at 297, 319 A.2d at 785. Under New Jersey Supreme Court Rule 4:38-2, a court may sever a multi-issue trial into separate issue trials when the issues are complex and confusing. *Id.* at 297, 319 A.2d at 785.

whether the attorney/defendant breached his duty of care.[69] If a breach is found, a second trial is held in which the ex-client's original claim is scrutinized.[70] The same judge and jury determine the validity of the underlying claim and then measure the value of the damages that the client/plaintiff incurred.[71]

The element of causation has been totally removed from consideration under this bifurcated process. Once duty and breach are shown at the first trial, and damages are determined at the second trial, the causal link between the attorney's acts and the ex-client's damage is assumed and liability is imposed. This causal link is assumed because the judge need not instruct the jury on causation.[72] Rather, having the same judge and jury participate in the second trial is itself the unspoken link that establishes causation.

The bifurcation process that this standard imposes, though protecting the client/plaintiff from the harshness of the "but for" rule, is not a viable alternative because it goes too far. Under this test, the attorney is placed in an inequitable position when proximate cause is questionable or non-existent. Because causation is assumed, the attorney is liable regardless of whether he or she caused the ex-client's loss. In essence, the attorney is strictly liable for all injury to the client.[73]

The *Fuschetti* bifurcation process does, however, offset the plaintiff's loss of settlement opportunity. Once the attorney/defendant is found liable at the first trial, he or she will "stand in the shoes" of the original defendant, and the opportunity to settle the

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This legal malpractice bifurcation procedure has also been adopted in New Mexico. George v. Caton, 93 N.M. 370, 600 P.2d 822 (1979).

69. *Fuschetti*, 128 N.J. Super. at 297, 319 A.2d at 785.

70. *Id.*

71. *Id.* at 297-98, 319 A.2d at 785. The New Jersey court wanted to have the same judge and jury hear the two bifurcated trials because it would otherwise be confusing to the second trial judge and jury as to why the attorney/defendant is standing-in for the original claim's defendants. *Id.* Thus, both of the legal malpractice trials are held in front of the same judge and jury "back-to-back, with a hiatus of no more than one day." *Id.* at 298, 319 A.2d at 785.

72. MEISELMAN, *supra* note 3, § 3.10. Causation is not determined in the first trial, where duty and breach are determined, nor is it determined at the second trial. *Id.* There is no requirement that the judge instruct at either trial on the issue of causation. *Id.*

73. Strict liability is liability without fault. BLACK'S LAW DICTIONARY 1275 (5th ed. 1979). Thus, a seller, engaged in the business of selling a product, who places a product in the stream of commerce without substantial change, is liable for any harm that the product causes, whether the seller is negligent or prudent. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 402A (1979).

It can be seen then that holding the attorney liable for all damage occurring to the client, regardless of causation, is a type of strict liability. Although the attorney/defendant is negligent, as determined in the first trial, the effect of the bifurcated trials holds the attorney liable for all damages suffered even if those damages were not proximately caused.

original claim will be recaptured.[74] Rather than having the underlying claim's defendant settle, the attorney will now attempt settlement of the original claim.

The *Fuschetti* bifurcated standard, therefore, imposes an unduly burdensome duty on the attorney because it removes the causation element in an effort to correct the unfairness of the "but for" test. Although this standard reinstates the client/plaintiff's settlement opportunity, the cost is substantial unfairness to the defendant/attorney. Because this standard is as harsh to the defendant/attorney as the "but for" rule is to the client/plaintiff, it should not be imposed.[75]

The Lost Opportunity Standard

Another approach used in an attempt to change the "but for," "trial within a trial" standard holds the attorney liable for the loss of the ex-client's opportunity to litigate the underlying claim.[76] This standard, perhaps the most stringent test for attorneys, was formulated in *Smith v. Lewis*.[77] In *Lewis*, the client/plaintiff sued her attorney for failing to assert certain property rights in her divorce action.[78] At the time of the divorce, the law was unsettled as to a spouse's community property rights to federal retirement and pension benefits.[79] Due to the uncertainty, the attorney/defendant ar-

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74. The issue of defendants' alleged neglect will therefore be tried first, leaving for later trial, if necessary, plaintiff's personal injury action, including the issues of liability and damages. This arrangement, moreover, has the merit of recapturing to some extent plaintiff's lost settlement opportunity: in the event defendant is held liable in the first trial, then for settlement purposes plaintiff will face him as she would have faced the personal injury defendants both before and during the trial of the personal injury action.

