COMMENT

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Shifting the Burden of Proof on Causation in Legal Malpractice Actions

COMMENT CONTENTS

I. INTRODUCTION

Legal malpractice suits, like any negligence claim, require the plaintiff to meet all of the elements of the malpractice claim. Texas malpractice claims are based on professional negligence.[1] In Texas, the elements a plaintiff

1. Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989); Fireman's Fund Am. Ins. Co. v. Patterson & Lamberty, Inc., 528 S.W.2d 67, 69 (Tex. Civ. App.—Tyler 1975, writ ref'd); Patterson & Wallace v. Frazer, 79 S.W. 1077, 1080 (Tex. Civ. App.—El Paso 1904, no writ); *see also* Hall v. White, Getgey, Meyer & Co., 347 F.3d 576, 585 (5th Cir. 2003) ("In Texas, a legal malpractice action sounds in tort and is governed by negligence principles."), *rev'd*, 465 F.3d 587 (5th Cir. 2006); Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004) (classifying legal malpractice as a tort); Allbritton v. Gillespie, Rozen, Tanner & Watsky, P.C., 180 S.W.3d 889, 892 (Tex. App.—Dallas 2005, pet. denied) ("A legal malpractice claim is based on negligence."); Stephen E. McConnico et al*., Unresolved Problems in Texas Legal Malpractice Law*, 36 ST. MARY'S L.J. 989, 991–92 (2005) ("A legal malpractice action in Texas is traditionally based on professional negligence."). "A litigation malpractice claim is like most other legal malpractice claims in that it is one of ordinary negligence. The distinction is that in litigation malpractice the alleged negligence consists of mishandling the client's claim or defense in the course of litigation." Clark Crapster, Comment, *The Common Sense of Re-Creation: Why Texas Should Close the Door to Expert Testimony on But-For Causation in Litigation Malpractice*, 40 TEX. TECH L. REV. 151, 154 (2007) (citation omitted). "In a professional malpractice case, the plaintiff must prove: (1) a duty by the professional to act according to a certain standard; (2) a breach of the applicable standard of care; (3) an injury; and (4) a causal connection between the breach of care and the injury." Onwuteaka v. Gill, 908 S.W.2d 276, 281 (Tex. App.—Houston [1st Dist.] 1995, no writ). "As legal malpractice claims arise in tort, they are treated like any other negligence claim. Therefore, the plaintiff must prove the traditional elements of negligence: duty, breach, causation, and damages." Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1021 (2007). "A cause of action for legal malpractice is in the nature of a tort and is thus governed by the two-year statute of limitations." Farah v. Mafrige & Kormanik, P.C., 927 S.W.2d 663, 670

must prove in a legal malpractice claim are: "(1) the attorney owed the plaintiff a duty[;] (2) the attorney breached that duty[;] (3) the breach proximately caused the plaintiff's injuries[;] and (4) damages occurred."[2]

(Tex. App.—Houston [1st Dist.] 1996, writ ref'd) (citing Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988)). The Texas Supreme Court has held that the discovery rule applies to legal malpractice claims. *See Willis*, 760 S.W.2d at 645 (applying the discovery rule to legal malpractice claims). "Under the discovery rule, the statute of limitations for legal malpractice actions does not begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing his cause of action." Trousdale v. Henry, 261 S.W.3d 221, 234 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (citing *Willis*, 760 S.W.2d at 646); *see also* Tyler T. Ochoa & Andrew J. Wistrich, *Limitation of Legal Malpractice Actions: Defining Actual Injury and the Problem of Simultaneous Litigation*, 24 SW. U. L. REV. 1, 26–27 (1994) (discussing the fact that most states have adopted the discovery rule where "the statute of limitation[s] does not begin to run[] until the plaintiff has suffered some damage").

