Cause-In-Fact and the Plaintiff’s Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal

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INTRODUCTION

Since time immemorial, philosophers, theologians, mathematicians, and members of the bar have been fascinated with the concept of cause and effect. Indeed, since at least the days of the Scottish philosopher David Hume, there has been an exhaustive attempt to adequately define the nexus or link between the antecedent, the cause, and the subsequent, the effect. This search for a nexus, what some have called the "relating relation" between cause and effect, or causation, has proven difficult, especially in the area of tort law.

At first blush, the issue of cause and effect and the relational issue of causation, would appear to be rather straightforward, however, "although it sounds simple, 'causation is an inscrutably vague notion, susceptible to endless philosophical argument, as well as practical manipulation.' Indeed, the element of cause-in-fact (as well as proximate cause) has proven especially troublesome in legal malpractice matters specifically and in tort matters generally. In legal malpractice matters more particularly, the judiciary and scholars alike seem rather perplexed over the element of cause-in-fact and the burdens plaintiffs have to demonstrate cause-in-fact and the value of the underlying claim, defense, or position that was allegedly lost at the hands of the negligent former attorney. For illustrative purposes, consider the issue of cause-in-fact and the plaintiff's burdens of proof with regard to causation and damages in the following two legal malpractice scenarios, imaginatively referred to as scenario A and scenario B.

In scenario A, E is a full time professor at a local university and a part time inventor. After years of struggle, he develops a product through the corporation he owns, X Corporation, which will revolutionize the computer industry. E has but one problem—a lack of working capital. To bring about the development of his product, E hires Law Firm B to contact members of the

1. Indeed, as far back as Thucydides, there was a philosophic concern with the impact of causation on the development of human history. See Robert B. Strassler & Victor Davis Hanson, The Landmark of Thucydides (1998). Of course the present confusion over the element of causation cannot be blamed entirely on its early philosophical underpinnings, inasmuch as the judiciary long ago rejected the philosophic view of causation in favor of the juristic view. See Jeremiah Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 102, 104 (1911).
2. See Charles A. Mercier, On Causation with a Chapter on Belief (1916).
3. See id.
5. See infra notes 12, 83-84 and accompanying text. While proximate cause will be discussed, this Article is concerned primarily with the element of cause-in-fact.
7. See infra section II.B.
8. Assume that E's friend D is the Chief Executive Officer of X Corporation.
local venture capital community. While the majority of those approached reject B’s advances, Capital Group C is interested and tells B that it will study the strength of E’s proposed product and the viability of X Corporation before deciding whether to proffer a term sheet. After the requisite period of due diligence, C informs B that it is indeed interested and wishes to negotiate terms with E. E naturally asks B to conduct the negotiations with C, but tells B that he has several essential terms he wants set forth in any deal, including that he remain in a supervisory position in X Corporation, and retain an equity interest in X Corporation.

While B is able to negotiate a deal whereby E receives several hundred thousand dollars in cash in return for his interest in his product, two million dollars in stock options, and an agreement to retain E in a supervisory position, B fails to inform E that the options and the employment are contingent on E’s product meeting certain production thresholds. All of the requisite documents are then executed. Needless to say, the production thresholds are not met and E is terminated by X Corporation. Incensed at his loss of employment, stock options, and interest in his product, E files suit against B for, inter alia, legal malpractice. E argues that were it not for the malpractice of B, E would have received a better deal from C. B defends by arguing that C would never have agreed to the deal if the production threshold clauses were not included.9

Consider E’s burden of proof with regard to causation and damages while reviewing Scenario B.

Scenario B is very much like scenario A except for one wrinkle. Assume that E once again sues B for, inter alia, legal malpractice. This time, however, E also sues D, the CEO of X Corporation for his purported negligence in failing to meet the production thresholds. B now has a Co-Defendant in D, but the question remains, what burden of proof does E have with regard to causation and damages? Does (and indeed should) E have to prove “but for” B’s and D’s purported negligence, E would have received a better deal in the underlying transaction? Does E have to demonstrate that B was a “substantial factor” in causing his purported injuries, or should the burden of proof be shifted to B (or D) such that B (or D) has to demonstrate that regardless of any alleged negligence, E would not have received a better deal in the transaction? While the answers to these queries appear straightforward, in the transactional legal malpractice context, these issues have caused a great deal of consternation in the judiciary and have resulted in a number of articles by authors calling for a repudiation of the traditional burdens of proof and methods by which cause-in-fact (and damages) are demonstrated.10

This Article concerns the burdens of proof on a plaintiff with regard to

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10. See infra note 103 and accompanying text.
cause-in-fact and damages in a transactional legal malpractice action.\textsuperscript{11} Enough ink has been spilled and a sufficient number of quills blunted in the war over causation in tort law,\textsuperscript{12} and over the legal malpractice cause of action generally.\textsuperscript{13} It is not the intent of this Article to fire another salvo in that scholarly war of attrition. Rather, this Article is written from the point of view

\textsuperscript{11} The first question is what do we mean when we say “transactional” legal malpractice? In this Article, we will review a multitude of non-litigation legal malpractice matters. The thrust of the Article’s argument, however, is concerned with the business transaction or negotiation that gives rise to a non-litigation, transactional legal malpractice case. The two matters are distinct in that the alleged malpractice occurs during the course of litigation in the litigation legal malpractice matter, while the malpractice occurs before litigation is commenced in the transactional context. See Tyler T. Ochoa & Andrew J. Wistrich, \textit{Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation}, 24 \textit{St. U. L. Rev.} 1, 32 (1994); see also Pompilio v. Kosmo, Cho & Brown, 39 Cal. App. 4th 1324, 1328 (1995) (stating transactional legal malpractice consists of “negligent legal advice or negligent preparation of documents”).


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of the practitioner with regard to the burden that should be placed on a plaintiff in a transactional legal malpractice action to demonstrate cause-in-fact and damages. An important question for the practitioner is what burden does a plaintiff have in such a setting with regard to demonstrating that their former attorney was the “actual cause” of their purported damages? Should a “but for” analysis be used? Should the burden of proof shift to the defendant-attorney in such a situation, or should a “substantial factor” analysis or “loss of chance” analysis be employed? If the aforementioned situation were not enough, the practitioner must also be concerned with the methods by which a putative plaintiff is to demonstrate that he or she suffered actual damages at the hands of an allegedly negligent defendant-attorney.

While concerns over the aforementioned have given pause to many a legal scholar and a number of courts and provoked a lively discourse in the rarified confines of legal academia, the judiciary and the practitioner should be more concerned with the approaches to cause-in-fact and damages that are the most consistent and least speculative in the transactional legal malpractice context. This Article submits that the so-called “but-for” test and the “case-within-a-case” approach are the most appropriate methods to demonstrate the often inextricably intertwined elements of cause-in-fact and damages in legal malpractice actions generally, and transactional legal malpractice matters more specifically. Though this approach has taken a drubbing in academic circles over the years and especially of late, in contrast to the proposed alternatives, the “but-for” test is the only approach that sifts through all of the infinite possible causes of an injury to illuminate the seminal or necessary cause. Further, the “case-within-a-case” approach is the most consistent method by which a plaintiff demonstrates the purported actual damages. While one may view these positions as an apologia for the status quo, in practice, the “but-for” test and the “case-within-a-case” approach, if properly implemented, are the most consistent methods to analyze the legal malpractice (both litigation and transactional) causes of action. In utilizing the “but-for” test in a transactional legal malpractice matter, the Article argues that the plaintiff should have the burden of proving by a preponderance of the evidence what is collectively (and derisively) referred to as the “better deal.” Essentially, the plaintiff has to demonstrate: (1) that the defendant-attorney was the but-for cause of the purported injury; and (2) that the plaintiff would have received a better deal in the underlying transaction or business deal but for the aforementioned

14. See supra notes 12-13 and accompanying text.
15. Of course the use of the term “case-within-a-case” approach is somewhat misleading in that in a transactional legal malpractice case, the alleged malpractice generally would not have occurred during litigation. The term will be used later in this article as a means of referring to the counterfactual approach by which a plaintiff in a transactional legal malpractice case demonstrates that he or she would have fared better in the underlying transaction or deal were it not for the purported negligence of the defendant-attorney.
negligence of the defendant-attorney.

Part I of the Article provides a historical overview of the legal malpractice cause of action. This section examines the development of the legal malpractice cause of action with special emphasis placed on the elements of duty and causation. The purpose of this analysis is to recognize the evolution of the legal malpractice cause of action and the judiciary’s initial focus over the issue of a standard of care, its later focus on the element of duty, and finally the binary element of causation. Part II of the Article reviews the issue of causation in legal malpractice with an emphasis on the problematic element of cause-in-fact. The next section examines cause-in-fact within the context of litigation and non-litigation legal malpractice caselaw. Part III reviews a number of proposed alternatives (both scholarly and juristic) to the “but-for” test in legal malpractice actions generally, and transactional legal malpractice actions specifically. Part IV sets forth the argument in favor of using the “but-for” test to determine cause-in-fact in the transactional legal malpractice context. This section illustrates that the proposed alternatives to the “but-for” test are too speculative and inconsistent for use as a means to demonstrate the necessary cause of the plaintiff’s purported injury. While modifications to the “but-for” test may be warranted in certain limited and specific factual settings, it is apparent that the “but-for” test is the best method to demonstrate the necessary cause of a plaintiff’s injury. Finally, this section demonstrates that in a transactional legal malpractice case, the plaintiff should have the burden of illustrating counterfactually that he or she would have received a “better deal” in the underlying business deal or negotiation except for the defendant-attorney’s purported negligence.

I. HISTORICAL OVERVIEW OF LEGAL MALPRACTICE

The concept of holding persons responsible for their private transgressions is not new. Indeed, Roman law recognized as much and even made a distinction between various kinds of negligence. Under Roman law, a general duty of care, or diligentia, rested on every person, and disregard of this duty resulted in cognizable carelessness, or neglegentia. In order to recover against the wrongdoer, the harmed person had a burden to demonstrate that the wrongdoer’s conduct caused their loss or injury. More importantly to this

17. See Rolf Dannenbring, Roman Private Law 152-57 (2d ed. 1968) (noting while Romans “perceived” of causation, “they hardly at all developed it” within context of “culpa” or negligence); see also Richard G. Coggin, Attorney Negligence . . . a Suit Within a Suit, 60 W. Va. L. Rev. 225, 226 (1958) (noting under Roman maxim, imperitia culpae annemator, want of skill could give rise to action for fault on part of those persons from whom a certain measure of skill was expected); P.H. Winfield, The History Of Negligence In The Law Of Torts (1926); cf. Bruce W. Frer, The Rise Of The Roman Jurists 140 (1985).

18. See Dannenbring, supra note 17, at 157.

19. See Dannenbring, supra note 17, at 152-57.
Article, the Romans saw fit to impose a higher standard of care on those persons who held positions of societal import. Those persons, including innkeepers, inspectors, and shipmasters. They were held to a to a standard of utmost care, or exactissima diligentia. Though the Romans never addressed the concept of malpractice, their view of negligence generally, and of holding persons responsible to a certain degree of care, would be shown to impact the development of English common law.

A. The Roots of Malpractice in England

It is perhaps shocking in these litigious times to think that at one period, attorneys enjoyed a certain amount of immunity from civil suit. Indeed, during the seventeenth and eighteenth centuries, English barristers were often granted immunity from suit while solicitors were not. This is not meant to suggest that solicitors were sued for the specific tort of legal malpractice, for as we shall see, these early professional liability cases were premised on the law of contract rather than on the law of tort. Moreover, immunity did not mean that all practitioners escaped liability for their alleged wrongs as is evident in a number of early cases, the most famous of which is Pitt v. Yalden. In construing the purported error of an attorney in the handling of a case, the Pitt court ascertained that an error committed by a member of the bar could give rise to liability. In setting forth the court’s decision, Lord Mansfield noted that:

[an attorney is liable for the consequences of ignorance or non observance of the rules of practice of the Court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession.

In sum, the Pitt court held that an attorney could be liable for “gross
negligence” but would not be liable for an “honest mistake.” 27 Such reasoning was the approach of the English courts in the late eighteenth century. 28 While this approach initially influenced the American colonies, 29 they soon developed their own standard. Indeed, as the American colonies struggled to develop their own system based upon the English model, they jettisoned the distinction between barristers and solicitors. 30 Because attorneys would be viewed without distinction in the colonies, a new standard initially based on the holding in Pitt would develop with regard to potential errors on the part of members of the bar. 31

B. Attorney Liability in Early America and the Development of a Standard of Care: From Gross Negligence to Ordinary Negligence

1. Liability for Gross Negligence

Even in the colonial period, the judiciary recognized that former clients could hold members of the bar responsible for certain actions and inactions. 32 Legal malpractice (though not couched as a distinct cause of action), has been recognized in the United States since the late eighteenth century. In 1796, the Supreme Court of Virginia in *Stephens v. White*, 33 heard arguably the very first case of legal malpractice in the United States. 34 The facts of the case are rather straightforward. A former client sued an attorney for failing to file a

27. *Id.*

28. But see Coggin, *supra* note 17, at 226-27 (noting court in *Lanphier v. Phipos*, 8 Car. & P. 475 (1838), held liability could be premised on lack of reasonable care on part of an attorney). Indeed, the *Lanphier* court stated that ordinary skill and care was the standard. *Id.* at 227. As such, the standard fluctuated from gross negligence in *Pitt*, to ordinary negligence in *Lanphier*, back to gross negligence in the colonies as represented in *Stephens*, and finally back again to the present standard of ordinary care. *Id.* at 226-27; see Wade, *supra* note 23, at 760-61 (waffling over the issue of whether distinction in fact made by judiciary between gross negligence and ordinary negligence, but finally concluding English courts did indeed make distinction that, like American courts, was later discarded in favor of a uniform approach based upon a standard of ordinary negligence); Wade, *supra* note 23, at 761 n.36.

29. In addition, some scholars have noted that the so-called suit-within-a-suit requirement in legal malpractice cases developed from these early English cases. See Kenneth G. Lupo, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 694-95 (1977).


31. *See MALLEN & SMITH, supra* note 22, § 1.5.

32. Though early courts recognized that attorneys could be held liable for certain actions or inactions, the institution of widespread malpractice actions was unheard of. Indeed, as some have noted during “colonial times and for almost two hundred years after the American revolution, lawyers practiced relatively free of anything like the intricate constraints of law that now hold lawyers fast.” See Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 470 (2001). Professor Wolfram also notes that though malpractice was rare, “the British American colonies . . . recognized institution of professional discipline that in some of its features resembles modern disbarment and suspension . . . [though] discipline seems to have been employed only rarely.” *Id.* at 473.

