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I. UNSTACKING THE DECK AGAINST LAWYERS

The legal malpractice suit is in vogue. Some scholars trace the origin

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of the onslaught to the Watergate era, observing that society subjects lawyers to a heightened degree of scrutiny since that dark chapter in our nation's history.[4] These same scholars further observe that "it may have been inevitable that the explosion of medical malpractice cases in recent decades would ultimately lead to a similar explosion in legal malpractice actions."[5] Others attribute the increase to a disappearance of the traditional congeniality of the bar and the disappearance of traditional sources of litigation awards.[6] Regarding this latter explanation, scholars point to the adverse financial impact of tort reform upon the plaintiff's verdict, and state that:

> One malpractice carrier further noted that in jurisdictions with no-fault auto insurance, legal work decreases and more malpractice claims are filed because lawyers begin suing each other in order to fill the void left in their practices. . . . The impact of these changes on legal malpractice claims is not difficult to foresee. Past and ongoing tort-reform efforts have made plaintiffs' recoveries under various theories more difficult. Consequently, plaintiffs' attorneys may seek out other targets, such as attorneys, for lawsuits.[7]

Whatever the cause, it is clear that the general public no longer deems the advice and performance of professionals as beyond reproach.[8] While this is probably a positive development, it appears that a number of clients (and patients) are raising the bar too high by unreasonably expecting and demanding the perfect result.[9] A disturbingly significant portion of legal malpractice suits are merely thinly veiled claims for an assumed "Breach of Implied Warranty of Perfect Result." These claims, and the accompanying expectation that attorneys implicitly

4. *See* Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1352 (1988) (expressing that litigation against attorneys is now common).

5. *Id.*

6. *See* Gary N. Schumann & Scott B. Herlihy, *The Impending Wave of Legal Malpractice Litigation – Predictions, Analysis, and Proposals for Change*, 30 ST. MARY'S L.J. 143, 176-88 (1998) (acknowledging that the increase in legal malpractice suits stems from the deterioration in relationships among lawyers and the decrease in traditional sources of compensation available to plaintiffs).

7. *Id.* at 180-81.

8. *See generally id.* (advancing that several factors comprise and contribute to the impending wave of legal malpractice suits being filed against attorneys).

9. Denzer v. Rouse, 180 N.W.2d 521, 525 (Wis. 1970) (asserting that plaintiff's may hold their attorney to a standard in relation to the attorney's education and experience, but may not demand perfect results); McCray v. New England Ins. Co., 579 So. 2d 1156, 1158 (La. App. 2d Cir. 1991) (declaring that attorneys are not required to exercise perfect judgment).

warrant a perfect result, represent a shift in expectations that threatens to upset the balance between negligence and strict liability established and proven by decades of experience and tradition.[10]

For nearly two centuries now, English and American case law have recognized a basis on which to predicate attorney liability.[11] One of the earliest decisions establishing a basis for imposing liability against attorneys was the 1838 King's Bench case of *Lanphier v. Phipos*,[12] which stated that "[e]very person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill . . . ."[13] In 1880, the United States Supreme Court in *Savings Bank v. Ward*,[14] set forth the general standard of care required of lawyers in this country.[15] After placing legal malpractice clearly within the field of negligence, the Court further noted:

> Proof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the action; but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is that if he acts with a proper degree of skill, and with reasonable care and to the best of his knowledge, he will not be held responsible.[16]

American courts have uniformly declared that an attorney is neither an insurer nor a guarantor of results in the absence of some express agreement.[17] As a New Jersey appellate court has observed:

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10. *See Denzer*, 180 N.W.2d at 525 (finding that generally attorneys cannot infallibly predict cases and are not strictly liable for their outcomes, rather a malpractice claim needs more than the fact that the lawyer interpreted a legal concept or document differently than another practitioner).

11. John Michael Husband, Note, *Legal Malpractice—Erosion of the Traditional Suit Within a Suit Requirement*, 7 TOL. L. REV. 328, 330-31 (1975).

12. 173 Eng. Rep. 581 (K.B. 1838).

13. Lanphier v. Phipos, 173 Eng. Rep. 581, 581 (K.B. 1838).

14. 100 U.S. 195 (1879).

15. *See* Savings Bank v. Ward, 100 U.S. 195, 196 (1879) (stating that the proper standard to determine attorney liability is a negligence standard).

16. *Id.* at 198.

17. *See* Transamerica Ins. Co. v. Keown, 451 F. Supp. 397, 402 (D. N.J. 1978) (stating that an attorney's opinion is not a guarantee); Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961) (noting that an attorney is not an insurer in the absence of an express agreement); Proto v. Graham, 788 So. 2d 393, 395 (Fla. Dist. Ct. App. 2001) (stating that "[g]ood faith tactical decisions or decisions made on a fairly debatable point of law are generally not actionable under the rule of judgmental immunity"); Martinson Bros. v. Hjellum, 359 N.W.2d 865, 873 (N.D. 1985) (asserting that lawyers do not act as guarantors without an expressed agreement); Weiss v. Van

> A lawyer, without express agreement, is not an insurer. He is not a guarantor of the soundness of his opinions, or the successful outcome of the litigation which he is employed to conduct, or that the instruments he will draft will be held valid by the court of last resort. He is not answerable for an error of judgment in the conduct of a case or for every mistake which may occur in practice. He does, however, undertake in the practice of his profession of the law that he is possessed of that reasonable knowledge and skill ordinarily possessed by other members of his profession.[18]

Although a client may expect perfection from his lawyer, courts do not impose such an exacting standard.[19] A lawyer is "bound to exercise his best judgment in light of his education and experience, but is not held to a standard of perfection or infallibility of judgment."[20] A lawyer is not required to exercise extraordinary skill or ability.[21] Generally, a lawyer is "not liable for an error in judgment if he acts in good faith[,] and his acts are well founded[,] and in the best interests of his client."[22] Further, a lawyer is not expected to be familiar with all of

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Norman, 562 N.W.2d 113, 117 n.4 (S.D. 1997) (quoting DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 10:1, at 160 n.8 (1980) for the proposition that attorneys are not guarantors of results); Denzer v. Rouse, 180 N.W.2d 521, 525 (Wis. 1970) (providing that "an attorney . . . is not held to a standard of perfection"); *see also* David J. Beck, *Legal Malpractice in Texas: Second Edition*, 50 BAYLOR L. REV. 605, 614, 631 (1998) (commenting that attorneys are not held to a strict liability standard nor are they recognized as insurers of a result).

18. Lemoine Ave. Corp. v. Finco, Inc., 640 A.2d 346, 351 (N.J. Super. Ct. App. Div. 1994) (quoting McCullough v. Sullivan, 132 A. 102, 103 (N.J. 1926)).

19. McCray v. New England Ins. Co., 579 So. 2d 1156, 1158 (La. Ct. App. 1991).

20. Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118, 128 (Wis. 1985); *see also* McCray v. New England Ins. Co., 579 So. 2d 1156, 1158 (La. Ct. App. 1991) (commenting that an attorney does not have to exercise perfect judgment); Cook v. Continental Cas. Co., 509 N.W.2d 100, 103 (Wis. Ct. App. 1993) (agreeing that a lawyer cannot be held to a standard of perfection).

21. *See* Spangler v. Sellers, 5 F. 882, 887 (C.C.S.D. Ohio 1881) (noting that no requirement of perfect legal knowledge exists); Malloy v. Sullivan, 415 So. 2d 1059, 1060 (Ala. 1982) (stating that a lawyer only needs to exercise reasonable care and skill); Great American Indem. Co. v. Dabney, 128 S.W.2d 496, 501 (Tex. Civ. App.—Amarillo 1939, writ dism'd) (restating that an attorney is not "an insurer of the results of his work").

22. Medrano v. Miller, 608 S.W.2d 781, 782 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); *accord Helmbrecht*, 362 N.W.2d at 130-31 (asserting that an attorney is not liable "for an error in judgment if he acts in good faith and his acts are well-founded and in the best interest of his client"); *see also* Leighton v. New York, Susquehanna & W. R.R. Co., 303 F. Supp. 599, 618-19 (S.D.N.Y. 1969), *aff'd*, 455 F.2d 389 (2nd Cir. 1972) (commenting that attorneys are "not liable for mere errors of judgment"); Mazer v. Security Ins. Group, 368 F. Supp. 418, 422 (E.D. Pa. 1973), *aff'd*, 507 F.2d 1338 (3rd Cir. 1975) (noting that the attorney's failure to join third-party defendants was based on the best interest of the client); Lucas v. Hamm,

the law on a particular subject.[23] The standard of care of an attorney does not require that he be infallible. Thus, simply because an attorney makes a mistake this does not equate to negligence as a matter of law.[24] Further, "an attorney will not be liable for undesirable effects of a decision that was reasonable at the time it was made."[25]

"In general, the lawyer [merely] undertakes a responsibility and obligation to render fair and reasonable professional services on a par with other attorneys acting under similar circumstances."[26] As the Washington Supreme Court has observed:

> An attorney at law, when he enters into the employ of another person as such, undertakes that he possesses a reasonable amount of skill and knowledge as an attorney, and that he will exercise a reasonable amount of skill in the course of his employment, but he is not [the] guarantor of results and is not liable for the loss of a case unless such loss occurred by reason of his failure to possess a reasonable amount of skill or knowledge, or by reason of his negligence or failure to exercise a reasonable amount of skill and knowledge as an attorney.[27]

Similarly, the standard in Texas is as follows:

> If an attorney makes a decision which a reasonably prudent attorney *could* make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. Attorneys cannot be held strictly liable for all of their clients' unfulfilled expectations. An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect.[28]

An Illinois court has stated:

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364 P.2d 685, 689 (Cal. 1961) (asserting that an attorney "is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers"); Bronstein v. Kalcheim & Kalcheim, Ltd., 414 N.E.2d 96, 98 (Ill. App. Ct. 1980) (affirming that an attorney "is not liable for mere error in judgment"); *Denzer*, 180 N.W.2d at 525 (emphasizing that a successful claim "of legal malpractice needs more than the fact, standing alone, that a trial or appellate court interpreted a document differently").

23. Metzger v. Silverman, 133 Cal. Rptr. 355, 361-62 (Cal. App. Dep't Super. Ct. 1976); Byrnes v. Palmer, 45 N.Y.S. 479, 481 (N.Y. App. Div. 1897).

24. Myers v. Beem, 712 P.2d 1092, 1094 (Colo. Ct. App. 1985).

25. Simpson v. James, 903 F.2d 372, 377 (5th Cir. 1990).

26. DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 2:1, at 14 (1980).

27. Ward v. Arnold, 328 P.2d 164, 167 (Wash. 1958).

28. Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989).

> An attorney is liable for malpractice only when he fails to exercise a reasonable degree of skill, not when he makes an error in judgment; his conduct is to be viewed in the context of events at the time of the alleged malpractice, not in the light of subsequent developments.[29]

Moreover, a lawyer is *presumed* to have competently represented his clients.[30] The attorney-client relationship itself raises "a presumption that an attorney acted in good faith in handling his [or her] client's affairs."[31] As an Illinois court has stated:

> [I]n an action for negligence brought by the client against his attorney that there is no presumption that an attorney has been guilty of a want of care, arising merely from his failure to be successful in the undertaking. On the contrary, he is always entitled to the benefit of the rule that everyone is presumed to have discharged his duty, whether legal or moral, until the contrary is made to appear.[32]

Despite these legal principles, the growing public demand for perfect results stacks the deck against lawyers in the legal malpractice trial. Legal malpractice litigation is truly unique. As respected commentators Ronald Mallen and Jeffrey Smith have observed, "The litigation of a legal malpractice action frequently thrusts the parties, the judge and the jury into a virtual fantasy world of hypothetical questions of fact and law with assumed plaintiffs and defendants, facing theoretical claims of liability and using evidence that is not quite what it seems."[33] They further observe that "[l]egal malpractice litigation is a land of second chances. Would-be lawsuits, which were never filed or litigated, are recreated and tried. Significant legal issues are decided solely as abstract propositions for parties more concerned with the result than

29. O'Brien v. Noble, 435 N.E.2d 554, 557 (Ill. App. Ct. 1982).

30. *See* Bronstein v. Kalcheim & Kalcheim, Ltd., 414 N.E.2d 96, 98 (Ill. App. Ct. 1980) (advancing that the presumption is that an attorney discharges his duty of competent representation to his clients and that the client must prove any violation of the duty).

