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Legal Malpractice Damages in a Trial Within a Trial: A Critical Analysis of Unique Concepts: Areas of Unconscionability

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LEGAL MALPRACTICE DAMAGES IN A TRIAL WITHIN A TRIAL — A CRITICAL ANALYSIS OF UNIQUE CONCEPTS: AREAS OF UNCONSCIONABILITY

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Where it is established that wrongful conduct has been committed by an attorney against a client, courts must provide credible criteria and procedures for establishing and calculating damages. If less than this is done, fundamental fairness to the client is sacrificed, the legal profession's conduct towards those whose trust it elicits and accepts becomes unconscionable, and the credibility of the legal system is seriously undermined.

This Article deals with damages in legal malpractice actions where an attorney has engaged in wrongful conduct in litigating a controversy, including wrongful failure to commence an action, or wrongfully allowing entry of a default judgment. Problems that arise with respect to the determination of damages in these legal malpractice actions are complex and an effort is made to explain and analyze these complexities. This Article articulates and examines differing jurisdictional views, their strengths and weaknesses, and the author's recommended solutions, which focus on the objective of fundamental fairness.

It must be stated at the outset that in some measure courts have allowed themselves to drift into solutions that in the view of the author fail the test of fundamental fairness. The term "drift" is used with measured regard for the author's belief that these results may have been the product of courts routinely, or without adequate depth of analysis, dealing with unique problems which they have perceived to be considerably less challenging than they actually are. In some instances, this lack of perception, and indeed lack of vigilance, has created a serious morass which courts have failed to recognize.

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I. PROBLEMS GENERATED BY THE UNIQUE NATURE OF THE TRIAL WITHIN A TRIAL

In a legal malpractice action, where a client alleges damage resulting from an attorney's failure to properly prosecute or defend an action, the client may be required to prove that he or she would have been successful in prosecuting or defending the underlying action, if not for the attorney's negligence or other improper conduct.[1] This has resulted in placing the burden upon the client in a legal malpractice action to prove a "case within a case,"[2] and as it has been described, participate in a "trial within a trial."[3]

The "trial within a trial" is not consistent with common law principles as it is not an adversarial proceeding between the real parties in interest in the underlying action.[4] The defendant is the attorney, rather than the person who would have been the defendant in the underlying action. Furthermore, witnesses and records may be difficult to obtain or unavailable and memories may have faded by the time the legal malpractice action is tried.[5] Legal malpractice actions are frequently predicated upon an attorney's failure to commence an underlying action within the time prescribed by the statute of limitations,[6] making difficulties such as these, because of long lapses in time, significant probabilities. Similar problems exist where the plaintiff in the legal malpractice action was the defendant in the underlying action and is required to establish that there was a meritorious defense to the underlying action.[7]

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1. *See, e.g.*, Williams v. Bashman, 457 F. Supp. 322 (E.D. Pa. 1978); Sitton v. Clements, 257 F. Supp. 63 (E.D. Tenn. 1966), *aff'd*, 385 F.2d 869 (6th Cir. 1967); Duke & Co. v. Anderson, 275 Pa. Super. 65, 418 A.2d 613 (1980); Sherry v. Diercks, 29 Wash. App. 433, 628 P.2d 1336 (1981).

2. *See, e.g.*, Ferencz v. Milie, 517 Pa. 141, 145, 535 A.2d 59, 62 (1987).

3. *See, e.g.*, Hoppe v. Ranzini, 158 N.J. Super. 158, 165, 385 A.2d 913, 917 (Super. Ct. App. Div. 1978).

4. *See, e.g.*, Fuschetti v. Bierman, 128 N.J. Super. 290, 295, 319 A.2d 781, 784 (Super. Ct. Law Div. 1974) ("[attorney] defend[s] himself as to his own neglect and stand[s] in the shoes of the personal injury defendants as to their neglect"). For a general discussion of common law principles, see J. KOFFLER & A. REPPY, COMMON LAW PLEADING (1969).

5. *See* Gautam v. DeLuca, 215 N.J. Super. 388, 398, 521 A.2d 1343, 1348 (Super. Ct. App. Div. 1987) ("it is often difficult for the parties to present an accurate evidential reflection or semblance of the original action").

6. *See* Koffler, *Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis*, 20 AKRON L. REV. 209 (1986), *reprinted in* 36 DEF. L.J. 405 (1987).

7. *See* Anderson v. Griffin, Dysart, Taylor, Penner & Lay, P.C., 684 S.W.2d 858 (Mo. Ct. App. 1984) (client did not become aware of default judgment until six years after it had been entered and legal malpractice action was commenced seven and one-half years after entry of the default).

Among the diverse questions upon which there may arise jurisdictional differences, policy considerations, and analytical difficulties, are the following:

1. In a legal malpractice action, is the appropriate question how the underlying action "should have been" decided, or how it "would have been" decided?[8] May the results differ, depending upon which concept is used, and are they both manageable concepts?[9]

2. Is causation established by the use of proximate cause, substantial cause, or another concept, and is forseeability required?[10]

3. In a legal malpractice action, who makes determinations on questions of law and questions of fact that arose in the underlying action?[11]

4. In a legal malpractice action, what factors should be considered in determining how a jury would have decided the underlying action?[12]

5. In a legal malpractice action, what criteria should be used to determine the credibility of witnesses testifying with respect to the underlying action?[13]

6. Does a client who was or would have been the plaintiff in the underlying action have the burden of proving that he or she would have been successful in the underlying action, or does the attorney have the burden of proving that the client would have been unsuccessful?[14]

7. Where the client was the defendant in the underlying action, does the client have the burden of proving that he or she would have been successful in the underlying action, or does the attorney have the burden of proving that the client would have been unsuccessful?[15]

8. Where the client was or would have been the plaintiff in the underlying action, is it necessary to establish that the defendant, or the prospective defendant, in the underlying action, was solvent?[16]

9. Must it be established in a legal malpractice action that if a judgment had been obtained awarding damages to the client in the underlying action, it would have been collectible?[17] If so, collectible at what time?[18]

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8. *See infra* Sections II A 1 and II A 3.
9. *See infra* Section II A 3.
10. *See infra* Section IV A.
11. *See infra* Section II A 3.
12. *Id.*
13. *Id.*
14. *See infra* Sections II A 1 and IV B and C.
15. *See infra* Section IV B and C.
16. *See infra* Section II B 1.
17. *See infra* Section II B 1 and 2.
18. *See infra* Section II B 2.

Questions such as these will be considered and analyzed in this Article, with a view toward establishing the parameters of existing requirements in various jurisdictions, and recommending approaches to maximize fundamental fairness.

II. FAILURE TO PROPERLY REPRESENT CLIENT IN PURSUING A CAUSE OF ACTION

A. Value of the Underlying Action

1. A "Would Have" and "Should Have" Dichotomy

The court in *Williams v. Bashman*[19] states that "[t]he orthodox view, and indeed virtually the universal one, is that when a plaintiff alleges that the defendant lawyer negligently provided services to him or her as a plaintiff in the underlying action,"[20] the plaintiff, in order to recover damages in the malpractice action, "must establish by the preponderance of the evidence that he or she would have recovered a judgment in the underlying action,"[21] and the damages in the malpractice action "are measured by the lost judgment."[22] In describing this view as "virtually the universal one,"[23] the *Williams* court is in error, because this view does not allow for possible additions to or subtractions from the amount of the lost judgment and there is significant authority requiring that this be done.[24]

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19. 457 F. Supp. 322 (E.D. Pa. 1978).

20. *Id.* at 326.

21. *Id.*; *see also* McDow v. Dixon, 138 Ga. App. 338, 339, 226 S.E.2d 145, 147 (1976) (client suing attorney for malpractice "must prove that his claim was valid and would have resulted in a judgment in his favor"); Taylor Oil Co. v. Weisensee, 334 N.W.2d 27, 29 (S.D. 1983).

22. *Williams*, 457 F. Supp. at 326.

23. *Id.*

24. The following cases, some of which involve a "trial within a trial," include legal malpractice actions and other actions growing out of the attorney-client relationship. These cases consider or discuss additions, subtractions or awards that are taken into account in arriving at a judgment, based on factors indicated in the text below. The author submits that there is no adequate basis for not including such additions, subtractions or awards with the amount of the lost judgment in arriving at a judgment in a legal malpractice action where the case involves a "trial within a trial" if they would have been allowed in a legal malpractice action not involving a "trial within a trial."

Personal injury, including mental and emotional distress. See, e.g., Singleton v. Foreman, 435 F.2d 962 (5th Cir. 1970); Quezada v. Hart, 67 Cal. App. 3d 754, 761, 136 Cal. Rptr. 815, 819 (1977) (court considered California Civil Code § 3333 and concluded that "California courts have limited emotional suffering damages to cases involving either physical impact and injury to plaintiff or intentional wrongdoing by defendant"); McClain v. Faraone, 369 A.2d 1090, 1094 (Del. Super. Ct. 1977) (court observed that breach of duty, which is basis of plaintiff's claim, does not involve wilful or wanton conduct of defendant and that "in an action based upon contract, unaccompanied by a related affirmative tortious physical act and unaccompanied by physical injury, mental suffering is not an element to be considered in awarding compensatory damages. *Restate-*

ment of Contracts § 341 . . . ."); Carroll v. Rountree, 34 N.C. App. 167, 237 S.E.2d 566, *aff'd*, 36 N.C. App. 156, 243 S.E.2d 821 (1977), McEvoy v. Helikson, 277 Or. 781, 562 P.2d 540 (1977).

Damage to reputation. See, e.g., Kirtland and Packard v. Superior Court, 59 Cal. App. 3d 140, 131 Cal. Rptr. 418 (1976); *McClain*, 369 A.2d at 1094 (refused to grant loss of reputation damages, apparently because breach of duty which was basis of plaintiff's claim did "not involve wilful or wanton conduct of defendant"); Hill v. Montgomery, 184 Ill. 220, 56 N.E. 320 (1900).

Attorney's fees, including contingent fees. See, e.g., Sitton v. Clements, 385 F.2d 869, 870 (6th Cir. 1967) (affirming district court's ruling that defendant attorney would have been entitled to 50% of the potential recovery in suit he failed to bring and therefore plaintiff in the legal malpractice action was "only entitled to half of the probable recovery" in the underlying action); Duncan v. Lord, 409 F. Supp. 687 (E.D. Pa. 1976); Kane, Kane & Kritzer, Inc. v. Altagen, 107 Cal. App. 3d 36, 165 Cal. Rptr. 534 (1980) (contingent fee attorney would have been entitled to in an underlying action cannot be subtracted from the award in a legal malpractice action); Christy v. Saliterman, 288 Minn. 144, 179 N.W.2d 288 (1970) (issue not properly raised by defendant attorney); Andrews v. Cain, 62 A.D.2d 612, 406 N.Y.S.2d 168 (App. Div. 1978); Childs v. Comstock, 69 A.D. 160, 74 N.Y.S. 643 (App. Div. 1902).

Attorney's fees for alternate counsel. A client may be required to pay attorney's fees to carry out or complete a matter entrusted to the defendant attorney, to bring an action against a third person, or to defend an action brought against the client as a result of the attorney's alleged negligence. *See, e.g.*, Coon v. Ginsberg, 32 Colo. App. 206, 509 P.2d 1293 (1973) (alternate counsel); Hill v. Okay Constr. Co., 312 Minn. 324, 252 N.W.2d 107 (1977) (payment to counsel to defend action brought against client as result of attorney's alleged wrongful conduct); Central Trust Co. v. Goldman, 70 A.D.2d 767, 417 N.Y.S.2d 359 (App. Div.), *appeal dismissed*, 47 N.Y.2d 1008, 394 N.E.2d 290, 420 N.Y.S.2d 221 (1979); Hiss v. Friedberg, 201 Va. 572, 112 S.E.2d 871 (1960) (payment to counsel to bring action against a third person).