33. 2 Va. 203 (1796).

34. See Allied Prods. v. Dueterdick, 232 S.E.2d 774, 775 (Va. 1977) (referring to *Stephens* as “first legal malpractice case reported in the United States”).
declaration that a previously entered judgment was lost.\textsuperscript{35} In construing the plaintiff’s cause of action, the court considered two areas that are still important in legal malpractice actions today: the standard of care by which to judge an attorney’s conduct, and what must be proved by the plaintiff to recover against his or her former attorney.\textsuperscript{36} As for the proper standard of care, the court held that an attorney could be liable for gross negligence.\textsuperscript{37} As for the burden of proof, the court noted that “where damages are the cause of the action, the plaintiff must declare them, or else cannot recover.”\textsuperscript{38}

As is evident in \textit{Stephens}, while clients could certainly maintain causes of action against their former attorneys, their burden of proof was great. In these early cases, the burden was (and still is) on the client to demonstrate negligence on the part of the former attorney. Indeed, in borrowing from the decision in \textit{Pitt}, the early American courts did not find liability for an attorney’s honest mistake. Rather, liability was premised only upon a showing of gross negligence. For instance, in \textit{Fitch v. Scott},\textsuperscript{39} the Supreme Court of Mississippi, in construing the liability of an attorney to a former client, cited \textit{Pitt} with approval and noted that an attorney must act with a “reasonable degree of care, skill and dispatch.”\textsuperscript{40} The court noted that liability can attach for acts of “gross negligence or ignorance, [however] if the attorney acts to the best of his skill, and with a bona fide degree of attention, he will not be responsible.”\textsuperscript{41} As with \textit{Fitch}, numerous courts over the next several decades held that liability would only attach for an attorney’s gross negligence.\textsuperscript{42}

\section*{2. A Modern Approach: Liability for Ordinary Negligence}

While a number of early nineteenth century decisions continued to reinforce the notion of liability for gross negligence only, several courts in the mid to late nineteenth century began to find liability for acts of so-called “ordinary” negligence. For example, in \textit{Babbitt v. Bumpus},\textsuperscript{43} the Supreme Court of

\textsuperscript{35} See \textit{Stephens}, 2 Va. at 203.
\textsuperscript{36} Id. at 206.
\textsuperscript{37} Id. at 212.
\textsuperscript{38} Id. The plaintiff in \textit{Stephens} was ultimately unsuccessful in his suit when the court found that he could not demonstrate that the attorney was representing him at the time in question. Id.
\textsuperscript{39} 4 Miss. (3 Howard) 314 (1839).
\textsuperscript{40} Id. at 317-18.
\textsuperscript{41} Id. Indeed, liability in the early American decisions was premised entirely on a finding of gross negligence on the part of the attorney. See Eccles v. Stephenson, 6 Ky. 517, 520 (1814) (noting attorney can be held liable for his acts of negligence); Pennington’s Exrs. v. Yell, 11 Ark. 212, 227 (1850) (noting attorney “liable for gross negligence or gross ignorance” in performing “his professional duties”).
\textsuperscript{42} See Isham v. Parker, 29 P. 835, 843 (Wash. 1892) (holding attorney “liable only for gross negligence or gross ignorance”); Morrill v. Graham, 27 Tex. 646, 651 (1864) (finding liability for “gross negligence” only); Pearson v. Darrington, 32 Ala. 227, 260 (1842) (liability only upon finding of gross negligence on part of attorney); Wilson v. Russ, 20 Me. 421, 424 (1841) (holding if client “injured by the gross fault, negligence, or ignorance of the attorney, the attorney is liable”).
\textsuperscript{43} 41 N.W. 417 (Mich. 1889).
Michigan held that attorneys must be held to a standard of “ordinary care and diligence.”44 In *Hill v. Mynatt*,45 the Court of Chancery Appeals of Tennessee rejected the old “gross negligence” standard, holding instead that an attorney should be liable for injuries caused when the attorney fails to exercise “reasonable diligence” or ordinary care.46 By the mid-nineteenth century, the judiciary was developing a somewhat consistent approach to a legal standard of care for attorneys.

While the change from a gross to an ordinary negligence standard was taking place, most legal malpractice actions were still being initiated under principles of contract law.47 Indeed, up until the early twentieth century, liability was generally predicated “under the broad heading of contract—the realm of cooperation—and comparatively few (disagreements) [were] relegated to the dismal annex of tort, the realm of unchosen relationship and collision.”48 The shift from individual responsibility in contract to group responsibility in tort occurred incrementally rather than overnight.49 As a more modern standard of reasonable care developed, however, legal malpractice began to be viewed fundamentally as a negligence cause of action sounding in tort. As such, and as with any other tort, a putative plaintiff had to demonstrate certain elements in order to succeed in his or her legal malpractice action.50

**C. The Present Day Legal Malpractice Cause of Action**

1. Elements: Anywhere from Three to Five

Traditionally, to state a cause of action for a tort claim premised on negligence, a putative plaintiff had to demonstrate the following: (1) a duty owed by the defendant to use ordinary, reasonable care for the safety of those persons in the plaintiff’s class; (2) a breach of said duty by the defendant; (3) that the defendant’s breach was the cause-in-fact, or actual cause, of the plaintiff’s alleged injury; (4) that the defendant’s breach was the proximate, or legal cause, of the plaintiff’s alleged injury; and (5) legally cognizable damages.51 Of course, it is important to note that there is some disagreement

44. *Id.* at 418-19. The decision is rather muddled, however, in that the court later spoke in the opinion of an attorney’s errors having to be “very gross” before liability could attach.
45. 59 S.W. 163 (Tenn. 1900).
46. *Id.* at 167.
47. See Wolfram, *supra* note 32, at 483. Professor Wolfram noted that “[i]n justifying legal malpractice awards, many courts in the latter part of the nineteenth century employed vocabulary that resonates more with notions of contract than with notions of relationship, unreasonable risk, or similar tort concepts.” *Id.*
49. *Id.* at 8.
50. As we shall see, there has been a vigorous debate amongst legal scholars and the judiciary over what must be demonstrated in order to succeed in a legal malpractice cause of action.
over the exact elements in a negligence cause of action, with many courts and scholars combining cause-in-fact and proximate cause into a singular causation element. That said, because the legal malpractice action has typically been couched in terms of negligence, the legal malpractice plaintiff has the burden of demonstrating the existence of these five elements.

For the better part of the late nineteenth and twentieth centuries, the members of the judiciary and scholars had trouble implementing a consistent approach when considering the elements of tort actions. In particular, the elements of duty, cause-in-fact, and proximate cause proved (and continue to prove) troublesome. Nowhere have these elements proven more troublesome than in the area of legal malpractice. While this Article is not concerned with the element of duty in a legal malpractice action, it is initially important to review the element of duty from the traditional rule founded upon principles of the law of contracts to a more modern and post-Macpherson duty of care owed to the whole world, since the element of duty has often been viewed as intertwined with the element of causation in legal malpractice matters.

2. A Struggle with Duty

Duty has long been a subject of interest in the field of legal malpractice. Specifically, the issue of to whom a person owed duty of care has troubled scholars and members of the judiciary since at least the mid-eighteenth century. Traditionally, a plaintiff could not bring a malpractice action against an attorney unless he or she was that attorney’s client. In other words, the plaintiff had to be in privity with the attorney before he or she could hope to bring an action for malpractice. The concept of privity was born in contract law, not tort law, and prevented actions by prospective plaintiffs who lacked

54. The reason that the element of duty is of import to the element of causation is because both involve foreseeability and how attenuated a tortfeasor’s actions must be before he or she is relieved of liability. See Valentine v. On Target, Inc., 727 A.2d 947, 950-51 (Md. 1999); Brewer v. Roosevelt Motor Lodge, 295 A.2d 647, 651-53 (Me. 1972) (noting foreseeability key to both proximate cause and duty); Turner v. Jordan, 957 S.W.2d 815, 818 (Tenn. 1997); see also Peter C. Healey, Paradigms of Proximate Cause, 36 TORT & INS. L.J. 147 (2000) (describing proximate cause in terms of foreseeability); Victor E. Schwartz, The Remoteness Doctrine: A Rational Limit on Tort Law, 8 CORNELL J.L. & PUB. POL’Y 421, 424-25 (1999) (noting terms “proximate cause” and “duty” often used interchangeably); Ernest J. Weinrib, Symposium on Causation in the Law of Torts: Causation and Wrongdoing, 63 CHI.-KENT L. REV. 407, 441 (1987). Weinrib notes that “[d]uty addresses the question of whether the plaintiff, as the person in fact affected, is to be regarded as within the class foreseeably affected by the defendant’s negligence. Proximate cause performs a parallel function with respect to the injury and the process through which the harm comes into being.” Weinrib, supra, at 441.
55. See supra notes 12-13 and accompanying text. In addition to debating the scope of the duty owed, the judiciary has struggled over whether the legal malpractice action is a tort-based or contract-based, and the issue of express attorney-client relationships versus implied attorney-client relationships. Id.
56. See MALLEN & SMITH, supra note 22, § 7.1, at 360-61.
57. See MALLEN & SMITH, supra note 22, § 8.3 (noting “claim of legal malpractice usually proceeds from a duty based on an attorney-client relationship”).
the requisite nexus with the potential defendant-attorney.

Violenti non fit injuria, “to one who is willing, no wrong is done,” 58 was a fundamental rule of the common law where the majority of accidents and injuries were covered by contract and were distinguished from tort by the consent of the parties that entered into the contracts. Borne of the ancient concept of trespass for deceit, the common law provided that one party’s performance of a contract harmed the other party to the contract as if the former had trespassed upon the latter’s land. Under this theory, the injured party could seek redress against the negligent person pursuant to their contract or agreement. 59 From these early concepts developed the principle that seller and buyer were bound by the terms of the respective agreements. In other words, the respective risks and responsibilities were allocated between the parties, and each party’s avenue of redress was via the terms of the contract. 60

In 1842, the English Court of Exchequer in Winterbottom v. Wright, 61 enunciated what is often referred to as the privity of contract rule. In Winterbottom, the court was faced with the potential liability of a coach manufacturer to an employee of the purchaser of the coach for injuries caused by an alleged defect. In holding for the defendant coach manufacturer, Lord Baron Abinger succinctly stated that doing away with the requirement of privity would lead to outrageous results and limitless lawsuits. In analyzing and ultimately ruling on the case, the Winterbottom court recapitulated the then well-settled principle that only parties to an agreement could seek redress for injuries via the terms of their respective contract. A party not privy to the contract had no right of redress. Thus, strangers who happened to be injured by a defective coach or automobile, for instance, could not bring an action against the manufacturer because they were not parties to any agreement or contact with the manufacturer. 62 This rule of privity would remain in place for over a century, insulating many purported tortfeasors (including many attorneys) from liability.

While the traditional rule of strict privity remained in place during the

58. See HUBER, supra note 48, at 20.
59. See HUBER, supra note 48, at 21-22. The concept of trespass for deceit was later expanded upon via the writ of assumpsit to protect those who were injured by a party that failed to perform at all under a contract.
60. See HUBER, supra note 48, at 23.
62. Two years prior to Winterbottom, the Supreme Court of Arkansas faced an early suit brought against an attorney for the attorney’s failure to collect on a note. Sevier v. Holliday, 2 Ark. 512 (1840). In Sevier, Peter Holliday received a note evidencing a debt owed to him by a third-party to be drawn in favor of one William English. Id. Mr. Holliday approached Attorney Sevier and sought his help in collecting on the debt. Id. Mr. Sevier failed to collect on the note, and that debt to Mr. Holliday was lost. A suit was then initiated premised on the alleged negligence of Sevier. Id. at 520-21. In finding for Sevier, the court noted that the note represented a contract between Mr. English and the third-party, a contract that Mr. Holliday was not privy to. In order to bring a negligent suit, Holliday had to have a legal interest in the contract, under which he could have pursued Sevier for his negligence with relation to the note. Id. Inasmuch as Holliday was not privy to the note, he could not maintain a cause of action against Sevier. Id. at 521.
nineteenth century.\textsuperscript{63} in the early part of the twentieth century, the judiciary began to depart from these traditional contract-based rules.

\textbf{D. A Reevaluation of Duty}

The 1916 New York Court of Appeals case \textit{MacPherson v. Buick Motor Co.}\textsuperscript{64} rendered a decision that would prove monumentally important in the development of tort law and significantly impact the concept of duty as an element of a tort cause of action. The facts of the case were relatively straightforward. The defendant was the manufacturer of an automobile.\textsuperscript{65} The defendant sold an automobile to a retail dealer, who in turn, sold the automobile to the plaintiff.\textsuperscript{66} While the plaintiff operated the vehicle, one of the vehicle’s wooden wheels came apart resulting in an injury to the plaintiff.\textsuperscript{67} Because the plaintiff was not the immediate purchaser of the vehicle, the court questioned whether the plaintiff had standing to bring the action against the manufacturer. Thus, the court was faced with the \textit{Winterbottom}-like issue of whether the rule of privity precluded the action by the injured plaintiff.

In finding for the plaintiff and effectively overruling \textit{Winterbottom}, the court of appeals noted that a manufacturer’s liability for negligence should not solely be ascertained under the law of contract.\textsuperscript{68} Rather, the court held that manufacturers owe a duty of care to the eventual end-users of their product. Privity, the court ascertained, should no longer serve as a bar to suits brought by third-party end users injured by manufacturers’ products. The import of the \textit{MacPherson} holding in the area of tort law generally, and on the concept of privity specifically, is immense. Some scholars have argued that \textit{MacPherson} represents a fundamental change in the judiciary’s approach to duty, an approach favoring a broad universal duty of care over “particularized obligations owed only by certain persons.”\textsuperscript{69} Such an approach, some argue, rejects the question of whether a particular defendant owes a particular plaintiff a specific duty of care, because the universal duty of care imposes a standard of reasonableness on all individuals.\textsuperscript{70} Others have argued that \textit{MacPherson} represents an adherence to a so-called “relational” concept of duty.\textsuperscript{71} In arguing for the “relational” concept of duty, adherents proffer that the \textit{MacPherson} court held that duties of care were not universal, but were rather

\begin{itemize}
  \item 63. See Sav. Bank v. Ward, 100 U.S. 195, 200 (1879) (holding duty of care owed only to client of attorney).
  \item 64. 111 N.E. 1050 (1916).
  \item 65. \textit{id.} at 1051.
  \item 66. \textit{id.}
  \item 67. \textit{id.}
  \item 68. \textit{MacPherson}, 111 N.E. at 1054.
  \item 71. \textit{Id.} at 1812-13.
\end{itemize}
owed by a specific class of defendants to a specific class of plaintiffs. The court noted that this approach is evident of the inherently dangerous product cases and stated that “where the nature of the product provides notice that due care in manufacture is necessary to avoid probable physical harm to a class of persons who cannot be expected to inspect the product, a duty of care runs to that class of persons, regardless of privity.”