Fuschetti, 128 N.J. Super. at 297, 319 A.2d at 785.

75. The same situation was presented in George v. Caton, 93 N.M. 370, 600 P.2d 822 (1979), where the bifurcated trial was proposed. The *Caton* court discussed the measure of damages but not the admissibility of evidence concerning settlement value.

76. Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), *rev'd sub nom. on other grounds, In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

77. 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), *rev'd sub nom. on other grounds, In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

78. *Id.* at 358, 530 P.2d at 594, 118 Cal. Rptr. at 626.

79. In 1967, the *Lewis* court noted that non-vested state pension rights were generally treated as community property in California. *Id.* However, substantial uncertainty existed in 1967 as to the status of non-vested pension rights granted in federal plans. *Id.* Therefore, Mrs. Smith's pension rights to Mr. Smith's federal retirement benefits as community property were judicially undefined. *Id.* The *Lewis* court held that, as to 1975, all pension rights were community property. *Id.* Ironically, this holding was subsequently reversed. *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). The very rights that the *Lewis* court deemed "settled" were, in fact, unsettled, and one year later the community property status

gued that the client/plaintiff may not have received a share of the husband's retirement and pension benefits even if the right to those benefits had been asserted.[80] Thus, the attorney contended that he was not liable for malpractice.[81]

The *Lewis* court decided that the attorney could have drawn a more knowledgable conclusion concerning his ex-client's rights if he had performed more extensive research.[82] Because he failed to perform the required research, the client/plaintiff was deprived of her opportunity to potentially prevail on the unasserted claim.[83] This failure to assert the claim created an inference of causation.[84] Under this approach, an attorney is liable in malpractice when he or she failed to make an informed decision concerning the ex-client's potential claim.[85]

The *Lewis* lost opportunity standard allows the factfinder to determine whether the failure to assert a claim caused injury to the client/plaintiff. Any unasserted claim gives rise to this inference of causation. Under this standard, the allegedly negligent attorney must show that the unasserted claim had been thoroughly considered and discounted. The client/plaintiff benefits from this hindsight approach because previously unasserted claims can be used to recover for the injury.[86]

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of non-vested pension rights was deemed non-community property. *Id.*

80. *Lewis*, 13 Cal. 3d at 358, 530 P.2d at 594, 118 Cal. Rptr. at 626.

81. Lewis claimed that Smith had suffered no loss because she may not have received a share of her husband's pension benefits. *Id.* Without causation of damages, there existed no malpractice liability. *Id.*

82. *Lewis*, 13 Cal. 3d at 359, 530 P.2d at 596, 118 Cal. Rptr. at 628. The attorney would have discovered, through minimal research, that state retirement benefits were treated as community property. *Id.* The attorney also would have learned that federal retirement benefits might have been treated as community property. *Id.* Knowing these facts, the attorney may have made an informed judgment to seek his client's rights to the state and federal community property benefits. *Id.* Absent such research and knowledge, the attorney did not make an informed decision. *Id.*

83. *Lewis*, 13 Cal. 3d at 361, 530 P.2d at 597, 118 Cal. Rptr. at 629. The measure of the client's loss is the value of the lost opportunity to claim an interest in the community property of her husband. *Id.*

84. The *Lewis* court rejected the theory that any inference of causation was made because the jury had already decided the issue of proximate causation. 13 Cal. 3d at 360, 530 P.2d at 596-97, 118 Cal. Rptr. at 628-29. The trial court had instructed the jury that proximate cause was a cause which produced damage otherwise not occurring. *Id.* The *Lewis* court would not, on appeal, disturb the jury's *implied* finding of fact when there is adequate bases in the record for that finding. *Id.* (emphasis added).