Attorney's fees for prosecuting legal malpractice action. See, e.g., Jenkins v. St. Paul Fire & Marine Ins. Co., 393 So. 2d 851, 859 (La. Ct. App. 1981) (but court, in what may be an effort to disguise the basis for its action, asserts that "[t]he award of this item of loss or damage [$5000, the amount which client had agreed to pay his attorney in the legal malpractice action] does not amount to an award of attorney fees incurred in order to pursue the malpractice action as such," but is to compensate for a different cost incurred by client), *aff'd*, 422 So. 2d 1109 (La. 1982); Widemshek v. Fale, 17 Wis. 2d 337, 342, 117 N.W.2d 275, 277 (1962) (court found client had not been damaged by alleged negligence or fraud and denied client any recovery, stating that "the law does not generally recognize attorney's fees as recoverable unless authorized by statute or contract, except when natural and proximate result of wrongful act by defendant has involved plaintiff with litigation with other parties").

Advances for expenses. See, e.g., Welder v. Mercer, 247 Ark. 999, 448 S.W.2d 952 (1970) (attorney who failed to file transcript was liable for client's advancement for processing appeal); Kilmer v. Carter, 274 Cal. App. 2d 81, 88, 78 Cal. Rptr. 800, 805 (1969) (in affirming trial court's refusal to award client cost of transcripts and filing fees expended in connection with appeal, court concludes client would have lost appeal, in which event he would not have been reimbursed for costs and therefore, "they are not a proximate result of defendants' negligence").

Interest. See, e.g., Jackson v. Clopton, 66 Ala. 29, 34 (1880) ("It does not appear that this [delay and consequent loss of interest] was attributable to any negligence on the part of the attorneys — to say nothing of the remote and speculative nature of a claim for damages based on such a contingency."); Slayton-Paltrow, Inc. v. Niles, 60 A.D.2d 912, 401 N.Y.S.2d 568 (App. Div. 1978); *In re* Remsen, 99 Misc. 2d 92, 415 N.Y.S.2d 370 (1979).

Punitive or exemplary damages. See, e.g., *Singleton*, 435 F.2d at 971 (If contract breach also amounts to an independent tort and "is accompanied by some intentional wrong, insult, abuse, gross negligence, or oppression, the claim for exemplary damages is properly asserted." Also, where malice may be imputed from attorney's conduct, punitive damages are justified.); Bangert v. Harris, 553 F. Supp. 235 (M.D. Pa. 1982) (court dismissed claims for punitive damages on

Establishing the value of the underlying action may require a "trial within a trial."[25] This is directed at determining whether the client would have or should have prevailed in the underlying action if not for the negli-

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counts based on breach of contract, but denied defendant's motions to dismiss exemplary damages claims in count alleging "intentional legal malpractice" and in count alleging "vindictive and intentional infliction of mental distress"); *Welder*, 247 Ark. 999, 448 S.W.2d 952 (rejects gross negligence as basis for punitive damages award, and indicates that it would require showing in nature of intentional wrong or conscious indifference); Kluge v. O'Gara, 227 Cal. App. 2d 207, 210, 38 Cal. Rptr. 607, 609 (1964) ("This established absence of actual damages removes all basis for award of exemplary damages.").

Settlement and payments by tortfeasors and insurance carriers. See, e.g., Smiley v. Manchester Ins. & Indem. Co., 71 Ill. 2d 306, 311, 375 N.E.2d 118, 121 (1978) ("bad faith refusal to settle case within policy limits" resulted in attorney's liability); Katzenberger v. Bryan, 206 Va. 78, 141 S.E.2d 671 (1965); Gustavson v. O'Brien, 87 Wis. 2d 193, 201-02, 274 N.W.2d 627, 631-32 (1979) (Attorney's negligence "forced the client to litigate an arguably meritorious issue and a fair settlement was reached, not hastily, but after extensive negotiations." Therefore, public policy "should not preclude the client from proceeding against the lawyer for any deficiency that can be definitely established.").

Contributory negligence, comparative negligence, and assumption of risk. There is authority to the effect that contributory negligence of the client, pursuant to common law doctrine, is a complete bar to recovery in a legal malpractice action. *See, e.g.*, Ott v. Smith, 413 So. 2d 1129, 1134-35 (Ala. 1982); Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975); *Gustavson*, 87 Wis. 2d 193, 274 N.W.2d 627 (client's negligence is an affirmative defense and is waived if not pleaded).

Where a jurisdiction has adopted a comparative negligence doctrine by case law or statute, and if the comparative negligence doctrine is deemed applicable in legal malpractice actions, contributory negligence may merely reduce recovery. *See, e.g.*, Cicorelli v. Capobianco, 89 A.D.2d 842, 453 N.Y.S.2d 21 (App. Div. 1982), *aff'd*, 59 N.Y.2d 626, 449 N.E.2d 1273, 463 N.Y.S.2d 195 (1983) (Jury found clients were 35% responsible for their loss. Court vacated this finding, pointing out that in light of the attorney's erroneous advice it would be improper to hold clients responsible for failing to apply for rezoning and for failing to pay taxes on property, but nowhere indicates that the comparative negligence doctrine is inapplicable in an appropriate case.); Titsworth v. Mondo, 95 Misc. 2d 233, 243, 407 N.Y.S.2d 793, 798 (Sup. Ct. 1978) ("Contributory negligence will, here as elsewhere, affect recovery. [citations omitted]. However, as of September 1, 1975, contributory negligence would no longer bar recovery but, rather, reduce damages to the extent of the culpable conduct. (CPLR Art. 14-A).").

Assumption of risk, which is generally a complete bar to recovery at common law in negligence actions, may merely reduce recovery in some comparative negligence jurisdictions. On the question of whether assumption of risk may be validly interposed in a legal malpractice action, see Morrison v. MacNamara, 407 A.2d 555 (D.C. 1979) (a medical malpractice action from which the rationale for application of the defense of assumption of risk to legal malpractice actions may be extrapolated).

Mitigation of damages. See, e.g., Lewis v. Superior Ct., 77 Cal. App. 3d 844, 853, 144 Cal. Rptr. 1, 6 (1978) (defendant attorney "is not required to compensate for damages avoidable by reasonable effort"); Theobald v. Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961); Ninth Ave. & Forty-Second St. Corp. v. Zimmerman, 217 A.D. 498, 500, 217 N.Y.S. 123, 125 (App. Div. 1926) (client "is under an obligatory duty to make reasonable effort to minimize the damages"); *Gustavson*, 87 Wis. 2d at 201, 274 N.W.2d at 631 ("The settlement was a bona fide attempt by [clients] to mitigate their damages and bring the litigation to an end.").

25. *See, e.g.*, Fuschetti v. Bierman, 128 N.J. Super. 290, 295-96, 319 A.2d 781, 784 (Super. Ct. Law Div. 1974). This may also be referred to as a "suit within a suit," *see, e.g.*, Lieberman v.

gence or other improper conduct of the attorney. If the conclusion is that the client would have or should have prevailed in the underlying action, the court then determines the amount of the judgment the client would have recovered, and makes a determination as to whether such a judgment would have been collectible, in whole or in part.[26] However, there is support for the principle that the "suit within a suit" concept has vitality in only a limited number of situations, as where an attorney's negligence prevents a client from bringing an action, for example, where the attorney allows the statute of limitations to run, or where the attorney's failure to appear causes judgment to be entered against the client, or where the attorney's negligence prevents an appeal from being perfected.[27]

While courts frequently state the issue in the legal malpractice action as being whether the client "would have"[28] prevailed in the underlying action, in *Lewandowski v. Continental Casualty Co.*[29] the court states that "the ultimate goal should be to determine what the outcome *should* have been if the issue had been properly presented in the first instance."[30] A cautionary note must be struck, however, when considering this language because, at another point, *Lewandowski* states that in *Sitton v. Clements*[31] "the court applied what might be termed the 'what *would have* happened' theory."[32] To lend additional confusion, *Lewandowski* quotes *Sitton* as stating that the burden of proof is upon the plaintiff to show that "if suit had been instituted he *could have* recovered a judgment from the defendant, the amount of such judgment, and that defendant was solvent."[33] Nothing has been found to indicate that *Lewandowski*, in using the word "should," intended to provide a substantially different test from "would," but the author suggests that the difference in these formulations could have important ramifications, as is set out in the subsequent discussion.[34]

Employers Ins. of Wausau, 84 N.J. 325, 342, 419 A.2d 417, 426 (1980), or as a "case within a case," *see, e.g.*, Ferencz v. Milie, 517 Pa. 141, 145, 535 A.2d 59, 62 (1987).

26. On the requirement of establishing the collectibility of a judgment, see *infra* Sections II B and IV C.

27. Basic Food Indus. v. Grant, 107 Mich. App. 685, 693, 310 N.W.2d 26, 30 (1981).

28. *Williams*, 457 F. Supp. at 326; *Christy*, 288 Minn. at 150, 179 N.W.2d at 294; Hoppe v. Ranzini, 158 N.J. Super. 158, 165, 385 A.2d 913, 917 (Super. Ct. App. Div. 1978).

29. 88 Wis. 2d 271, 276 N.W.2d 284 (1979).

30. *Id.* at 281, 276 N.W.2d at 289 (emphasis in original).

31. 257 F. Supp. 63 (E.D. Tenn. 1966), *aff'd*, 385 F.2d 869 (6th Cir. 1967).

32. *Lewandowski*, 88 Wis. 2d at 280, 276 N.W.2d at 288 (emphasis added).

33. *Id.* at 281, 276 N.W.2d at 289 (quoting *Sitton*, 257 F. Supp. at 67) (emphasis added).

34. *See infra* Section II A 3.

2. "Trial Within A Trial" and "Alternatives"

The finder of fact in the legal malpractice action is asked to determine whether the plaintiff would have prevailed, or should have prevailed, in the underlying action, based upon evidence and testimony presented at the trial of the legal malpractice action. Witnesses who presumably would have testified at a trial of the underlying action may testify in the legal malpractice action.[35] *Lewandowski* can be construed to indicate that the availability of witnesses is a factor to be considered in determining whether there is to be a "trial within a trial" to determine damages, or whether some other methodology for determining damages is to be used.[36] But, the *Lewandowski* opinion gives no insight as to what other methodology might be available. Some insight may be gleaned, however, from *Gautam v. DeLuca*,[37] where the court points out that the New Jersey Supreme Court had earlier "eschewed rigid application of the 'suit within a suit' principle in favor of a more flexible rule."[38] It had declined to " 'delineate in final detail what alternatives must be considered,' "[39] but had observed that " 'they include the 'suit within a suit' approach or any reasonable modification thereof.' "[40] *Gautam* appears to imply that a legal malpractice action might proceed without a "suit within a suit" where the action involves the recovery of damages for emotional distress, or the award of punitive damages.[41] The court observes that "it is often difficult for the parties to present an accurate evidential reflection or semblance of the original action,"[42] and that "the passage of time itself can be a significant factor militating against the 'suit within a suit' approach."[43]

If there is no damage to the client in the nature of emotional distress, and the client is not entitled to punitive damages, the "suit within a suit" may be the only available refuge for the client seeking an award of damages in a legal malpractice action based upon alleged misconduct of an attorney in litigating an action. Furthermore, damages for emotional distress and punitive damages may be available in legal malpractice actions grounded on the improper conduct of an attorney unrelated to improper conduct of liti-

35. *Lewandowski*, 88 Wis. 2d at 282, 276 N.W.2d at 289.

36. *Id.* at 281-82, 276 N.W.2d at 289.

37. 215 N.J. Super. 388, 521 A.2d 1343 (Super. Ct. App. Div. 1987).

38. *Id.* at 398, 521 A.2d at 1348 (citing *Lieberman*, 84 N.J. at 343, 419 A.2d at 427).

39. *Id.* (quoting *Lieberman*, 84 N.J. at 343, 419 A.2d at 427).