Notwithstanding the lingering debate, the lasting impact of *MacPherson* is that it solidly rejected the approach taken in *Winterbottom*, instead holding that manufacturers need “to be vigilant of the physical safety of product users, regardless of privity.” Moreover, the controversy generated by the rejection of the bar of privity, coupled with the court’s analysis of the concept of duty, would significantly impact the development of professional liability in general (and to third parties more particularly). Thus, having jettisoned the old contract-based duty analysis and after having adopted a universal duty of care approach to tort-based actions, scholars and the judiciary alike turned with alacrity to the element of causation.

1. The Paradox of Causation

What is it that makes the subject of causation so alluring yet so perplexing? Is it the desire to know what might have been? Or is it simply that the concept of causation seems so simple, and yet has remained maddeningly elusive to practitioners and scholars alike? Perhaps the fascination (and confusion) with causation stems from the apparent inability of the judiciary to cogently construe it in the area of tort law. Notwithstanding the lack of a consensus on causation, it is important to note initially, that in a negligence-based cause of action, there is a general agreement that because a putative plaintiff is seeking relief from the judiciary, the burden is on the plaintiff to prove that the defendant is responsible for the plaintiff’s alleged damages.

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72. Id. at 1815.
73. Id.
74. Goldberg & Zipursky, supra note 70, at 1816-17.
75. See Strassfield, supra note 12, at 340.
76. See Wright, *Causation in Tort Law*, supra note 12, at 1737.
77. Indeed, even the earliest legal malpractice cases recognized that the plaintiff had the burden of proof with regard to demonstrating the negligence of the attorney. See Md. Cas. Co. v. Price, 231 F. 397 (4th Cir. 1916); Spangler v. Sellers, 5 F. 882 (C.C.S.D. Ohio 1881); Campbell v. Magana, 184 Cal. App. 2d 751 (1960); Lally v. Kuster, 171 P. 961 (Cal. 1918) (holding plaintiff has burden of proof with each element of their cause of action); Hastings v. Hallock, 13 Cal. 203 (1859); Goldzier v. Poole, 82 Ill. App. 469, 472 (1899); Spiller v. Davidson, 4 La. Ann. 171, 172 (La. 1849) (noting plaintiff has burden to demonstrate valid claim); Salisbury v. Gourgas, 51 Mass. 442 (Mass. 1845) (rejecting argument placing burden of proof on allegedly negligent defendant-attorney); Isham v. Parker, 29 P. 835, 843 (Wash. 1892); see also John L. Diamond et al., *Understanding Torts* 193 (1996); Mallen & Smith, supra note 22, at 512; Prosser, supra note 52, at 241 (noting plaintiff in general has burden of proof); *Restatement (Third) of Torts* § 28(a) (Tentative Draft No. 3, 2002) (noting “plaintiff has the burden to prove that the defendant’s tortious conduct was a factual cause of the plaintiff’s physical harm”); Christopher C. Haug, *The Law of Damages in a Legal Malpractice Action*, 24 J.
The reason that the burden of proof is generally placed on the plaintiff is because the plaintiff is asking the court to grant him or her relief.78

II. CAUSE-IN-FACT AND LEGAL MALPRACTICE

For every effect there are an infinite number of possible antecedents or causes. In a tort matter premised on negligence, the plaintiff has the burden to prove by a preponderance of the evidence that the defendant was the necessary cause of the complained of injury.79 While many courts have often construed causation as a single element or an amalgam of two elements,80 two

78. See Charles Reinhart Co. v. Winiemko, 513 N.W.2d 773, 775 (Mich. 1994) (noting with regard to carrying their respective burden of proof: “[s]ince in all other tort actions, the plaintiff has the burden of proving all the elements of the [legal malpractice] suit to prevail); see also Meredith J. Duncan, Legal Malpractice: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet, 34 WAKE FOREST L. REV. 1137, 1141 (1999) (noting “plaintiff-client must prove, by a preponderance of the evidence, that the defendant-attorney breached the professional duty of care and that the breach of due care caused actual harm to the plaintiff”). But see Lupo, supra note 29, at 689 (arguing against placing burden on plaintiff and stating such practice in legal malpractice case does nothing more than insulate defendant-attorney from liability).

79. See supra note 77 and accompanying text; see also Robertson, supra note 12, at 1773-74 (noting plaintiff has burden to demonstrate causal link between wrongful conduct of tortfeasor and injury complained of).

components actually comprise causation in tort law: cause-in-fact and proximate cause.\textsuperscript{81} These two elements are uniquely dissimilar, and as we shall see, the inability of the judiciary to adopt a consistent approach in analyzing these two issues has often resulted in a great deal of confusion at the trial of legal malpractice matters, especially with regard to jury instructions. The confusion in the judiciary notwithstanding, \textsuperscript{82} and for the sake of clarity in this Article, the Article will employ several accepted views and definitions of each of the components of the binary element of causation.\textsuperscript{83}

Cause-in-fact, or actual cause, \textsuperscript{84} looks at whether the defendant's purported conduct was the actual or necessary cause of the putative plaintiff's alleged injury.\textsuperscript{85} Proximate cause, however, accepts that the defendant's action was a cause of the plaintiff's alleged injury but seeks to determine “whether that tortuous cause should be treated as a proximate (responsible) cause.”\textsuperscript{86}

As many scholars have noted, in construing the element of causation, a court is not forced to examine what happened, rather, the court must analyze how a certain effect happened.\textsuperscript{87} In determining how an effect (or in a tort case, the injury) occurred, a court cannot possibly examine every possible antecedent or

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\textsuperscript{81} See Brennwald, infra note 183, at 748 (noting causation comprised of cause in fact and proximate cause); Cooter, supra note 80, at 525 (noting causation comprised of cause-in-fact and proximate cause); Wright, Causation in Tort Law, supra note 12, at 1735; Michele E. Randazzo, Case Comment, California Rejects “But-For” Jury Instruction for Determining Cause-in-Fact in Negligence Actions—Mitchell v. Gonzales, 54 Cal. 3d 1041, 819 P.2d 913 (1991), 26 SUFFOLK. U. L. REV. 1228, 1228 (1992) (noting causation inquiries focus on both cause-in-fact and proximate cause); see also Charles Reinhart Co. v. Winiemko, 513 N.W.2d 773, 776 n.13 (Mich. 1994) (noting “[c]ausation in fact is one aspect of, and distinguishable from, legal or proximate cause”) (internal citation and quotation marks omitted). The dissent in Reinhart went even further and noted that “there can be no doubt that ‘proximate cause’ and ‘cause in fact’ are distinct and separate issues, and that the resolution of each rests upon unique considerations.” Id. at 793 (Brickley, J., dissenting); see White v. Lawrence, 975 S.W.2d 525, 529 (Tenn. 1998) (holding difference between two types of causation more than “merely an exercise in semantics”).

\textsuperscript{82} See supra note 13 and accompanying text.

\textsuperscript{83} See supra note 12 and accompanying text (offering articles analyzing proximate cause).

\textsuperscript{84} See Wright, Causation in Tort Law, supra note 12, at 1737-38 (noting cause-in-fact often described as “actual causation” and proximate cause been described as consisting of little more than “noncausal policy judgments on the appropriate limits of liability for actually caused harm”).

\textsuperscript{85} See Wright, Clarifying the Concepts, supra note 12, at 1011.

\textsuperscript{86} Wright, Clarifying the Concepts, supra note 12, at 1011 (emphasis in original); see Brennwald, infra note 183, at 748 (noting proximate cause concerned with “the legal policies limiting the liability of a defendant whose conduct was a cause-in-fact of the injury”); see also Schwartz, supra note 54, at 429-30 (noting “vital distinction” between cause-in-fact and proximate cause). Proximate cause looks at a number of issues, including foreseeability and remoteness of harm before ascertaining whether to impose liability on the defendant for his actions. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 41, at 264 (5th ed. 1984) (noting proximate cause “in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor’s responsibility for the consequences of the actor’s conduct”); Prosser, supra note 52, at 236; Schwartz, supra note 54, at 429-30.

\textsuperscript{87} See Wright, Causation in Tort Law, supra note 12, at 1803.
cause of the purported injury. Over the years, a number of approaches or tests have evolved or developed for use in determining cause-in-fact. The “but-for” test has emerged as the preferred method to ascertain cause-in-fact in tort matters generally, and in legal malpractice matters specifically. The “but-for” test asks the question, but for the defendant’s alleged negligence, would the plaintiff’s injury have occurred? If the plaintiff’s injury would have occurred even if the defendant had not been negligent, the defendant is not liable for the plaintiff’s injury.

While the “but-for” test has remained largely unchallenged in cases of singular causation, it has been called into question in cases of “causal overdetermination,” or cases involving multiple sufficient causes of a purported injury. The “but-for” test will not result in a finding of liability because the negligence of one purported tortfeasor will insulate the other from liability. Outside of these multiple sufficient cause cases, courts have applied the “but-for” test frequently over the years because it is a very effective method of sifting through the infinite number of antecedents, or causes, to find the one necessary cause, or the *causa causans*, the dramatic cause. Even though the “but-for” test has proven its mettle in the majority of legal malpractice cases, there are many courts that have had difficulty in utilizing it to determine the “inscrutably vague notion” that is cause-in-fact. Part of the problem lies in the inability to distinguish cause-in-fact from proximate cause, and the other lies in the confusion and controversy surrounding the counterfactual method by which a putative plaintiff demonstrates the sometimes overlapping elements of causation and damages, the so-called, “case-within-a-case” approach.

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88. See Keeton et al., supra note 86, at 266 (noting “‘but for’ rule serves to explain the greater number of cases”). This is not to say that the “but-for” test has does not have a legion of detractors, for it does. See infra note 104 and accompanying text; see also Restatement (Third) of Torts, supra note 77, § 26 cmt. b (listing all jurisdictions adopting “but for” test for factual causation and noting “the but-for test is central to determining factual cause”).

89. See Smith, supra note 1, at 109 (noting “a defendant is not liable, unless it be true that, both for his tortuous act, the damage would not have happened”).


91. See infra note 160 and accompanying text; see also Robertson, supra note 12, at 1779-80 (noting “only multiple causation cases that are legitimately solved by the substantial factor test, are the ‘combined force’ situations in which we are morally certain that the but-for test stubbornly persists in yielding the wrong answer”; Smith, supra note 1, at 109 (noting “it is a mistake to apply the ‘but for’ rule affirmatively, as constituting a sole sufficient test of causation”).

92. We will be reviewing the arguments against the “but for” test in section III, infra.

93. See Viator, infra note 161, at 1542. Indeed, as Professor Richard Wright has noted, “[w]e are not interested in all the possible causes, but only those that were tortuous.” See Wright, Causation in Tort Law, supra note 12, at 1749; see also Smith, supra note 1, at 104 (noting analysis should be concerned with determining which of many antecedents or causes of a harm was “predominant antecedent”).


95. Although the so-called case-within-a-case approach is used to determine the element of damages in a legal malpractice case, a number of courts and scholars have had difficulty determining whether the approach is
A. Burdens of Proof

1. Litigation Malpractice: The Case-Within-a-Case

As seen on several occasions, the burden of proof is squarely on the plaintiff in a legal malpractice case. The plaintiff must prove that the former attorney was the cause-in-fact and proximate cause of the alleged injuries. In a litigation legal malpractice case, it is well-settled that a plaintiff must show that he or she had a meritorious claim or defense that was lost as a result of the former attorney’s negligence in order to demonstrate cause-in-fact. The most widely accepted method or test to ascertain cause-in-fact is the so-called “but-for” test, and the attendant method by which the value of the lost underlying claim is demonstrated is known as the “case-within-a-case” approach. This approach has been adopted by the majority of jurisdictions in legal malpractice cases. In a recent decision, the United States District Court for the District of

used to determine causation, damages, or a mixture of the two. See infra note 104 and accompanying text.

96. See supra note 77 and accompanying text.
97. See supra note 77 and accompanying text.
98. See Robertson, supra note 12, at 1768 (outlining five-step process for framing and answering but-for questions).
99. See MALLEN & SMITH, supra note 22, at 3 n.5; Myers, infra note 103, at 9 (noting suit within a suit doctrine used to demonstrate damages in legal malpractice case); see also Lynn A. Epstein, Post-Settlement Malpractice: Undoing the Done Deal, 46 CATH. U. L. REV. 453, 462-63 (1997) (noting in order to demonstrate damages, plaintiff has to show “but for the attorney’s conduct, the client would have been successful in the prosecution of the underlying claim”); Wade, supra note 23, at 774 (discussing plaintiff’s burden of proof for claim of negligent litigation). Wade notes that “[i]f the charge is negligence in regard to the conduct of litigation the client is required to win two cases; he must show both that the defendant was negligent and that plaintiff was entitled to win the original suit and would have won it except for the defendant’s negligence.” Wade, supra note 23, at 774. As with the issue of causation, the issue of which element the case-within-a-case approach helps to demonstrate has caused a certain measure of confusion. Compare MALLEN & SMITH, supra note 22, § 20.3, at 127 (noting damages can be resolved through the trial-within-a-trial methodology), with Id. § 33.9, at 77 (noting “objective of the trial-within-a-trial concept is to establish causation”) (emphasis added). The reason that the case-within-a-case approach has confused some is because in essence, its analysis goes to the element of causation and damages. See Deeter v. McNicholas, 2002 Cal. App. Unpub. LEXIS 7813, at *26 (Aug. 19, 2002) (Grignon, J., concurring) (noting case-within-a-case approach “correctly used only as a means for determining damages”); Jensen, supra note 12, at 670 (stating “trial within a trial” approach is part of demonstrating “but for” causation); Jeffrey S. Pollak, Transactional Legal Malpractice: “But For” Causation in a “What If” World, 44 ORANGE COUNTY LAW. 20, 21 (May 2002) (referring to case within a case standard as that which is used to determine proximate cause). For instance, if the plaintiff is required to prove that he or she lost an underlying claim due to the defendant’s negligence for the issue of causation, he or she will have to prove (1) that the claim was lost; and (2) that the claim had merit, for an attorney can only be liable for the destruction of a meritorious underlying claim. This inevitably will overlap with the determination of damages because in order to determine if the underlying claim had merit, the value of said claim will have to be demonstrated. This value in turn represents the actual damages that the plaintiff purportedly suffered (aside from any other compensatory or punitive damages sought) when his or her claim was lost at the hands of the allegedly negligent defendant.