The *Lewis* dissent noted that the record did not show that Lewis' negligence would have caused any loss. *Id.* at 373, 530 P.2d at 605, 118 Cal. Rptr. at 637 (Clark, J., dissenting). There was no evidence that the unasserted property rights, if asserted, would have conferred upon Smith any right to her husband's retirement benefits. *Id.*

Therefore, it appears that the *Lewis* court did allow an inference of causation, though denying it was doing so, which created attorney liability.

85. *Lewis*, 13 Cal. 3d at 359, 530 P.2d at 595, 118 Cal. Rptr. at 627.

86. The "Smith v. Lewis Syndrome" has been soundly criticized. Bridgman,

Like the bifurcation standard, the lost opportunity test goes too far in protecting the client/plaintiff from the inequity of the "but for" rule. The *Lewis* standard requires an allegedly negligent attorney to disprove claims which would never have been asserted. The attorney/defendant will be liable for all claims which, in hindsight, could have been argued unless the attorney can show that the unasserted claim had been thoroughly considered. Furthermore, to settle the malpractice claim, the attorney/defendant will be required to consider claims that would never have been asserted in the original plaintiff's action, thereby significantly increasing attorney liability. This procedure, while laudibly replacing the traditional "but for" test, imposes too high of a burden on the attorney in an effort to protect his or her ex-clients.

The Lost Substantial Possibility Standard

In 1978, one commentator proposed a new standard of causation to replace the traditional "but for" approach. He suggested a causation standard that requires the client/plaintiff to show the loss of a substantial possibility of recovery.[87] This standard derives from a common causation standard used in medical malpractice cases.[88] Under this approach the client/plaintiff must show "a substantial, but not flawless claim."[89] Causation is inferred if the plaintiff's loss of a substantial chance of recovery resulted from the attorney's acts.[90] No American jurisdiction has, as yet, adopted this standard.[91]

The basic difficulty that this standard ignores is the inherent difficulty in defining the term "substantial." The client/plaintiff need only show that the original suit was substantially meritorious.[92] The attorney/defendant can, however, show that the underlying

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supra note 28, at 228.

87. *See* Note, *supra* note 27, at 679-80.

88. *E.g.*, Hicks v. United States, 368 F.2d 626 (4th Cir. 1966); Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970); Whitfield v. Whittaker Memorial Hosp., 210 Va. 176, 169 S.E.2d 563 (1969). Under this standard, medical malpractice causation is defined as the loss of "any substantial possibility of survival." Note, *supra* note 88, at 679 (*citing Hicks*, 368 F.2d at 632).

89. *See* Note, *supra* note 27, at 680.

90. The author advocated the use of the medical malpractice standard of causation for legal malpractice causation use. *Id.* Rather than the medical standard of lost substantial possibility of survival, it was proposed that the legal standard be defined as a lost substantial possibility of recovery. *Id.* at 679-80. Once the client shows that the underlying claim had a substantial possibility of recovery, and that the underlying claim was lost, causation can be inferred that the attorney caused that loss. *Id.*

91. MEISELMAN, *supra* note 3, § 3.11.

92. Under this "lost substantial opportunity" standard, the client/plaintiff must still show the merits of the underlying claim. Note, *supra* note 27, at 680. The requirement that the client/plaintiff prove the underlying claim with certainty, the problem of the "but for" rule, no longer exists in this proposed standard. *Id.*

claim was not substantially valid.[93] Thus, just as the burden shifting and presumption of validity standards failed, so too is this proposed standard inadequate. The allegedly negligent attorney can, in an effort to avoid liability, use the confidential and privileged data obtained from his ex-client to rebut the very claims previously asserted. Thus, the attorney is afforded an opportunity to void the inference of causation and obviate malpractice liability. Although this approach is a step in the right direction because it affords the client/plaintiff an opportunity to present evidence on the probable settlement value of the underlying claim, it does not completely eliminate the harshness of the "but for" rule.