40. *Id.* (quoting *Lieberman*, 84 N.J. at 343-44, 419 A.2d at 427).

41. *Id.* at 390-91, 397-401, 521 A.2d at 1344, 1347-49 (although the court found that neither an award of damages for emotional distress nor punitive damages was warranted in this case).

42. *Id.* at 398, 521 A.2d at 1348.

43. *Id.*

gation, where a "suit within a suit" would not in any event be available.[44] It is inaccurate to conclude that an alternative to a "suit within a suit" is required where damages for emotional distress or punitive damages are sought in a legal malpractice action grounded on negligence in litigating a controversy. Where a plaintiff has been damaged by loss of a judgment in the underlying action, certainly the plaintiff should be allowed to establish this damage through the device of a "suit within a suit," and also be awarded, where appropriate in the factual context, additional damages which may include damages to compensate for emotional distress and punitive damages.[45]

3. Evaluating the Evidence[46] — Credibility of Witnesses

Where there is a "trial within a trial," is the trier of fact in the legal malpractice action to decide simply what it considers to be the weight of

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44. *See McEvoy*, 277 Or. at 789, 562 P.2d at 544 (under terms of divorce decree, plaintiff had legal right to custody of his child, and "[i]t follows . . . that conduct by defendant which resulted in an infringement of that legal right, if established by evidence on trial, would entitle plaintiff to recover damages for 'anguish and mental [suffering] due to the loss of his minor child,' as alleged in the complaint"). In *Singleton*, 435 F.2d 962, a client sued her discharged attorney to recover items given as security under a contingent fee agreement and to recover for alleged emotional distress the client suffered because of the attorney's conduct following his discharge after the attorney refused to permit the client to settle a divorce action. In an unusual complaint, the client alleged that she was entitled to exemplary damages because "defendant should be taught that when individuals approach him for aid and services, as plaintiff did, much as one would approach a priest or minister, he should not be allowed to conduct himself in the manner in which he has toward the plaintiff . . . ." *Id.* at 967. The court, in reversing dismissal on the pleadings, states that "[i]f the breach is accompanied by some intentional wrong, insult, abuse, gross negligence, or oppression, the claim for exemplary damages is properly asserted." *Id.* at 971.

45. *See* cases cited *supra* note 24. Although the cases cited therein which relate to damages for emotional distress and punitive damages do not involve a "suit within a suit" or a "trial within a trial," cases cited in various other categories do allow damages as additions to the amount of a lost judgment.

46. Issues arise in a "trial within a trial" in a legal malpractice action as to who should make determinations on questions of fact and questions of law that arose in an underlying action. With respect to questions of fact, these determinations should be made by the jury, or other trier of fact in the legal malpractice action. Thus, in Chocktoot v. Smith, 280 Or. 567, 575, 571 P.2d 1255, 1259 (1977), the court states that "[i]n the present case, the trial court, placing itself in the position of Judge Sisemore in the earlier proceeding, concluded that proper presentation of all available evidence would have led to a decision in favor of Wesley Wendell Brown, either at trial or, if not there, then on *de novo* review on appeal." The court added that this "conclusion is one of fact from the evidence and should have been left to the jury, unless the court thought that it was beyond reasonable dispute to the point of justifying a directed verdict on the issue of causation as well as negligence." *Id.* at 575-76, 571 P.2d at 1259.

With respect to questions of law, these determinations should be made by the court in the legal malpractice action. Thus, the *Chocktoot* court concludes that a determination of whether a directed verdict was justified in an underlying action is a question of law for the trial court in the legal malpractice action. In Martin v. Hall, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971), the

proffered evidence in establishing the client's underlying cause of action and damages or is the trier of fact in the legal malpractice action to decide what weight, in its view, the trier of fact at the trial of the underlying action would have, or should have, given to this evidence?

Hypothesize a situation where parties of different ethnic origins would have been plaintiff and defendant in the underlying action, and the venue would have been in an area strongly weighted, ethnically, in the direction of one of the parties. Should this be considered by the trier of fact in the legal malpractice action in determining what the result in the underlying action would have, or should have, been? It is suggested that the result reached by the trier of fact in the legal malpractice action might be affected, if ethnicity is considered, where the question is what "would have" been the result in the underlying action, but presumably would not be affected if the question is what "should have" been the result in the underlying action. Therefore, the formulation of this issue in terms of "would have" or "should have" may be critical to the result in a legal malpractice action.

Consider the question of credibility of witnesses. Is this to be decided by the trier of fact in the legal malpractice action in terms of how this trier of fact appraises a witness' credibility or is the trier of fact in the legal malpractice action to be called upon to determine how the trier of fact in the underlying action would have appraised the credibility of a witness? Is this latter proposition so absurd and impossible to accomplish that it should be summarily dismissed? Perhaps viscerally, but not in the context of a clearly defined issue, assuming the issue is framed in terms of how the trier of fact *would have* found (rather than should have found) in the underlying action. Does not what would have happened in truth determine whether, and to what extent, the client was damaged?

To add an additional dimension in terms of complexity, how does one determine whether the trier of fact in the underlying action would have been a judge or jury? If it is assumed, rightly or not, that it would have been a jury, what is the judge's duty if a judge is the trier of fact in the legal malpractice action? With legal training and judicial experience, the judge

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opinion states that "[t]he trial court, in the instant case, therefore should have ruled how the court in the criminal case would have resolved these legal questions." *Id.* at 420, 97 Cal. Rptr. at 733. However, some doubt is raised with respect to this conclusion by the court in *Coon*, where it states that "[e]vidence should have been heard in regard to the allegations set out therein, and the jury should have been instructed that Ginsberg's liability depended upon the Coons establishing (1) that, had the motion [to vacate the judgment] been prosecuted, the judgment against the Coons would have been set aside . . . ." *Coon*, 32 Colo. App. at 210, 509 P.2d at 1295. Whether a motion to vacate a judgment should in this instance have been considered a question of fact, rather than a question of law, is open to inquiry.

may conclude that there is very substantial doubt as to a witness' credibility, but at the same time conclude that this witness would impress a jury and would expectably be believed by a jury. Under these circumstances, what weight should the judge give to the witness' testimony? Impulse could lead to the answer that the judge should apply his knowledge and understanding so as to arrive at the most "truthful" answer.

But, paradoxically, this is not what a resolution of the issue would require. The question posed — assuming it is what the jury in the underlying action would have found (rather than what the jury should have found) — is meaningful in terms of determining whether and to what extent *the client was in fact damaged* by the attorney's improper conduct. The logical response is therefore that the judge in the legal malpractice action is to decide how an "unsophisticated" jury would have evaluated the credibility of the witness, and not how the judge evaluates the credibility of the witness.

Is this philosophically and ethically acceptable? Will this actually be the modus operandi of a judge hearing the legal malpractice action? The above issues are raised in the hope that they are sufficiently provocative to lead to serious thought at this time, rather than wholly relying upon a case by case development.

B. Collectibility of a Hypothetical Judgment in the Underlying Action

1. Collectibility and Solvency

Schooled in the common law tradition that the collectibility of a judgment is, or should be, irrelevant to the question of whether or not a judgment should be awarded, or its amount,[47] it may be difficult to initially accept the proposition that a finding of non-collectibility of a judgment in the underlying action should result in the loss of the legal malpractice action. But, here again, as the issue is whether the client was damaged, it follows syllogistically that the client was not damaged if he or she would have been unable to collect upon a judgment, even if it had been recovered in the underlying action.

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47. In *McDow*, 138 Ga. App. 338, 226 S.E.2d 145, the issue of solvency was considered in a legal malpractice action. The court observes that:

> The foregoing solvency requirement is an exception to the general rule that wealth has no relevance to, and is inadmissible in, the trial of a civil suit for damages. This is because a litigant's financial condition normally has no probative value as to any of the contested questions, but serves to prejudice jurors as to the general liability of a defendant.

Id. at 340, 226 S.E.2d at 148; *see also* Moore v. Moyle, 405 Ill. 555, 566, 92 N.E.2d 81, 87 (1950) (Crampton, J., dissenting) ("the presence or absence of insurance has no bearing upon the question of liability but only upon the collectibility of any judgment which may be rendered").

It is stated in *Sitton v. Clements*[48] that the burden of proof is on the plaintiff in a legal malpractice action to show that the defendant in the underlying action was "solvent."[49] But is this an appropriate requirement? Insolvency may be said to exist where liabilities exceed assets.[50] If this definition of insolvency is accepted, it seems clear that in some instances, depending upon the amount of the judgment and surrounding circumstances, the judgment will be in whole or in part collectible, although the defendant is insolvent. There should accordingly be no requirement that it be shown that the defendant in the underlying action was solvent. *Sitton* does not define insolvency, and it does indicate that the result reached is grounded on collectibility,[51] although by simply halving the award by way of remittitur from $162,500.00 to $81,250.00 on the ground that the award "is substantially more than plaintiff could have recovered and collected,"[52] the court indicates an almost shotgun approach in arriving at the $81,250.00 figure. In *Hoppe v. Ranzini*,[53] the court states that evidence of the solvency of the defendant in the underlying action may be considered, but indicates that this evidence is to be used as just one of the factors in determining the amount of the judgment that could have been collected from the defendant in the underlying action.[54]

In *Pickens, Barnes & Abernathy v. Heasley*,[55] the court states that where the solvency of the defendant is known beyond question, as in a tort claim

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48. 257 F. Supp. 63 (E.D. Tenn. 1966), *aff'd*, 385 F.2d 869 (6th Cir. 1967).

49. *Id.* at 67.

50. *See* McGinley v. Massey, 71 Md. App. 352, 355, 525 A.2d 1076, 1077 (Ct. Spec. App. 1987); Southern Lumber & Coal. Co. v. M.P. Olson Real Estate and Constr. Co., 229 Neb. 249, 254, 426 N.W.2d 504, 507 (1988); *In re* Liquidation of United Am. Bank, 743 S.W.2d 911, 916 (Tenn. 1987). In *McDow*, 138 Ga. App. 338, 339-40, 226 S.E.2d 145, 147, the court rejects this definition, observing:

> Solvency as used herein is not intended to imply a bankruptcy-type standard, but rather is intended to illustrate the original defendant's ability to pay a judgment, had one been rendered against him. . . .
>
> Thus, the essence of this requirement is that the malpractice plaintiff show that he could have recovered a judgment in an amount which was collectible.

138 Ga. App. at 339-40, 226 S.E.2d at 147.

51. *Sitton*, 257 F. Supp. at 67.

52. *Id.*

53. 158 N.J. Super. 158, 385 A.2d 913 (Super. Ct. App. Div. 1978).

54. *Id.* at 165, 385 A.2d at 917. The court states:

> Plaintiff's loss proximately resulting from the attorney's malpractice is deemed to be measured only by the amount of the judgment that could have been collected against the main defendant. To that extent evidence of the main defendant's financial status and solvency may be considered, although it is not entirely clear as to the period of time that should be taken into account for that purpose.

Id.

55. 328 N.W.2d 524 (Iowa 1983).

against the state or an insurance claim within policy limits, a court may hold without other proof that the entire judgment would have been collectible. But the court adds that if the defendant in the underlying action was an individual or other entity "whose solvency is not known beyond question,"[56] the client must introduce "substantial evidence from which a jury could reasonably find that a prior judgment would have been collectible in full, or could reasonably find the portion of the judgment which would have been collectible."[57] However, finding collectibility because the solvency of the defendant is thought to be known beyond question may prove faulty because the actual financial condition of the defendant may not conform with public perception.[58] Also, finding collectibility because a claim is within policy limits may prove faulty because there may be, in certain circumstances, affirmative defenses to coverage.[59]

Is it sound to require a showing of collectibility? The court in *Hoppe* states that requiring proof of collectibility "may effect a change in or departure from the concept of proximate causation and the measure of damages in negligence actions generally, including other kinds of attorney malpractice cases and malpractice suits involving other professions."[60] This position must fail upon analysis. A judgment in the underlying action which would not have been collectible would generally be of no value to a client. To predicate an award of damages upon both the requirement that a judgment would have been recovered and that it would have been collectible, in whole or in part, requires a showing of causation, in this factual context, that is conceptually no different from that required in negligence cases generally.[61]

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56. *Id.* at 526.