31. DiPaolo v. DeVictor, 555 N.E.2d 969, 975 (Ohio Ct. App. 1988); *see also Bronstein*, 414 N.E.2d at 98 (declaring that an "attorney is presumed to have discharged [his] duty and the burden is on plaintiff to allege and prove every fact essential to establish [the attorney's] duty and a violation of it").

32. Spivack, Shulman & Goldman v. Foremost Liquor Store, Inc., 465 N.E.2d 500, 504-05 (Ill. App. Ct. 1984).

33. 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.1, at 2 (5th ed. 2000); *see also* Noreen L. Slank, *Suit Within a Suit: A Doctrine Michigan Courts Hate to Love*, 72 MICH. B.J. 1174, 1174 (1993) (claiming that "attorney malpractice litigation struggles to provide a firm foot-hold in the land of 'might have been'").

with the reasons."[34] Under routine practice, this unique setting can blur the line between the attorney's legal duty and the hypothetical results. In the face of shifting public expectations, routine procedures fail to adequately sharpen this line and to bring the distinction between duty and results into focus, with the end game often holding the attorney to a higher standard of conduct than the law requires.

The very nature of a legal malpractice trial is sufficiently unique to warrant special procedural attention. A procedural mechanism should account for and acknowledge the fact that a lawyer is presumed to have competently represented his client and is neither an insurer nor a guarantor of results.[35] This procedural mechanism should also function as a safeguard against clients suing over their mere unfulfilled expectations and against those seeking a new target because the perfect result eluded them in the underlying case.[36] Reverse bifurcation of the legal malpractice trial, such that the plaintiff-client must first prove the validity of his claim or defense in the underlying case, is just such a procedural mechanism.[37] This Article briefly addresses the fundamentals of the legal malpractice cause of action, while paying particular attention to the unique role played by the "suit within a suit" doctrine.[38] Next, this Article considers bifurcation principles in general, and their historical application in legal malpractice trials. Finally, this Article proposes a reverse bifurcation procedure as a means of leveling the legal malpractice playing field.

II. FUNDAMENTALS OF THE LEGAL MALPRACTICE CAUSE OF ACTION

The elements of a legal malpractice action are fairly uniform

34. 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.1, at 3 (5th ed. 2000).

35. *See* Lemoine Ave. Corp. v. Finco, Inc., 640 A.2d 346, 351 (N.J. Super. Ct. App. Div. 1994) (stating that unless an attorney expressly agrees, he will not be an insurer nor guarantor of the possible results of trial).

36. *See* Denzer v. Rouse, 180 N.W.2d 521, 525 (Wis. 1970) (providing that an attorney is not required to provide perfection but rather to exercise sound judgment considering his education and experience).

37. *See* Bronstein v. Kalcheim & Kalcheim, Ltd., 414 N.E.2d 96, 98 (Ill. App. Ct. 1980) (claiming that the plaintiff must first allege and prove facts necessary to give rise to a duty and a breach of that duty).

38. *See* Law Offices of Lawrence J. Stockler, P.C. v. Rose, 436 N.W.2d 70, 77 (Mich. Ct. App. 1989) (stating that the "suit within a suit" doctrine requires a client to utilize factual evidence, not speculation to establish a causal link between his damages and his attorney's services).

throughout the United States. In most states, in order to prevail, the plaintiff in a legal malpractice action must generally prove: (1) "[a]n attorney-client relationship giving rise to a duty; (2) the attorney, either by an act or a failure to act, violated or breached that duty; (3) the attorney's breach of duty proximately caused injury to the client; and (4) the client sustained actual injury, loss or damage."[39]

Courts have recognized that the proximate cause element in a legal malpractice action is not to be taken lightly. A New Jersey court expounded upon the significance of the proximate cause element of a legal malpractice action as follows:

> The general rule in this State is that an attorney is only responsible for a client's loss if that loss is proximately caused by the attorney's legal

39. Weiss v. Van Norman, 562 N.W.2d 113, 116 (S.D. 1997); *see also* Streber v. Hunter, 221 F.3d 701, 722 (5th Cir. 2000) (stating that in Texas there are four elements that a plaintiff must prove); DiPalma v. Seldman, 33 Cal Rptr.2d 219, 222 (Cal. Ct. App. 1994) (indicating that to establish a tort claim for professional negligence, four elements must be met); Proto v. Graham, 788 So. 2d 393, 395 (Fla. Dist. Ct. App. 2001) (reiterating that three elements must be proven to establish a claim of legal malpractice under Florida law); Lenahan v. Russell L. Forkey, P.A., 702 So. 2d 610, 611 (Fla. Dist. Ct. App. 1997) (advancing that a plaintiff must prove three elements: employment, neglect, and proximate cause); Glass v. Pitler, 657 N.E.2d 1075, 1078 (Ill. App. Ct. 1995) (providing the necessary elements for a successful legal malpractice claim); Charles Reinhart Co. v. Winiemko, 513 N.W.2d 773, 775 (Mich. 1994) (stating that the Michigan Supreme Court unanimously delineated the test for legal malpractice into four elements); Basic Food Industries, Inc. v. Grant, 310 N.W.2d 26, 28 (Mich. Ct. App. 1981) (acknowledging that a plaintiff must prove four factors in order to prevail in a negligence claim or in a case of breach of implied contract); Fiedler v. Adams, 466 N.W.2d 39, 42 (Minn. Ct. App. 1991) (noting that in order to show a prima facie case the client must show a relationship, a causal link of detrimental reliance, and a chain of proximate cause); Terrain Enterprises, Inc. v. Mockbee, 654 So. 2d 1122, 1132 (Miss. 1995) (listing the necessary elements for a successful malpractice claim); Mills v. Mather, 890 P.2d 1277, 1281 (Mont. 1995) (claiming that in a legal malpractice case there must be a duty, breach of duty, and that such breach was a proximate cause of the client's damages); Wood v. McGrath, North, Mullin & Kratz, P.C., 581 N.W.2d 107, 116 (Neb. Ct. App. 1998) (claiming that the plaintiff must show: employment, neglect, and proximate cause); Fitzgerald v. Linnus, 765 A.2d 251, 256-57 (N.J. Super. Ct. App. Div. 2001) (restating that the three elements for legal malpractice are: duty, breach, and proximate cause); Greenwich v. Markhoff, 650 N.Y.S.2d 704, 706 (N.Y. App. Div. 1996) (noting that three elements must be satisfied to sustain a legal malpractice claim); Vahila v. Hall, 674 N.E.2d 1164, 1169 (Ohio 1997) (establishing that in order for a plaintiff to assert a legal malpractice claim, he or she must fulfill certain requirements); Landis v. Hunt, 610 N.E.2d 554, 558 (Ohio Ct. App. 1992) (noting that four elements constitute a case of legal malpractice and that all four elements must be established); Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) (asserting that "[a]n action for negligence is based on four elements"); Ahmann-Yamane, LLC v. Tabler, 19 P.3d 436, 439 (Wash. Ct. App. 2001) (expressing that a legal malpractice claim amounts to a negligence action that must satisfy four requirements to prevail); Moore v. Lubnau, 855 P.2d 1245, 1248 (Wyo. 1993) (asserting that the proper test to apply in legal malpractice claims is the same test applied in medical malpractice claims).

> malpractice. The test of proximate cause is satisfied where the negligent conduct is a substantial contributing factor in causing the loss. The burden is on the client to show what injuries were suffered as a proximate consequence of the attorney's breach of duty. That burden must be sustained by a preponderance of the competent, credible evidence and is not satisfied by mere "conjecture, surmise or suspicion."[40]

The Wisconsin Supreme Court has noted that even where there exists a direct chain of causation between an attorney's negligence and a client's injury, recovery may be denied if the injury is too remote from the negligent act, out of proportion to culpability, and too extraordinary that the negligence would have brought about the harm suffered.[41] The Maine Supreme Court has acknowledged that "mere negligence on the part of an attorney is not necessarily sufficient to impose liability," as certain negligence can amount to "malpractice in a vacuum" where no damages could possibly result from the negligent conduct.[42]

Legal commentators Mallen and Smith believe that the litigation of a legal malpractice action usually involves five separate but related issues:

> First, was the attorney's act or omission legally erroneous? Second, if there was an error, was the error a consequence of an informed judgmental decision on an unsettled, debatable or tactical issue? Third, if not, did the attorney's conduct comport with the standard of care? Fourth, did the conduct cause injury? Fifth, if so, what are the nature and measure of the damages?[43]

These issues, as they state, are usually handled "by having a trial-within-a-trial, the goal of which is to decide what the result of the underlying proceeding or matter should have been, an objective standard."[44] Thus, a showing of proximate cause in at least certain types of legal malpractice actions requires proof that the plaintiff-client

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40. Lemoine Ave. Corp. v. Finco, Inc., 640 A.2d 346, 351-52 (N.J. Super. Ct. App. Div. 1994).

41. Schlomer v. Perina, 473 N.W.2d 6, 8-9 (Wis. Ct. App. 1991), *aff'd*, 485 N.W.2d 399 (Wis. 1992).

42. *See* Schneider v. Richardson, 411 A.2d 656, 658 (Me. 1979) (discussing that proof of proximate causation is needed to sustain a negligence action).

43. 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.1, at 3 (5th ed. 2000).

44. *Id.* at 3-4.

would have prevailed in the underlying action.[45]

III. THE "SUIT WITHIN A SUIT" DOCTRINE

The "suit within a suit" doctrine is a procedural tool for addressing the causation element of a plaintiff's legal malpractice claim. With respect to attorney malpractice, "the causal requirement is worded in the negative."[46] "[I]t is often said that the plaintiff can recover against the defendant-attorney only when it can be shown that the injury would not have occurred 'but for' the negligence of the lawyer."[47] So in addition

45. *See, e.g.*, Godbout v. Norton, 262 N.W.2d 374, 376 (Minn. 1977) (denying plaintiff's claim of legal malpractice for failing to establish proof of negligence); Haberer v. Rice, 511 N.W.2d 279, 285 (S.D. 1994) (noting that a "plaintiff in a legal malpractice case has not only to prove the four elements basic to negligence cases" but may need to prove additional factors).

46. *Haberer*, 511 N.W.2d at 284 (quoting DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 3:1, at 40 (1980)).