Proof of Causation: A New Proposal

As the foregoing examination indicates, the solutions to the traditional "but for" rule have not resolved the inequity of the causation difficulty.[94] A shifting of the burden of proof does help alleviate the overwhelming difficulty client/plaintiffs encounter in malpractice suits, but it is not enough in cases like *Cook* and *Jenkins*. The real problem lies in the malpractice situation itself; an attorney who previously defended the rights of the client/plaintiff is entitled to disparage those rights when defending himself.[95] Thus, the negli-

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93. Although this commentator does not specifically state the attorney can rebut the underlying claim's "substantial" validity, this proposal can be inferred from his article. Under the medical malpractice cases, the doctor may rebut the inference made that the patient had a substantial possibility of recovery. *See, e.g., Hicks*, 368 F.2d at 632-33. Thus, adoption of this medical malpractice standard to legal malpractice actions would include this opportunity of the attorney to rebut the client's possibility of recovery.

94. Throughout the previous discussions the solutions to the traditional "but for" rule have demonstrated two similar characteristics. Causation is inferred, and the burden of proof is shifted to the attorney. *See supra* notes 34-35 and accompanying text. Each modern standard, however, has failed to remedy the inequity of the "but for" rule. The shifting of the burden test allows the attorney to rebut the very inference of causation made. *See supra* text accompanying notes 37-56. The "presumption of validity" standard allows the attorney to disprove one element of the underlying claim to vitiate malpractice liability. *See supra* text accompanying notes 57-66. Bifurcation removes entirely a consideration of the damages the attorney caused, holding the attorney strictly liable for any damages the client suffers. *See supra* text accompanying notes 67-75. The "lost opportunity" standard imposes liability on the attorney for every unasserted claim, allowing the client to recover for every claim which, through hindsight, could have been asserted. *See supra* text accompanying notes 76-86. The "lost opportunity" proposal allows the attorney an opportunity to rebut the inference of the client's substantially valid claim. *See supra* note 95 and accompanying text. Each standard is either underinclusive in protecting the client's rights, or is overinclusive and imposes too heavy a burden on the defending attorney.

95. This, the author recognizes, is due to the nature of the attorney/client relationship. The legal field is basically an adversarial one, requiring an attorney to represent the client's interests against the interests of another. To this end, the attorney must create legal arguments based upon plausible legal doctrines with the knowledge that the arguments created will be contended.

gent attorney can negate the presumptions created to remedy the causation problem, and elude malpractice liability. To remedy this situation, a unique solution is required.[96]

Estoppel Theory

The theory of equitable estoppel is extensively used throughout American jurisprudence to preclude a party from asserting inconsistent expressions or conduct.[97] The general requirements for equitable estoppel consist of six elements: (1) misrepresentation of a material fact, (2) knowledge of the untruth of that fact, (3) lack of knowledge as to the truth of the representation on the part of the listener, (4) expectation that the representation will be acted upon, (5) reliance upon the representation, and (6) such reliance causes detriment to the listener.[98] These six elements can be divided into three significant factors: fraud on the part of the speaker, which the listener relies upon, and which causes injury.[99]

Thus, unlike doctors, accountants or other professionals when malpractice is claimed, the attorney must disprove the arguments he or she created. While other professionals assert their prior actions as correct to vitiate malpractice liability, the adversarial nature of the legal field requires an attorney to assume a mirror image: assert the prior actions as correct.

96. Unique solutions are not new to legal difficulties. For example, proof of medical malpractice causation dictated the creation of an unique solution, and a solution was formulated. *See supra* note 90 (adoption of the lost substantial possibility of survival for causation).