57. *Id.*

58. In Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963), where the court considered a count in breach of implied warranty, it states:

> However, for the present at least we do not think it necessary so to extend this rule as to hold liable the manufacturer [defendant Kollsman] of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer [Lockheed] which put into the market the completed aircraft.

As a matter of fact, however, a number of years later Lockheed skirted the edge of bankruptcy. *See* N.Y. Times, Jan. 27, 1971, at 1, col. 2.

59. There may be viable defenses to coverage in a particular case, and the insurance company, which could most effectively raise these defenses, is generally not a party to the legal malpractice action.

60. *Hoppe*, 158 N.J. Super. at 167, 385 A.2d at 918.

61. *See* Martin v. Herzog, 228 N.Y. 164, 170, 126 N.E. 814, 816 (1920) ("We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury."); P.A. LANDON, POLLOCK'S LAW OF TORTS 345 (15th ed. 1951) ("Proof of negligence in the air, so to speak, will not do.").

2. Collectibility at What Time? And a Proffered Solution

If collectibility is required, collectibility at what time? At this point we enter an area of the law that has developed in a relatively sparse number of cases and where the answers are indecisive, inconclusive, and in good measure fail the test of logic.

Standards developed in various decisions indicating the time at which it must be shown that a judgment in the underlying action would have been collectible are set out at this point, together with additional standards developed by the author that have not, to the knowledge of the author, been advanced by the courts. At each point the author also presents an analysis of the validity or acceptability of the standards.

First. Collectibility is irrelevant. There should be no requirement that it be established in a legal malpractice action that a judgment in the underlying action would have been collectible.

In support of this proposition it may be argued that even if collectibility, either at the time the hypothetical judgment would have been recovered or at a subsequent point in time, cannot be proven in the legal malpractice action, the defendant in the underlying action conceivably could at any future time acquire additional assets and be able to satisfy the judgment. It would therefore be inequitable to deprive a client of a recovery in a legal malpractice action because of an inability to marshal sufficient proof to establish that a judgment would have been collectible at the time it would have been recovered in the underlying action or at some future time.

In opposition to this proposition it may be urged that it would be unfair to require the defendant attorney in a legal malpractice action to pay damages to a client when there may be no more than a scintilla of hope that a judgment in the underlying action would have been collectible. This would provide an undeserved windfall to the client at the expense of an attorney who, based upon the proof presented in the legal malpractice action, has caused no damage to the client.

Second. The question is whether the judgment, had it been obtained, would have been collectible in whole or in part at the time it would have been recovered in the underlying action.

In support of this proposition it may be urged that it provides for certainty and fairness. It provides for certainty because the trier of fact in the legal malpractice action makes a determination upon the basis of ability to pay, at a fixed point in time, by the person who would have been the defendant in the underlying action. It provides for fairness in that this relatively clear-cut issue, when resolved, will establish what, if anything, the client would have received in satisfaction of the judgment at the time of recovery,

and therefore it is fair to assess this amount against the attorney in damages.

It may be urged, on the contrary, that this proposition lacks merit because a judgment may become collectible for the first time long after it is recovered. To deprive a client of damages because of uncollectibility at the time the judgment would have been recovered, could result in a windfall to the attorney at the expense of the client. If the judgment would have become collectible at a later point in time, within the statutory period for satisfaction of a judgment, it is unfair to deprive the client of a recovery against the attorney.

> *Third.* The issue should be framed in terms of whether a judgment would have been collectible in whole or in part at the date of the trial of the malpractice action.[62]

In support of this proposition it may be argued that it provides for certainty because the facts are examined and a determination is made with respect to a relatively fixed point in time, the date of the trial of the malpractice action.

In opposition to this proposition it may be observed that there is no fixed point in time when the frame of reference is the date of the trial of the malpractice action because the trial may encompass a substantial period of time. At a minimum, there should be more focus and definition in fixing a determinative time.

But this argument assumes some general acceptability of this proposition, while in fact it is unacceptable. In *Hoppe v. Ranzini*[63] the court, after stating that some of the cases seem to use the date of the trial of the malpractice action, observes that "[w]hether this is a proper time span, in view of the life of a judgment, is certainly debatable."[64] Acceptance of this proposition could deprive the client of legitimate recompense for his or her dam-

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62. The court in *Hoppe* states, "some of the cases seem to use the date of the trial of the malpractice action." 158 N.J. Super. at 169, 385 A.2d at 919 (citing McDow v. Dixon, 138 Ga. App. 338, 226 S.E.2d 145 (1976)); *Sitton*, 257 F. Supp. 63. The author finds no express statement to this effect in *McDow*, and the *Sitton* court, while not affirmatively embracing this proposition, states:

> We believe that it is reasonably clear that all of the $162,500.00 could not have been collected from Fuller if judgment had been obtained before his sentence to jail or immediately after he was released from jail. The jury could have found from the evidence that some part of this amount could have been recovered from him. The jury could have also found that at the rate of his accumulation of property that additional amounts could have been collected from him from time to time to the date suit was tried, namely, April 5, 1966.

Sitton, 257 F. Supp. at 66.

63. 158 N.J. Super. 158, 385 A.2d 913 (Super. Ct. App. Div. 1978).

64. *Id.* at 169, 385 A.2d at 919.

ages because no consideration is given to whether the defendant in the underlying action would have been able to satisfy the judgment after the date of the trial of the malpractice action.

> *Fourth.* It should be determined whether a judgment would have been collectible in whole or in part within a reasonable period of time after the date of trial of the malpractice action, short of the initial viability period of a judgment in the applicable jurisdiction.[65]

It may be urged that because this proposition extends the time for determining what the defendant's ability to pay would have been to a reasonable period of time after the date of trial of the malpractice action, it provides for a more equitable determination of damages than is provided for under the previously stated propositions.

In opposition, it may be urged that there is no justificiation for this limitation as it interjects the vague and unmanageable concept of a reasonable period of time after the date of trial. What criteria are to be used to determine what period is reasonable in this context? Furthermore, why should there be any such limitation, and why should it ever be short of the viability period of a judgment that would have been entered in an underlying action? The analysis of the *fifth* proposition speaks to this final question.

> *Fifth.* The issue should be whether the judgment would have been collectible in whole or in part during the number of years set out in the relevant statute of limitations for enforcing a judgment, measuring from the date upon which a judgment would have been entered in the underlying action.[66]

This proposition would require the jury in the legal malpractice action to determine on the basis of factors such as assets, liabilities, education, occupation, expectancies, insurance coverage, and other relevant factors,[67]

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65. *Hoppe*, 158 N.J. Super. at 169, 385 A.2d at 919 ("Perhaps a reasonable period of time after the date of trial [of the malpractice action], short of the initial 20-year viability period of a judgment, may be more appropriate.").

66. While the *Hoppe* court suggests that a view similar to that set out in the *fourth* proposition, would be appropriate (see *supra* note 65), it does take note of the fact that "[i]t is not without significance that had a judgment been obtained against [a defendant in an underlying action], it would have been valid for 20 years, and, in an appropriate proceeding, might have been extended for another 20 years." *Hoppe*, 158 N.J. Super. at 169, 385 A.2d at 919.

67. Although not espousing the view set out in the *fifth* proposition, the *McDow* court states:

> [I]t is . . . proper to allow the introduction of evidence of the original alleged tortfeasor's worldly circumstances, financial status, assets, insurance coverage, ownership or other interest in real and personal property, etc., to determine the ability of the original alleged tortfeasor to satisfy, in whole or in part, what has been determined to be the plaintiff's damages.

138 Ga. App. at 341, 226 S.E.2d at 148.

the extent to which a judgment against the defendant in the underlying action would have been collectible during this entire period of time.

In support of this proposition it is observed that this would, to the extent feasible, place the client in the position in which he or she would have been, if not for the negligence or other improper conduct of the attorney. In opposition to this proposition it may be argued that it is difficult to determine as a matter of fact what will result over such a long period of time, and therefore the proposition should be rejected.

The author suggests that this argument in opposition to the *fifth* proposition may be responded to as follows. The *first*, *second*, and *third* propositions would indeed result in determinations that are less difficult to make. But the *first* proposition must be rejected if the issue is to what extent the client was actually damaged, and the *second* and *third* propositions are intrinsically inequitable. The *fourth* and *fifth* propositions both require factual determinations that are difficult, if not impossible, to make with certainty. But the *fourth* proposition does not deal with the problem as equitably, or arrive at as logically acceptable a solution as the *fifth* proposition which utilizes the relevant statute of limitations period for enforcing a judgment, measuring from the date a judgment would have been entered in the underlying action.

Furthermore, tort principles generally, as increasingly developed by the courts, reject the concept of lack of certainty in determining damages as a basis for eschewing new frontiers. This is found, for example, in developing legal principles in the area of recovery for negligence without impact,[68] and in the limitation upon or removal of traditional non-consensual privileges.[69] In the area under consideration, the argument that acceptance of the *fifth* proposition, or any of the other stated propositions, would result in lack of certainty in arriving at damages, is not a viable basis for rejecting the proposition.[70] Furthermore, the *fifth* proposition is the most fundamentally

68. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 737, 441 P.2d 912, 918, 69 Cal. Rptr. 72, 78 (1968) (allowing mother who allegedly witnessed fatal automobile accident involving child to state a cause of action for shock which resulted in physical injury, observing that "[t]he possibility that some fraud will escape detection does not justify an abdication of the judicial responsibility to award damages for sound claims"); Battalla v. State, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 38 (1961) (a cause of action is stated when it is alleged that the claimant was negligently caused to suffer severe emotional and neurological disturbances with residual physical manifestations, despite argument that "the damages or injuries are somewhat speculative and difficult to prove").

69. *See, e.g.*, Gelbman v. Gelbman, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969) (allowing injured automobile passenger to sue her unemancipated son who was driver despite "possibility of a collusive and fraudulent suit").

70. *See, e.g.*, *Hoppe*, 158 N.J. Super. at 169-70, 385 A.2d at 919:

sound and fair basis upon which to make a determination of damages, as it does all that a court realistically can do to place the client in the position that he or she would have been in if not for the negligence or other improper conduct of the attorney. Therefore, the *fifth* proposition is recommended by the author.

III. Failure to Properly Represent the Client in Defending an Action

A. In General

Where a judgment is entered against the client in the underlying action, in order for the client to prevail in a legal malpractice action, it must be established that the client would have prevailed in the underlying action,[71] or the client would have achieved a better result in the underlying action,[72] if not for negligence or other improper conduct of the attorney. Here, as in the case where the client was or would have been the plaintiff in the underlying action, there may be required, in the legal malpractice action, a "trial within a trial"[73] in order to determine whether the result in the underlying action would have been more favorable to the client, if not for the negligence or other improper conduct of the attorney.[74] There is, however, support for the principle that where the client was the defendant in an underlying action the "suit within a suit" concept has vitality only in a limited number of instances, such as where the attorney's failure to appear causes judgment to be entered against the client[75] or where the attorney's negligence prevents an appeal from being perfected.[76]

Frequently, negligence is established by a showing that the attorney allowed a default judgment to be entered against the client in the underlying action.[77] In that case, the principal issue remaining in the legal malpractice action is whether the client had a meritorious defense to the underlying

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The fact that many of the matters going to collectibility of a judgment appear to be speculative in nature is not necessarily a bar to having them considered. Subject to appropriate proofs and control and instructions by the court, the trier of facts often considers factors in assessing damages that may be speculative in some degree.

71. Sherry v. Diercks, 29 Wash. App. 433, 438, 628 P.2d 1336, 1338 (Ct. App. 1981).

72. *Id.*

73. For a discussion of the "trial within a trial," see *supra* Section II A.

74. *Sherry*, 29 Wash. App. at 438, 628 P.2d at 1338.