2. *Alexander*, 146 S.W.3d at 117 (quoting Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995)); *see also Cosgrove*, 774 S.W.2d at 665 (requiring attorney malpractice actions to be based upon negligence); *Trousdale*, 261 S.W.3d at 227 (listing the four elements of a legal malpractice claim); Swank v. Cunningham, 258 S.W.3d 647, 667 (Tex. App.—Eastland 2008, pet. denied) (holding that a plaintiff must prove the four elements to prevail in a legal malpractice claim); *Allbritton*, 180 S.W.3d at 892 (delineating the four elements of a legal malpractice claim); McMahan v. Greenwood, 108 S.W.3d 467, 495 (Tex. App.—Houston [14th Dist.] 2003, pet denied) ("In a legal malpractice claim, a plaintiff must prove the attorney owed the plaintiff a duty, that duty was breached, the breach proximately caused the plaintiff's injuries, and damages occurred."). "Generally, to recover on a claim of legal malpractice, a plaintiff must prove: (1) the attorney owed the plaintiff a duty; (2) the attorney breached that duty; (3) the breach proximately caused the plaintiff's injuries; and (4) damages occurred." *Farah*, 927 S.W.2d at 670; *see also* McConnico et al., *supra* note 1, at 991–92 (outlining the requirements for legal malpractice claims in Texas). The United States Court of Appeals for the Fifth Circuit has established the same four elements to recover on a claim for legal malpractice. *See Hall*, 347 F.3d at 585 ("To recover on a claim for legal malpractice, the plaintiff must establish that (1) the attorney owed him a duty, (2) the attorney breached that duty, (3) the breach proximately caused injury to the plaintiff, and (4) damages resulted."), *rev'd*, 465 F.3d 587 (5th Cir. 2006). An Illinois appellate court also requires the four elements to prove a legal malpractice claim. *See* Nika v. Danz, 556 N.E.2d 873, 882 (Ill. App. Ct. 1990) (outlining the four elements). Texas and Louisiana differ as to what elements are required to prove a legal malpractice claim. *Compare Onwuteaka*, 908 S.W.2d at 281 ("[T]he plaintiff must prove: (1) a duty by the professional to act according to a certain standard; (2) a breach of the applicable standard of care; (3) an injury; and (4) a causal connection between the breach of care and the injury."), *and* Crapster, *supra* note 1, at 154 ("[T]he litigation malpractice plaintiff must always prove five elements: (1) that the defendant owed a duty of reasonable care to the plaintiff, (2) that the defendant breached that duty, (3) that damages occurred, (4) that the damages were a foreseeable risk, and (5) that the damages would not have occurred but for the defendant's breach of duty."), *with* Prince v. Buck, 2006-CA-1603 (La. App. 4 Cir. 5/16/07); 969 So. 2d 641, 643 (outlining the elements for legal malpractice claims as "(1) there was an attorney-client relationship; (2) the attorney was negligent; and (3) that negligence caused plaintiff some loss"), Scott v. Thomas, 543 So. 2d 494, 495 (La. Ct. App. 1989) ("In order to prove a claim for legal malpractice, plaintiff must prove: (1) that there was an attorney-client relationship (2) that the attorney was negligent in his representation of the client, and (3) that this negligence caused plaintiff some loss."), *and* Evans v. Detweiler, 466 So. 2d 800, 802 (La. Ct. App. 1985) ("To state a claim for legal malpractice[,] plaintiffs must allege that there was an attorney-client relationship, that the attorney was negligent in his representation of the client

Most jurisdictions, including Texas, place the burden on the plaintiff to meet all elements of the claim, including causation.[3] However, a significant minority of jurisdictions allow the burden to shift to the defendant after the plaintiff presents a prima facie case of negligence.[4]

A. *Proving a Legal Malpractice Case*

The first two elements of a legal malpractice claim are significantly easier to prove than the causation element. First, the plaintiff must prove that

and that this negligence caused plaintiffs some loss."). The Louisiana Court of Appeals for the Fourth Circuit has allowed for partial summary judgment on the "proof of loss" element when the plaintiff has established the first two elements. *See* Couture v. Guillory, 98-CA-2796 (La. App. 4 Cir. 4/15/98); 713 So. 2d 528, 530 ("Pretermitting a discussion of the first two elements, we find that defendants have established under La. Code Civ. Proc. art. 966 C that partial summary judgment is proper on the third element of a legal malpractice claim: proof of loss."). Similar to legal malpractice claims, medical malpractice cases also sound in negligence and require analogous elements to be proved. *See* White v. Wah, 789 S.W.2d 312, 315 (Tex. App.—Houston [1st Dist.] 1990, no writ.) ("[T]he plaintiff must prove four elements: (1) a duty by the physician to act according to a certain standard; (2) a breach of the applicable standard of care; (3) an injury; and (4) a causal connection between the breach of care and the injury.").