Informed consent is another example of an unique solution created to remedy perceived difficulties. Recognizing that medical malpractice actions required a solution to the affirmative defenses of consent and assumption of risk, the physician is now required to inform patients of the risks and dangers of medical treatment. *E.g.*, Salgo v. Stanford, 154 Cal. App. 2d 560, 317 P.2d 170 (1957). *See also* Plante, *An Analysis of "Informed Consent,"* 36 FORD L. REV. 639 (1968). Informed consent has been expounded as a possible method for holding an attorney liable when the attorney fails to advise the client of the potential risk of losing a lawsuit. Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289 (1984). *But see* Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980) (an attorney should reject litigation which has no merit).

97. *See, e.g.*, United States v. Briggs Mfg. Co., 460 F.2d 1195 (9th Cir. 1972); Prudential Ins. Co. of Am. v. Bonney, 299 F. Supp. 794 (W.D. Okla. 1969); Witchita Fed. Sav. & Loan Ass'n. v. Jones, 155 Kan. 821, 130 P.2d 556 (1942). *See also* 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 340 (S. Symons 5th ed. 1941). *See generally* 31 C.J.S. *Estoppel* § 59 (Supp. 1985).

98. *E.g.*, Ralston Purina Co. v. United States, 58 F.2d 1065 (Ct. Cl.), *cert. denied*, 289 U.S. 732 (1932). The six elements of equitable estoppel are: (1) words or conduct amounting to a misrepresentation or concealment of material facts, (2) knowledge of the untruth of those representations, (3) lack of knowledge as to the truth of the representations, on the part of the listener, (4) expectation that the representation will be acted upon, (5) reliance by the listener of those representations, and (6) prejudicial effect of the reliance on the listener if estoppel is not granted. National Tea Co. v. 4600 Club, Inc., 33 Ill. App. 3d 1000, 1002, 339 N.E.2d 515, 518 (1975).

99. *E.g.*, Burlington Sav. Bank of Burlington, Vt. v. Rockwell, 31 F.2d 27 (9th Cir. 1929). *See also* 2 F. LAWRENCE, A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE § 1044, at 1130 (1929).

The first factor required to invoke equitable estoppel is fraud. In equity, the term "fraud" does not mean intentional or willful deception.[100] Rather, fraud in the estoppel context refers to unfair or inequitable results.[101] Thus, an attempt to repudiate prior inconsistent statements, if creating a fundamental unfairness, is a fraud.[102]

In legal malpractice actions, the attorney/defendant has previously filed a complaint, accepted a contingent fee contract, or elected to maintain a course of conduct to vindicate the ex-client's rights. To avoid malpractice liability, the attorney then attempts to repudiate that prior conduct. This repudiation results in unfairness to the ex-client because he or she is forced to prove conduct which the attorney previously asserted in the original case.[103] The necessary elements of fraud therefore exist because the attorney's repudiation of prior conduct unfairly burdens the ex-client's malpractice case.

Reliance, the second factor required to establish equitable estoppel, is based upon belief. The listener must believe or rely upon the speaker's assertions.[104] A fiduciary relationship is created when an attorney accepts the client's case.[105] This relationship allows the client to reasonably and justifiably rely upon the attorney's ac-

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100. Fraud can be either actual or constructive. BLACK'S LAW DICTIONARY 595 (5th ed. 1979). Though actual fraud is an intentional misrepresentation or concealment of facts, constructive fraud is a legal or equitable act or omission which operates to the injustice of another. *Id.*

> In those cases in which the defendant's inactivity, ineptitude, or ignorance has precluded the client, because of lapse of time, loss of physical evidence, or whatever, from proving the underlying case, the "case within a case" rule ought never to apply. The rule that one whose wrongful conduct renders the ascertainment of damages difficult cannot complain that the trier of fact must merely estimate the damages, should control. In other words, why should the attorney who renders proof of the client's underlying case impossible by failure to preserve evidence or locate witnesses, be permitted to use his own negligence as a shield against the innocent client? The law is clear that one ought not profit by his own wrong.