75. Basic Food Indus. v. Grant, 107 Mich. App. 685, 693, 310 N.W.2d 26, 30 (1981).

76. *Id.*

77. *See, e.g.*, R.H. Schwartz Constr. Specialties v. Hanrahan, 207 Mont. 105, 672 P.2d 1116 (1983).

action.[78] In pleading a cause of action where it must be established that there was a meritorious defense to an underlying action, the client may fail if the client does not make such an allegation in his or her complaint.[79] Thus, where the client-plaintiff alleged that a default judgment was entered against him because of the attorney's failure to file an answer in an action as promised, it was held that the client did not state a cause of action because of the client's failure to allege that a defense to the action existed.[80] The court may also require specificity in this regard. Accordingly, the Oregon Supreme Court held that a complaint in a legal malpractice action against an attorney would be dismissed on demurrer where the alleged defense to the underlying action was accord and satisfaction. The court concluded that "[t]his allegation [in client-plaintiff's complaint] does not sufficiently evidence the intent of the parties to presently extinguish and thereby fully satisfy the pre-existing indebtedness."[81]

It has been observed that where the client was or would have been the plaintiff in the underlying action, various problems arise and differences in result may be achieved, dependent upon whether the court in the legal malpractice action adopts the test of what "should have" been the result in the underlying action, or what "would have" been the result in the underlying action, if not for the attorney's negligence or other improper conduct.[82] The test frequently favored by the courts is what "*would have*" been the result in the underlying action.[83] However, in the above analysis of cases where the client was or would have been the plaintiff in the underlying action, it is observed that *Lewandowski v. Continental Casualty Co.*[84] makes reference to the test of what "should have" been the result in the underlying action. If this test is adopted in cases where the client was the defendant in the underlying action, in the author's view, different issues will arise from those that arise where the "would have" test is employed. These issues are similar to those postulated and previously considered in discussing the "trial within a trial," where the client was or would have been the plaintiff

78. *See, e.g.*, Central Cab Co. v. Clarke, 259 Md. 542, 270 A.2d 662 (1970); Garguilo v. Schunk, 58 A.D.2d 683, 395 N.Y.S.2d 751 (App. Div. 1977); Masters v. Dunstan, 256 N.C. 520, 523, 124 S.E.2d 574, 576 (1962); Floyd v. Kosko, 285 S.C. 390, 329 S.E.2d 459 (Ct. App. 1985); *Sherry*, 29 Wash. App. 433, 628 P.2d 1336; *see also infra* note 129.

79. Martin v. Nichols, 110 Wash. 451, 188 P. 519 (1920) (counterclaim in action for legal services rendered).

80. *Id.* at 453-54, 188 P. at 520.

81. Harding v. Bell, 265 Or. 202, 210, 508 P.2d 216, 220 (1973).

82. *See supra* Section II A 3.

83. *See supra* note 28.

84. 88 Wis. 2d 271, 276 N.W.2d 284 (1979).

in the underlying action.[85] Reference is made to that discussion for an analysis of issues that may arise where the "should have" and "would have" tests are adopted, and their impact on the outcome in legal malpractice actions.[86] Furthermore, the previously discussed evidentiary problems that arise from proceeding within the context of a "trial within a trial" are equally relevant where the client was the defendant in the underlying action.[87]

B. The Prepayment Rule and Statutes of Limitations — and A Proffered Solution

An additional problem arises where the client was the defendant in the underlying action and has not paid a judgment that was entered against the client in that action. Under one view, the client may have a cause of action against the attorney even though the client has not paid this judgment.[88] As justification, it has been reasoned that the judgment is still "hanging over [the client-plaintiff's] head."[89] Under a contrary view, the so-called "prepayment rule," a legal malpractice action against an attorney will be dismissed where the client has not paid any part of the judgment in the underlying action.[90] Under the prepayment rule, if the client has paid part, but not all, of the judgment, the client's recovery against the attorney in the legal malpractice action would be limited to the amount paid.[91]

This "prepayment rule" can be severely criticized. There are cases in which the client is *unable to pay* the judgment, in which instances the application of this rule will result in the client being *unable to recover a judgment against an attorney* who has committed malpractice. Consider this together

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85. *See supra* Section II A 3.

86. *Id.*

87. *Id.*; *see also supra* note 5 and accompanying text.

88. Montfort v. Jeter, 567 S.W.2d 498 (Tex. 1978). The court in Gruse v. Belline, 138 Ill. App. 3d 689, 486 N.E.2d 398 (App. Ct. 1985), states:

> Generally, where an attorney is engaged to defend an action that is lost by his negligence, the amount of the judgment suffered by the client is a proper element of recovery in a malpractice proceeding against the attorney. . . . In the context of a legal malpractice action, it was held in *Montfort v. Jeter* (Tex. 1978), 567 S.W.2d 498, that an unpaid judgment against the plaintiff shown to have resulted from his attorney's unauthorized act was evidence of actual damages even though it remained unpaid at the time of trial.

Id. at 698, 486 N.E.2d at 404 (citation omitted).

89. *Montfort*, 567 S.W.2d at 499.

90. *See* Allied Prods., Inc. v. Duesterdick, 217 Va. 763, 232 S.E.2d 774 (1977).

91. *Id.* at 766, 232 S.E.2d at 776 ("Accordingly, we hold that when a client has suffered a judgment for money damages as the proximate result of his lawyer's negligence such judgment constitutes actual damages recoverable in a suit for legal malpractice only to the extent such judgment has been paid.").

with the additional fact that the statute of limitations for enforcing judgments will almost certainly be longer than the statute of limitations for instituting legal malpractice actions.[92] In this circumstance, if the client is unable to pay the judgment in the underlying action and at a later date acquires assets, the client may be required to pay the judgment (the statute of limitations for enforcement of judgments not having run) and be *without remedy* against the attorney who committed malpractice because the statute of limitations for legal malpractice has run. This result is unconscionable.

But such a result can be prevented by courts developing a doctrine which provides that the statute of limitations for legal malpractice actions is tolled for the period of time during which the judgment in the underlying action remains unpaid by the client. The author recommends the adoption of such a doctrine. Numerous other doctrines for tolling the statute of limitations in legal malpractice actions have already been devised and applied by the courts.[93] These doctrines can be justified on the policy consideration that unconscionability should be prevented, and in particular, and with special force, in the attorney-client relationship. This is a sound and adequate policy basis for adopting a tolling doctrine in the situation under discussion.

C. *The Prepayment Rule and Res Judicata*

Even if the statute of limitations is not a bar in a particular case, if the court applies the principle that the attorney will be liable in a legal malpractice action only where the client has paid all or part of the judgment in the underlying action, the client may be placed in an untenable position. Assume the client has been unable to pay any part of the judgment and therefore fails in a legal malpractice action he or she institutes against the attorney. Further assume that the client subsequently obtains assets and these are seized in satisfaction of the judgment. It may be urged that the client is barred by *res judicata* from maintaining a second legal malpractice

92. *See, e.g.*, ALA. CODE § 6-5-574 (Supp. 1988) (provides, in part, for a two-year statute of limitations for all legal service liability actions against a legal service provider, with a discovery rule which includes a provision that in no event may the action be commenced more than four years after the act, omission or failure that gives rise to the claim); ALA. CODE § 6-9-192 (1977) (provides that "[n]o execution shall issue on a judgment of the district or circuit court on which an execution has not been sued out within 10 years of its entry until the same has been revived by appropriate motion or action under the Alabama Rules of Civil Procedure"); ALA. CODE § 6-9-190 (1977) (provides that a judgment cannot be revived after the lapse of 20 years from its entry); *see also* Sitton v. Clements, 257 F. Supp. 63, 66 (E.D. Tenn. 1966) ("Under Tennessee law, a judgment is good for ten years and may be renewed, if renewed within the ten-year period, for another ten years, etc."), *aff'd*, 385 F.2d 869 (6th Cir. 1967); *supra* note 66.

93. For a discussion of other doctrines which toll the statute of limitations in legal malpractice actions, see Koffler, *supra* note 6.

action against the attorney. If this position is accepted, the bald — and certainly unconscionable — result would be liability of the client resulting from the attorney's malpractice, and freedom from liability for the attorney.

It is suggested, however, that if the sole basis for attempting to preclude recovery by the client is *res judicata*, the client may argue as follows: All of the elements necessary to establish a cause of action for legal malpractice had not come into existence at the time the client instituted the first legal malpractice action against the attorney (assuming a jurisdiction in which it must be established that the client has paid all or part of the judgment in order to have a cause of action against the attorney, and the client had made no such payment). As it is necessary that all of the essential elements of an action come into existence before a cause of action exists,[94] no cause of action existed against the attorney when the first legal malpractice action was instituted. When the client later satisfied the judgment in the underlying action, a cause of action against the attorney for legal malpractice came into existence *for the first time*. The client was therefore litigating, in the second legal malpractice action, a cause of action that did not exist when the first action was instituted, and accordingly the doctrine of *res judicata* is not applicable.[95]

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94. *See, e.g.*, Brown v. American Broadcasting Co., 704 F.2d 1296, 1300 (4th Cir. 1983) ("the statute of limitations cannot begin to run against a claim until all the elements of the cause of action exist"); Hodge v. Service Mach. Co., 438 F.2d 347, 349 (6th Cir. 1971) ("A suit may not be brought upon a cause of action until it exists, and a cause of action does not exist until all its elements coalesce."); McDaniel v. Clarkstown Cent. School Dist., 110 A.D.2d 349, 352, 494 N.Y.S.2d 885, 888 (App. Div. 1985) ("A wrongful death claim . . . does not come into existence until all the statutory elements of such a cause of action have been met.").

95. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 20(2) (1982). According to the RESTATEMENT:

> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.

Id.; *see also* Green v. Illinois Dep't of Transp., 609 F. Supp. 1021, 1024-25 (N.D. Ill. 1985) ("the doctrine of *res judicata* does not stop a plaintiff from bringing a . . . claim based on acts occurring after judgment in the first suit"); O'Brien v. City of Syracuse, 54 N.Y.2d 353, 358, 429 N.E.2d 1158, 1160, 445 N.Y.S.2d 687, 689 (1981) ("the general trespass allegations [against the municipality] — are not barred by *res judicata* to the extent that they describe acts occurring after the 1973 lawsuit"); Cone v. City of Lubbock, 395 S.W.2d 651, 654 (Tex. Civ. App. 1965) (former judgment "does not prevent further proceeding where the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants").

IV. CAUSATION AND BURDEN OF PROOF — THE "TRIAL WITHIN A TRIAL": UNCONSCIONABILITY

A. Causation — Theories and Results

On the issue of causation in legal malpractice actions, courts frequently state that proximate cause is to be established by applying a "but for" test. Such a test requires a plaintiff to prove that but for the attorney's negligence, the plaintiff would have prevailed at the trial of the underlying action;[96] or if an underlying action had been properly defended, a defense to the underlying action would have been wholly or partially successful;[97] or that but for the attorney's negligence, plaintiff would have prevailed on an appeal from the underlying action.[98]

In a Note in the April 1978 issue of the Cornell Law Review,[99] the "but for" test is considered in conjunction with standard of proof and this conclusion is reached: "The burden of proof is usually on the plaintiff to prove causation in fact by a preponderance of the evidence. In legal malpractice cases, however, courts often combine the 'but for' requirement with a high standard of proof."[100] If this latter conclusion is correct, it is of great importance, and therefore the authorities and analysis offered in support of this conclusion have been carefully examined. The author is of the opinion that the conclusion that courts often combine the "but for" requirement with a high standard of proof in legal malpractice actions is clearly *not* supported by the citations and analysis provided in the Note, for reasons set out in the footnote appended hereto.[101]

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96. *See, e.g.*, Phillips v. Clancy, 152 Ariz. 415, 733 P.2d 300 (Ct. App. 1986); Freeman v. Rubin, 318 So. 2d 540 (Fla. Dist. Ct. App. 1975); Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C., 25 Mass. App. Ct. 107, 515 N.E.2d 891 (1987); Christy v. Saliterman, 288 Minn. 144, 179 N.W.2d 288 (1970); Hickox v. Holleman, 502 So. 2d 626 (Miss. 1987); Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985).