Columbia succinctly described this counterfactual approach by noting that to recover in a legal malpractice action, a plaintiff must:

[D]emonstrate not only that the alleged malpractice was the proximate cause of the injury suffered, but also that the action for which the plaintiff had sought the attorney’s services was a good cause of action. Thus, the Court, must evaluate the so-called “case within a case” to determine if it was a good cause of action. If the case within a case was not a good cause of action, then the claim of professional malpractice must fail.\(^{101}\)

The reason that the plaintiff is required to prove that a meritorious underlying claim was adversely impacted or lost due to the attorney’s purported negligence, is that if there was not a valid underlying claim the plaintiff has not suffered any actual damages.\(^{102}\) Not surprisingly, many legal scholars (and several courts) have criticized the “case-within-a-case” approach as placing too high a burden on already beleaguered plaintiffs because it forces the plaintiff to essentially litigate and try two separate actions.\(^{103}\) As we shall see, regardless

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\(^{103}\) See McClung v. Smith, 870 F. Supp. 1384, 1391 (E.D. Va. 1994) (noting proof of negligence alone insufficient). The plaintiff must also demonstrate that the underlying case would have been different but for the purported negligence of the defendant-attorney. Id. In essence, damages under this scenario would be equal to either the value of the lost claim or the consequences of an adverse judgment entered. Jackson v. Johnson, 5 Cal. App. 4th 1350, 1355 (1992) (noting must be evidence of actual damages and “[t]he mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized does not suffice to create a cause of action for negligence” (internal quotation marks and citations omitted)); see Duncan, supra note 78, at 143 (noting in legal malpractice case, “a plaintiff must prove that the defendant’s breach of the duty of care actually caused harm to [the plaintiff]’); Nathaniel Rothstein, Lawyers’ Malpractice in Litigation, 21 CLEV. ST. L. REV. 2:1, 5 (1972) (noting plaintiff’s measure of damages in a legal malpractice case “is the amount that he would have recovered in the original action”).
of the criticism, the "case-within-a-case" approach remains a hurdle that the putative plaintiff must overcome in a litigation legal malpractice case.104

104 See Jensen, supra note 12, at 671-72; Jack Leavitt, The Attorney as Defendant, 13 HASTINGS L.J. 1
While the “case-within-a-case” approach remains largely unchallenged in litigation legal malpractice actions, its applicability has been called into question in the non-litigation and transactional contexts. In scenario A and scenario B at the beginning of this article, for instance, many would question the applicability of the “case-within-a-case” approach since the hypothetical does not technically involve the loss of an underlying claim or defense (although a better position in an underlying business transaction or negotiation could certainly be referred to as a “claim”). In a mechanical application of the “but-for” test and the “case-within-a-case” approach in Scenario A, E would have to demonstrate that except for B’s negligence he would have received a better deal from C. While this seems a rather innocuous undertaking (and most probably would be in a litigation setting), it is the non-litigation and transactional settings that have caused some to question the propriety of using the “case-within-a-case” approach to demonstrate causation and damages.

Scenario B poses additional problems. In this scenario, many critics would attack the use of the “but-for” test and the “case-within-a-case” for the following reasons: (1) the matter does not arguably involve a lost claim or defense in a non-litigation matter, and (2) there appears to be multiple sufficient causes of E’s purported injuries. While these present valid concerns (especially as to the issue of multiple sufficient causes), as we shall see, wholesale changes to the traditional approaches to ascertaining the elements of cause-in-fact and damages need not be undertaken in the vast majority of legal malpractice cases, be they litigation cases or transactional cases.

B. Non-Litigation Malpractice

Recently, a number of legal scholars and courts have called into question the traditional burdens of proof on plaintiffs with regard to causation and damages in non-litigation and some litigation cases. The practitioner should be concerned with these developments since the arguments raised in non-litigation matters could soon be applied to litigation malpractice. This article will consider two types of legal malpractice matters that have proven problematic where some courts have called for alternatives to the traditional burdens placed on plaintiffs: legal malpractice cases involving judgments, and transactional legal malpractice cases.\(^\text{106}\)

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\(^{105}\) The fact that E is also suing co-defendant D is of great import to the determination of which test is to be used by E to demonstrate cause-in-fact.

\(^{106}\) In addition, the area of appellate legal malpractice also caused great confusion in the judiciary. The confusion in the appellate malpractice context does not directly relate to the matters in this article in that it does not specifically pertain to the issues of the “but for” test for cause-in-fact and the “case-within-a-case” approach. It is important, however, to note that in the appellate context, the judiciary once again has had
1. Collection on Judgments

The judiciary is somewhat torn over which party bears the burden of proof with regard to the collectibility of judgments. The issue of collectibility arises in two types of cases: those involving a plaintiff’s attempt to have an attorney collect on an obtained judgment, and those where a plaintiff sues his or her former attorney and alleges that the attorney’s purported negligence prevented the plaintiff from prevailing and obtaining judgment. Regardless of the type of case, the majority of courts hold that the burden is on the plaintiff to demonstrate that the underlying judgment was collectable in the subsequent legal malpractice case because this lost judgment represents the plaintiff’s actual damages. A growing minority of courts, however, have held that the burden should be on the defendant attorney to prove (often as an affirmative defense) that the client’s putative judgment was uncollectible.

difficulty implementing a consistent approach to the counterfactual inquiry at the heart of the appellate malpractice case. Further, the plaintiff in an appellate malpractice case clearly has the burden of proving that he or she would have been successful in his or her appeal “but for” the purported negligence of the defendant-attorney. See Daugert v. Pappas, 704 P.2d 600, 605 (Wash. 1985); MALLEN & SMITH, supra note 22, § 30.44, at 619-20 n.45 (listing every jurisdiction placing burden on plaintiff to prove he or she had meritorious appeal). Confusion exists over whether the counterfactual inquiry in the appellate malpractice context concerns proximate cause, cause-in-fact or both, and whether such matters are issues of law or fact. See Millhouse v. Wiesenthal, 775 S.W.2d 626, 627-28 (Tex. 1989). Specifically, several courts have disagreed over whether the judge or the jury is in the best position to ascertain whether a putative plaintiff’s appeal would have been successful in the absence of the defendant-attorney’s purported negligence. Id.; see Charles Reinhart Co. v. Winiemko, 513 N.W.2d 773, 776 (Mich. 1994).

107. See Sheppard v. Krol, 578 N.E.2d 212, 216 (Ill. 1991); Whiteaker v. Iowa, 382 N.W.2d 112, 115 (Iowa 1986) (holding “the client has the burden to show not just that a judgment in an ascertainable amount would have been entered, but the amount that would have been collected on that judgment”); Koeller v. Reynolds, 344 N.W.2d 556, 561 (Iowa 1983) (noting burden squarely on plaintiff to demonstrate he could have collected on judgment); Glasgow v. Hall, 332 A.2d 772, 724 (Md. 1975) (holding plaintiff in legal malpractice action has burden to demonstrate he had meritorious underlying claim and had ability to collect on judgment); Jernigan v. Giard, 500 N.E.2d 806 (Mass. 1986) (noting burden on plaintiff to prove he could collect on judgment unless negligence of attorney makes such demonstration impossible); Johnson v. Haskins, 119 S.W.2d 235 (Mo. 1938); McKenna v. Forsyth, 720 N.Y.S.2d 654, 655 (2001) (noting when plaintiff’s cause of action allegedly lost at the hands of a negligent attorney, “the client’s injury is measured by the amount that would have been collected on that lost cause of action. We further hold that the client bears the burden of proving that amount”); Schmitt v. McMillan, 162 N.Y.S. 437 (1916); Collier v. Pulliam, 81 Tenn. 114 (1884). But see Garretson v. Miller, 99 Cal. App. 4th 563, 572 (2002). The Garretson court noted that “in order to withstand a motion for judgment notwithstanding the verdict, a malpractice plaintiff need only have proven he could have collected something from the defendant in the cause-within-a-case, and that is amount that is the proper measure of his damages in the malpractice action.” Id.

Recently, a number of courts have considered the issue. For instance, in *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, a Washington State appellate court considered the case of a law firm sued for malpractice for failing to properly collect on a judgment for the client. The plaintiff argued that the burden should be on the defendant to demonstrate that the judgment was uncollectible. The court of appeals rejected the plaintiff’s argument and noted that in malpractice cases generally, the plaintiff had the burden of proof with regard to causation. Because the judgment collection case was a legal malpractice case, the *Lavigne* court held that the plaintiff should have the burden of proving that his or her underlying judgment was collectable.

In contrast to the *Lavigne* holding, several courts have adopted a minority position that the burden should be on the defendant attorney to prove that the judgment was uncollectible. Courts in the Commonwealth of Pennsylvania, for instance, have embraced this approach. In *Kituskie v. Corbman*, the court held that the burden was squarely on the attorney to prove the client’s underlying judgment was uncollectible. In *Fernandes v. Barss*, a Florida appellate court held that while the burden should ordinarily be on the plaintiff to prove the collectibility of a judgment, when the negligence of an attorney makes it impossible for the client to prove collectibility, the burden is shifted to the attorney. The *Fernandes* decision is in line with a limited number of decisions that have shifted the burden of proof to the defendant attorney when his or her negligence has made it impossible for the client to prove a prima

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In *Aviation*, wherein the District of Columbia Superior Court Probate Court held plaintiff should have burden of proving collectibility, the court noted that “the concept of collectibility of a judgment is a bedrock element of proving that actual harm occurred that was the product of malpractice in the filing of a lawsuit.” *Id.* at *4. In this regard, the *Aviation* court (construing the common law of the District of Columbia) implicitly rejected the holding in *Smith v. Haden*.

109. 50 P.3d 306 (Wash. 2002).
110. *Id.*
111. *Id.* at 309.
112. *Lavigne*, 50 P.3d at 309.
116. See *Mallen & Smith*, supra note 22, § 32.9, at 178; Jeffrey B. Albert, *Perspectives on Pennsylvania Legal Malpractice: Challenges in Legal Malpractice Liability*, 68 Pa. Bar Assn. Q. 113, 115 (July 1997) (noting *Kituskie* court offered “no empirical basis” to support its holding and decision to shift burden to defendant-attorney); Elisa Recht Marlin, Recent Decision, *Kituskie v. Corbman*, 714 A.2d 1027 (Pa. 1998), 37 Duq. L. REV. 521, 532-34 (1999). The decision has also been embraced by a number of courts. See *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 31-32 (Alaska 1998) (recognizing Supreme Court of Alaska cited *Kituskie* with approval and noted burden on defendant-attorney to prove uncollectibility because it was his negligence causing predicament); Bauman, *supra* note 103, at 1135-37; *Leubsdorf, infra* note 183, at 151 (arguing “lawyer should bear the burden of persuading the jury that any judgment would have been uncollectible, or at a minimum should bear the burden of coming forward with evidence demonstrating that uncollectibility was a real possibility”).
118. *Id.*
While the cases addressing malpractice in collecting on judgment have centered on the issue of burden shifting, a growing number of transactional legal malpractice cases have concerned themselves with the method by which a putative plaintiff must demonstrate that the defendant was the cause-in-fact of their purported injuries.

2. Transactional Legal Malpractice and the Repudiation of the “But-For” Test and the “Case-Within-A-Case” Approach: California as a Harbinger of Things to Come?

While burden shifting has consumed those courts addressing judgment collection legal malpractice matters, courts construing transactional legal malpractice cases have (especially of late) been preoccupied with the methods by which a plaintiff demonstrates cause-in-fact. Traditionally, plaintiffs have had the burden of demonstrating cause-in-fact via the “but-for” test. A number of courts, however, have determined that this is an improper method of demonstrating cause-in-fact in a transactional context. Moreover, many of these same courts have also been proponents of doing away with the “case-within-a-case” approach. Perhaps not surprisingly, the majority of the decisions that have found the “but-for” test to be improper have come from courts in California.

Over the years, a number of California appellate courts have made the distinction between causation in litigation malpractice and causation in transactional malpractice. Initially, it is important to review the case of Mitchell v. Gonzales. Although it is not a legal malpractice case, it is important to California’s ever evolving approach to cause-in-fact in transactional legal malpractice cases. Mitchell will be reviewed first in order to demonstrate California’s approach to determining cause-in-fact, and then a number of California cases construing the applicability of the “case-within-a-
The necessity of demonstrating the better deal

Mitchell concerned a suit initiated by the parents of a young boy who accidentally drowned. The issue before the California Supreme Court was whether the jury should have been given an instruction regarding “but-for” causation or an instruction that encompassed the “substantial factor” approach. While the Mitchell decision largely concerns the semantics of the jury instructions at issue, it is important because it rejected the “but-for” test in all but a limited number of situations. Instead, the supreme court in Mitchell, sitting en banc, held that a “substantial factor” approach should be used in most if not all tort matters, even those that do not involve allegations of multiple sufficient causes. This holding would be embraced by a number of courts in coming years (especially in Viner v. Sweet, see infra note 174) when the matters at issue involved alleged legal malpractice in the transactional context. Specifically, a number of courts have cited Mitchell for the proposition that a plaintiff in a transactional legal malpractice matter need only demonstrate that the defendant-attorney was a substantial factor in causing the injuries. Before reviewing the Viner decision and its unique view of the transactional legal malpractice case, it is important to review a number of California cases that have rejected or questioned the use of the traditional “case-within-a-case” approach in legal malpractice matters.

122. Mitchell, 819 P.2d at 873. We will be addressing the substantial factor test in greater detail later in this Article. See infra notes 165-90 and accompanying text.

123. In addition, the majority decision confused the element of causation, holding that proximate cause was a component of cause-in-fact rather than a separate element. Mitchell, 819 P.2d at 876.

124. Mitchell, 819 P.2d at 877-78. As has been noted by other courts, the Mitchell court did not entirely reject the “but for” test. Rather, it held that the substantial factor test was more appropriate and that a better “but-for” jury instruction should be drafted and implemented. Id.; see Shawmut Bank, N.A. v. Kress Assocs., 33 F.3d 1477, 1495 n.16 (9th Cir. 1994) (reviewing Mitchell holding in great detail).