Bridgman, 30 S.C.L. REV. 213, 235 (1979).

101. *See, e.g.*, Cessna v. Montgomery, 63 Ill. 2d 71, 344 N.E.2d 447 (1976); Dill v. Widman, 413 Ill. 448, 109 N.E.2d 765 (1952). If the conduct of the speaker unfairly or unjustly prejudices the listener, then constructive fraud in equity exists. *Cessna*, 63 Ill. 2d at 73, 344 N.E.2d at 450.

102. Repudiation of inconsistent previous statements which prejudices the listener is fraud in the equity sense. *Cessna*, 63 Ill. 2d at 73, 344 N.E.2d at 450. *See also* 1 J. POMEROY, *supra* note 97, § 304; 2 F. LAWRENCE, *supra* note 90, § 1044. *See generally* 31 C.J.S. *Estoppel* § 59 (Supp. 1985).

103. *See supra* note 23 and accompanying text (attorney's ability to rebut assertions previously made). *See also, e.g.*, Malloy v. Sullivan, 415 So. 2d 1059 (Ala.), *cert. denied*, 459 U.S. 974 (1982) (requiring plaintiff to plead and prove all elements of the malpractice action).

104. *See supra* note 99 and accompanying text.

105. The attorney/client relationship creates a fiduciary relationship. MEISELMAN, *supra* note 3, § 1.1. *See also* supra note 23 (confidentially of communications between attorney/client because of fiduciary obligation).

tions[106] because the average client has little or no training in the law and unquestionably relies upon the legal advice his or her attorney dispensed.

The third element of equitable estoppel requires an injury as a result of the ex-client's detrimental reliance on the speaker's assertion. The listener must be induced to take a position which causes a loss.[107] This position need not be an affirmative act. It is enough that the listener refrain from taking action.[108] Causation of injury is established when the client, relying upon the attorney's assertions, loses the ability to take actions previously within the listener's power.[109]

A client retains an attorney to advocate the client's rights. Relying upon the attorney's actions, the client refrains from pursuing those rights through other attorneys or alternate causes of action. When the attorney does not assert the client's claim, the client loses the ability to assert that original claim. The client thus suffers a loss of the original, and previously available, right or rights.

The doctrine of equitable estoppel can be applied to legal malpractice in test of causation situations. Because the ex-client relied upon the attorney's conduct and this reliance caused a loss, the attorney should not be allowed to discount prior positions voluntarily assumed. Equitable estoppel should bar the attorney/defendant's assertion that the client/plaintiff's underlying claim was worthless. The negligent attorney should not be allowed to assert a position inconsistent with representations or conduct that the ex-client relied upon.

If equitable estoppel became the sole test of causation in a legal malpractice case, however, an attorney would inevitably be liable for all malpractice claims.[110] The doctrine of equitable estoppel corrects the inference of causation problems encountered in the burden shifting, presumption of validity, and lost substantial opportunity

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106. A client retains the attorney to assert certain rights. The attorney, licensed to practice law in that jurisdiction, trained in legal theory, and hired to use the experience gained in the field to assert the client's rights, is to be remunerated for actions on the client's behalf. The fiduciary duty arising between the client and attorney, between principal and agent, warrants the client's belief that the attorney will use his or her skills to vindicate the client's rights.

107. *See supra* note 99 and accompanying text.

108. The speaker does not have to do an affirmative act, for an omission may induce a listener to reasonably rely upon the unasserted representation. *See* 3 J. POMEROY, *supra* note 99, § 304; 2 F. LAWRENCE, *supra* note 101, § 1044.

109. *Id.*

110. The attorney is to zealously advocate all possible claims of the client due to the adversarial nature of the legal profession. *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1981) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

standards.[111] Yet, holding the attorney responsible under this estoppel theory imposes liability as strict as the bifurcation and lost opportunity standards.[112] Thus, this estoppel doctrine should be used in conjunction with a shifting of the burden of proof, thereby allowing the attorney to disprove liability.