97. *See, e.g.*, Fairhaven Textile Corp. v. Sheehan, Phinney, Bass & Green, 695 F. Supp. 71, 75 (D. N.H. 1988); Zych v. Jones, 84 Ill. App. 3d 647, 406 N.E.2d 70 (1980); Central Cab Co. v. Clarke, 259 Md. 542, 270 A.2d 662 (1970); Garguilo v. Schunk, 58 A.D.2d 683, 395 N.Y.S.2d 751 (App. Div. 1977); Sherry v. Diercks, 29 Wash. App. 433, 438, 628 P.2d 1336, 1338 (1981); *see also infra* note 129.

98. *See, e.g.*, Daugert v. Pappas, 104 Wash. 2d 254, 704 P.2d 600 (1985).

99. Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666 (1978).

100. *Id.* at 668.

101. The conclusion reached in the Note is as follows: "The burden of proof is usually on the plaintiff to prove causation in fact by a preponderance of the evidence. In legal malpractice cases, however, courts often combine the 'but for' requirement with a high standard of proof." *Id.* Reliance is placed upon Coon v. Ginsberg, 32 Colo. App. 206, 509 P.2d 1293 (1973), as one of the principal authorities in support of this conclusion. The Note states that *Coon* "required a 'showing with certainty' that the plaintiff had sustained actual damages as a result of the defendant attorney's negligence." Note, *supra* note 99, at 668-69 (quoting *Coon*, 32 Colo. App. at 210, 509

P.2d at 1295). However, in *Coon* the court simply observes, in a loosely drawn opinion, that "[b]y the fundamental rules of damages, however, a wronged litigant cannot recover substantial damages in the absence of a showing with certainty that actual damages were, in fact, sustained." *Coon*, 32 Colo. App. at 210, 509 P.2d at 1295 (citing 25 C.J.S. *Damages* § 3 (1966)). The court does not indicate that these rules are applied differently in legal malpractice actions than in other actions.

In *Coon*, it is alleged that the defendant attorney, against the express directions of the clients, stipulated to a judgment against the clients in the underlying action. An issue the court deals with involves an instruction of the trial court relating to *what* damage can be the responsibility of the defendant attorney. The court holds that contrary to the trial court's instruction, the defendant attorney cannot be held responsible for any lost equity in an airplane that had been sold at public sale, because the agreement to sell the airplane was made with the assistance of other counsel prior to defendant attorney's entry into the case. The court also holds that the correct measure of damages on this issue "is that portion of the amount to which Ginsberg [defendant attorney] stipulated that exceeds the actual amount to which the bank was entitled from the Coons [clients] at that time." *Coon*, 32 Colo. App. at 211, 509 P.2d at 1296. Thus, the court finds error in the instruction, as indicated, and also finds error in an instruction on an unrelated issue concerning damages for payments made to alternate counsel. In view of the issues presented and the holding of the court, *Coon* offers little support for the conclusion in the Note under discussion.

Better Homes Inc. v. Rogers, 195 F. Supp. 93 (N.D. W. Va. 1961) is also advanced in support of the conclusion under consideration, being cited for the principle that "plaintiff must show that [the] 'result could only have been in its favor.' " Note, *supra* note 99, at 669 n.20 (quoting *Better Homes*, 195 F. Supp. at 95). *Better Homes* is an action against attorneys for failing to timely file an appeal from a judgment rendered against their client, the defendant in the underlying action. The opinion reveals that counsel for the plaintiff client in the legal malpractice action conceded that plaintiff must show that "it would have been awarded a new trial" on appeal and that plaintiff must also "satisfy this court that on a new trial the result could only have been in its favor, and no judgment could properly have been entered against it." *Better Homes*, 195 F. Supp. at 95. Plaintiff's counsel having made this latter concession, the court observed that "[i]n my opinion, this concession is justified." *Id.* at 95. The court indicates that if it is found that appellate review is imperative, then in the posture of this case, the next step "is limited to a search for error so vital that its correction would necessitate a judgment *non obstante veredicto* and the entry of a judgment for the defendant . . . or a reversal of the case with clear indication to the trial court that a verdict should be directed for the defendant." *Id.*

Despite its extreme position, *Better Homes* does not appear to provide significant authority for the conclusion that in legal malpractice actions courts often combine the "but for" requirement with a high standard of proof. *Better Homes* arises in the factual context of alleged negligence in failure to appeal, and would not necessarily be applicable in actions based upon alleged negligence in failure to commence or defend an action, a major source of litigation in this area. It also includes a concession by counsel on the issue being considered. In addition, the court cites little authority, as it observes: "I have been surprised at the paucity of authoritative cases in which a losing defendant charges negligence against his lawyer for failure to take timely appeal. Counsel has cited none, and my own research has uncovered few." *Id.* at 96.

The Note also seeks support from Gladden v. Logan, 28 A.D.2d 1116, 1116, 284 N.Y.S.2d 920, 921 (1967), a legal malpractice action grounded in defendant attorneys' failure to prosecute a negligence action which had been entrusted to them by the plaintiff. The Note indicates that the court rejected plaintiff's request that plaintiff be required to show that "she probably would recover" rather than that "she would recover" in the underlying action. Note, *supra* note 99, at 669 n.20.

But in *Gladden*, a two paragraph per curiam opinion, the court states, "[o]bviously it is impossible to show conclusively that had that action gone to trial it would have resulted in a verdict favorable to plaintiff. What plaintiff must do is to prove such facts in regard to the accident as

In *Hoppe v. Ranzini*,[102] the court states that an attorney is liable for "that which his negligence was a substantial factor in bringing about. His negligence need not be *the* proximate cause of such damages. It suffices if it is *a* proximate cause thereof."[103] This is consistent with application, in legal malpractice actions, of the view expressed in the Restatement of Torts. The Restatement provides that an "actor's negligent conduct is a legal

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enables the jury to find that she would have recovered." *Gladden*, 28 A.D.2d at 1116, 284 N.Y.S.2d at 921. The court adds that "[w]hether this is called 'that she would recover' or that 'she probably would recover' is merely a matter of phrasing." *Id.* at 1116, 284 N.Y.S.2d at 921. It seems fair to conclude that this lends no support to the conclusion that in legal malpractice cases, courts often combine a "but for" requirement with a high standard of proof.

Reliance is also placed on Weiner v. Moreno, 271 So. 2d 217, 218-19 (Fla. Dist. Ct. App. 1973). It is stated in the Note that the court remanded the case "for redetermination of an attorney's liability, even though the plaintiff had conclusively demonstrated that the attorney had been negligent and that, in the underlying medical malpractice case, two surgical packs had been left in the patient's body." Note, *supra* note 99, at 669-70. In *Weiner*, an individual sustained serious injuries in an automobile accident, underwent emergency surgery, and died. The widow of the decedent retained the defendant attorneys to bring a malpractice action against Dade County for wrongful death. The claim was filed, but was dismissed for want of prosecution after the statute of limitations had run. *Weiner* merely concludes that it had not been successfully proven by plaintiff in the legal malpractice action that the negligence of the defendant attorneys "resulted in and was the proximate cause of the loss to the client" because "the jury in the trial for damages, due to the trial judge's ruling, was not presented with a complete evidentiary picture which could have allowed it to make a determination that the medical malpractice rather than the automobile accident was the proximate cause of Mr. Moreno's death." *Weiner*, 271 So. 2d at 219. This offers no support for the conclusion that in legal malpractice actions courts often combine a "but for" requirement with a high standard of proof. The reference in the Note to the fact that two surgical packs had been left in the patient's body, while factually accurate, is not relevant on the question of standard of proof.

It is also contended that *Weiner* "is particularly disturbing because it purports to follow Maryland Casualty Co. v. Price, [231 F. 397 (4th Cir. 1916)], a case that enunciates a simple 'but for' test." Note, *supra* note 99, at 670. This is followed by the assertion that "[s]ince a majority of jurisdictions look to *Maryland Casualty* for the standard of causation in legal malpractice, cases that read its rule to require virtual certainty may influence other jurisdictions also to attach a demanding standard of proof to the 'but for' test." Note, *supra* note 99, at 670. But *Maryland Casualty*, as quoted in *Weiner*, simply requires that in an action against an attorney for negligence, the plaintiff must prove " 'that such negligence resulted in and was the proximate cause of loss to the client.' " *Weiner*, 271 So. 2d at 219 (quoting *Maryland Casualty*, 231 F. at 401). This can be interpreted as requiring virtual certainty only if a statement that proximate cause is required is interpreted to mean that virtual certainty is required. This is an unacceptable conclusion.

Furthermore, an examination of the opinion in *Maryland Casualty* reveals that the court simply affirmed the trial court's sustaining of defendant's demurrer to an amended declaration because, as the opinion observes, the declaration does not allege that there was a meritorious defense to an underlying action, and also affirmed the refusal of the trial court to allow further amendment of the declaration on the additional ground that if this were permitted, the result could be that the threshold amount required for jurisdiction would not be reached. This also provides no basis for reading the case as requiring a standard of proof of virtual certainty.

102. 158 N.J. Super. 158, 385 A.2d 913 (Super. Ct. App. Div. 1978).

103. *Id.* at 166, 385 A.2d at 917 (emphasis in original).

cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."[104]

Hoppe's assertion that the attorney's negligence need not be *the* proximate cause, but that it is enough that it be *a* proximate cause, is no more than an application of traditional tort doctrine in legal malpractice actions. Traditional tort doctrine provides for joint and several liability among joint tortfeasors and has, as its basis, the principle that *sole* proximate cause is generally not a requirement.[105] Thus, on this limited point, *Hoppe* appears to add no novel approach in legal malpractice.

The independent intervening agency concept may be important in legal malpractice actions, particularly with reference to the conduct of an attorney who subsequently represented the client in matters for which the allegedly negligent or otherwise defaulting attorney is being sued. While an intervening cause may be superseding,[106] "[t]he connection between a negligent act and an injury is not broken by an intervening event which occurs so naturally in the course of events that it might reasonably have been anticipated by the wrongdoer."[107]

B. Burden of Proof — The Mistake of "Routine" Application as Affecting Fundamental Fairness

Traditional doctrines of burden of proof are "routinely" applied in legal malpractice actions, even where there is a "trial within a trial,"[108] and it is at this point that one may ask whether this constitutes impeccable correctness, or an evasion of responsibility rising to the level of unconscionability by the legal profession. The following discussion is intended, among other things, to shed light on this question.

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104. RESTATEMENT (SECOND) OF TORTS § 431(a)(b) (1965).

105. *See, e.g.*, Johnson v. Chapman, 43 W. Va. 639, 645, 28 S.E. 744, 746 (1897) (in determining fault in a non-legal malpractice case, the court states, "both contributing thereto, both are liable for the whole damage done, and cannot complain because they are both brought before the court in the same suit").

106. *See* RESTATEMENT (SECOND) OF TORTS § 440 (1965) ("A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.").