47. *Id.*; *see also* Vanderford v. Penix, 39 F.3d 209, 211 (8th Cir. 1994) (holding that the lessee's case also failed to provide evidence on the relevant standard for legal malpractice); Carmel v. Clapp & Eisenberg, *P.C.*, 960 F.2d 698, 703 (7th Cir. 1992) (stating that "if the harm would have resulted irrespective of such negligence, then the negligence is not a substantial factor or cause-in-fact"); Best v. Rome, 858 F. Supp. 271, 277 (D. Mass. 1994) (concluding that a client may only prevail if he "establishes that the attorney's negligence 'made a difference to the client'"); Hanlin v. Mitchelson, 623 F. Supp. 452, 456 (S.D.N.Y. 1985) (explaining that in order to prevail in a malpractice action the plaintiff must prove that but for the alleged acts he would have recovered); Skinner v. Stone, Rashn & Israel, 559 F. Supp. 808, 809 (S.D.N.Y. 1983), *rev'd* 724 F.2d 264 (2d Cir. N.Y. 1983) (reiterating that the plaintiff needs to show that but for the negligent actions of the attorney, the claim would have been successful); Johnson v. Home, 500 So. 2d 1024, 1026 (Ala. 1986) (establishing that "the plaintiff must show that, but for the defendant's negligence, he would have recovered on the underlying cause of action"); Glass v. Pitler, 657 N.E.2d 1075, 1079 (Ill. App. Ct. 1995) (clarifying the "but for" standard in malpractice claims); Nika v. Danz, 556 N.E.2d 873, 882 (Ill. App. Ct. 1990) (outlining the necessary elements a plaintiff must show to succeed in a malpractice action); Sladek v. K-Mart Corp., 493 N.W.2d 838, 840 (Iowa 1992) (indicating that in a malpractice claim the measure of damages "is limited to those obtainable in the underlying suit"); St. Pierre v. Washofsky, 391 So. 2d 78, 79 (La. Ct. App. 1980), *cert. denied* 396 So. 2d 1328 (La. 1981) (discussing that "in a malpractice action the client must prove by a preponderance of the evidence"); Williams v. Preman, 911 S.W.2d 288, 295 (Mo. Ct. App. 1995), *overruled by* Klemme v. Best, 941 S.W.2d 493 (Mo. 1997) (requiring "that plaintiff plead and prove that but for the attorney's negligence, the results of the underlying proceeding would have been different"); Rodgers v. Czamanaske, 862 S.W.2d 453, 458 (Mo. Ct. App. 1993) (recognizing that a plaintiff must prove that but for the lawyer's negligence, the result for the claim would have been different); McVaney v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, 466 N.W.2d 499, 507 (Neb. 1991) (identifying that the burden of proof is on the plaintiff in a malpractice action); Montgomery v. Everett, 600 N.E.2d 256, 258 (Ohio Ct. App. 1991) (stressing that the plaintiff must demonstrate that without the attorney's negligent conduct she would have won at trial); Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied) (noting that in Texas a malpractice action based on negligence requires proof of the elements); Harline v. Barker, 912 P.2d 433, 439-40 (Utah 1996) (finding "that when a client cannot prove that he would succeed in the underlying action, the suit within the suit, the client cannot prevail in a legal malpractice

to proving negligence, in certain types of legal malpractice actions, a client must show that *but for* his attorney's negligence he would have been successful in the original litigation.[48] "'Accordingly, the client seeking recovery from his attorney is faced with the task of proving two cases within a single proceeding.'"[49] Any lesser burden "would permit a jury to find a defendant liable on the basis of speculation and conjecture."[50]

Stated another way, "[t]raditionally a plaintiff who brings a professional malpractice action against an attorney must prove 'that he probably would have obtained a better result had the attorney exercised adequate skill and care.'"[51] "Most commonly, this requirement oblig[ates] the plaintiff to present evidence of his likelihood of success in the underlying action in order to show that 'but for the attorney's failure, the client probably would have been successful in the prosecution of the litigation giving rise to the malpractice claim.'"[52]

"The term 'but for' is in effect substituted for 'proximate cause' when the case involves legal malpractice. Stated as simply as possible, this standard, by its very definition, would bar recovery by the plaintiff-client unless the attorney's negligent conduct caused the alleged injury

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claim"); Glamann v. St. Paul Fire & Marine Ins., 424 N.W.2d 924, 926 (Wis. 1988) (stating that in order to establish causation the plaintiff must establish that "but for the negligence of the attorney, the client would have been successful"). *See generally* Kenneth G. Lupo, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 691-92 (1977) (discussing the different categories of malpractice claims); John W. Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 769 (1959) (clarifying the causal relationship the client must show to recover in a malpractice suit).

48. *Haberer*, 511 N.W.2d at 284.

49. Basic Food Indus. v. Grant, 310 N.W.2d 26, 29 (Mich. App. 1981) (citing Annotation, *Attorney's Liability for Negligence in Preparing or Conducting Litigation*, 45 A.L.R.2d 5 (1956)).

50. *See* Charles Reinhart Co. v. Winiemko, 513 N.W.2d 773, 776 (Mich. 1994) (holding that the question of whether the underlying suit would have prevailed was reserved to the court and not the jury since it involved issues of law); Stockler v. Rose, 436 N.W.2d 70, 77 (Mich. 1989) (determining that one objective of the "suit within a suit" doctrine is to require clients to "prove damages based on factual evidence, rather than mere speculation").

51. Wehringer v. Powers & Hall, P.C., 874 F. Supp. 425, 427 (D. Mass. 1995) (summarizing the requirements that must be in a legal malpractice action by the plaintiff).

52. *Id.* (citing Colucci v. Rosen, Goldberg, Slavet, Levensor & Wekstein, P.C., 515 N.E.2d 891, 895 (Mass. App. Ct. 1987)); *see also* Webb v. Pomeroy, 655 P.2d 465, 467-68 (Kan. Ct. App. 1982) (determining that plaintiff failed to prove the underlying suit, which would have resulted differently in the legal malpractice claim); John C. Nemeth, *Legal Malpractice in Ohio*, 40 CLEV. ST. L. REV. 143, 164-65 (1992) (reasoning that "[u]nder Ohio law, the issue of proximate cause in a legal malpractice action is not satisfied if the plaintiff cannot show that he would have successfully prosecuted or defended the underlying suit absent the alleged malpractice").

or harm."[53] Therefore, in order to prevail in a suit for legal malpractice, the "plaintiff must show that but for the negligence of [the] defendant, [the] plaintiff would have suffered no 'loss.' In order to meet this burden, [the] plaintiff must prove . . .: (1) that the original claim was valid; (2) it would have resulted in a judgment in [the] plaintiff's favor; and (3) the judgment would have been collectible."[54]

> The manner in which the plaintiff can establish what should have transpired in the underlying action is to recreate, i.e., litigate, an action which was never tried. This procedure of recreating the underlying action is known as a suit within a suit, a trial within a trial, an action within an action, [or] a case within a case, to name but a few of the designations.[55]

The trial within a trial method of resolving malpractice litigation is based on the simple premise that the best way to determine a client's loss from the lawyer's misconduct is to litigate the underlying claim against the original defendant as part of the malpractice action against the attorney.[56]

> One suit [in this framework] is against the attorney who represented the [client] in the underlying action. The other suit is theoretically against the original [opponent to the client,] since the success of that action is required in order to establish the attorney's error [resulted in] harm. The plaintiff in the legal malpractice suit must show that he would have won the underlying suit (the case within a case) before he can succeed against the attorney.[57]

As the Supreme Judicial Court of Maine has further explained:

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53. DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 3:3, at 42 (1980) (examining legal malpractice and necessary elements to establish a claim).

54. Summer v. Allran, 394 S.E.2d 689, 690 (N.C. Ct. App. 1990).

55. Haberer v. Rice, 511 N.W.2d 279, 285 (S.D. 1994); *see, e.g.*, McClung v. Smith, 870 F. Supp. 1384, 1391 (E.D. Va. 1994) (stating that "the trier of fact in [a] malpractice action must consider the merits of the underlying action, and consequently the plaintiff must prove a 'case-within-the case'"); Bye v. Mack, 519 N.W.2d 302, 305 (N.D. 1994) (stressing that in legal malpractice case in which "the underlying action was concluded by summary judgments that were not appealed because of . . . attorney's alleged negligence in failing to perfect the appeals, 'the plaintiff will be required to recreate, i.e.[,] litigate, an action which was never tried'").

56. John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1130 (1988).

57. DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 3:5, at 44-45 (1980).

> Assuming negligent representation, a plaintiff must prove nevertheless that he could have been successful in the initial suit "absent the attorney's negligent omission to act." This requirement is merely the assertion of the established principle that proof of proximate causation is necessary to the maintenance of a negligence action. Thus, mere negligence on the part of an attorney is not sufficient to impose liability if, for example, his client's claim[s] [are] meritless or barred by the statute of limitations. Such negligence is considered "malpractice in a vacuum," since no damages could possibly flow therefrom.[58]

The objective in the legal malpractice "suit within a suit" is to "establish what the result [of the underlying litigation] should have been (an objective standard), not what a particular judge or jury would have decided (a subjective standard)."[59] "This is the accepted and traditional means of resolving the issues involved in the underlying proceedings in a legal malpractice action. This procedure amounts to trying two separate and distinct lawsuits."[60] In this manner, the "suit within suit" or "trial within a trial" is the ordinary means of handling the proximate cause issue in a legal malpractice case.[61]

In the "suit within a suit" method, the malpractice client must reconstruct the underlying action. "If the client [was] a plaintiff in the litigation, the burden is to show the existence of a valid claim upon which there was a greater than fifty percent likelihood of prevailing but for the attorney's [negligence]."[62] Similarly, malpractice clients who were defendants in the underlying litigation must affirmatively prove a meritorious defense to the underlying claims, which would have either precluded any recovery or reduced the amount of the judgment but for the attorney's negligence.[63] Generally speaking, as Professor Bauman

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58. Schneider v. Richardson, 411 A.2d 656, 658 (Me. 1979) (citations omitted).

59. Piscitelli v. Friedenberg, 105 Cal. Rptr. 2d 88, 101-02 (Cal. Ct. App. 2001); Nika v. Danz, 556 N.E.2d 873, 882 (Ill. App. Ct. 1990); Harline v. Barker, 912 P.2d 433, 439-40 (Utah 1996); Cook v. Cont'l Cas. Co., 509 N.W.2d 100, 104 (Wis. Ct. App. 1993); *cf.* Hunt v. Tomlinson, 799 F.2d 712, 712 (11th Cir. 1986) (stating that the proper standard of proof is whether the client "would have" prevailed in the underlying action, not whether he "might have" prevailed); Wood v. McGrath, North, Mullin & Kratz, P.C., 581 N.W.2d 107, 118 (Neb. Ct. App. 1998) (acknowledging that "[t]he law states generally that an expert may testify about a reasonable and probable outcome at trial").

60. Haberer v. Rice, 511 N.W.2d 279, 285 (S.D. 1994).

61. *Harline*, 912 P.2d at 439-40.

62. Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1481 (1968).

63. *Harline*, 912 P.2d at 439-40; *see also* Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial—A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40, 66 (1989).

has explained:

> Where the injured client is a plaintiff, the measure of damages is the value of the lost claim. For clients who are defendants, damages are the amount of the judgment (or increase in the judgment) entered against them. On the other hand, if the client cannot show that there would have been a favorable judgment in the properly handled hypothetical case, the negligent attorney will prevail because the malpractice did not cause the loss, which would have occurred anyway.[64]

Courts apply the "suit within a suit" doctrine so that the plaintiff does not recover for legal malpractice in cases in which, even if he had "been competently represented, he would have lost the suit that his lawyer bobbled."[65] As the court explained in *Winskunas v. Birnbaum*,[66] "[f]or then he has not been injured by the bobble, and injury is an essential element of every tort, including the tort of legal malpractice."[67] By employing the suit within a suit approach, the law procedurally incorporates the principle that "a former client may prevail in an action against the attorney only if the client establishes that the attorney's negligence 'made a difference to the client.'"[68]

A. *Legal Malpractice Plaintiff Who Was Defendant in Underlying Suit*

In the context of a legal malpractice plaintiff who was a defendant in the underlying litigation, it is considered necessary by most courts that

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64. John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1129 (1988).

65. Winskunas v. Birnbaum, 23 F.3d 1264, 1267 (7th Cir. 1994) (citing Glamann v. St. Paul Fire & Marine Ins. Co., 424 N.W.2d 924, 926 (Wis. 1988)).

66. 23 F.3d 1264 (7th Cir. 1994).