125. Mitchell, 819 P.2d at 878-79. Indeed, the Mitchell court described the “substantial factor” approach as “comparatively free of criticism” and as having been praised by a number of scholars and courts. Id. at 878. The dissent in Mitchell strongly criticized the holding of the majority pointing out that the “substantial factor” approach would lead to confusion over how one was to determine the “respective degrees of the contribution of [the] different causes of any injury.” Id. at 884 (Kennard, J., dissenting). Moreover, there seems to be a bit of confusion in California over which test is to be used to demonstrate cause-in-fact in tort matters generally, and legal malpractice matters specifically, with a California appellate court holding in an unpublished decision, Deeter v. McNicholas, that “a plaintiff in a malpractice action must establish that he or she should have ultimately prevailed in the underlying action but for the defendant-attorney’s professional malpractice.” Deeter v. McNicholas, 2002 Cal. App. Unpub. LEXIS 7813, at *16 (Aug. 19, 2002). Another published decision held that “a plaintiff in a legal malpractice case must establish that it would have prevailed in the underlying action but for the defendant’s professional negligence.” Roger H. Proulx & Co. v. Crest-Liners, Inc., 98 Cal App. 4th 182, 195 (2002). In addition to case law, a recent article by a California practitioner stated that with regard to causation in a legal malpractice cause of action, “the plaintiff’s attorney must prove causation by showing that but for the attorney’s breach of duty, the result for the client would have been more favorable.” See Lemon, infra note 238, at 40. Certainly, the aforementioned flies in the face of the holdings in Mitchell and Viner, which call for the use of the “substantial factor” test rather than the “but for” test. See Dennis Yokoyama, Real Estate Law: Danger Zones, 24 L.A. LAW. 44, 45 n.3 (2002) (noting California applies “substantial factor” test and views causation as comprised of cause-in-fact and proximate cause).
In *DiPalma v. Seldman*, California’s Court of Appeals analyzed a matter concerning an attorney who was allegedly negligent in giving his client poor advice in a real estate transaction and in failing to properly record a judgment in favor of the client. The trial court ascertained that while the defendant attorney had been negligent, the plaintiff suffered no damages because the plaintiff’s judgment was uncollectable. The California Court of Appeals rejected the trial court’s holding, finding that the burden on the plaintiff to prove a valid underlying claim applied only “where the alleged malpractice consists of mishandling a client’s claim.” In those cases, the plaintiff has the burden to “show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof.” While the *DiPalma* court did not address the burden of demonstrating cause-in-fact in a transactional legal malpractice case per se, the decision is important for it intimated that a “case-within-a-case” type of approach might only be appropriate in a *litigation* legal malpractice case where a plaintiff has allegedly lost a viable underlying claim or defense.

In *California State Automobile Association Inter-Insurance Bureau v. Patrichan*, California’s Court of Appeals soundly rejected the “case-within-a-case” approach as a method of determining cause-in-fact in non-litigation legal malpractice cases. In analyzing the “case-within-a-case” approach, the court reviewed the trial court’s holding that when the plaintiff’s case involves a lost claim or defense (i.e., a litigation type case), the “case-within-a-case” approach is appropriate. The trial court also found that when the plaintiff’s case concerns an underlying business transaction or negotiation allegedly affected by the attorney’s negligence, the “case-within-a-case” approach is inappropriate.

In construing the trial court’s rejection of the “case-within-a-case” approach, the *Patrichan* court of appeals noted that the nature of the services provided by the attorney in the underlying matter was the key factor. In the underlying matter, the representation provided by the attorney was akin to business advice, and therefore the court of appeals analyzed the matter as a transactional legal malpractice case. Because the plaintiff was not claiming that a meritorious claim or defense was lost, the court found that the “case-within-a-case”

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127.  Id. at 1505.
128.  Id.
129.  Id. at 1507 (emphasis added).
132.  Id. at 710.
133.  Id.
134.  Id. at 711.
136.  Id. at 711-12.
approach was inapplicable. The Parichan decision mirrors the DiPalma holding since it restricts the “case-within-a-case” approach to those matters where an underlying claim or defense was allegedly lost at the hands of a negligent attorney.

While it would appear from the above that California has soundly restricted the “case-within-a-case” approach to the litigation legal malpractice context, this is not necessarily the case. Specifically, in Piscitelli v. Friedenberg and Mattco Forge, Inc. v. Arthur Young & Co., California appellate courts embraced the “case-within-a-case” approach (though perhaps a bit begrudgingly), as a bulwark against speculative claims for damages.

In Piscitelli, the California Court of Appeals undertook a lengthy review of the applicable law on the issue of the “case-within-a-case” approach both within and without the state, and held that the approach was “part and parcel of the element of causation” in a legal malpractice case and a protection against speculative legal malpractice suits. In a similar vein, the Mattco court held that the “case-within-a-case” approach was the “most effective safeguard yet devised against speculative and conjectural damages in this era of ever expanding litigation.” In light of the above, it is clear that California has, at best, taken an inconsistent approach to the implementation of the “case-within-a-case” doctrine. While those arguing against the wide-spread use of the “case-within-a-case” approach will certainly point to the fact that Piscitelli and Mattco were litigation legal malpractice cases (though arguably a bit atypical in that regard), both holdings are important because they do not specifically restrict the “case-within-a-case” approach solely to the litigation legal malpractice case.

In addition to Piscitelli and Mattco, there have been a number of decisions in other jurisdictions holding that the plaintiff’s burden of proof with regard to causation and damages is the same regardless of whether the case is a litigation or transactional matter. In Cannata v. Wiener, the Supreme Court of Vermont considered a suit arising from allegedly poor business advice given by the defendant-attorney. The trial court determined that the plaintiff had failed to meet his burden of proof with regard to causation. The state

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137. Id. at 713-14.
138. See Sammis v. Brobeck, Phleger & Harrison, No. D036784, 2002 Cal. App. LEXIS 1896, at *11-13 (June 4, 2002) (holding plaintiff in legal malpractice case has to demonstrate attorney was substantial factor in causing injury). The Sammis court also cited DiPalma with approval and noted that the “trial-within-a-trial requirement, however, does not apply to transactional legal malpractice actions.” Id. at *12; see Viner v. Sweet, 92 Cal. App. 4th 730 (2001).
141. Piscitelli, 87 Cal. App. 4th at 970.
142. Mattco, 52 Cal. App. 4th at 834.
143. 789 A.2d 936 (Vt. 2001).
144. Id. at 937-38.
145. Id. at 938.
Supreme Court concurred with the trial court’s holding, noting that the plaintiff failed to demonstrate that the attorney was the cause-in-fact of any injury.\textsuperscript{146} The Court continued in noting that the burden was on the plaintiff to demonstrate that the attorney’s negligence prevented the plaintiff from pursuing other meritorious courses of action.\textsuperscript{147}

In *Hazel v. Thomas*,\textsuperscript{148} the Supreme Court of Virginia had to decide whether a plaintiff had met his burden of proof with regard to the element of causation in a transactional legal malpractice case. In *Hazel*, the plaintiff approached the defendant law firm about representing him in negotiations to purchase a piece of property.\textsuperscript{149} Negotiations were undertaken and a contract signed. According to the contract provisions, the plaintiff had to pay the seller of the property a one million dollar deposit that would be forfeited if the plaintiff failed to close on the property.\textsuperscript{150} The plaintiff took possession of the property and paid the deposit, but a series of events caused the plaintiff to refuse to close on the property, and the seller evicted the plaintiff and retained the one million dollar deposit.\textsuperscript{151} The seller sued the plaintiff and obtained a judgment. The plaintiff then filed suit against his former attorneys, claiming they were negligent in negotiating the terms of the underlying contract with the seller.\textsuperscript{152}

The trial court found for the plaintiff in the malpractice suit, but the state Supreme Court reversed, finding the plaintiff had failed to meet his burden as to causation.\textsuperscript{153} Specifically, the Court noted that the plaintiff bore the burden of proof to demonstrate by a preponderance of the evidence that the defendants had been the proximate cause of his injuries.\textsuperscript{154} In a transactional legal malpractice case, the *Hazel* Court held that the plaintiff had the burden to demonstrate that the seller would have agreed to the terms that the plaintiff insisted should have been included in the underlying contract.\textsuperscript{155} Because the plaintiff could not demonstrate that he would have received the terms in the underlying transaction, he failed to demonstrate that the defendants were the cause of his purported injuries.

What do the above cases demonstrate? For one, these cases demonstrate that a consistent approach to construing the elements of causation and damages in transactional legal malpractice matters is sorely lacking. Perhaps, as a result of

\textsuperscript{146} *Id.*
\textsuperscript{147} *Cannata*, 789 A.2d at 939.
\textsuperscript{148} 465 S.E.2d 812 (Va. 1996). Interestingly, the *Hazel* case was cited by the defendants in *Viner* for the proposition that the burden was on the plaintiffs to prove they would have received a better deal. The *Viner* court rejected the *Hazel* holding as factually inapposite.
\textsuperscript{149} *Id.* at 813.
\textsuperscript{150} *Id.*
\textsuperscript{151} *Id.* at 814.
\textsuperscript{152} *Hazel*, 465 S.E.2d at 814.
\textsuperscript{153} *Id.*
\textsuperscript{154} *Id.* at 815. The court also noted that the question of proximate cause in the case was a question of law to be decided by the court.
\textsuperscript{155} *Id.*
this confusion, a number of scholars have stepped forward into the breach to offer a number of proposed alternative approaches to the traditional methods of construing litigation and transactional legal malpractice matters.

III. PROPOSED SCHOLARLY AND JURISTIC ALTERNATIVES TO THE “BUT-FOR” TEST AND CASE-WITHIN-A-CASE APPROACH IN TRANSACTIONAL LEGAL MALPRACTICE CASES

A. Proposed Alternatives to the “But For” Test

While the “but-for” test has traditionally been applied in legal malpractice actions, it has been subject to a fair amount of criticism. Indeed, scholars and a limited number of courts have castigated the “but-for” test in tort actions generally and legal malpractice cases specifically. In attacking the “but-for” test, a number of alternate approaches have been proposed including the following: shifting the burden of proof to the defendant attorney, employing a “loss of chance” analysis, and using a “substantial factor” test in place of the “but-for” test. As we shall see, however, the strength of the “but-for” test becomes apparent when one examines the proposed alternatives.

1. Substantial Factor

Perhaps no replacement for the “but-for” test in the legal malpractice context has been lauded as much as the “substantial factor” test. The primary reason for this is that while most scholars and courts agree that the “but-for”

156. See supra text accompanying notes 91-92; see also Robertson, supra note 12, at 1773-76 (noting some courts recognize alternatives to “but-for” test when test does not help determine liability).

157. The “substantial factor” test has also been referred to as the “substantial factor” doctrine or analysis. For the sake of clarity, I will refer to it as a test. The “substantial factor” test requires a plaintiff in a legal malpractice case to demonstrate that the defendant-attorney was a substantial factor in bringing about the complained of injuries.

158. Indeed, the “substantial factor” test has been championed by scholars and a limited number of courts in the legal malpractice arena. See DIAMOND ET AL., supra note 79, at 192; Kessler, supra note 6, at 401. As for cases applying the “substantial factor” test in legal malpractice actions, see Viner v. Sweet, 92 Cal. App. 4th 730 (2001); Beverly Hills Concepts, Inc. v. Schatz, 717 A.2d 724, 743 (Conn. 1998) (noting in legal malpractice case, “substantial factor” test used to determine proximate cause); DAUGHERTY v. RUNNER, 581 S.W.2d 12, 16 (Ky. 1978) (noting burden on plaintiff to show attorney's negligence substantially contributing factor to client's loss); WHEELER v. WHITE, 714 A.2d 125, 129 (Me. 1998) (Lipez, J., dissenting) (noting jury should be given instruction on “substantial factor” analysis); CONKLIN v. WEISMAN, 678 A.2d 1060, 1060 (N.J. 1996) (explaining plaintiff must demonstrate former attorney “substantial factor” causing client’s injuries); Gorski v. Smith, No. 320 EDA 2001, 2002 Pa. Super, LEXIS 3204 (Oct. 30, 2002) (noting “substantial factor” test used if plaintiff alleged to be contributorily negligent); DAUGHERTY v. APPAS, 704 P.2d 600, 605 (Wash. 1985) (stating “substantial factor” test only used where plaintiff unable to show one event caused injury); Campbell v. Chaney, 485 N.W.2d 421, 425 (Wis. 1992); GUSTAVSON v. O'BRIEN, 274 N.W.2d 627, 631 (Wis. 1979) (employing “substantial factor” test). But see KEETON ET AL., supra note 86, at 267 (arguing “substantial factor” approach employed to demonstrate significance of antecedent rather than “factual quantum” and therefore “can scarcely be called a test”).
test should be applied in the majority of cases, the “but-for” test may help a tortfeasor evade liability. Indeed, in those cases where there are two or more possible causes of an injury, each of which was sufficient by itself to have caused the complained of injury, application of the “but-for” test would theoretically result in an injustice, namely a finding of no liability on the part of either purported tortfeasor since it could not be said that “but for” one of the purported causes the injury would not have occurred. Of late, some have proposed the “substantial factor” test as a replacement for the “but-for” test in most, if not all, legal malpractice cases.

Indeed, Professor Lawrence Kessler wrote an entire article lambasting the present approach to causation and the plaintiff’s burden of proof in the legal malpractice context. In his article, Professor Kessler states that causation in the legal malpractice context has proven to be “the tort law’s last refuge for the shoddy practitioner.” Professor Kessler argues that the “but-for” test, and what he refers to as the “suit within a suit” requirement, place too great a burden on the plaintiff. After all, he argues, a client, much like a patient in a medical setting, is dependent on the attorney for knowledge, advice, and information. Professor Kessler argues that because the attorney has superior

159. See Prosser, supra note 52, at 239. However, as we shall see, a number of scholars and courts propose rejecting the “but for” test entirely or in the majority of cases.

160. “Causal overdetermination” refers to those cases where “two causes concur to bring about an event, and either cause, operating alone, would have brought about the event absent the other cause.” Robertson, supra note 12, at 1776 (internal quotation marks omitted). Perhaps the most cited example of such a case is Summers v. Tice, 199 P.2d 1 (Cal. 1948). Also see RESTATEMENT (THIRD) OF TORTS, supra note 77, § 26 comm. i, noting plaintiff’s harm is “overdetermined” because each of the causal sets would produce harm, and neither is the but-for cause of harm.


162. See id. at 1531. Viator noted that “the but-for test does not comport with our expectations; for if the conduct of each co-defendant is sufficient to cause the harm, the but-for test, strictly applied, would exonerate each wrongdoer.” Id.


164. Id. at 406.

165. The “suit within a suit” requirement has also been referred to as the “case-within-a-case” or “trial within a trial” approach. For the sake of clarity, and because I am principally addressing non-litigation legal malpractice matters, I will refer to the requirement as the “case-within-a-suit” approach.