107. Ward v. Arnold, 52 Wash. 2d 581, 584, 328 P.2d 164, 166 (1958) (a legal malpractice action not involving a "suit within a suit"). The court also states, "[w]e see no sound reason, and none is urged why the degree of causation which must be proved in an action for damages for malpractice should be any different from that required in an ordinary negligence case." *Id.*

108. Williams v. Bashman, 457 F. Supp. 322, 326 (E.D. Pa. 1978).

If the malpractice charged is related to the prosecution of an underlying action, it is generally held that where there is a "trial within a trial" the client-plaintiff in the legal malpractice action has the burden of proof[109] to establish that proper handling of the matter would have resulted in recovery of a judgment,[110] and that the judgment would have been fully or partially collectible[111] within a period of time established by a jurisdictional rule.[112] Where the alleged malpractice of an attorney relates to defending an action, it is frequently stated that where there is a "trial within a trial" the client-plaintiff in the legal malpractice action has the burden of proof to establish that if not for the negligence or other improper conduct complained of, the action would have been successfully defended,[113] or the client would have achieved a better result.[114]

Is it fair and proper for courts to place the burden of proof upon the client, as described above, where there is a "trial within a trial?" It may be urged that there is a sound basis for this requirement historically and in contemporary legal development, as a "trial within a trial" 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.[115] But does it follow that in cases involving a "case within a case," and therefore a "trial within a trial," it is proper to apply such accepted legal doctrine?

It is submitted that the answer is in the negative, and that placing the burden of proof upon client-plaintiff in these instances constitutes an evasion by the legal profession of its responsibility to its clients. A "trial within a trial" in a legal malpractice action is unique in that, unlike in other actions, it must be established that the client-plaintiff would have succeeded in

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109. *Id.* (client-plaintiff "must establish by a preponderance of the evidence that he or she would have recovered a judgment in the underlying action").

110. *Id. But see* Nitis v. Goldenthal, 128 A.D.2d 687, 688, 513 N.Y.S.2d 186, 188 (App. Div. 1987) (the court, while stating that "[t]he plaintiff in a legal malpractice action must show that but for his attorney's negligence, he would have prevailed on the underlying claim," nevertheless concludes that "an attorney who asserts that an affirmative defense exists which would defeat the underlying claim bears the burden of proof on that issue").

111. *See supra* Section II B.

112. *See supra* Section II B 2.

113. *Zych*, 84 Ill. App. 3d at 652, 406 N.E.2d at 75; Gillespie v. Klun, 406 N.W.2d 547, 555 (Minn. App. 1987); *Sherry*, 29 Wash. App. 433, 628 P.2d 1336.

114. *Sherry*, 29 Wash. App. at 438, 628 P.2d at 1338.

115. *See* Lindemann v. San Joaquin Cotton Oil Co., 5 Cal. 2d 480, 508, 55 P.2d 870, 884 (1936) ("Besides, the jury was instructed that the burden of proof was upon the plaintiff to prove every essential element of the [personal injury] case by a preponderance of evidence . . ."); Janow v. Town of Ansonia, 11 Conn. App. 1, 8, 525 A.2d 966, 969 (1987) ("The plaintiff, however, is still bound to prove the essential allegations of his [personal injury] complaint.").

an action or defense at an earlier point in time against one who is not a party to the legal malpractice action. Therefore, "routinely" bringing to bear accepted legal doctrine in this context is principled only if its application is affirmatively justified. But fundamental fairness weighs heavily against placing the burden of proof upon the client-plaintiff to prove causation in a "trial within a trial."

The "trial within a trial" requires proof that a judgment would have been obtained against one who is not a party to the legal malpractice action,[116] or proof that there would have been a successful, or more successful, defense against one who is not a party to the legal malpractice action.[117] Difficulties in proof, varied and significant, exist at the "trial within a trial," which would not have confronted the client if the underlying action had in fact been litigated.[118] The client may be required at the "trial within a trial" to produce witnesses who are no longer available, and evidence that is old and has become difficult or impossible to obtain.[119] As legal malpractice actions are very frequently grounded upon an attorney's failure to commence an underlying action within the time prescribed by the statute of limitations,[120] or failure to answer within a prescribed time,[121] difficulties such as these are significant probabilities. The delay necessitating the production of proof that has become more difficult to obtain because of the passage of time was caused by the negligence or other improper conduct of the attorney. Is the attorney to benefit and the client to be prejudiced by the wrong committed by the attorney? The answer today is "yes," but it must become "no" if the legal profession is to meet its obligation to apply to its clients fair and ethical principles of law.

The author has found that case law generally does not recognize that this problem exists and it fails to acknowledge that accepted principles applicable in other areas should not be applied here. The barreness of thought, concern and analysis that is inherent in courts applying traditional

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116. *Williams*, 457 F. Supp. at 326.

117. *Sherry*, 29 Wash. App. at 438, 628 P.2d at 1338.

118. *See, e.g.*, Gautam v. DeLuca, 215 N.J. Super. 388, 398, 521 A.2d 1343, 1348 (Super. Ct. App. Div. 1987).

119. *Id.*

120. *See, e.g.*, McDow v. Dixon, 138 Ga. App. 338, 226 S.E.2d 145 (1976); Baker v. Beal, 225 N.W.2d 106 (Iowa 1975); *Christy*, 288 Minn. 144, 179 N.W.2d 288; *Hoppe*, 158 N.J. Super. 158, 385 A.2d 913; Ferencz v. Milie, 519 Pa. 141, 535 A.2d 59 (1987); Duke & Co. v. Anderson, 275 Pa. Super. 65, 418 A.2d 613 (1980); *see also* Koffler, *supra* note 6.

121. *See, e.g.*, Giuffria v. St. Paul Fire & Marine Ins. Co., 293 So. 2d 518 (La. Ct. App. 1974); Anderson v. Griffin, Dysart, Taylor, Penner & Lay, P.C., 684 S.W.2d 858 (Mo. Ct. App. 1984); R.H. Schwartz Constr. Specialties, Inc. v. Hanrahan, 207 Mont. 105, 672 P.2d 1116 (1983); Masters v. Dunstan, 256 N.C. 520, 124 S.E.2d 574 (1962); Martin v. Nichols, 110 Wash. 451, 188 P. 519 (1920).

doctrines of burden of proof in a "trial within a trial" is gleaned from the opinion of the Washington Court of Appeals in *Sherry v. Diercks*.[122] In *Sherry*, the court states:

> The client argues, in effect, that once he showed that the attorney did not defend the client, the burden of proof should shift to the attorney to justify the entry of the default judgment. That is not the law of this state. We are not persuaded that there is any logical justification to vary the foregoing well established principles of proximate causation and burden of proof in such cases.[123]

There has been a trickle of cases that are not in accord with the general view, including an 1831 English case[124] in which the defendant attorney, who had allowed a default judgment to be entered against the client, urged that "no action lies for negligence unless the Plaintiff shew special damage."[125] Alderson, J., in his opinion, arrives directly at the conclusion that "[n]egligence, therefore, has been proved against [the attorney] and he has failed to shew that it was immaterial to the Plaintiff [client],"[126] and as a result the attorney is liable.

In *Glidden v. Terranova*,[127] where the attorney allowed a default to be entered against the client in the underlying action, the court acknowledges that "[w]here a party who was the plaintiff in a legal action sues his attorney for negligence in the prosecution of that action, he must establish that he probably would have succeeded in the underlying litigation were it not for the attorney's negligence."[128] But the court adds that there are no appellate cases in Massachusetts which answer the question of where the burden of proof lies in a malpractice action when the defendant-attorney allegedly failed to defend in the underlying litigation. *Glidden* holds that the attorney should bear the burden of proof in such a case, " 'since the client had no obligation "to prove his case" in the underlying action (he could have simply required the plaintiff to prove his case), he should not shoulder the burden of proving a defense in the malpractice action.' "[129]

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122. 29 Wash. App. 433, 628 P.2d 1336 (1981).
123. *Id.* at 438, 628 P.2d at 1339.
124. Godefroy v. Jay, 131 Eng. Rep. 159 (1831).
125. *Id.* at 161.
126. *Id.* at 163.
127. 427 N.E.2d 1169 (Mass. App. Ct. 1981).
128. *Id.* at 1171.
129. *Id.* (quoting NOLAN, TORT LAW § 182). The distinction drawn in *Glidden* leads one to question whether courts, which frequently state that the burden of proof is upon the client to establish that there was a *meritorious defense* to the underlying action, are thinking in terms of requiring that the client establish that an adequate affirmative defense existed to the underlying action, or are thinking in terms of requiring that the client establish either that the plaintiff in the underlying action would have been unable to prove his case, or in the alternative that the client

The Louisiana Supreme Court in *Jenkins v. St. Paul Fire & Marine Insurance Co.*[130] applies a reasoned approach in rejecting the general rule that the client has the burden of proof to establish that he or she would have prevailed upon a claim in the underlying action. This is a case grounded upon the fact that the attorney had failed to timely file his client's claim in the underlying action. The court states, in the first step of a two-step analysis, that once the client "has proved that his former attorney accepted employment and failed to assert the claim timely, then the client has established a prima facie case that the attorney's negligence caused him some loss, since it is unlikely the attorney would have agreed to handle a claim completely devoid of merit."[131]

Although the court does not elaborate upon this reasoning, the author suggests that an effort can be made to justify the hypothesis that it is unlikely that the attorney would have agreed to handle a claim completely devoid of merit, by reference to the Model Code of Professional Responsibility. The Model Code provides that in the representation of a client, a lawyer shall not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another;"[132] and shall not "[k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."[133]

But *query* whether all attorneys comply with these provisions of the Model Code of Professional Responsibility? Yet, even if they do not, should it not for this purpose be presumed that they do comply, or where

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would have prevailed upon an affirmative defense. In *Garguilo*, 58 A.D.2d 683, 395 N.Y.S.2d 751, the court points out, in affirming, that the trial court dismissed the action on the ground that the client failed to make "*a showing that a meritorious defense was available*" in the underlying action. *Id.* at 683, 395 N.Y.S.2d at 752 (emphasis added). The court then states that "in an action against an attorney for alleged malpractice, the [client] must show not only that the [attorney] was negligent, but also that *the [client] would have been successful* in the underlying action." *Id.* at 683-84, 395 N.Y.S.2d at 752 (emphasis added). Thus it appears that the court may be confused, or at least projects confusion, as to what it is requiring or permitting the client to prove in order to prevail in a legal malpractice action. *See also* Grayson v. Wilkinson, 7 Miss. (5 S. & M. 268) (1845); *Giuffria*, 293 So. 2d at 519.

130. 422 So. 2d 1109 (1982).

131. *Id.* at 1110.

132. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1989).

133. *Id.* at DR 7-102(A)(2) (1989); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

the Code is not enacted in a jurisdiction, that they adhere to comparable standards? Furthermore, the court's reasoning is based upon what is "likely," and therefore lack of universality is consistent with the hypothesis upon which the court bases its conclusion that a prima facie case is established.

The *Jenkins* court then takes the second step in its analysis and concludes that having, in its view, established a "prima facie case" that the attorney's negligence caused the client some loss, the "more logical approach"[134] is to impose on the negligent attorney, at this point in the trial, "the burden of going forward with the evidence to overcome the client's prima facie case by proving that the client could not have succeeded on the original claim."[135] The court persuasively supports this conclusion by observing that "[t]he client's problem is frequently compounded when the attorney's negligence and the lapse of time has left a new attorney to search for stale evidence and has prevented or severely hampered thorough and effective preparation of the claim for trial."[136]

The inadequacy of the reasoning in *Jenkins* lies in the fact that the first step of the court's two-step analysis, that of raising a "prima facie" case, is artificially constructed and has a basis that is of questionable factual validity. Therefore, it may be expected that courts in other jurisdictions will refuse to take this step. Furthermore, the second step, and the court's conclusion, are based upon what the court finds logically follows from the hypothesis constructed and conclusion reached in the first step, rather than upon a recognition of unconscionability.[137]

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

135. *Id.*

136. *Id.* at n.2.