67. *Winskunas*, 23 F.3d at 1267. Specifically, there is a "requirement that the matter for which the attorney was engaged must have had sufficient merit that any malpractice actually caused damages to the plaintiff." Riordan v. Jones, 793 F. Supp. 650, 651 (D. Md. 1992). "Proof of damages proximately caused by negligence is a fundamental element of a malpractice action." Haberer v. Rice, 511 N.W.2d 279, 287 (S.D. 1994). "This requires that the malpractice plaintiff demonstrate merit in the underlying claim." *Riordan*, 793 F. Supp. at 651; *Haberer*, 511 N.W.2d at 287. Accordingly, damages in a legal malpractice context must be incurred and are not presumed, and the plaintiff must affirmatively plead and prove that he suffered injuries as a result of the attorney's malpractice. Glass v. Pitler, 657 N.E.2d 1075, 1080 (Ill. App. Ct. 1995). "Where . . . damages result from a plaintiff's inability to prosecute or defend in a prior litigation, the plaintiff would be required to prove what his recovery or liability would have been in that prior matter absent the alleged malpractice." *Id.*

68. Best v. Rome, 858 F. Supp. 271, 277 (D. Mass. 1994) (quoting Jernigan v. Giard, Jr., 500 N.E.2d 806, 807 (Mass. 1986)).

the client establish an existing meritorious defense.[69] *Maryland Casualty Co. v. Price*,[70] appears to be the seminal case for this principle.[71] In that case, Maryland Casualty Company sued its attorneys for negligence.[72] In the underlying lawsuit, Gail Lynch had sued the Wylie Permanent Camping Company to recover $15,000 for personal injuries she received while riding on the company's coaches.[73] Under its contract of insurance, Maryland Casualty "was bound to indemnify the camping company against any loss in [the] suit, not exceeding $5,000, and was also bound to defend the suit."[74] For several years the defendant attorneys, in the legal malpractice suit, served as the retained attorneys of Maryland Casualty.[75] In the underlying suit they were instructed to enter an appearance for the camping company and to take steps necessary to prevent a judgment.[76] [T]he defendant [attorneys] advised [Maryland Casualty] that it was not necessary to enter an appearance . . . to avoid a default judgment, but that they would look after the case" for Maryland Casualty.[77] Maryland Casualty attempted to settle the suit for $2,000 and could have done so had a default judgment of $20,000 ($15,000 plus interest and costs) not been taken against the camping company.[78] Maryland Casualty paid the $20,000 judgment, then filed the malpractice suit.[79]

Maryland Casualty claimed that by reason of the defendant attorneys' neglect and failure to enter an appearance, the default judgment was taken, and that the judgment would not have been rendered but for the negligence of the defendants.[80] The defendant attorneys demurred that Maryland Casualty's suit failed to properly allege that it suffered any damages by reason of the defendants' negligence, and that it was

69. *See, e.g.*, Maryland Cas. Co. v. Price, 231 F. 397, 402 (4th Cir. 1916) (stating that even when an attorney, disregarding his duty, fails to appear for trial, resulting in a default judgment "it does not follow that the client has suffered damage, because the judgment may be entirely just"); Tijerina v. Wennermark, 700 S.W.2d 342, 344 (Tex. App.—San Antonio 1985, no writ) (asserting that "[i]n order to support a malpractice recovery against an attorney, it is necessary that the client establish that he had a meritorious defense").

70. 231 F. 397 (4th Cir. 1916).

71. Maryland Cas. Co. v. Price, 231 F. 397, 400 (4th Cir. 1916).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Maryland Cas. Co.*, 231 F. at 400.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

necessary for it, in order to make out a case, to allege that the camping company had a good defense to Mrs. Lynch's action or allege that a lesser sum would have been recovered in that action but for the negligence of the defendants.[81] The court wrote that:

> It will be observed that the defendants are not advised of any facts which would constitute a defense in whole or in part to the suit against the camping company. It is not even stated that there was a defense to the suit, or that the plaintiff intended to defend it on the merits.[82]

The court further wrote as follows:

> We think it clear that the original declaration does not allege sufficient facts to charge the defendants with liability, because it does not show that plaintiff suffered any damage by reason of their negligence. It is not alleged that if the attorneys had appeared and made a proper defense there would have been no judgment against the camping company, or that the judgment would have been for a less [sic] sum. The averment is merely that the default judgment would not have been rendered if defendants had not failed to appear; and the declaration nowhere alleges that the camping company had any defense to the action of Mrs. Lynch, or that she was not justly entitled to recover $15,000 on account of her injuries.[83]

The court stated that:

> the original declaration was properly held to be insufficient because it does not allege that the camping company had a meritorious defense to the Lynch suit, which the defendants negligently failed to interpose, and that she would not have recovered a judgment, or that such judgment would have been for a much less amount, if the defendants had not failed to discharge the duties of their employment.[84]

The court concluded with the following missive about a plaintiff's burden in a legal malpractice suit:

> suits against attorneys for negligence are governed by the same principles as apply in other negligent actions. If an attorney, in disregard of his

81. *Maryland Cas. Co.*, 231 F. at 401.
82. Maryland Cas. Co. v. Price, 231 F. 397, 401 (4th Cir. 1916).
83. *Id.* at 402.
84. *Id.*

> duty, neglects to appear in a suit against his client, with the result that a default judgment is taken, it does not follow that the client has suffered damage, because the judgment may be entirely just, and one that would have been rendered notwithstanding the efforts of the attorney to prevent it. It is said that there is a difference between the case of an attorney who fails to do anything for his client, and one who makes an inexcusable mistake in attempting to comply with instructions; but we do not perceive any basis in principle for such a distinction. In either case the burden is upon the client to prove the damages he has suffered.[85]

This meritorious defense principle has been more recently applied in the Colorado case of *Coon v. Ginsberg*.[86] There the court held that there can be no recovery by a client for an attorney's breach of an employment contract unless the client can show that his defense to an action would have been successful had the attorney actually carried the cause to litigation, rather than negligently not pursuing the defense.[87] The court stated that "[t]he burden of proof is on the plaintiff client to show that he, the client, had a meritorious defense or claim and that his attorney's negligence in failing to prosecute it was a proximate cause of the damages."[88] The court also observed that "[b]y the fundamental rules of damages, . . . a wronged litigant cannot recover substantial damages in the absence of a showing with certainty that actual damages were, in fact, sustained."[89] This latter statement has been construed by a number of commentators as raising the bar on the legal malpractice plaintiff's burden of proof to a standard of certainty. Although the "certainty" standard is clearly a minority one, it nevertheless illustrates the importance of requiring a legal malpractice plaintiff to prove each and every element of a legal malpractice claim with credible evidence.

B. *Loss of Cause of Action*

"Generally, proof of proximate causation in a legal malpractice action is the same as in an ordinary negligence action."[90] Yet, we have seen how a plaintiff-client who was a defendant in the underlying case is required to establish causation by showing that he had a meritorious defense to the underlying claim. Similarly, "where the attorney's

85. *Id.* at 402-03.
86. 509 P.2d 1293, 1295 (Colo. App. 1973).
87. Coon v. Ginsberg, 509 P.2d 1293, 1295 (Colo. App. 1973).
88. *Id.*
89. *Id.* (emphasis added).
90. Fiedler v. Adams, 466 N.W.2d 39, 42 (Minn. Ct. App. 1991).

alleged negligence has caused the loss of or damage to the client's existing cause of action, [i.e., plaintiff-client was a plaintiff or other claimant in the underlying case], the client asserting malpractice must also prove that but for the attorney's negligence, 'he had a meritorious cause of action originally.'"[91] In essence, this causation requirement "*describes* the proximate cause element unique to malpractice cases alleging destruction of the client's cause of action."[92]

For example, in order to recover against an attorney for missing a statute of limitations, a plaintiff-client must establish the recovery which he would have obtained if the plaintiff-client's claims had not become time-barred due to the attorney's acts or omissions.[93] "[T]he measure of damages is ordinarily the amount that the client would have received but for his attorney's negligence. Such damages are generally shown by introducing evidence establishing the viability and worth of the claim that was irredeemably lost. This procedure has been termed a 'suit within a suit.'"[94]

Some courts have been critical of the application of the "case within a case" standard in suits where the client lost an opportunity to assert a claim. In *Jenkins v. St. Paul Fire & Marine Ins. Co.*,[95] the court remarked as follows:

> [A] rule which requires the client to prove the amount of damages by trying the "case within a case" simply imposes too great a standard of certainty of proof. Rather, the more logical approach is to impose on the negligent attorney, at this point in the trial, the burden of going forward with evidence to overcome the client's prima facie case by proving that the client could not have succeeded on the original claim, and the causation and damage questions are then up to the jury to decide. Otherwise, there is an undue burden on an aggrieved client, who can prove negligence and causation of some damages, when he has been relegated to seeking relief by the only remedy available after his attorney's negligence precluded relief by means of the original claim.
>
> Accordingly, when the plaintiff . . . proves that negligence on the part of his former attorney has caused the loss of the opportunity to assert a claim and thus establishes the inference of causation of damages

91. *Id.*

92. *Id.*

93. Frazier v. New Jersey Mfrs. Ins. Co., 667 A.2d 670, 676 (N.J. 1995) (quoting Osborne v. O'Reilly, 631 A.2d 577, 579 (N.J. Super. Ct. Law Div. 1993)).

94. *Id.* (quoting Gautam v. De Luca, 521 A.2d 1343, 1347-48 (N.J. Super. Ct. App. Div. 1987)).

95. 422 So. 2d 1109 (La. 1982).

> resulting from the lost opportunity for recovery, an appellate court . . . must determine whether the negligent attorney met his burden of producing sufficient proof to overcome plaintiff's prima facie case.[96]

As discussed below, the reasoning of the *Jenkins* case is flawed in that it presumes the underlying claim has value, and encourages frivolous underlying lawsuits. However, it also appears that by setting the standard for causation at the amount that the client would have received but for the attorney's negligence, as well as through public policy, the law further limits the types of damages that the legal malpractice plaintiff can recover.[97]

C. *Possible Limited Applicability of "Suit Within a Suit" Doctrine*

Some courts have held that the "suit within a suit" doctrine applies only in a limited number of situations. For example, in *McClarty v. Gudenau*,[98] the court identified situations for applying the doctrine as follows:

(1) When a legal malpractice plaintiff's claim is not that he received a judgment of greater liability than he would have received if the attorney had acted in conformity with the standard of care, but, rather, that he received an adverse judgment in an otherwise successful claim because of the attorney's negligence.

(2) "Where an attorney's negligence prevents the client from bringing a cause of action (such as where he allows the statute of limitations to run)."

(3) "[W]here an attorney's failure to appear causes judgment to be entered against his client."

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96. Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So. 2d 1109, 1110 (La. 1982).

97. *See, e.g.*, Piscitelli v. Friedenberg, 105 Cal. Rptr. 2d 88, 108 (Cal. Ct. App. 2001) (refusing on the grounds of public policy to permit a legal malpractice plaintiff to recover "compensatory" damages from the attorney for lost punitive damages in the underlying suit); Eastman v. Messner, 721 N.E.2d 1154, 1158 (Ill. 1999) (stating that "a plaintiff who obtains recovery in a malpractice suit can be 'in no better position by bringing suit against the attorney than if the underlying action against the third-party tortfeasor had been successfully prosecuted'"); Douglas v. Delp, 987 S.W.2d 879, 885 (Tex. 1999) (noting that the foreseeable result of an attorney's negligence typically extends only to economic loss, and holding that "when a plaintiff's mental anguish is a consequence of economic losses caused by an attorney's negligence, the plaintiff may not recover damages for that mental anguish").

98. 173 B.R. 586 (E.D. Mich. 1994).