3. Mackie v. McKenzie, 900 S.W.2d 445, 448–49 (Tex. App.—Texarkana 1995, writ denied); *accord* Vooth v. McEachen, 181 N.Y. 28, 31–32 (App. Ct. 1905) ("'In a suit by a client against an attorney for negligence in conducting the collection of a claim, whereby the debt was lost, the burden rests on the former to allege and prove every fact essential to establish such liability. He must allege and prove that the claim was turned over to the attorney for collection; that there was a failure to collect, and that this failure was due to the culpable neglect of the attorney, *and that but for such negligence the debt could or would have been collected*.'" (quoting III AM. & ENG. ENCYC. OF LAW 391 (2d. ed. 1902))); *see also* McConnico et al., *supra* note 1, at 991–92 (showing that the burden remains on the plaintiff in proving all of the elements of a legal malpractice claim, including causation). "Causation is an essential element in a cause of action based on negligence." Faber v. Herman, 731 N.W.2d 1, 7 (Iowa 2007).

4. *See* Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So. 2d 1109, 1110 (La. 1982) (providing for burden shifting because the "case-within-a-case" requirement puts too much of a burden on the plaintiff); *see also Prince*, 969 So. 2d at 643 (allowing the burden of causation to shift to the defendant-attorney after the plaintiff presents a prima facie case of negligence); *Couture*, 713 So. 2d at 530 (allowing partial summary judgment on the proof-of-loss element of a legal malpractice claim after the plaintiff made a prima facie case of negligence by proving the first elements of the malpractice claim); VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 115 (2011) (stating that some courts have employed the burden-shifting technique). The United States District Court for the District of Massachusetts has also employed the burden-shifting approach. St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP, 408 F. Supp. 2d 59, 60 (D. Mass. 2006) (holding "that the attorney should indeed bear the burden of proof in such a case"). The Massachusetts Court of Appeals has also held that the burden of causation should be placed on the defendant-attorney. *See* Glidden v. Terranova, 427 N.E.2d 1169, 1171 (Mass. App. Ct. 1981) ("We hold that the attorney should indeed bear the burden of proof in such a case, for 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." (internal quotation marks omitted) (quoting J.R. NOLAN, TORT LAW § 182, at 297 (1979))).

there was a fiduciary relationship.[5] The existence of a fiduciary relationship can be considered a question of law or fact depending on the nature of the relationship in dispute.[6] A fiduciary relationship arises when an attorney–client relationship is created.[7] The Fourteenth Court of Appeals of Texas, in *Goffney v. Rabson*,[8] described the attorney–client relationship as "one of 'most abundant good faith,' requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception."[9] Texas has made the relationship between clients and attorneys a fiduciary relationship as a matter of law.[10]

5. *See Alexander*, 146 S.W.3d at 117 (listing the establishment of a fiduciary relationship as the first element in a legal malpractice claim); *Peeler*, 909 S.W.2d at 496 (requiring the establishment of a fiduciary duty for legal malpractice claims); *Cosgrove*, 774 S.W.2d at 665 (holding that the plaintiff must prove a fiduciary relationship in a legal malpractice action).

6. *Compare* Crim Truck & Tractor Co. v. Navistar Int'l Transp. Co., 823 S.W.2d 591, 594 (Tex. 1992) (noting that the existence of informal fiduciary relationships is generally a question of fact), *superseded by statute*, TEX. REV. CIV. STAT. ANN. art. 4413(86), § 6.06(e), *repealed by* Act of June 1, 2003, 77th Leg., R.S., ch. 1421, § 13, 2003 Tex. Gen. Laws 5020, *and* Berry v. First Nat'l Bank of Olney, 894 S.W.2d 558, 560 (Tex. App.—Fort Worth 1995, no writ) ("Generally, whether a fiduciary or confidential relationship exists is a question of fact."), *with* Meyer v. Cathey, 167 S.W.3d 327, 330 (Tex. 2005) ("In certain formal relationships, such as an attorney-client or trustee relationship, a fiduciary duty arises as a matter of law."). Whether a fiduciary duty exists depends on the circumstances. Hoggett v. Brown, 971 S.W.2d 472, 488 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

7. *See Meyer*, 167 S.W.3d at 330 (holding that the establishment of an attorney-client relationship gives rise to a fiduciary duty); *Swank*, 258 S.W.3d at 666 ("Fiduciary duties arise when an attorney-client relationship is created."). "The existence of an attorney-client relationship turns largely on the client's subjective belief that it exists." Barnett v. Sethi, 608 So. 2d 1011, 1014 (La. Ct. App. 1992). An attorney should also keep in mind that not only is a fiduciary relationship created between the client and the attorney, but it could also be created in situations involving third-party intended beneficiaries. *Lawyers' Responsibilities to the Client: Legal Malpractice and Tort Reform*, 107 HARV. L. REV. 1547, 1561 (1994). "The intended-beneficiary test requires that both the attorney and the client expressly intended the plaintiff to benefit from the legal services, and that this benefit was the 'primary or direct purpose of the transaction or relationship.'" *Id.* at 1561–62 (quoting Pelham v. Griesheimer, 440 N.E.2d 96, 99 (Ill. 1982)).