137. *See also* Cook v. Gould, 109 Ill. App. 3d 311, 314, 440 N.E.2d 448, 450 (1982). In *Cook*, an attorney allowed the statute of limitations to run in the underlying action. The court refused to reject existing Illinois law which provided that the client has the burden of proving that his claim would have been successful had it not been for the negligence of the attorney. But in unusual dictum the court states that "[n]otwithstanding the state of the law, however, we can conceive of situations where the attorney, because of equitable considerations, might be estopped to deny the validity of the underlying lawsuit." *Id.* at 314, 440 N.E.2d at 450. Such estoppel, the court adds, "would give rise to a shifting burden of proof that would require the lawyer, in the first instance, to present some evidence as to the lack of value of the underlying action. The instant action, however, is not such a case." *Id.*

This dictum in *Cook* is inadequate for several reasons. Although the attorney would be required in the first instance to present "some evidence" to shift the burden of proof to the client, the amount of evidence is not further quantified. It appears that what is contemplated as adequate to shift the burden of proof to the client is considerably less than a preponderance of the evidence. Therefore, this view, if implemented, would be inadequate as an instrument for arriving at justice in this area. Additionally, estoppel could be invoked only in those cases where a special showing is made. This would restrict even this limited variance from the general rule to individual or

The author recommends that the general rule be rejected by the courts on the basis of a direct and unencumbered recognition that this rule, a creature of the legal profession, is *unconscionable* towards the clients that the legal profession is bound, in a fiduciary relationship, to assist and protect. The legal profession cannot conscionably support the continued application of a rule that allows an attorney to negligently represent a client and thereby cause a lapse of time and change in circumstances that makes the client's claim or defense more difficult to prove,[138] and then place upon the client the burden to prove the very claim or defense that the attorney's negligence has made more difficult to prove. The unconscionability of the present approach of placing the burden of proof upon the client-plaintiff in the legal malpractice action must be recognized and accepted by the courts as a rationale for refusing to apply traditional doctrines of burden of proof in these cases.

On the different, but related question of an attorney negligently failing to file an appeal, courts generally have placed the burden upon the client to prove that the appeal would have been successful.[139] But the United States District Court for Eastern Louisiana in *Cabot, Cabot & Forbes v. Brian, Simon, Peragine, Smith & Redfearn*,[140] indicating that it is following "the mandate of *Jenkins*,"[141] concludes to the contrary that the attorney "must carry the burden of showing that [the client's] appeal would not have succeeded."[142] The court goes on to state, after finding that the Louisiana appellate court would have reversed and remanded the case to the trial court, that the attorney also has the burden of establishing that at trial the client would not have achieved a better result.[143]

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isolated cases. The *Cook* court fails to perceive that the general rule is unconscionable and operates unfairly in all cases.

138. *But see* Coggin, "*Attorney Negligence . . . A Suit Within a Suit*," 60 W. VA. L. REV. 225, 235 (1958) ("A more valid objection to the use of the suit within a suit method of ascertaining damages is the fact that the attorney defendant will probably not have at his disposal the evidence which would have been offered by the opposing party in the original action.").

139. *See, e.g.*, Molever v. Roush, 152 Ariz. 367, 732 P.2d 1105 (1986); Gillion v. Tieman, 86 Ill. App. 3d 147, 407 N.E.2d 1146 (1980); Dings v. Callahan, 4 Kan. App. 2d 36, 602 P.2d 542 (Ct. App. 1979); *Daugert*, 104 Wash. 2d 254, 704 P.2d 600 (1985).

140. 568 F. Supp. 371 (1983).

141. *Id.* at 373.

142. *Id.* at 373-74.

143. *Id.* at 376.

C. *Burden of Proof — Proffered Solutions*[144]

The author recommends that where there is a "trial within a trial" in a legal malpractice action, and the client was or would have been the plaintiff in the underlying action, the attorney should have the burden of proving that the client would *not* have recovered a judgment in the underlying action.[145] Since the delay which engendered the difficulty of proof is of the attorney's making, it is fair and sound, and in the view of the author imperative, that the difficulties in proof be the attorney's and not the client's burden. If the attorney fails to establish that the client would not have recovered a judgment in the underlying action, the client should have the burden of proving the amount of the judgment that would have been recovered. Even if the attorney establishes that the client would not have recovered a judgment in the underlying action, the client should be permitted to establish that if not for the negligence or other improper conduct of the attorney, the underlying action would have been settled, as for example, in a factual context where the attorney failed to advise the client of an offer to settle. The client should have the burden of proving that the underlying action would have been settled, and also the amount of such a settlement. In these instances it is necessary to marshal evidence to affirmatively establish ultimate facts — the amount of a judgment, or the fact and amount of a settlement — and therefore, the burden of proof should properly rest with the client.

Where the issue is whether the underlying action would have been successfully defended or more successfully defended, if not for the attorney's negligence or other improper conduct, the burden of proof should be upon the attorney to prove that even if he or she had acted properly, there would have been no successful defense, or no more successful defense, of the un-

144. Wherever, in the recommendations proffered in this section, the author refers to burden of proof, the recommendation is that the burden be by a preponderance of the evidence.

145. *But see* Note, *supra* note 99, where a different standard is proposed based upon analogy to a "lost substantial possibility of survival" standard in medical malpractice. *Id.* at 679. This proposed standard would require plaintiff in a legal malpractice action to prove a "lost substantial possibility of recovery," and upon this showing "the factfinder may infer causation." *Id.* at 679-80. In support of this standard it is reasoned that "[a]lthough the plaintiff must still provide evidence of the merits of the underlying claim, the requirement of showing certainty, often precluded by the attorney's prior behavior, no longer exists." *Id.* at 680. This reasoning is not acceptable because it assumes that there presently exists a requirement of showing certainty, but as is demonstrated in the analysis in *supra* note 101, this has not been established.

On the merits of the proposal, perhaps a "lost substantial possibility of recovery" is too vague a standard, but more important, the proposal should be rejected on the ground that it continues to require the client to bear the burden of proof. It is unconscionable to require that the client, rather than the attorney, bear the burden of proof, for reasons set out in the text. *See supra* text accompanying notes 138-50.

derlying action. Here, too, the delay which engenders added difficulty in proof is of the attorney's making, and it is unconscionable to prejudice the client because of the attorney's negligence or other improper conduct. If the attorney fails to establish that there would have been no successful defense to the underlying action, the attorney should be permitted to show that a judgment in some amount would have been recovered against the client in the underlying action. The attorney should have the burden of proof on this issue, and also the burden of proof to establish the amount of such a judgment. If the client desires to establish that the action would have been settled if not for the attorney's negligence or other improper conduct, the client should be permitted to do so, and should have the burden of proof on this issue and also on establishing the amount of such a settlement.

These recommended changes are of immediate urgency in legal malpractice actions, as they have at their core the attorney-client relationship. The attorney-client relationship is fiduciary in nature[146] and requires the ultimate in trust. It cannot legitimately provide the attorney with a vehicle for damaging the client by negligence or other improper conduct, and then allow the attorney to use the results of this conduct to prejudice the client procedurally and substantively to the point where the client may be effectively deprived of redress against the attorney. To allow the present situation to continue would be to perpetuate both an unconscionable and unethical framework for justice in this area.

It is also generally held that where the client-plaintiff in a legal malpractice action was or would have been the plaintiff in the underlying action, he or she bears the burden of proof on the issue of collectibility of a judgment that would have been recovered in the underlying action if not for the negligence or other improper conduct of the attorney.[147] In an unusual holding, however, the court in *Hoppe v. Ranzini*[148] states that "fairness requires that the burden of proof with respect to the issue of collectibility should be upon the attorney defendants, notwithstanding the rule elsewhere that places that burden on plaintiff."[149]

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146. *See* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 188, 491 P.2d 421, 428-29, 98 Cal. Rptr. 837, 844-45 (1971).

147. *See, e.g., Sitton*, 257 F. Supp. at 67; *McDow*, 138 Ga. App. at 338, 226 S.E.2d at 147 (1976); Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524, 526 (Iowa 1983) (if prior defendant's solvency is not known beyond question, "the client must introduce substantial evidence from which a jury could reasonably find that a prior judgment would have been collectible in full, or could reasonably find the portion of the judgment which would have been collectible"); Taylor Oil Co. v. Weisensee, 334 N.W.2d 27, 29 n.2 (S.D. 1983).

148. 158 N.J. Super. 158, 385 A.2d 913 (Super. Ct. App. Div. 1978).

149. *Id.* at 171, 385 A.2d at 920. At least one additional state court has rejected the general rule that the burden of proof is on the client-plaintiff in a legal malpractice action to prove collec-

The author recommends that the burden of proof be placed upon the attorney to prove that the judgment would not have been collectible, in whole or in part, during the relevant statute of limitations period for enforcing a judgment.[150] It is fair and proper to require the attorney to bear this burden of proof, as the issue of collectibility would not have existed if not for the negligence or other improper conduct of the attorney. If this is not done, the client will continue to be unfairly prejudiced in his or her ability to obtain redress for damages caused by the attorney's wrongful conduct. Whether or not a judgment would have been collectible, especially at a distant point in time, is frequently difficult to prove. This difficulty should be the attorney's — not the client's. The fiduciary nature of the attorney-client relationship makes imperative the formulation of principles whereby the wrong of the attorney can be redressed without unfair burdens being placed upon the client. The legal profession must not continue to apply principles relating to the burden of proof on the issue of collectibility that are fundamentally unfair to its clients.

Fundamental fairness also requires that where the attorney negligently fails to file or perfect an appeal, the burden of proof be placed upon the attorney to establish that the appeal would have been unsuccessful. The general view currently followed by the courts, which places the burden of proof upon the client to establish that the appeal would have been successful, burdens the client and rewards the attorney for his or her negligence. If the attorney fails to establish that the appeal would have been unsuccessful and the court in the legal malpractice action concludes that the appellate court would not have entered judgment for the client, but would have reversed and remanded the case to the trial court, then consistent with the recommendations set out above, the attorney should also have the burden of proof in a "trial within a trial" to establish that the client, if the claimant in the underlying action, would not have prevailed in that action, or that the client, if the defendant in the underlying action, would not have de-

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tibility. Jourdain v. Dineen, 527 A.2d 1304, 1306 (Me. 1987). The *Jourdain* court adopted the rule that "uncollectibility is an affirmative defense that must be pleaded and proved by the defendant." *Id.* at 1306. Another variation on the issue of burden of proof in this context is set forth by a federal court applying New York law. In Wagner v. Tucker, 517 F. Supp. 1248 (S.D.N.Y. 1981) the court states:

> It is thus reasonable to conclude that while a New York court might place the burden of proof upon the plaintiff to demonstrate the collectibility of any judgment received in the underlying action, it will also place a burden of going forward on the defendant such that, if the issue is not raised by the defendant, no proof of collectibility is required of the plaintiff.

Id. at 1252.

150. For a discussion of collectibility, *see supra* Section II B.

feated that action or achieved a better result. If the client desires to establish that the action would have been settled if not for the attorney's negligence or other improper conduct, the client should be permitted to do so, and should have the burden of proof on this issue and also on establishing the amount of such a settlement.

V. CONCLUSION

Intricacies and special consequences result from the unique nature of a "trial within a trial" in a legal malpractice action. Among the numerous matters considered in this Article relating to a "trial within a trial" have been questions of burden of proof. For reasons that may involve simply slipshod analysis, or more, principles of law relating to burden of proof in a "trial within a trial" have generally been skewed enormously in favor of the attorney and against the client. For example, where the statute of limitations has run on a claim that the attorney wrongfully failed to institute, the attorney is generally not required to bear the burden of proving that the claim was invalid. Rather, the client is generally required to bear the burden of proving that had the attorney properly commenced the action, the client would have prevailed. Frequently several years have elapsed and evidence needed to establish the claim has been lost or diluted by the passage of time — the very passage of time caused by the attorney's wrongful conduct. The result is that the attorney derives a benefit from his or her wrongful conduct, and thus the system of justice places, wittingly or otherwise, an unconscionable burden upon the client. As a consequence, legal doctrine in this area surreptitiously mocks the fiduciary relationship of the attorney to the client. Recommendations have been offered by the author to overcome the unconscionable nature of the status quo. These recommendations, if implemented, should result in a system of justice in this area that for the first time meets the test of fundamental fairness to the client.