(4) "[W]e the attorney's negligence prevents an appeal from being perfected."[99]

The court reasoned:

> Requiring the plaintiff in all cases to show that he would have prevailed completely in the former action as a condition precedent to recovery in a subsequent malpractice action is a harsh requirement that would preclude otherwise meritorious claims. If the attorney's negligence results in a verdict against his client that is larger than what would have been returned in the absence of his negligence, then the attorney should be held liable for the increased amount of the judgment.[100]

Courts limiting the applicability of the "suit within a suit" doctrine generally perceive the doctrine as harsh and inequitable, as discussed in further detail below.

D. *General Criticism of "Suit Within a Suit" Doctrine*

In the Ohio case of *Vahila v. Hall*[101] the court voiced its concern over universal application of the "suit within a suit" doctrine:

> We are aware that the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case. Naturally, a plaintiff in a legal malpractice action may be required, depending on the situation, to provide some evidence of the merits of the underlying claim. However, we cannot endorse a blanket proposition that requires a plaintiff to prove, in every instance, that he or she would have been successful in the underlying matter. Such a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim.[102]

One Michigan commentator has noted Michigan's "considerable ambivalence" to the "suit within a suit" doctrine, and remarked that acceptance of the doctrine has been "grudging."[103] The commentator

99. McClarty v. Gudenau, 173 B.R. 586, 601-02 (E.D. Mich. 1994) (citations omitted); *see also* Streber v. Hunter, 221 F.3d 701, 723-24 n.31 (5th Cir. 2000) (providing that a plaintiff in a malpractice claim must prove that but for the malpractice he would have been successful in the underlying suit).

100. *McClarty*, 173 B.R. at 602 (quoting Basic Food Indus., Inc. v. Grant, 310 N.W.2d 26, 30 (Mich. App. 1981)).

101. 674 N.E.2d 1164, 1169-70 (Ohio 1997).

102. Vahila v. Hall, 674 N.E.2d 1164, 1169-70 (Ohio 1997).

103. Noreen L. Slank, *Suit Within a Suit: A Doctrine Michigan Courts Hate to Love*, 72

states that "the harshest criticism is reserved for the perceived inequity of requiring a plaintiff to prove two lawsuits in order to recover in one."[104] However, the commentator writes that the "suit within a suit" doctrine remains "vital and viable."[105] The *Basic Food Industries, Inc. v. Grant*,[106] decision retained the "suit within a suit" doctrine for use in the great majority of instances where it was needed "to insure that the damages complained of due to the attorney's negligence are more than mere speculation."[107] Indeed, the Michigan commentator has observed that "[d]espite the so-called limited acceptance of the doctrine in Michigan, legal malpractice plaintiffs are still generally required to prove that but for attorney negligence their 'might-have-been' truly 'would-have-been.'"[108] The commentator observed that "[i]t is recognized at every turn that attorney malpractice litigation requires that the ["suit within a suit"] doctrine be applied. Not to do so would turn tort law inside out because plaintiffs must surely be required to prove that the defendant's conduct caused damages."[109]

E. *Merits of the Doctrine*

The criticisms of the "suit within a suit" doctrine are captured by the observations of legal malpractice commentator David J. Meiselman, who has observed:

> This most unusual situation places the judicial system in the strained position of supervising the adjudication of a case in which the banner of the original defendant is now carried by the attorney who represented the plaintiff in that action. The defendant-attorney must, in order to defend himself in the malpractice action, represent the opposite position for which he had been retained. The theoretical liability of persons not even parties to the malpractice action is thereby determined through an obviously awkward process of reconstruction. Adding to the confusion is the complexity of the determination to be made by the jury; the fact-finder must now weigh the merits of two cases rather than one.[110]

MICH. B.J. 1174, 1174 (1993).

104. *Id.*

105. *Id.*

106. 310 N.W.2d 26 (Mich. App. 1981).

107. Basic Food Indus., Inc. v. Grant, 310 N.W.2d 26, 30 (Mich. App. 1981).

108. Noreen L. Slank, *Suit Within a Suit: A Doctrine Michigan Courts Hate to Love*, 72 MICH. B.J. 1174, 1175 (1993).

109. *Id.* at 1176.

110. DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 3:5, at 45 (1980).

Yet the justification for the "suit within a suit" method is easy and apparent. As stated by Professor Bauman, "[i]f we wish to know what a client has lost because of an attorney's negligence, it is relevant to ask what would have happened had the case gone forward without the attorney's breach of duty."[111] The requirements of causation inexorably dictate that a legal malpractice action only has merit if the original claim or defense had merit.[112] Accordingly, "[t]he traditional doctrine of suit within a suit is a thoughtful and well-reasoned application of basic principles of tort law to the specialized litigation which follows on the heels of a failed attorney-client relationship."[113] Moreover, the "suit within a suit" doctrine should be openly acknowledged as the tort system's most powerful predictor of the correct result in a wide variety of malpractice actions.[114]

However, this unique aspect of the legal malpractice trial also opens the door for juror confusion. By itself, the "suit within a suit" doctrine does not protect the attorney from jury passions and prejudices that may arise in reaction to the attorney's breach of the standard of care. Additional procedural mechanisms should be instituted to prevent juries from holding attorneys liable for imperfect, but inevitable, results. Bifurcation–and reverse bifurcation in particular–are such procedural mechanisms.

IV. GENERAL BIFURCATION PRINCIPLES

Federal and state rules of civil procedure provide for the bifurcation of trials. Rule 42(b) of the Federal Rules of Civil Procedure provides as follows:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the

111. John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1130-31 (1988).

112. Lewandowski v. Cont'l Cas. Co., 276 N.W.2d 284, 287 (Wis. 1979).

113. Noreen L. Slank, *Suit Within a Suit: A Doctrine Michigan Courts Hate to Love*, 72 MICH. B.J. 1174, 1177 (1993).

114. *Id.*

Constitution or as given by a statute of the United States.[115]

District courts have authority to bifurcate issues for purposes of trial under the Federal Rules of Civil Procedure.[116] District courts acting within their discretion should consider: the preservation of constitutional rights, clarity, judicial economy, inconsistent results, and confusion.[117] Courts that bifurcate issues will not abuse their discretion when such issues are clearly separable.[118] The trial court may bifurcate a case in order to streamline the judicial process.[119] Despite critics' arguments that bifurcation does not save court time, it is procedurally common, and a judge's decision to do so is reviewed deferentially.[120]

In *Martin v. Bell Helicopter*,[121] the court explained that in determining whether to bifurcate issues in a trial, the court may consider the following:

1. Will separate trials be conducive to expedition of the litigation and economy?

2. Will separate trials be in furtherance of convenience to the parties and avoid prejudice?

3. Are the issues sought to be tried separately significantly different?

4. Are the issues triable by jury or by the court?

5. Has discovery been directed to single trial of all issues or separate trials?

6. Will substantially different witnesses and evidence be required if issues are tried separately?

7. Will a party opposing severance be significantly prejudiced if it is

115. FED. R. CIV. P. 42(b).

116. FED. R. CIV. P. 42(b); *see also* O'Dell v. Hercules Inc., 904 F.2d 1194, 1201-02 (8th Cir. 1990) (outlining procedures for trial court's decision to bifurcate); Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 964 (l0th Cir. 1993) (stating that a trial court's decision to bifurcate will not be reversed unless there was an abuse of discretion).

117. *O'Dell*, 904 F.2d at 1202.

118. *Id.*

119. Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995).

120. *Id.* at 890.

121. 85 F.R.D. 654 (D. Colo. 1980).

granted?

8. Will an unfair advantage be afforded to a party if bifurcation is granted?

9. Will management of trial, delineation of issues, and clarity of factual questions be substantially enhanced by bifurcation?

10. Will bifurcation assist efficient judicial administration of the case?[122]

These ten factors generally favor bifurcation of the underlying case or causation issues in the legal malpractice trial. As discussed more fully below, bifurcation of the causation portion of the legal malpractice trial can expedite the litigation and enhance convenience by disposing of cases at an early stage, before the necessity of full discovery on the issue of the attorney's negligence. Further, the case within the case is usually significantly different from the malpractice case against the attorney, requiring different witnesses and evidence.

The benefits of utilizing the bifurcation procedure in the legal malpractice context are consistent with the fundamental goals of bifurcation procedure in general. Bifurcation promotes judicial convenience and eliminates prejudice.[123] As one scholar has stated, "[a] bifurcated trial can serve as an ejector button that saves precious judicial resources and reduces trial delay. If a single issue has the potential to dispose of a case and to make trial of other issues unnecessary, separate trial of the dispositive issue obviously saves time for all."[124] Accordingly, bifurcation should be an effective procedural tool for unstacking the deck against lawyers in malpractice cases.

V. HISTORICAL APPLICATION OF BIFURCATION IN LEGAL MALPRACTICE TRIALS

Legal malpractice trials are uniquely amenable to bifurcation. As Mallen and Smith have observed:

122. Martin v. Bell Helicopter, 85 F.R.D. 654, 658 (D. Colo. 1980); *accord* Kimberly-Clark Corp. v. James River Corp. of Va., 131 F.R.D. 607, 608-09 (N.D. Ga. 1989) (listing the factors a court should consider).

123. *See* Tom A. Cunningham & Paula K. Hutchinson, *Bifurcated Trials: Creative Uses of the Moriel Decision*, 46 BAYLOR L. REV. 807, 817 (1994) (stating that although bifurcation is not a right it is a device of convenience).

124. J.D. Page & Doug Sigel, *Bifurcated Trials in Texas Practice: The Advantages of Greater Use of Texas Rule of Civil Procedure 174(b)*, 53 TEX. B.J. 318, 318 (1990).

> The trial-within-a-trial procedure enables a court to bifurcate the proceedings to try separately the merits of the underlying matter from the issue of negligence. The standard of care is an issue distinct and separate from the issue of what should have happened in the underlying proceeding. Separate trials can provide a cogent and clear evidentiary process, reducing the risk of confusing a jury. . . .
>
> Bifurcation of the issues, theoretically, can be achieved with separate instructions for the jury concerning the legal malpractice claim, the underlying claim, and a third set covering both cases.[125]

In addition, there is ample precedent for the bifurcation of legal malpractice trials from courts throughout the United States. For example, one frequently cited case in support of the bifurcation of legal malpractice trials is the Illinois case of *Nika v. Danz*.[126] In that case, Nika filed a legal malpractice action against attorney Danz, alleging Danz was negligent when he failed to file a personal injury action against U.S. Printing Ink, the party allegedly responsible for Nika's back injuries.[127] The jury had been given instructions for the underlying case, "labeled '*Nika v. U.S. Printing Ink Company*' (hypothetical), and separate instructions for the legal malpractice action, labeled '*Nika v. Danz*.'"[128] The jury was instructed to consider the underlying case after they had considered the malpractice action and determined Danz liable.[129] The jury ultimately returned a verdict for attorney Danz.[130]

On appeal, Nika argued that the jury instruction presented as a "case within a case," violated an Illinois court rule regarding usage of pattern jury instructions, and produced difficult and confusing instructions.[131] Nika further contended that the instructions directing the jury to first consider Danz's liability to Nika "were erroneous because the underlying case should have been considered first."[132] Attorney Danz contended in response that "the sequence of the jury instructions properly presented the factual dispute between" Nika and himself; that

125. 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.25, at 172-73 (5th ed. 2000).

126. 556 N.E.2d 873 (Ill. App. Ct. 1990).

127. Nika v. Danz, 556 N.E.2d 873, 876 (Ill. App. Ct. 1990).

128. *Id*. at 881.

129. *Id.*

130. *Id.* at 876.

131. *Id.* at 881.