166. Kessler, supra note 6, at 483-86. Interestingly, in arguing that the client is reliant or dependent on the attorney to guide him or her though the serpentine path of litigation, Kessler maintains that his Article and arguments are limited to litigation malpractice cases stating, “[t]he scope of both this analysis and the proposed doctrinal changes is limited to the litigation bar, because the relationship between an attorney who represents a client in litigation is completely different than that between an attorney and a client in a transactional setting.” Id. at 410. But see Wade, supra note 23, at 774-75 (noting dissimilarities between medical malpractice cases and legal malpractice cases making their juxtaposition difficult to accept). Specifically, the fact that medical malpractice cases focus on redress for physical injuries, rather than for economic injuries makes it a stretch to compare the two types of tort actions for the sake of argument. Id.
knowledge of the law and facts at issue and controls access to information, the plaintiff should not have the burden of proving causation and damages vis-à-vis the “but-for” test and “case-within-a-case” (or some similar) approach. Instead, Professor Kessler argues, courts should employ alternative proof doctrines, such as the “substantial factor” test.

In arguing for the “substantial factor” test, Professor Kessler states that the “substantial factor doctrine permits the plaintiff to establish the relationship between the injury and the proven negligence of the defendant through a presumption.” Using this approach, the plaintiff would merely have to demonstrate that the defendant-attorney was a “substantial” cause of the plaintiff’s purported injuries. The plaintiff would not have to demonstrate counterfactually that he or she had a meritorious underlying claim or cause of action. Obviously, this approach is more favorable to the plaintiff than the “but-for” test and the “case-within-a-case” approach, and a limited number of courts have adopted variations on this argument in transactional legal malpractice actions.

As alluded to earlier in the review of the Mitchell case, in 2001, the California Court of Appeals in Viner v. Sweet rejected the “but-for” test in a transactional legal malpractice case, holding instead that the plaintiffs did not have a burden to demonstrate they would have received a “better deal” in an underlying business transaction “but for” the purported negligence of their former attorneys. In Viner, the plaintiffs hired a prominent Washington, D.C. law firm to negotiate a business deal on their behalf. While the attorney and his law firm negotiated on the plaintiffs’ behalf, the parties omitted certain key provisions from the final deal. As a result of the omitted provisions, the

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167. According to Kessler, the attorney’s controlling access to information creates a “special relationship” that argues against the use of the “but for” test to demonstrate cause in fact. Kessler, supra note 6, at 489-90.
168. Id. Indeed, Kessler rejects what he sees as the “illusion of replicability” in the case-within-a-case approach, arguing that a plaintiff can never actually recreate the underlying case without such necessaries as the same judge, jury, and evidence. Id. at 494-95.
169. Id. at 503-04. Kessler states that the “substantial factor” test is particularly applicable to litigation malpractice. Id. at 504.
170. Id.
171. Kessler, supra note 6, at 505.
172. Id. Kessler states that proof of malpractice would be “direct proof of fault and circumstantial proof of causation.” Id.
174. Viner v. Sweet, 92 Cal. App. 4th 730 (2001). The Supreme Court of California is currently reviewing the Viner decision and may choose to reject the court’s findings as to the standard of proof in transactional legal malpractice matters. See Pollak, supra note 99, at 20. That said, it is difficult to see how the Supreme Court of California will be able to rationalize or reject the Viner court’s determination that the “substantial factor” test should be used instead of the “but for” test in transactional legal malpractice cases in light of the court’s previous decision in Mitchell v. Gonzales, which explicitly rejected the “but for” test. See supra note 121, infra note 181 (noting California Supreme Court decision of June 23, 2003).
175. Viner, 92 Cal. App. 4th at 735.
plaintiffs suffered various purported injuries and sued their former attorney and his law firm. In defending against the allegations, the defendants argued that the burden was on the plaintiffs to prove they would have received a better deal “but for” the defendants’ purported negligence.

The California Court of Appeals rejected the defendants’ argument and rendered a decision that has caused fear amongst many transactional attorneys. The Viner court found that while the “but-for” test should be applied in litigation legal malpractice matters, plaintiffs in transactional legal malpractice cases need not demonstrate that they would have received a better deal “but for” their attorneys’ negligence. Because the “but-for” test was too speculative to be applied in a transactional setting, the Viner court held that the plaintiffs only had to demonstrate that their former attorneys were a substantial factor in causing their purported injuries. Thus, in rejecting the

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176. Id. Not surprisingly, the partner handling the matter for the plaintiffs is no longer with the law firm in question.
177. Id. at 739-40.
178. See Court Holds That “Case Within A Case” Doctrine Should Not Be Used In Transactional Malpractice Cases, at www.murchison-cumming.com/vinger.htm (on file with author); Kurt W. Melchior, The Art of the Deal Making a Case for Transactional Malpractice Just Got a Lot Easier, THE RECORDER (Dec. 12, 2001) (reviewing holding in Viner); ABA/BNA Lawyers’ Manual on Professional Conduct, Conference Report, Legal Malpractice and Risk Management, Panel Speakers Review Alarming Trends In Legal Malpractice Liability and Litigation, Vol. 18 No. 7, at 1 (Mar. 27, 2002) (reviewing Viner decision and noting “Viner opens the door for former clients to prove transactional malpractice simply by putting on an expert to testify about what should have happened and the resulting damages, rather than proving what the outcome of the negotiation would have been ‘but for’ the lawyer’s malpractice”).
179. Interestingly, this position is exactly the opposite of Professor Kessler’s argument that the “but for” test should not be used in litigation legal malpractice matters, but should be used in transactional legal malpractice matters. In addition to rejecting the use of the “but for” test, the Viner court also held that the “case-within-a-case” approach was only appropriate in litigation malpractice cases because transactional malpractice cases did not involve claims or causes or action that were lost due to the alleged negligence of an attorney. Viner, 92 Cal. App. 4th at 753.
180. Id. at 743-45.
181. Id. at 752-53.

Interestingly, on June 23, 2003, the Supreme Court of California reversed the California Court of Appeals (Viner v. Swee, 92 Cal. App. 4th 730 (Cal. 2001), cited in footnotes 174-81, above.). Viner v. Swee, 70 P.3d 1046 (Cal. 2003). In constructing the court of appeals’ decision, the Court noted that the only issue before it was whether the “plaintiff in a transactional legal malpractice action must prove that a more favorable result would have been obtained but for the alleged negligence.” Id. at 1050.

In reversing the court of appeals, the California Supreme Court held that the so-called “but for” test for causation was still viable in California in litigation and transactional legal malpractice cases (except in so-called multiple sufficient cause cases), and that a plaintiff in a transactional legal malpractice case must demonstrate that he or she would have received a more favorable result in the transaction but for the purported negligence of the attorney. Id. at 1052 (stating “[i]t is far too easy to make the legal advisor a scapegoat for a variety of business misjudgments unless the courts play close attention to the cause in fact element, and deny recovery where the unfavorable outcome was likely to occur anyway”).

Finally, the Court also took the time to reject the decision in California State Automobile Association Inter-Insurance Bureau v. Parichan, 84 Cal. App. 4th 702 (2000) (cited in note 131, supra), and to clarify the holding in Mitchell v. Gonzales, 819 P.2d 872 (Cal. 1991) (cited in note 121, supra). More specifically, the Court noted that Mitchell did not call for the rejection of the “but for” test, rather, it held that the then-current jury instruction on the “but for” test was inartfully drafted and that the “substantial factor” test had essentially
“but-for” test, the Viner court arrived at the same conclusion as Professor Kessler, but for very different reasons. While both Professor Kessler’s argument and the Viner court’s holding certainly appear to relax the plaintiff’s burden with regard to causation and the approach by which actual damages are demonstrated in the legal malpractice context, they must be rejected for a number of reasons that will be discussed shortly in Section IV. Before that, however, it is important to review the other proposed alternatives to the “but-for” test and the “case-within-a-case” approach.

2. Loss of Chance

In addition to the “substantial factor” test, a number of scholars and several courts have discussed applying the “loss of chance” doctrine in the legal malpractice context. Traditionally, the “loss of chance” doctrine has been applied in medical malpractice cases. Typically, the “loss of chance” doctrine in medical malpractice cases is said to be comprised of the following four parts or elements: (1) a plaintiff with a preexisting condition; (2) a potential for physical recovery from this condition; (3) negligence on the part of a medical practitioner that prevents the opportunity for recovery; and (4) absolutely no opportunity for recovery as a result of the aforementioned negligence.

Some have argued that a legal malpractice action is quite similar to a medical malpractice action in that the negligent attorney has harmed a client’s opportunity to recover or succeed on their underlying claim just as a negligent

subsumed the “but for” test in cases involving alleged multiple sufficient causes of the alleged injury.

182. See supra notes 163-73 and accompanying text; see also In re South Bank v. Super. Ct. of San Diego County, D040541, 2003 Cal. App. LEXIS 886, at *20 (Jan. 29, 2003). The Court noted that while a plaintiff has the burden of proving the elements of a legal malpractice cause of action, “the plaintiff need not prove that the defendant-attorney’s negligence was the sole cause of the plaintiff’s loss or injury. On the element of causation, the plaintiff need only prove that the defendant-attorney’s negligence was a substantial factor in causing the plaintiff’s loss or injury.” In re South Bank, 2003 Cal. App. LEXIS 886, at *20-21 (internal citations omitted).

183. See Krista M. Enns, Can a California Litigant Prevail in an Action for Legal Malpractice Based on an Attorney’s Oral Argument before the United States Supreme Court?, 48 DUKE L.J. 111, 143-45 (1998). The author notes that if the “loss of chance” doctrine replaced the “but for” test, a plaintiff “would only need to convince a jury that the attorney’s conduct diminished the chance of receiving a favorable verdict,” however, due to the inherent unreliability of the loss of chance approach, “the adoption of loss of chance in the legal malpractice field would be ill-advised.” Id.; John Leubsdorf, Legal Malpractice and Professional Responsibility, 48 RUTGERS L. REV. 101, 149-50 (1995); Polly A. Lord, Loss of Chance in Legal Malpractice, 61 WASH. L. REV. 1479 (1986); Stephen F. Brennwald, Proving Causation in “Loss of Chance” Cases: A Proportional Approach, 34 CATH. U. L. REV. 747 (1985) (providing general overview of “loss of chance” doctrine in medical cases). As for courts examining the doctrine in the context of legal malpractice actions, see Holton v. Memorial Hosp., 679 N.E.2d 1202, 1221 (Ill. 1997) (Heiple, J., concurring) (castigating majority for failing to limit “loss of chance” doctrine to medical context). Judge Heiple also argues that it should not be applied in malpractice cases against other professionals. Holton, 679 N.E.2d at 1221; Hardy v. S.W. Bell Tel. Co., 910 P.2d 1024 (Okla. 1996) (holding “loss of chance” doctrine should not apply in legal malpractice actions). “There is no commensurate harm, no lost chance, in a legal malpractice case as the matter may eventually be reviewed.” Hardy, 679 N.E.2d. at 1029 (internal citation omitted).

184. See Lord, supra note 183, at 1491-92.
doctor has harmed the patient’s opportunity to recover from a preexisting condition. Because of the purported similarity in the medical malpractice and legal malpractice causes of action, the following four elements comprise the legal malpractice “loss of chance” doctrine: (1) facts and circumstances of a client’s case that represent the equivalent of a preexisting condition; (2) that given these facts and circumstances there exists a certain likelihood of obtaining a successful result; (3) that the aforementioned opportunity to obtain a successful result was diminished by the negligence of the attorney; and (4) total loss to the client of the opportunity to recover in their underlying matter.\(^{185}\) Thankfuly, nearly every court that has considered the proposal to apply the “loss of chance” theory in the legal malpractice context has rejected it.\(^{186}\) In perhaps the most cited legal malpractice “loss of chance” case, the Supreme Court of Washington rejected the proposed change to the traditional “but-for” test in *Daugert v. Pappas*.\(^{187}\)

In *Daugert*, the plaintiff alleged that his former attorney failed to file a timely petition for review with the state’s appellate court.\(^{188}\) The question before the supreme court was the plaintiff’s burden of proof with regard to what the court saw as proximate cause. The *Daugert* court examined whether the “loss of chance” doctrine might be an appropriate replacement for the “but for” test in certain malpractice matters.\(^{189}\) In considering the alleged similarities between legal malpractice and medical malpractice cases, the supreme court noted that unlike a client in a medical malpractice case, a client in a legal malpractice case can have his or her purported loss of chance reviewed by a higher court.\(^{190}\) Thus, in rejecting the “loss of chance” doctrine in the legal malpractice context, the *Daugert* court realized that there are significant differences between a medical malpractice case and a legal malpractice case.\(^{191}\)

Regardless of the rejection of the “loss of chance” doctrine by a multitude of courts, proponents still exist. Some scholars have even offered modified approaches including a “lost substantial possibility of recovery” approach wherein, upon a showing of a lost substantial possibility of recovery in an underlying matter, the fact-finder can infer causation.\(^{192}\) Of course, as with the

\(^{185}\) See Lord, *supra* note 183, at 1493-94.


\(^{187}\) *Daugert*, 704 P.2d at 600.

\(^{188}\) *Id.* at 602.

\(^{189}\) *Id.* at 605.

\(^{190}\) *Id.* The court went on to note that “[o]n the other hand, in the medical context, when a patient dies all chances of survival are lost.” *Id.*

\(^{191}\) *Daugert*, 704 P.2d at 605.

\(^{192}\) See Jensen, *supra* note 12, at 680.
“substantial factor” test, one is immediately confronted with having to measure substantiality against an imaginary yardstick, an undertaking that is not for the faint of heart.\(^{193}\) In addition to a “lost chance” approach, some have called for a change in the respective burdens of proof in legal malpractice actions.

3. **Burden Shifting**

In addition to altering the test by which causation is analyzed, some have argued that the traditional burden of proof in a legal malpractice action should shift to the defendant-attorney. As noted before,\(^{194}\) the burden of proof in legal malpractice actions (as in all other tort matters) is on the plaintiff. Some scholars have argued that shifting the burden of proof to the defendant-attorney is reasonable as it is “easier for the attorney to prove the absence of one element in the underlying claim than for the plaintiff to prove the presence of all elements.”\(^{195}\) Of course, courts could take this position in every tort action such that if the burden is shifted in legal malpractice actions, it must also be shifted in all other tort matters,\(^{196}\) unless there is something particularly special about the legal malpractice cause of action. Professor Kessler, for one, argues that there is something unique about the legal malpractice cause of action, principally that the almost preternatural control an attorney exerts over information and evidence in a civil proceeding makes the client in an attorney-client relationship exceedingly dependent on the attorney.\(^{197}\) In other words, because the attorney has control over the underlying matter and all information relating to it, it is most likely that the attorney’s negligence in the prosecution of the matter would negatively impact the very information and evidence that would be needed by the client in the subsequent malpractice case to demonstrate that the claim was meritorious.\(^{198}\) Professor Kessler argues that the jury should be instructed “that if they find that the defendant was negligent, they must find that this negligence caused harm, unless the defendant establishes as an affirmative defense that the negligence did not cause any harm.”\(^{199}\) This is not a novel argument, and this has been analyzed by a few

\(^{193}\) Indeed, the proponent of this modified approach offers little in the way of analyses as to how substantiality is to be measured. See Jensen, supra note 12, at 680.