Shifting the Burden

Because it is the attorney's duty to pursue a client's best interests,[113] the attorney should know the possibilities of an adverse resolution of the client's original claim. In an adversarial proceeding, the attorney realizes the possibility of failure.[114] The burden should rest upon the attorney to prove that the initial action, though valid by estoppel, would not have been meritoriously resolved in favor of the ex-client. This puts the attorney in the position of fighting the battle lost as a result of the negligent conduct. The attorney assumes the role of the defendant in the underlying claim, and is allowed to fight the original, valid claim. The possibility of settlement increases when the attorney is placed in the role of the original defendant. If the ex-client's original claim is litigated, the rights of both parties will be fairly determined.

In addition to estoppel and shifting the burden to the attorney, the courts should recognize the relevance of testimony concerning reasonable settlement value. Some basis for making a determination of damages must be presented. The attorney, while carrying the burden to prove that plaintiff's underlying cause was not meritorious, will present little if any evidence concerning plaintiff's damages. Though plaintiff would no longer have to show a winable suit, original items of damages must be presented to avoid mere jury speculation. Proof of damages should include expert testimony from practitioners of claims agents who may reasonably weigh liability and

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111. Under the burden shifting, "presumption of validity," and "lost substantial opportunity" standards, the causation difficulty is the allowances that the attorney can rebut the inferences made because he or she has the use of confidential information to cancel assertions previously advocated. *See supra* note 96. Estoppel bars the attorney from asserting these inconsistent expressions. *See supra* text accompanying notes 97-112.

112. Under the bifurication and "lost opportunity" standards, the attorney is liable to the client for all damages the client receives, whether proximately caused or not. *See supra* note 99 and accompanying text. Strict estoppel theory would bar the attorney from rebutting prior inconsistent statements, and the attorney would be liable for breaching the attorney/client obligation or in malpractice. *See supra* note 99 and accompanying text.

113. *See supra* note 97 and accompanying text.

114. "[A]n attorney undertakes the responsibility of ascertaining the pertinent facts and preparing for trial. It is fair to presume that, in doing so, he will assess the viability of affirmative defenses raised against his client and devise strategies for rebutting them." Romanian Am. Interests, Inc. v. Scher, 94 A.D.2d 549, 552, 464 N.Y.S.2d 821, 824 (1983).

items of damages in order to express an opinion on reasonable settlement value.

This proposed standard, using equitable estoppel, a shifting of the burden of proof, and proof of reasonable settlement value, would remedy the faults of the "but for" test while eliminating the inadequacies inherent in the other modern causation tests. The inequity inherent in the burden shifting, presumption of validity, and lost substantial opportunity standards is corrected without overcompensating the client/plaintiff as is done with the bifurcation or lost opportunity standards. In effect, the "trial within a trial" concept would be eliminated because the malpratice case would take the posture of the underlying claim when the ex-client has presented evidence of duty and breach. The attorney would be liable only for those damages negligently caused.

Conclusion

The harshness of the traditional "but for" test of causation in legal malpractice cases demands a change in the law. Although several attempts in various jurisdictions have been made,[115] the inadequacies of these standards are founded in their failure to recognize that the attorney/client relationship is unique. The use of equitable estoppel and a shifting of the burden of proof is a substantial departure from the mainline of malpractice causation tests, but it would fairly and adequately protect both the client/plaintiff's and attorney/defendant's rights. Whether this estoppel and burden shifting standard or one of the other modern standards is adopted for use in jurisdictions using the traditional test, the need for change is clear. The need for the legal profession and the courts to eradicate the "but for" rule and adopt a nonprejudicial standard as the test for causation in legal malpractice actions is long overdue. Though in our jurisprudence no one cares if you are negligent until you hurt someone, the plaintiff in a litigation situation is hurt when he or she loses the opportunity to pursue, litigate, and settle a claim.

115. *See supra* note 25 and accompanying text.