132. *Nika*, 556 N.E.2d at 881.

is, that Danz "had a duty to investigate any possible personal injury action (liability) and because he did not," Nika lost his right to recover against U.S. Ink (damages).[133]

The court noted that in order for a plaintiff to prevail in a legal malpractice claim, he "must prove that *but for* the negligence charged, he would have been successful in the prosecution or defense of a cause of action involving a third party."[134] The court further noted that where, as in the case before it, "an attorney is charged with negligently not filing an action within the statute of limitations, the plaintiff must recreate and litigate the action which was never filed."[135] The court stated that "[t]he accepted procedure for presenting evidence regarding the underlying action in a legal malpractice action is known as a 'suit within a suit' or 'trial within a trial.' [Accordingly,] the objective is to establish what the result *should have been* had the case been filed."[136]

The *Nika* court stated its opinion as follows:

> On the merits, a review of the instructions in the record demonstrates the jury was given three sets of instructions[:] one for "*Nika v. Danz*"; one for "*Nika v. U.S. Printing Ink Company*" (hypothetical); and a third set to be used for both cases. The jury was instructed that only if it determined Danz was negligent was it to consider the net value of the underlying claim. Plaintiff asserts the underlying claim had to be considered first by the jury, before any consideration was given to Danz's alleged negligence in not filing an action against U.S. Ink. We disagree. This case is no different from an ordinary negligence action where the jury is instructed to consider a defendant's liability before considering any damages. In effect, the method of using three sets of instructions in this case separated the liability issue in the legal malpractice case from the damages issue. The instructions given, so far as can be determined, properly stated the legal framework applicable to this negligence case. We find no error.[137]

Similarly, the South Dakota Supreme Court has trumpeted the virtues of bifurcating legal malpractice trials. In *Haberer v. Rice*[138] the Haberers sued attorney Rice for negligent representation in connection with a foreclosure action. The court noted:

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133. *Id.*
134. *Id.* at 882.
135. *Id.*
136. *Id.*
137. *Nika*, 556 N.E.2d at 883-84.
138. 511 N.W.2d 279, 284-85 (S.D. 1994).

> A client's burden of proving injury as a result of his attorney's negligence is especially difficult to meet when the attorney's conduct prevented the client from bringing his original cause of action or the attorney's failure to appear caused judgment to be entered against him as a defendant. In addition to proving negligence a client must show that but for his attorney's negligence he would have been successful in the original litigation.[139]

Accordingly, the court further explained, "the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding."[140] The court further remarked that a trial within a trial is the "accepted and traditional means of resolving the issues involved in the underlying proceedings in a legal malpractice action."[141]

The *Haberer* court observed that "[t]he trial-within-a-trial procedure often makes it desirable to bifurcate . . . the underlying action or actions."[142] The court explained that "[t]he standard of care as an issue is distinct and separate from the issue of what should have happened in the underlying proceeding."[143] Further, the court acknowledged that "[s]eparate trials can provide a cogent and clear evidentiary process, minimizing the risk of confusing a jury."[144] Referring to *Nika v. Danz*, the court also stated that bifurcation of the issues can "be achieved with separate instructions for the jury concerning the underlying claim, the legal malpractice claim, and the total case."[145] The court cited all of these bifurcation policies in the course of stating that a portion of the *Haberer* case constituted a case within a case, namely, the foreclosure action of the bank as plaintiff where it was alleged that the attorney failed to defend and counterclaim.[146]

A Wisconsin appellate court has addressed bifurcation in the context of establishing causation and damages in the case of *Cook v. Continental Casualty Co.*[147] In that case, the plaintiff alleged that the attorney-defendant was negligent for failing to identify certain fact

139. Haberer v. Rice, 511 N.W.2d 279, 284-85 (S.D. 1994).

140. *Id.* at 285 (quoting Basic Food Indus., Inc. v. Grant, 310 N.W.2d 26, 29 (Mich. App. 1981)).

141. *Id.* at 285.

142. *Id.*

143. *Id.*

144. *Haberer*, 511 N.W.2d at 285.

145. *Id.*

146. *Id.*

147. 509 N.W.2d 100, 104-05 (Wis. Ct. App. 1993).

witnesses, and for failing to call them for his case-in-chief in the underlying products liability action. The court stated that "[t]o establish causation and injury in a legal malpractice action, the plaintiff is often compelled to prove the equivalent of two cases in a single proceeding," i.e., the "suit within a suit." This involves establishing that, "but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action."[148] The court explained legal malpractice trial procedure as follows:

> There must first be a determination that the lawyer was negligent, that is, whether he or she violated the duty "to exercise a reasonable degree of professional care, skill and knowledge." If the jury determines that the lawyer fulfilled this standard of care, that ends the case. If, however, the jury determines that the lawyer was negligent, the case moves on to the second phase, the so-called "suit within a suit," to determine whether the client was, in fact, damaged by that negligence. Thus, the ultimate goal of the "suit within a suit" is to "determine what the outcome *should* have been if the issue had been properly presented in the first instance."[149]

The *Cook* court remanded the case (due to various trial court errors) for trial in a bifurcated proceeding, stating that "[t]he first issue that must be resolved is whether [the defendant-attorney] breached the standard of care toward [the plaintiff-client], and, if so, the second proceeding would consist of retrying the relevant portions of the underlying personal injury claim . . . ."[150]

The Wisconsin case of *Lewandowski v. Continental Casualty Co.*,[151] involved a malpractice claim against an attorney who failed to file a personal injury action regarding an auto accident within the applicable limitations period.[152] The attorney admitted negligence in his answer, but denied that the negligence caused any loss to the plaintiffs.[153] The trial court bifurcated the case, first proceeding "with the trial of the negligence action as between the drivers of the two vehicles."[154] The jury found Lewandowski, the legal malpractice plaintiff, 65% negligent

148. Cook v. Cont'l Cas. Co., 509 N.W.2d 100, 104-05 (Wis. Ct. App. 1993) (quoting Glamann v. St. Paul Fire & Marine Ins., 424 N.W.2d 924, 926 (Wis. 1988)).

149. *Id.* at 105.

150. *Id.* at 106.

151. 276 N.W.2d 284 (Wis. 1979).

152. Lewandowski v. Cont'l Cas. Co., 276 N.W.2d 284, 285 (Wis. 1979).

153. *Id.*

154. *Id.*

for the auto accident.[155] The Wisconsin Supreme Court upheld the trial court's bifurcation of the trial, stating that "[t]he requirements of causation dictate that the merits of the malpractice action depend upon the merits of the original claim."[156] The court noted that "[u]nder the facts of the case, the trial court determined that the measure of damages in the malpractice action" against the defendant-attorney "would be the damages that would have been awarded" to the plaintiff-client in an action against the other driver. Accordingly, the supreme court concluded that "the trial court did not err or abuse its discretion in so proceeding with the trial in this case."[157] The supreme court justified the bifurcation as follows:

> Under the facts of this case it is our conclusion that the trial court chose the appropriate methodology to resolve the issue in this case. In the final analysis, whether the [plaintiff-client] had been damaged by the [defendant-attorney's] failure to timely file suit against [the other driver] could only be determined after a trial involving the question of whether the negligence of [the other driver] was greater than that of [the plaintiff-client].[158]

Accordingly, the supreme court affirmed the trial court's dismissal of the case.

In *Terrain Enterprises, Inc. v. Mockbee*[159] the Mississippi Supreme Court held that a trial court did not abuse its discretion in bifurcating a legal malpractice trial.[160] In that case, Terrain Enterprises sued its former attorney, Mockbee, after Mockbee allegedly negotiated an unauthorized settlement of a lawsuit with a surety of a performance bond for a construction project being developed by the corporation, which settlement was enforced on appeal.[161] "Prior to that trial date, the trial court determined a bifurcated trial would be held, with any liability of the [defendant-attorney] to be determined separately from the issue of damages."[162] The jury returned a verdict for the defendant-attorney on the liability issue, so the damages issue was not

155. *Id*. at 286.
156. *Id.* at 287.
157. *Lewandowski*, 276 N.W.2d at 287.
158. *Id.* at 289.
159. 654 So. 2d 1122, 1123 (Miss. 1995).
160. Terrain Enters., Inc. v. Mockbee, 654 So. 2d 1122, 1123 (Miss. 1995).
161. *Id.*
162. *Id.*

considered.[163] The supreme court approved of the bifurcation, stating:

> While some evidence relevant to the damages issue was reviewed in the liability phase, the decision to bifurcate was supported by the fact that the entire Western/Terrain relationship, with a complete discussion of particularized and disputed damages, including punitive damages, interest and attorney fees, would have been necessary had the liability issue been decided in Terrain's favor. Bifurcation in this case appears to have avoided needless expense and delay and possible confusion to the jury without prejudicing either party.[164]

In the Alabama case of *Johnson v. Horne*,[165] the plaintiff Johnson had been involved in an automobile accident.[166] Johnson then retained attorneys Horne and Gilmore to represent him in a claim against Washington County based on the county's alleged negligence in causing his accident.[167] However, Gilmore failed to file Johnson's claim with the Washington County Commission within one year, as required by the applicable code.[168] Accordingly, the trial court granted summary judgment in favor of the county.[169] Johnson then sued Horne and Gilmore for legal malpractice.[170]

The court set forth the procedure applied by the trial court, and explained that Johnson's "underlying claims against the Washington county were tried as part of the malpractice action to determine whether the [attorneys'] alleged negligence had been the cause, in fact, of [his] failure to recover."[171] The trial judge instructed the attorneys "to limit their [closing] arguments to the underlying cause of action against Washington County," indicating that he was going to "bifurcate the proceedings before the jury."[172] The charge to the jury read, in pertinent part:

> We have separated this case. There are really two lawsuits and we've separated it really for—and the other suit against the attorneys will

163. *Id.*
164. *Id.* at 1132.
165. 500 So. 2d 1024, 1025 (Ala. 1986).
166. Johnson v. Horne, 500 So. 2d 1024, 1025 (Ala. 1986).
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Johnson*, 500 So. 2d at 1025.
172. *Id.*

> be considered totally separately. The first thing which you must consider is what would have happened had this lawsuit been filed and actually heard in Washington County when it was filed back in 1977 or '78. And you sit as a jury would have been sitting in Washington County to determine whether or not the plaintiff has proved his case and whether or not they would be entitled to recover.[173]

The jury found that Johnson "would not have recovered against Washington County."[174] As the court explained, "[t]he effect of the decision was that, [the attorneys'] alleged [negligence] notwithstanding, their conduct was not the proximate cause of any injury" to Johnson.[175] Therefore, "the trial judge entered judgment for the defendants" attorneys.[176]

On appeal, the court found that no bifurcation actually occurred, because the underlying case "was the only aspect of the legal malpractice case that contained any triable issues of fact."[177] If the jury had found for the plaintiffs with respect to the underlying case, then the trial court would have found, as a matter of law, for the plaintiffs with respect to their legal malpractice claim.[178] Accordingly, the court did not address the issue of the propriety of the trial court's bifurcation of the separate aspects of the legal malpractice case. However, the court indicated that its opinion should not be construed to restrict a trial court's exercise of discretion in bifurcating cases.[179]

Indeed, since the *Johnson* case, the Alabama state legislature has specifically provided for bifurcation of legal malpractice trials by statute. The Alabama Code provides:

> (a) If the liability to damages of a legal services provider is dependent in whole or in part upon the resolution of a underlying action, the outcome of which is either in doubt or could have been affected by the alleged breach of the legal services provider standards of care, then, in that event, the court shall upon the motion of the legal services provider, order the severance of the underlying action for separate trial.[180]

173. *Id*.
174. *Id*. at 1026.
175. *Id*.
176. *Johnson*, 500 So. 2d at 1026.
177. Johnson v. Horne, 500 So. 2d 1024, 1026 (Ala. 1986).
178. *Id.* at 1027.
179. *Id.*
180. ALA. CODE § 6-5-579(a) (1993).