8. Goffney v. Rabson, 56 S.W.3d 186 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

9. *Id.* at 193 (quoting Perez v. Kirck & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied)). "An attorney is obligated to use the skill, prudence, and diligence commonly exercised by practitioners of his profession." Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988); *see also* Ramp v. St. Paul Fire & Marine Ins. Co., 269 So. 2d 239, 244 (La. 1972) (holding that attorneys are "obligated to exercise at least that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in [their] locality").

10. *Meyer*, 167 S.W.3d at 330; *Willis*, 760 S.W.2d at 645; Lundy v. Masson, 260 S.W.3d 482, 502 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); Trousdale v. Henry, 261 S.W.3d 221, 229 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *Goffney*, 56 S.W.3d at 193; Arce v. Burrow, 958 S.W.2d 239, 246 (Tex. App.—Houston [14th Dist.] 1997), *aff'd in part*, *rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999).

Once the fiduciary relationship is established, the plaintiff must then show a breach of that duty.[11] Instead of a "reasonable person" standard, an attorney is held to the standard of a "reasonable attorney," which requires the exercise of "the degree of diligence, care, and skill ordinarily or commonly demonstrated by attorneys in the relevant geographical area."[12]

A breach of a fiduciary duty between a client and an attorney can arise in a variety of situations.[13] For example, a breach of a fiduciary relationship could result from an attorney's failure to give full and fair

11. *See* Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004) (outlining the breach of fiduciary duty as the second element of a legal malpractice claim). A breach of fiduciary duty as a claim on its own should not be confused with a legal malpractice claim. *See* 48 ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, HANDBOOK OF TEXAS LAWYER & JUDICIAL ETHICS § 2:2 (2009–2010 ed.) ("The focus of breach of fiduciary duty is whether an attorney obtained an improper benefit from representing a client, while the focus of a legal malpractice claim is whether an attorney adequately represented a client." (quoting Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied))). However, when a claim for a breach of fiduciary duty is based on the same set of facts as a malpractice claim, the two will most likely be combined into the malpractice claim. *See* Hinson & Snyder, *supra* note 1, at 1018 ("[W]hen the fiduciary duty claim arises from the same set of facts as the malpractice claim, it is subsumed within the malpractice claim and cannot be separately maintained."). "[I]n order to support a cause of action for breach of fiduciary duty separate and apart from a claim for legal malpractice, the allegations in the petition must amount to self-dealing, deception, or misrepresentations in the representation of the plaintiff that go beyond the mere negligence allegations in a legal malpractice action." *Trousdale*, 261 S.W.3d at 232.

12. *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1562; *see also* Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989) (establishing the standard of care an attorney is held to as that of a "reasonable attorney"); Hoppe v. Ranzini, 385 A.2d 913, 916 (N.J. Super. Ct. App. Div. 1978) ("An attorney's duty to his client requires him to exercise the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated."). "'Negligence' is the doing of that which a person of ordinary prudence would not have done, or the omission to do what the hypothetical person would have done, in the same or similar circumstances." Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App.—Austin 1985, no writ). The specialization of certain types of law may affect the "reasonable attorney" standard a lawyer is held to. *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1562 (discussing how a tax attorney, for example, could be held to a higher standard of care in matters dealing with taxes than an ordinary attorney who is not specialized in the area). "Generally, a malpractice claim is based on 'the improper representation of a client or upon the failure of an attorney to exercise the degree of care and diligence that a lawyer would commonly exercise.'" Hinson & Snyder, *supra* note 1, at 1017 (quoting Lajzerowicz v. McCormick, No. 04-05-00681-CV, 2006 WL 2871298, at *1 (Tex. App—San Antonio Oct. 11, 2006, no pet.) (mem. op.)). "The standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith." *Cosgrove*, 774 S.W.2d at 665.