\(^{194}\) See supra note 77 and accompanying text.

\(^{195}\) Jensen, supra note 12, at 676.

\(^{196}\) But see Senn v. Merrell-Dow, 751 P.2d 215, 222 n.6 (Or. 1988) (rejecting control over evidence argument in favor of shifting burden of proof to defendant and noting modern discovery rules have “vitiated” argument in favor of burden shifting in such situations).

\(^{197}\) See Kessler, supra note 6, at 505-06.

\(^{198}\) Id. at 506.

\(^{199}\) Id. at 508 (noting “the burden of proof [in this instance] concerning causation would be allocated to the defendant”). In an earlier article that seems to have laid the groundwork for Professor Kessler’s piece, it was also argued that it is improper to place the burden on the plaintiff to essentially prove two causes of action in a legal malpractice case. Rather, the plaintiff should be required to show attorney-client relationship, and that the negligence of the defendant-attorney lost the plaintiff’s underlying claim or action. After demonstrating the aforementioned, the burden shifts to the defendant-attorney to demonstrate that his or her
courts in very specific situations. Generally, courts have been willing to shift the burden of proof to the defendant-attorney in a legal malpractice case only when the attorney’s conduct has made it impossible for the plaintiff to prove his or her case. For instance, in *Thomas v. Lusk*, a California appellate court addressed a matter where an attorney’s alleged negligence caused a plaintiff to lose a products liability case. To make matters worse, the plaintiff claimed the attorney had failed to preserve a key item of evidence such that he could not meet his burden of proof in the malpractice case. The plaintiff in the case argued that the burden of proof should be shifted to the defendant attorney to prove that the plaintiff’s underlying products liability case would have been unsuccessful. The court noted that the burden of proof could be shifted in those cases where the attorney’s negligence makes it impossible for the plaintiff to prove “proximate cause.” The approach taken by the *Lusk* court is similar to the position articulated Professor Kessler and others in that the concern centers on the very nature of the attorney-client relationship, but differs in that the court did not advocate a wholesale shifting of the burden of proof to defendants in legal malpractice matters. Therefore, the *Lusk* holding is limited in that for the burden of proof to be shifted, it must be demonstrated that the attorney made it impossible for the plaintiff to prove a prima facie case of legal malpractice.

Still other burden shifting approaches have been championed by legal scholars, including the use of a modified *res ipsa loquitur* approach to legal

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201. See *Galanek v. Wismar*, 68 Cal. App. 4th 1417 (1999) (analyzing and shifting burden of proof in legal malpractice matter when defendant-attorney’s conduct made it impossible for plaintiff to demonstrate causation); *Mallen & Smith*, supra note 22, at 80-82 (noting only time burden should shift to defendant-attorney when attorney affects availability of evidence client hopes to use to prove case).


203. *Thomas*, 27 Cal. App. 4th at 1709. But see *Cabot, Cabot & Forbes Co. v. Brian, Simon, Peragine, Smith & Redfern*, 568 F. Supp. 371, 373-74 (E.D. La. 1983) (reviewing Louisiana’s unique approach to legal malpractice actions). A plaintiff in Louisiana need only prove that a defendant-attorney was negligent. *Id.* Once that is demonstrated, the burden of proof shifts to the defendant-attorney to demonstrate that the plaintiff’s underlying claim would not have been successful. *Id.*

204. *Thomas*, 27 Cal. App. 4th at 1709. The plaintiff noted that if he did not have the item of evidence allegedly lost at the hands of the defendant-attorney, he would have no way of demonstrating in the subsequent malpractice case that he had a meritorious underlying products liability case. *Id.*

205. *Id.* at 1719.

206. See *Robertson*, supra note 12, at 1782-83 (discussing very limited circumstances where burden shifting appropriate).

207. Louisiana takes a different and somewhat confused approach to the issue by noting that a plaintiff initially has to prove a prima facie case, but once that case is made, “the burden of proof shifts to the defendant-attorney, who bears the burden of proving that the litigation would have been unsuccessful.” *Lowndes v. Falcon*, No. 98-4829, 1992 U.S. Dist. LEXIS 4556, at *9 (E.D. La. Mar. 27, 1992).
malpractice cases. Using this approach, a putative plaintiff would have to demonstrate that an attorney-client relationship existed, and that the plaintiff’s underlying claim was lost at the hands of the negligent attorney. If the plaintiff demonstrates these two elements, the burden shifts to the defendant-attorney to demonstrate that the plaintiff’s underlying claim was not meritorious. As with all other burden shifting arguments, the modified res ipsa loquitur approach must be rejected because of its selective implementation.

IV. WHY THE PLAINTIFF IN A TRANSACTIONAL LEGAL MALPRACTICE CASE SHOULD HAVE THE BURDEN OF DEMONSTRATING THE “BETTER DEAL”

As we have seen, a multitude of scholars and even some courts have been calling for reform in the area of causation and with regard to the burdens of proof on plaintiffs in the legal malpractice context. “But-for” causation is too difficult to prove, the detractors say, and too speculative too boot. Rather than place the burden on the plaintiff, those calling for reform propose to shift certain burdens to the defendant in an effort to make it easier for the plaintiff to prove his or her case. While those calling for this self-described reform in the area of causation have raised some interesting points, they fail to acknowledge the inherent weaknesses in the proposed alternatives to the “but-for” test and “case-within-a-case” approach, including the fact that the alternatives will lead to increased speculation and alter the traditional burdens that have always been allocated to the plaintiff. While we have reviewed the proposed alternatives to the traditional methods of determining causation and damages, it is now time to examine why the “loss of chance” doctrine, “substantial factor” test, and burden shifting theories must be rejected.

A. Substantial Factor

There are a multitude of reasons why the “substantial factor” test must be rejected as a replacement for the “but-for” test. First, the “substantial factor” test must be rejected in the majority of legal malpractice cases because it adds
to (rather than subtracts from) the level of speculation in such a setting. Indeed, if the “substantial factor” test were adopted in all legal malpractice cases, the plaintiff would have a two-fold burden (which would appear to increase the burden on the already allegedly beleaguered plaintiff class rather than take away from it).

First, the plaintiff would have to demonstrate that the attorney’s actions or inactions were a possible cause or antecedent to his or her alleged injuries. After demonstrating this, a plaintiff would then have to demonstrate that the attorney’s actions or inactions were “enough” of a cause to be held liable for the damages sustained. Regarding the second portion of the analysis, the question asks against what yardstick are the attorney’s actions measured to determine if they are substantial enough? The short answer, of course, is that there is no yardstick against which substantiability is measured. Indeed, a number of scholars have attacked the “substantial factor” test for this very reason.214 Professor Richard Wright, for one, has noted that “[t]he problem with the substantial-factor formula as a test of actual causation (apart from its complete lack of guidance on what constitutes a ‘factor’) is that the alleged cause must be a substantial factor.”215 In substituting the “substantial factor” test for the “but-for” test, scholars and a limited number of courts are now asking the plaintiff to demonstrate the extent or quality of the attorney’s purported actions.

In addition, rather than helping to clarify the element of causation in legal malpractice cases, the use of the “substantial factor” test will serve only to engender more speculation in malpractice matters. As evidence of this we need look only to scenario A at the beginning of this Article. If the “but-for” test were to be used in both scenarios, the plaintiff would have to demonstrate that but for the alleged negligence of the attorneys, they would have received a better result in the underlying matter. In this instance, the judge or jury would only have to determine whether, in the absence of the attorney’s purported negligence, the former client would have sustained injury. If, on the other hand, the “substantial factor” test is used, the plaintiff would have to demonstrate that the attorney’s alleged negligence was a cause of his or her purported injuries and that it was “enough” of a cause. As is plainly evident, the second part of the analysis forces the judge or jury to compare the attorney’s conduct to some vague standard that is undefined.216 Instead of helping to clarify the issue of cause in fact in a legal malpractice case, the “substantial factor” test would serve only to inject higher levels of speculation into the analysis.

214. See Strassfield, supra note 12, at 355 (criticizing “substantial factor” test because “[i]t directs the factfinder to measure the significance or substantiability of a particular cause against an unspecified yardstick”).
215. See Wright, Causation in Tort Law, supra note 12, at 1782.
216. See Robertson, supra note 12, at 1780 (noting “[w]hen courts begin turning to the substantial factor vocabulary in a broader range of cases, valuable precision of analysis is lost and nothing is gained”).
It is interesting to note that in line with the above, the Restatement (Third) of Torts seems to have taken the very same approach in rejecting the “substantial factor” test as a means by which cause-in-fact is demonstrated in all but a handful of cases. In section 26, comment j of the Restatement, the authors have noted that while the “substantial factor” test is useful in the multiple sufficient cause case context, in all other matters, the “but-for or necessary-condition standard” must be met.

Further, it is important to note that there is simply a dearth of legal malpractice cases where plaintiffs are complaining of multiple sufficient causes of their purported injuries. The reason that this is important is that the multiple sufficient cause case is often cited as justification for the repudiation of the “but-for” test. The simple fact is that there is a dearth of such cases. Indeed, the author of this Article randomly reviewed a number of quite recent legal malpractice cases and none were of the multiple sufficient cause variety that might justify the use of the “substantial factor” test (as opposed to scenario B, which probably would). This is not surprising since the overwhelming majority of cases cited in this Article were not of the multiple sufficient cause variety. Because there appears to be anything but an epidemic of multiple sufficient cause cases in legal malpractice matters, it would seem imprudent and illogical to implement the widespread use of a test which was proposed for a certain factual setting that, in practice, is rather rare. Rather than implement yet another tired “test” or analysis, perhaps a greater emphasis should be placed on consistently using the methods that are already in place.

1. Multiple Sufficient Cause Cases

While the widespread use of the “substantial factor” test should be avoided, the test is useful in certain of the aforementioned multiple sufficient cause legal malpractice cases. For instance, in scenario B involving the purported negligence of B and D, the use of the “but-for” test would result in a finding of

217. See Restatement (Third) of Torts, supra note 77.
218. See Restatement (Third) of Torts, supra note 77, § 26 cmt. j.
219. Of course, as David Hume and a multitude of subsequent philosophers have noted, theoretically, there are always an infinite number of possible causes or antecedents for any purported injury or harm. When I speak of multiple sufficient causes (or the lack thereof) in this section specifically and in the article generally, I am speaking of those causes singled out as possible legal causes in the plaintiff’s cause of action.
221. In addition, it is interesting to note that the “substantial factor” test might be utilized if the defendant-attorney alleges that the plaintiff-client was contributorily negligent in the underlying matter. See Gorski v. Smith, No. 320 EDA 2001, 2002 Pa. Super. LEXIS 3204, at *37-41 (Oct. 30, 2002) (providing overview of jurisdictions analyzing issue).
no liability against B and D. If the “substantial factor” test were employed, however, E would be permitted to move forth with his case after demonstrating that B, D, or both, were a substantial factor in causing his purported injuries. This approach would have the effect of both preventing any prejudice to the plaintiff and also silencing the critics who claim the “but for” test and the “case-within-a-case” approach are simply methods concocted by the Bar to avoid liability.

B. Loss of Chance

In addition to the differences between the medical malpractice cause of action and the legal malpractice cause of action, which makes the application of the “loss of chance” doctrine inappropriate, it is important to note that the doctrine would make it significantly easier for a disgruntled client to sue his or her former attorney. Rather than having to demonstrate causation via the “but-for” test, the plaintiff under a “loss of chance” doctrine could initiate a cause of action any time the offending attorney reduced the client’s chances of recovering a favorable verdict or obtaining a better result in the underlying matter.222 More troublesome still is the fact that the “loss of chance” theory, like the “substantial factor” test, would increase the level of speculation in the already problematic cause-in-fact analysis.

For instance, what actions on the part of an attorney would constitute a loss of chance to the client, and by what yardstick would these actions be measured? While a lost opportunity to live or recover in a medical malpractice case arguably is easy to demonstrate, how does one quantify the instance when a plaintiff was unable to address one of a number of issues in an underlying appeal due to an attorney’s purported negligence? Do these actions constitute a loss of chance, and if so, what damage has been done to the client?223 There is an infinite amount of speculation that would be injected into an already muddled arena if yet another “analysis” (derived from the medical malpractice context no less) were to be applied in the legal malpractice field.

C. Burden Shifting

The arguments in favor of burden shifting generally focus on what some have characterized as the dependent nature of the attorney-client relationship.224

222. Indeed, the concurrence in the Holton case recognized this. See Holton v. Mem’l Hosp., 679 N.E.2d 1202, 1221-22 (Ill. 1997).

223. This issue is important and goes to the fourth part or element of the traditional “loss of chance” doctrine, the foreclosure of any opportunity on the part of the patient/client to recover as a result of the professional’s malpractice. Obviously, as the Daugert court recognized, a client, unlike a medical patient, has the opportunity to have any alleged mistake reviewed by an appellate court. Thus, the very nature of the legal malpractice cause of action would seem to weigh heavily against any application of the “loss of chance” doctrine.

224. See Kessler, supra note 6, at 410-11 (likening dependency to that inherent in doctor-patient
Because the attorney controls access to information and evidence, and "possesses such great superior knowledge," with regard to the matters at hand, it is highly likely that the attorney’s negligence will make it difficult, if not impossible, for a plaintiff to demonstrate cause-in-fact in a subsequent legal malpractice matter. There are several obvious problems with the arguments in favor of burden shifting.

The first problem with burden shifting is also the most obvious and concerns the proposed selective implementation of the approach. If the burden of proof is to be shifted in legal malpractice cases, it must be shifted in all other negligence based tort matters. In addition, unlike the amount of alleged control and superior knowledge of attorneys in litigation legal malpractice cases, the client in the transactional matter often possesses knowledge of the facts and matters at issue that is on par with or exceeds the knowledge of the attorney.