Commentators W. Michael Atchison and Robert P. MacKenzie, III have described the practical impact of this provision upon legal malpractice claims in Alabama as follows:

> Once severed, the first action relates to the underlying suit or controversy, while the second action relates to the claim for legal malpractice. Bifurcation is critical because (1) the plaintiff is required to litigate the underlying action in the same forum in which it was originally filed; (2) the standard of review in the underlying action may be more limited and may favor the defendant; (3) the admissibility of evidence should be limited to evidence that was or would have been admissible at the time; and (4) resolution of the underlying action may offer a causation defense and grounds for summary judgment if there is a finding that the plaintiff would not have prevailed.
>
> . . . According to the statutory language, the trial court does not have discretion to deny a properly supported motion.[181]

Accordingly, bifurcation appears to have become routine legal malpractice procedure in Alabama.[182]

VI. SHORTCOMINGS OF THE TRADITIONAL BIFURCATION METHOD IN LEGAL MALPRACTICE TRIALS

The "suit within a suit" doctrine has been widely criticized by a number of commentators on various fronts. Much of the criticism is reserved for the doctrine's alleged harshness, the fact that it does not account for the loss of an opportunity to settle the underlying case, and that it is fundamentally flawed in addressing the causation issue.

The allegation that the "suit within a suit" doctrine is a harsh one is apparently rooted in the feeling that it stacks the deck against the plaintiff.[183] The case most frequently cited with alarm by these "harshness" critics is *Coon v. Ginsberg*, in which a Colorado appellate court required a "showing with certainty" that the plaintiff had sustained

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181. W. Michael Atchison & Robert P. MacKenzie, III, *The Professional Liability of Attorneys in Alabama*, 30 CUMB. L. REV. 453, 485 (2000).

182. *Cf.* Carpenter v. Cullan, 581 N.W.2d 72, 80-81 (Neb. 1998) (disapproving of bifurcation employed by the trial court in a legal malpractice trial, reasoning that the proximate result of the attorney's negligence "should have been submitted to the trier of fact in the same trial as the other issues").

183. *See generally* Erik M. Jensen, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666 (1978) (discussing the obstacles a disgruntled client must overcome to prevail in a legal malpractice claim).

actual damages as a result of the defendant attorney's negligence.[184] As one commentator has stated:

> The reality of the trial within a trial method clearly does not meet the promise of a full, theoretically complete reconstruction of the original lawsuit. Dissatisfied courts have struggled with the method, partly because of the impossibility of accurate reconstruction, and partly because of the client's difficult burden of proof. Commentators assert that the trial within a trial method actually insulates attorneys from liability and is inaccurate because parties face academic claims of liability and use evidence which is not quite what it seems. The evidence is restricted to what would have been admitted had the underlying action taken place, despite the fact that the passing of time is bound to impact the quality of the evidence. The ultimate irony is that the attorney is placed in an adversary position and must oppose a cause which he once advocated. Moreover, the attorney has better insights concerning weaknesses in the client's case than did the original defendant.[185]

However, any difficulties in accurate reconstruction of the underlying case may be offset by the judicial efficiency gains of bifurcation. For example, discovery regarding the underlying claims will usually be substantially known and/or complete and available, saving substantial resources when trying the causation issue. Further, this criticism fails to offer an alternative means of satisfying the causation element of a plaintiff's legal malpractice claim, without making the attorney the guarantor of his client's results.

Several commentators complain that the "suit within a suit" doctrine fails to recognize that a legal malpractice plaintiff can be damaged by the loss of an opportunity to settle the underlying case. Some plaintiffs have argued that they should not have to establish that they should have succeeded in the underlying case because they lost the opportunity to prevail, which can be evaluated by legal experts. This may be coupled with the notion that most claims have some "settlement value" that illustrates demonstrative loss.[186] This argument has been advanced,

184. Coon v. Ginsberg, 509 P.2d 1293, 1295 (Colo. App. 1973); *see also* Weiner v. Moreno, 271 So. 2d 217, 219 (Fla. Dist. Ct. App. 1973) (expressing the difficulty a client has recovering from their attorney); Better Homes, Inc. v. Rodgers, 195 F. Supp. 93, 97 (N.D. W. Va. 1961) (prohibiting a client from recovering from his attorney, who failed to take a timely appeal).

185. Polly A. Lord, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1482-83 (1986) (citations omitted).

186. *See* 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.8, at 71 (5th ed. 2000) (pointing out that every claim possesses at least some settlement value).

among others, by Professor John H. Bauman:

> The trial within a trial method requires a client to establish that a favorable judgment would have been recovered in the underlying action. Its dubious premise is that a client who failed to establish that a favorable judgment would have been obtained in the underlying action has sustained no injury. This position obviously places a very high burden of proof on the plaintiff client in a malpractice action and has been criticized for that reason. While some have suggested that the method could be reformed by changing the standard of causation, a better approach is to take a different view of what constitutes an actionable loss. The orthodox view ignores the fact that the loss of a claim, without more, is itself a genuine injury. Acceptance of this latter view permits a differentiation between proof of the fact of loss and proof of the amount of loss. If loss of a legitimate claim is an actionable injury, that loss can be measured in terms other than the ultimate result of a hypothetical trial.
>
> The fundamental misconception underlying the orthodox approach thus appears to be its assumption that the only way to value a case is to try it. It is well established, however, that only a small percentage of cases are actually tried. In a system that depends upon settlement of the vast majority of legal actions, it is odd that the standard of proof of causation and damages in legal malpractice cases not only presumes that the action would have been tried, but actually requires that the action be tried, deeming this procedure the only possible way of establishing the fact and amount of harm resulting from the defendant's malpractice. Plaintiffs therefore are forced to choose trial of a claim that might very well have been one of that "vast majority" that get compromised and settled. Plaintiffs whose claims are not clear winners are therefore deprived of the chance of settling and accepting half a loaf.[187]

However, as commentators Mallen and Smith note, the notion that every claim has some settlement value "could render attorneys liable as the guarantors since there is almost some value to their clients' claims every time they err, or, at least, an expert could be found to so testify."[188] This "loss of chance" issue was considered by the Washington Supreme Court in *Daugert v. Pappas*,[189] which addressed whether "loss of chance" or "but for" should be the proper test for

187. John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1134-35 (1988) (citations omitted).

188. 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 32.8, at 170-71 (4th ed. 1996).

189. 704 P.2d 600 (Wash. 1985).

causation in a legal malpractice case.[190] The court discussed the trial within a trial process, and held that the "loss of chance" doctrine is inappropriate for resolution of the causation issue in legal malpractice claims.

Further, Mr. Bauman's argument could encourage frivolous claims, as all such claims have settlement value, typically termed "nuisance value." The Seventh Circuit Court of Appeals implicitly rejected Mr. Bauman's argument in *Beatty v. Wood*,[191] explaining as follows:

> [Plaintiff-client] makes one last effort, however, to salvage his professional negligence claim, arguing that his ADEA claim would have netted him money in a settlement even if he could not have ultimately succeeded on the merits. In other words, [plaintiff-client] attempts to show damages not by demonstrating that his case was meritorious, but by showing that he could have obtained settlement for the nuisance-value of the suit if he had been able to bring the ADEA claim. A legal malpractice cause of action is meant to provide a litigant with damages that he would have been entitled to under law had the case been properly handled. It is not a vehicle for compensating a litigant for the damages that could have been extracted by pursuit of a meritless case. For that reason, under Illinois law an element of a legal malpractice claim is the requirement that plaintiff demonstrate that "but for" the attorney's negligence, he would have prevailed in the underlying action.[192]

The Seventh Circuit's reasoning in *Beatty* is consistent with the intuitive proposition that the courts exist to provide litigants justice, and not to provide a bargaining platform for the mere transfer of wealth between them.

Legal malpractice commentator David J. Meiselman simply believes that the "suit within a suit" doctrine is fundamentally flawed. As he has observed:

> The bifurcated procedure never really comes to grips with the issue of causation since it becomes obscured by the process itself. During the first trial, the jury is concerned with whether there existed an attorney-client relationship and therefore a duty, and then decides whether the attorney violated or breached that duty. There is no concern during the first trial as to whether the attorney's breach actually caused any damage.

190. *See* Daugert v. Pappas, 704 P.2d 600, 605 (Wash. 1985) (stating that the loss of chance doctrine does not apply to legal malpractice cases).

191. 204 F.3d 713 (7th Cir. 2000).

192. Beatty v. Wood, 204 F.3d 713, 718-19 (7th Cir. 2000).

> The second trial goes right on to evaluate the underlying claim. Thus, each trial omits consideration of proximate cause which appears to be almost assumed. This attempt to create an innovative procedure for the adjudication of a legal malpractice case merely substitutes new problems for old ones and is clearly not the solution for creating an improved and fairer standard of causation.[193]

However, as discussed above, causation in legal malpractice cases looks to "but for" cause, such that proximate cause in a bifurcated trial can properly be presumed.

In Erik Jensen's Cornell Law Review article criticizing the harshness of the "but for" test of causation in legal malpractice cases, he analyzed the New Jersey case of *Fuschetti v. Bierman.*[194] In that case, the New Jersey Superior Court proposed bifurcating the trial of a legal malpractice claim.[195] The court explained its procedure as follows:

> The court finds that a single trial of all issues would be complex and confusing. The issue of defendant's alleged neglect will therefore be tried first, leaving for later trial, if necessary, plaintiff's personal injury action, including the issues of liability and damages. This arrangement, moreover, had the merit of recapturing to some extent plaintiff's lost settlement opportunity: in the event defendant is held liable in the first trial, then for settlement purposes plaintiff will face him as she would have faced the personal injury defendants both before and during the trial of the personal injury action.[196]

The court further held that the "two trials will be heard by the same jury 'back-to-back,' with a hiatus of no more than one day" to reduce the potential prejudice to the plaintiff-client due to possible inability of the plaintiff-client to present evidence essential to her claim in the underlying action if such evidence was lost as a result of the defendant-attorney's alleged negligence.[197]

Mr. Jensen comments that "[t]he *Fuschetti* procedure takes one step toward keeping separate the various elements of the malpractice

193. DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 3:10, at 49 (1980).

194. Erik M. Jensen, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 678 (1978); 319 A.2d 781 (N.J. Super. Ct. 1974).

195. Fuschetti v. Bierman, 319 A.2d 781, 785 (N.J. Super. Ct. 1974).

196. *Id.*

197. *Id.*

claim."[198] In addition, he states that "it lets the plaintiff regain settlement opportunities lost in the initial action."[199] For example, "[i]f in the first trial the attorney is found negligent, then in the second trial the plaintiff faces the attorney as he would have faced the original defendant. The possibility of settlement thus depends on the merits of the initial claim."[200]

Mr. Jensen, however, criticizes the *Fuschetti* procedure by stating that "although bifurcation helps to keep some analytic distinctions clear, it does so by blurring the interlocking nature of the elements of the malpractice claim. Without knowing the nature of the underlying claim, for example, the factfinder cannot determine whether a breach of duty has occurred."[201] This is an obvious and serious shortcoming of the traditional bifurcation method in legal malpractice suits. It is a flaw which could be remedied by turning traditional legal malpractice suit bifurcation theory on its head: try the merits of the underlying claim first. As Mr. Jensen and a number of courts have acknowledged, "[t]he very requirement of causation dictates that the merits of the malpractice action depend upon the merits of the original claim."[202]

VII. A BETTER BIFURCATION METHOD

The better reasoning is that the "suit within a suit" doctrine is indeed appropriate for legal malpractice cases, because it prevents the attorney from being held liable for negligence committed within a vacuum. As one commentator has stated, "it is simply a unique method of establishing causation, and placing the burden of proof upon a plaintiff to prove all of the essential allegations of an action, including causation, is accepted legal doctrine."[203] Bifurcation enhances the benefits of the "suit within a suit" doctrine, as commentators Mallen and Smith explain:

> The trial-within-a-trial procedure enables a court to bifurcate the proceedings to try separately the merits of the underlying matter from the issue of negligence. The standard of care is an issue distinct and separate

198. Erik M. Jensen, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 678 (1978).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 671.

203. Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial—A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40, 66 (1989).

> from the issue of what should have happened in the underlying proceeding. Separate trials can provide a cogent and clear evidentiary process, reducing the risk of confusing a jury.
>
> Without bifurcation, all instructions would be presented to the jury at once, increasing the risk of confusion.[204]

The key issue, however, is which phase of the legal malpractice trial should first be submitted to the jury. In "traditional bifurcation," the parties try the standard of care issues first, and then proceed to try the underlying claims if the jury finds that the attorney violated the standard of care. A more effective mechanism for maintaining the traditional balance between negligence and strict attorney liability is "reverse bifurcation," in which the parties try the underlying case first, and only proceed to try the standard of care issues if the plaintiff-client proves "but for" causation.

The advantages of reverse bifurcation are numerous, including judicial economy and the litigation expenses saved by the parties. If a court reverse bifurcates a legal malpractice case and tries the underlying case first, a subsequent trial on attorney liability may prove unnecessary. Further, reverse bifurcation has the practical effect of stimulating settlement. If the trial on the merits of the underlying case results in a favorable outcome to the plaintiff-client, a settlement of the malpractice claim becomes more likely.[205]

The plaintiff in *Nika v. Danz* was right: the underlying case should have been considered first. Although the court in *Nika* laudably embraced the merits of bifurcating legal malpractice trials, it failed to sufficiently appreciate the distinctions between legal malpractice and other negligence actions. The *Nika* court wrote that "[t]his case is no different from an ordinary negligence action where the jury is instructed to consider a defendant's liability before considering any damages."[206] But in light of the "suit within a suit" doctrine, legal malpractice actions are not ordinary negligence actions. Ordinary negligence actions do not involve an underlying lawsuit or claim.

Judicial economy, efficiency, and the dictates of causation are best served in the typical legal malpractice trial when the jury is first asked

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204. 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.25, at 173 (5th ed. 2000).

205. *Cf.* John C. Nemeth, *Legal Malpractice in Ohio*, 40 CLEV. ST. L. REV. 143, 167-68 (1992) (praising the merits of the traditional bifurcation method).

206. Nika v. Danz, 556 N.E.2d 873, 883 (Ill. App. Ct. 1990).

to consider the merits of the underlying case. As a matter of simple logic, it would seem a wasteful exercise for a jury to first consider the liability of an attorney with respect to an underlying case that was not favorable for the legal malpractice plaintiff. Should a jury find that an underlying plaintiff had no meritorious claim, or that an underlying defendant had no meritorious defense, the legal malpractice trial should then cease, as there would be no need for a liability phase. Alternatively, should a jury find that a legal malpractice plaintiff had a weak position in the underlying case, this may well prompt a settlement of the case and dispose of the need for a liability phase. Neither of these scenarios are uncommon. Further, prior discovery taken in the underlying case is often available on the causation issue, reducing the costs of litigating this phase of the reverse bifurcated trial.

Several courts have considered the reverse bifurcation procedure in the legal malpractice context. In *Kearns v. Horsley*,[207] the plaintiff-client was injured while walking down the aisle in a movie theater in New Jersey.[208] The plaintiff-client brought suit in North Carolina, alleging that her attorneys committed malpractice and caused her damage by failing to assert her personal injury claim within the applicable limitations period.[209]

The trial court granted the defendant-attorneys' motion to bifurcate the issues, such that the plaintiff-client was required to "first prove that her 'original claim was valid and would have resulted in a judgment in her favor against [General Cinemas,]' before she would be allowed to present evidence of the defendants' negligence in prosecuting that claim."[210] The trial court explained its ruling as follows:

> Legal negligence cases, such as this case, involve the trying of a "case within a case." The plaintiff must first demonstrate that plaintiff must prove that: (1) the original claim was valid; (2) it would have resulted in a judgment in h[er] favor; and (3) the judgment would have been collectible. . . . In this case the determination of the first of these three things would require the application of the laws of the State of New Jersey, while the remaining issues in this case would involve the application of the laws of the State of North Carolina.
>
> The Court, in its discretion finds and concludes that in furtherance of convenience and to avoid prejudice in this matter, that the issues of

207. 552 S.E.2d 1, 3 (N.C. Ct. App. 2001).
208. Kearns v. Horsley, 552 S.E.2d 1, 3 (N.C. App. 2001).
209. *Id.*
210. *Id.*

> whether the plaintiff's original claim was valid and would have resulted in a judgment in her favor against the original party should be tried separately from the other issues in this matter. The Court further finds that these issues should be tried first before a different jury than will try the other issues.[211]

The appellate court agreed that "trying of both cases at once would likely have prejudiced the present defendants," and held that the trial court did not err in granting the severance.[212]

It is worth noting that the trial court not only applied the reverse bifurcation procedure in *Kearns*, but also required the standard of care issues to be tried later before a different jury.[213] By doing so, the court maximized the benefits of the reverse bifurcation procedure. Trying the separate issues before different juries optimizes judicial economy and minimizes costs to the litigants, because the bifurcated trial may take place over a greater period of time. This enables the court to limit discovery to issues connected with the underlying suit before the first phase of the trial. Limiting the scope of discovery, in turn, will often enable the dispute to reach trial sooner than otherwise possible, while reducing the discovery costs to the litigants if the initial phase disposes of the plaintiff-client's claims. The more significant impact of using a different jury for the second (standard of care) phase of the bifurcated trial will be to eliminate undue juror bias and prejudice against the attorney based upon the plaintiff-client's successful underlying claim or defense. This will prevent the jury from presuming that the attorney was negligent based upon the outcome of the underlying action, and prevent the plaintiff from recovering for a breach of an implied warranty of perfect result.

In *Bowen v. Hunter, Maclean, Exley & Dunn*,[214] the plaintiffs alleged that the attorney-defendant breached fiduciary duties and injured them by not providing them with a copy of his client's prenuptial agreement with their deceased kinsman.[215] The trial court bifurcated the trial. "In the first phase of the trial, the jury considered whether the prenuptial agreement was valid. If it found the agreement valid, then in the second phase of the trial the jury would consider whether [the defendant-attorney] and the law firm were liable for failing to disclose

211. *Id.* at 7 (citation omitted).
212. *Id.*
213. *Kearns*, 552 S.E.2d at 7.
214. 525 S.E.2d 744, 747 (Ga. Ct. App. 1999).
215. Bowen v. Hunter, Maclean, Exley & Dunn, 525 S.E.2d 744, 747 (Ga. Ct. App. 1999).

its contents."[216] The trial court explained that "the issue of whether Plaintiffs were beneficiaries of the estate is a question of fact which hinges on whether or not the prenuptial agreement was valid and enforceable."[217] The appellate court held that the trial court did not abuse its discretion in bifurcating the trial.[218] Although the plaintiffs' legal malpractice claims were denied as a matter of law for lack of an attorney-client relationship, the causation element required proof of a valid underlying agreement, just as the case within the case requires a meritorious underlying claim or defense. Accordingly, *Bowen* provides further persuasive authority for the effectiveness of the reverse bifurcation procedure.[219]

VIII. REVERSE BIFURCATION IN TRANSACTIONAL LEGAL MALPRACTICE CASES

Thus far, we have considered applying the reverse bifurcation procedure to legal malpractice cases arising out of litigation matters, i.e., those that actually have a case within a case. However, the reverse bifurcation procedure should apply equally to a legal malpractice case arising from a transactional matter. The fundamental utility of the reverse bifurcation procedure is to separate and distinguish the standard of care issues from the "but for" causation issues. Reverse bifurcation helps the jury sharpen and focus the line between the attorney's duty and results by temporally separating these issues from their consideration. Reverse bifurcation will achieve this end for any type of legal malpractice case that requires "but for" causation.

Although relatively few cases discuss causation issues in the context of transactional malpractice claims, the Supreme Court of California recently addressed the issue in *Viner v. Sweet*.[220] In *Viner*, the plaintiffs-clients alleged that the defendants-attorneys negligently represented them in connection with their entry into a securities purchase agreement and a corresponding employment termination agreement, the effects of which subsequently differed from the

216. *Id.* at 746.

217. *Id.* at 748.

218. *Id.*

219. *But see* Nat'l Union Fire Ins. Co. v. Dowd & Dowd, P.C., 191 F.R.D. 566, 567-68 (N.D. Ill. 1999) (denying defendant-attorneys' motion to reverse bifurcate their legal malpractice trial, because the plaintiff-client was the defendant in the underlying action, and the issues of liability and damages were closely intertwined).

220. 70 P.3d 1046 (Cal. 2003).

plaintiffs-clients' expectations.[221] It was undisputed that the plaintiffs-clients did not attempt to prove "but for" causation in the legal malpractice trial.[222] The defendants-attorneys argued that in a transactional malpractice action, the plaintiffs-clients had to show "but for" causation. Specifically, they argued that the plaintiffs-clients "had to show that without defendants' negligence (1) they would have had a more advantageous agreement (the 'better deal' scenario), or (2) they would not have entered into the transaction . . . and therefore would have been better off (the 'no deal' scenario)."[223]

The court held that the "but for" cause requirement applied to transactional malpractice cases:

> We see nothing distinctive about transactional malpractice that would justify a relaxation of, or departure from, the well-established requirement in negligence cases that the plaintiff establish causation by showing either (1) *but for* the negligence, the harm would not have occurred, or (2) the negligence was a concurrent independent cause of the harm.[224]

Citing Professor Bauman, the court explained:

> It is far too easy to make the legal advisor a scapegoat for a variety of business misjudgments unless the courts pay close attention to the cause in fact element, and deny recovery where the unfavorable outcome was likely to occur anyway, the client already knew the problems with the deal, or where the client's own misconduct or misjudgment caused the problems. It is the failure of the client to establish the causal link that explains decisions where the loss is termed remote or speculative. Courts are properly cautious about making attorneys guarantors of their clients' faulty business judgment.[225]

The court further explained that, although litigation generally involves past events and transactional practice generally involves anticipating future outcomes, this simply creates a distinction without a difference. "Determining causation always requires evaluation of hypothetical situations concerning what might have happened, but did not. In both

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221. Viner v. Sweet, 70 P.3d 1046, 1048-49 (Cal. 2003).

222. *Id.* at 1050.

223. *Id.*

224. *Id.* at 1051.

225. *Viner*, 70 P.3d at 1052 (quoting Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and Threatening Flood*, 61 TEMP. L. REV. 1127, 1154-55 (1988)).

litigation and transactional malpractice cases, the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent."[226]

Accordingly, "but for" causation forms a base element of the legal malpractice claim, whether the underlying question is whether the plaintiff-client would have received a better deal, (or no deal), as pertains to transactional matters, or whether the underlying question is whether the plaintiff-client had a meritorious claim or defense, as pertains to litigation matters. In both scenarios, reverse bifurcation can separate the "but for" causation issue from the standard of care issue, sharpening the line between the attorney's duty and the results obtained.

IX. CONCLUSION

The growing public demand for perfect results is shifting the time-tested obligation of lawyers to meet the standard of care. Instead, legal malpractice juries are increasingly holding attorneys to be guarantors of their client's results. Innovative procedures are necessary to level the legal malpractice playing field and shield attorneys from liability for breach of the Implied Warranty of Perfect Result. A reverse bifurcation method in which a plaintiff-client must first prove the validity of his claim or defense in the underlying case honors the principle that an attorney is not a guarantor of results and is presumed to have competently represented his client.

226. *Id.*