13. *See Trousdale*, 261 S.W.3d at 232 ("[B]reach of fiduciary duty by an attorney often involves the attorney's failure to disclose conflicts of interest, failure to deliver funds belonging to the client, placing personal interests over the client's interests, improper use of client confidences, taking advantage of the client's trust, engaging in self-dealing, and making misrepresentations." (citing *Goffney*, 56 S.W.3d at 193)); *see also* Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied) (discussing the existence of a fiduciary duty).

disclosure of material facts related to the client's representation.[14] A fiduciary relationship can be breached simply by not using a reasonable attorney standard of care in preparing and presenting a client's case in litigation, or not giving a client advice when the attorney is legally obligated to do so.[15] Furthermore, a breach could arise from an attorney's failure to disclose a conflict of interest.[16] Proving a breach of a fiduciary duty is typically ascertained by the use of expert testimony concerning the duties owed and whether or not those duties were breached.[17]

B. *The Problem with Establishing Causation in Legal Malpractice Actions—The Trial Within a Trial*

Establishing causation in jurisdictions that place the burden on the plaintiff for all elements of the malpractice claim often results in what is known as a trial within a trial.[18] This occurs when the plaintiff must prove that he or she would have prevailed in the underlying suit but for the negligence of the attorney.[19] Many issues can arise in the trial-within-a-

14. *See Trousdale*, 261 S.W.3d at 229 ("As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation." (quoting *Willis*, 760 S.W.2d at 645)).

15. *See* 48 ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, HANDBOOK OF TEXAS LAWYER & JUDICIAL ETHICS § 2:2 (2009–2010 ed.) (listing various ways in which the fiduciary relationship between an attorney and client can be breached).

> The attorney's negligence may consist in the giving of an erroneous legal opinion or advice, in failing to give any advice or opinion when legally obliged to do so, in disobeying a client's lawful instruction, in taking an action when not instructed by the client to do so, in delaying or failing to handle a matter entrusted to the attorney's care by the client, or in the attorney's want of ordinary care in preparing, managing, and presenting litigation that affects the client's interests.

Zidell, 692 S.W.2d at 553.

16. *See Goffney*, 56 S.W.3d at 193 (describing situations in which an attorney may be held to have breached a fiduciary duty, including failure to disclose conflicts of interests).

17. *See* 48 ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, HANDBOOK OF TEXAS LAWYER & JUDICIAL ETHICS § 2:2 (2009–2010 ed.) (stating that expert testimony should be "directed at the nature of the attorney's fiduciary obligations and whether the attorney's acts or omissions violated those obligations").

18. *See* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 109–13 (2011) (detailing the trial-within-a-trial analysis); Hinson & Snyder, *supra* note 1, at 1021 ("[I]f a legal malpractice case arises from prior litigation, a plaintiff must prove that, but for the attorney's breach of his duty, the plaintiff would have prevailed in the underlying case. This aspect is referred to as but for causation or the suit-within-a-suit requirement." (internal quotation marks and footnote omitted)).

19. *See* Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied) (explaining that in order to succeed in a legal malpractice case using the trial-within-a-trial method, one must prove they would have succeeded in the underlying case but for the negligence of the

trial approach, including problems relating to the gathering of evidence, the availability of expert testimony, and the difficult requirement that a layperson-plaintiff prove he would have succeeded in the underlying action, which in some cases may never have actually gone to trial due to the negligence of the attorney.[20]

Many courts and commentators have pointed out the problems associated with the suit-within-a-suit method.[21] It has been described as "placing too high a burden on already beleaguered plaintiffs because it forces the plaintiff to essentially litigate and try two separate actions."[22] In an attempt to alleviate some of the problems associated with the suit-within-a-suit approach of proving causation, some jurisdictions have employed burden-shifting analysis.[23] This analysis allows the burden of disproving causation to shift to the defendant attorney after the plaintiff presents a prima facie case of negligence—by proving the existence of a

attorney); Jackson v. Urban, Coolidge, Pennington & Scott, 516 S.W.2d 948, 949 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (holding the burden is on the plaintiff to prove they would have won but for the negligence of the attorney); *see also* Greathouse v. McConnell, 982 S.W.2d 165, 172–73 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (providing information and explanation on the suit-within-a-suit requirement). "Where 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." Glidden v. Terranova, 427 N.E.2d 1169, 1171 (Mass. App. Ct. 1981). "All the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. b (2000).

20. *See* Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 845 A.2d 602, 612 (N.J. 2004) (noting problems that arise with the suit-within-a-suit approach including the passage of time between the two suits, the difficulties of not having the same access to evidence that was available at the first trial, and the difficulties of accurately reconstructing the underlying suit in general); VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 110 (2011) (describing the trial-within-a-trial method of proving causation in legal malpractice actions as "exceedingly complex").