For instance, the client in an underlying business transaction or deal will often be familiar with business terms, contracts, and the parties with whom the deal is being structured. These are matters familiar to the business client which he or she is concerned with on a daily basis. This is quite unlike the litigation setting, when a client (assuming that the client is not an attorney) will often be unfamiliar with the litigation process, discovery, motions practice, etc., and may depend more on the attorney for his or her guidance. Thus, unlike the litigation malpractice setting, it cannot be easily said that the attorney has superior knowledge to the client or controls access to information in the transactional setting. Perhaps this is why Professor Kessler limited his

relationship).

225. See Kessler, supra note 6, at 410; see also Haughey, supra note 103, at 893-94 (arguing burden of proof should shift in malpractice case to defendant-attorney). Haughey argues that the burden should shift because the defendant-attorney might have an advantage over the plaintiff based on the information that was acquired during the litigation of the underlying matter. Haughey, supra note 103, at 893-94. Of course, this argument fails to acknowledge that the plaintiff will be able to obtain this material during the course of discovery in the malpractice action; thus, any advantage that might theoretically be retained by the defendant-attorney would be obviated.

226. See Albert, supra note 116, at 115 (arguing “no court shifting the burden of proof to the attorneys has offered any weighty justification other than to suggest that it is proper punishment for the attorney’s negligence. If that argument is valid, the burden in all damage claims in tort would be shifted to defendants”); Robertson, supra note 12, at 1782 (noting burden shifting only appropriate where, as result of defendant’s actions, plaintiff has no way of meeting burden).

227. Indeed, it is very possible that the purported malpractice will have occurred before a significant amount of work is done by the defendant-attorney. For instance, as one author has noted, a purported injury in a transactional matter:

could be deemed to occur (a) when the transaction is entered into by the client, or when the client acts upon the attorneys’ advice; (b) when the other party to the transaction takes some action inconsistent with the client’s asserted rights; (c) when a dispute arises concerning the rights and obligations of the parties, or when an action is filed by either party to the transaction; (d) when a client incurs attorney’s fees in defending his or her legal position; (e) upon entry of judgment adverse to the client at the trial court level; or (f) after the adverse judgment has been sustained on appeal.
burden-shifting argument to the context of litigation legal malpractice matters. 228

D. The Necessity and Efficacy of the “Case-Within-A-Case” Approach

In addition to the methods by which cause-in-fact is demonstrated in a legal malpractice cause of action, the counterfactual “case-within-a-case” approach should be retained because it provides a justifiable deterrent to speculative lawsuits and its detractors have failed to proffer any viable alternatives. As we have seen, those attacking the “case-within-a-case” approach often claim that it places too high a burden on plaintiffs. Undoubtedly, this approach does pose a hurdle for many plaintiffs if only because the plaintiff actually has to show that he or she would have been successful in the underlying litigation or transaction. Perhaps, though, this is a good thing, both for attorneys and an often overwhelmed judiciary.

For instance, I would argue that placing the burden on a plaintiff in a transactional legal malpractice case to demonstrate his or her actual damages creates a bulwark against speculative lawsuits. In many jurisdictions, such matters are increasing at an alarming rate. For instance, in the District of Columbia, there has been an increase in the number of legal malpractice claims filed against transactional attorneys. 229 From personal experience, I can attest to many former clients wanting to hold attorneys accountable for actions that were arguably violative of the District of Columbia Rules of Professional Conduct. While violations of the applicable ethical rules should certainly be looked on with disdain, many plaintiffs are initiating civil suits rather than instituting their claims as bar complaints. 230 This is important because in

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Ochoa & Wistrich, supra note 11, at 33-34 (providing transactional legal malpractice and impact of injury date for statute of limitations purposes).

228. See Kessler, supra note 6, at 486 (noting “client in a transactional matter has more knowledge of that transaction than a client does in any litigation”). While Professor Kessler is partially correct, he fails to acknowledge those cases wherein a client is suing the attorney for the allegedly negligent representation provided within the context of an underlying legal malpractice case. In those instances, a former client (who is also an attorney) is suing his counsel for his or her alleged negligence with regard to the handling of the client’s defense in the underlying legal malpractice case. In these type of litigation legal malpractice cases, the plaintiff has just as much knowledge as the defendant with regard to the matters at issue. See MALLEN & SMITH, supra note 22, at 78.

229. See Rick Arthurs, Lawyer-Owned Insurer Flooded By New Members, LEGAL TIMES, May 1985, at 2, 11 (identifying Washington, D.C., California, New York, and Florida as jurisdictions traditionally seeing increasing numbers of legal malpractice actions).

230. Indeed, I would argue that the attorney disciplinary process is the best vehicle to be used in an attempt to alter the conduct of those attorneys whose actions may have been less than proper. Many argue the opposite, principally, that civil litigation is the best method to use to alter improper conduct. Professor Kessler mentions using litigation to alter improper attorney conduct but fails to address the use of the disciplinary process to achieve the same result. See Kessler, supra note 6, at 404 (noting “[m]alpractice tort litigation is the common law’s mechanism for enforcing standards of professional conduct”). This is not to say that there has been a decrease in the number of disciplinary actions instituted, as often disciplinary actions go hand in hand with malpractice suits. Quite often, plaintiffs appear to use the disciplinary process or the threat of such an action as
almost every jurisdiction a violation of the applicable ethical rules does not necessarily give rise to civil liability, thereby calling into question the use of civil litigation rather than the disciplinary process to alter arguably improper conduct.\textsuperscript{231} The significance of the increase in disciplinary matters masquerading as civil litigation (and vice versa) means there is an ever increasing number of questionable claims that are litigated rather than brought to the attention of bar counsel. Accordingly, the judiciary must be vigilant in placing the burden on the plaintiff to prove actual damages. The only present (and effective) method by which this is done is the “case-within-a-case” approach.

In addition to providing a bulwark against speculative claims, it is rather interesting to note that those decrying the use of the “case-within-a-case” approach have largely fallen silent when pressed to offer viable alternatives.\textsuperscript{232} Indeed, little more than variations on the same tired burden shifting arguments,\textsuperscript{233} alternative liability schemes,\textsuperscript{234} and variations on the res ipsa loquitur\textsuperscript{235} approach (that was rejected nearly seventy years ago in the legal leverage in the related civil proceeding, though arguably this conduct violates rule 8.4(g) of the District of Columbia Rules of Professional Conduct. See Threats to File Disciplinary Charges, \textit{Nat’l Rpttr. on Legal Ethics & Prof. Resp.} 220 (D.C. Ethics Opinion Sept. 17, 1991) (reviewing Rule 8.4(g) and threatened use of disciplinary process to gain leverage in civil suit).

In addition, to an increase in the number of legal malpractice actions filed generally, in the District of Columbia there has also been an upsurge in the number of disciplinary actions and legal malpractice cases filed against immigration lawyers. The increase, no doubt, is due in part to the holding in 
\textit{Lozada v. INS}, 857 F.2d 10 (1st Cir. 1988). In \textit{Lozada}, the First Circuit Court of Appeals reviewed an appeal from a decision of the Board of Immigration Appeals in \textit{Matter of Lozada}, 1988 BIA LEXIS 19, 19 I. & N. Dec. 637 (Apr. 13, 1988). In reviewing the case, the First Circuit recapitulated the holding from the Board of Immigration Appeals that in order to reopen a deportation proceeding, an alien must allege ineffective assistance of counsel on the part of his or her former attorney. \textit{Lozada}, 857 F.2d 10 at 13. What the \textit{Lozada} holding means for the practitioner is that a client, ordered deported through no fault of the attorney, can only reopen the deportation proceedings by claiming his or her former attorney’s conduct fell below the standard of care. Indeed, the author has first hand knowledge in representing a significant number of attorneys in disciplinary matters and malpractice actions who have been sued by their former clients on actions premised on the holding in \textit{Lozada}. In such a situation where a plaintiff is often prodded by successor counsel to file an action in order to have prior deportation proceedings reopened, it is imperative that the burden be placed on the plaintiff to prove via the “case-within-a-case” approach that he or she has suffered actual damages. In this instance, the “case-within-a-case” approach provides a bulwark against a possibly speculative lawsuit.


\textsuperscript{232} See Coggins, supra note 17, at 234.

\textsuperscript{233} See Lupo, supra note 29, at 701-02.

\textsuperscript{234} See Jensen, supra note 12, at 678-80 (discussing “substantial possibility of recovery” standard (a twist on the “loss of chance” theory as replacement for what referred to as “trial within a trial” approach); Leubsdorf, supra note 183, at 149-50 (addressing applicability of “loss of chance” theory to legal malpractice case).

\textsuperscript{235} See Lupo, supra note 29, at 701-02; White, supra note 103, at 607-09.
malpractice context) have been offered as replacements for the standard approaches to causation and damages. Accordingly, when all is said and done, no viable alternative for the “case-within-a-case” approach has yet been offered. As such, it is apparent that this approach will (and must) continue to be the preferred method by which a plaintiffs demonstrate that they suffered actual damages at the hands of their former attorneys.

E. The Plaintiff’s Burdens in a Transactional Legal Malpractice Case

At the end of the day, when all of the various alternate tests for causation and damages have been cast aside, what burden should remain on the plaintiff in a transactional legal malpractice case? First, the plaintiff should have to prove that a duty was owed and that the defendant breached that duty; on that the majority of scholars and courts agree. With regard to causation (specifically cause-in-fact) and damages, courts and practitioners should be equally resolute in stating that a transactional legal malpractice case is similar to other tort based causes of action. As such, a plaintiff in a transactional legal malpractice cause of action should have to prove that the defendant’s actions were the necessary cause of the plaintiff’s injuries and that actual damages resulted therefrom. To demonstrate actual damages, it is not enough to allege that an attorney acted wrongfully, for there are many instances where an attorney’s conduct arguably falls below the applicable legal standard of care but does not result in damages. Moreover, there are instances when a defendant-attorney’s conduct may even be violative of an applicable ethical rule, but this too may not necessarily result in damages. Rather, a plaintiff must have the burden of proving by a preponderance of the evidence that a meritorious underlying “position” existed and was negatively impacted by the defendant-attorney’s purportedly negligent conduct.

In the transactional setting, a plaintiff should therefore have to demonstrate that an underlying position (be it a set of proffered business terms or otherwise) was compromised or negatively impacted due to the purported negligence of the defendant-attorney. While I (and many others) use the term “case-within-a-case” in the context of legal malpractice matters generally, the plaintiff in a transactional legal malpractice case will generally not be complaining of negligence in some underlying litigation. The use of the term “case-within-a-case” should not distract from the valid argument, however, that the plaintiff in the transactional legal malpractice matter should still have the same burden as the plaintiff in the litigation legal malpractice matter to demonstrate that a meritorious underlying position was compromised by the negligence of the defendant-attorney. This means that the plaintiff must show that he or she would have been ultimately better off in the underlying transaction in a world

237. See supra note 231 and accompanying text.
where the defendant-attorney’s purported negligence had never occurred. Yes, this means that the plaintiff will have to demonstrate that the non-party in the underlying deal or transaction would have given the plaintiff a better deal or a better set of terms, for example. This should not come as a surprise since it is this loss of position, if you will, that constitutes the plaintiff’s actual damages. If this better position would not have been obtained regardless of negligence on the part of the defendant, the plaintiff has suffered no actual damages, though the defendant-attorney may arguably have been negligent.

In applying this approach to Scenario A, for example, E would have to demonstrate that B was the necessary cause of E’s injuries and that C would have agreed to E’s essential terms even without B’s agreed to production threshold contingency requirements. If C would not have agreed to E’s essential terms regardless of the production threshold contingency requirements, then E has suffered no actual damages as a result of the purported negligence of B. Obviously, if C would have agreed to E’s terms regardless of the production thresholds, then B is responsible for E’s actual damages, namely his loss of employment and interest in his corporation and product.

While the approach in Scenario A might certainly be viewed with disdain by a number of scholars and courts, in practice it leads to consistency while admittedly posing at least a minimal hurdle for many putative plaintiffs. Rather than being a negative, however, perhaps a hurdle of some measure is a good thing. After all, why should a plaintiff in a transactional legal malpractice situation as in Scenario A not have to prove that he or she lost a meritorious position or claim as a result of the alleged negligence of the defendant-attorney? Indeed, if this burden were not imposed, almost any client in any representation could theoretically argue that he or she could have achieved a better result absent some alleged negligence on the part of the defendant-attorney. In sum, the traditional burdens placed on plaintiffs in legal malpractice cases should not be modified simply because the underlying matter involved a business transaction rather than litigation.

CONCLUSION

For the practitioner, the debate regarding causation and damages in legal malpractice matters generally, and transactional legal malpractice matters specifically, can be somewhat distracting. Rather than focus on a litany of unproven alternatives, concern should be placed on the most consistent method to determine the actual cause of the plaintiff’s purported injury in the transactional legal malpractice context. Clearly the “but-for” test takes away

238. Though the matters can appear distracting, they should be of the utmost importance to the practitioner because legal malpractice cases are on the upswing and are considered a “growth industry” among those underwriting errors and omissions insurance policies for attorneys in the United States. See Boyd S. Lemon, Lawyer vs. Lawyer, 22 LOS ANGELES LAW. 39, 40 n.1 (1999).
all of the possible causes of an injury to illuminate the necessary cause. In contrast, the proposed alternatives offer little more to the practitioner than speculation and inconsistency. Indeed, the “substantial factor” test fails as a replacement for the “but-for” test for the very reason that the term by which it is referenced is both too precise and too vague. After all, while “substantial” denotes a significant antecedent or cause, almost anything could theoretically be a “substantial” cause of an injury when that antecedent or cause is measured against a non-existent yardstick. Moreover, the fact that the imaginary yardstick for substantiality is susceptible to manipulation by interested members of judiciary calls into question the reasons for employing the test on a wide spread basis.

Likewise, the “loss of chance” or “loss of opportunity” and burden shifting arguments are ill-advised replacements for the “but-for” test and the “case-within-a-case” approach because of their selective implementation and the vagaries concerning what measure of a lost opportunity in an underlying matter would give rise to a claim for malpractice. This is not to say that these proposed alternatives do not have a modicum of merit, for they do. Certainly, in those multiple sufficient cause legal malpractice cases, where the “but-for” test would work an injustice on the plaintiff, the “substantial factor” test should be utilized. Furthermore, in instances where an attorney’s negligence has made it impossible for a plaintiff to prove a prima facie case of legal malpractice, the burden of proof with regard to causation and damages may be shifted to the defendant-attorney.239 As these situations are the exception rather than the norm, the “but-for” test and the “case-within-a-case” approach will (and should) continue to be utilized in the overwhelming majority of legal malpractice cases.