21. *See Garcia*, 845 A.2d at 612 (noting how the suit-within-a-suit method presents problems for the plaintiff and can "distort the underlying action"); Thomas v. Bethea, 718 A.2d 1187, 1197 (Md. 1998) (providing detail on the problems associated with proving a case within a case in legal malpractice claims); Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So. 2d 1109, 1110 (La. 1982) (explaining how the suit-within-a-suit method of proving causation imposes "too great a standard of certainty of proof"); George S. Mahaffey, Jr., *Cause-In-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 412–13 (2004) (discussing the issues that arise in the suit-within-a-suit method of proving causation).

22. Mahaffey, *supra* note 21, at 411.

23. *See generally Jenkins*, 422 So. 2d at 1109 (discussing burden-shifting analysis).

fiduciary relationship and a breach of that relationship.[24]

This Comment will highlight and discuss some of the problems that accompany the trial-within-a-trial method of proving causation and suggest a solution. Part II discusses causation generally, and points out the obstacles associated with the trial-within-a-trial method of proving causation. Part III examines Texas law regarding proof of causation in legal malpractice actions, and also discusses the use of expert testimony in proving such actions. Part IV considers Louisiana law pertaining to causation as an example of a jurisdiction employing burden-shifting analysis. Part V details the problems associated with the trial-within-a-trial method, including issues that arise for the plaintiff, as well as defendant attorneys. Part VI offers a solution to the problems that come with the trial-within-a-trial method of proving causation, and suggests a change in the way Texas courts handle the causation element of legal malpractice actions. This Comment will demonstrate the benefits associated with the burden-shifting approach and conclude by suggesting that Texas courts employ this approach.

II. CAUSATION: THE PLAINTIFF'S BURDEN

Even in cases where negligence is admitted on the part of the attorney, causation is not presumed.[25] Causation is a separate element that must be proven regardless of the amount of evidence presented to establish negligence.[26]

The plaintiff has a two-prong burden of causation—factual and proximate causation.[27] To meet the burden of factual causation, a

24. Prince v. Buck, 2006-CA-1603 (La. App. 4 Cir. 5/16/07); 969 So. 2d 641, 643; *see also Jenkins*, 422 So. 2d at 1110 (shifting the burden to the attorney to prove the plaintiff could not have succeeded in the underlying case).

25. Alexander v. Turtur & Assocs., 146 S.W.3d 113, 119 (Tex. 2004); VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 101 (2011); McConnico et al., *supra* note 1, at 1005.

26. *See Alexander*, 146 S.W.3d at 119 ("Breach of the standard of care and causation are separate inquiries, however, and an abundance of evidence as to one cannot substitute for a deficiency of evidence as to the other."); *see also* Faber v. Herman, 731 N.W.2d 1, 7 (Iowa 2007) (describing causation as an "essential element [of any] cause of action based on negligence").

27. *See Alexander*, 146 S.W.3d at 117–18 ("[P]roximate cause require[s] proof of causation in fact."); *see also Faber*, 731 N.W.2d at 7 (discussing that causation in negligence actions has two components: (1) factual, or cause-in-fact causation, and (2) proximate, or legal-cause causation); 7A C.J.S. *Attorney and Client* § 302 (2010) (detailing the requirements of proving both factual and

plaintiff must prove that "but for" the lawyer's negligence or breach of duty, the plaintiff would have won the previous case the negligence claim arose from.[28] This is what leads to what is commonly referred to as the "suit-within-a-suit" or "trial-within-a-trial" problem.[29] In the suit-within-a-suit approach, both the malpractice claim and the underlying suit are tried in front of the same jury to determine if the plaintiff would have won the suit but for the negligence of the lawyer.[30] Thus, the burden remains

proximate causation in legal malpractice cases); VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 101–117 (2011) (explaining both factual and proximate causation as they relate to legal malpractice actions in detail).

28. Hoover v. Larkin, 196 S.W.3d 227, 231 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *see also* Greathouse v. McConnell, 982 S.W.2d 165, 172–73 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (utilizing the "but for" test to determine if "but for" the attorney's breach of duty and negligence the plaintiff would have prevailed on the underlying action); VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 107 (2011) (explaining that the "but for" test is the most common method to prove factual causation); *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1568 ("Courts apply a but-for test to determine whether the defendant's negligence injured the plaintiff. In other words, the plaintiff must prove that injury would not have occurred but for the defendant's negligence."); Crapster, *supra* note 1, at 157 (stating that "in order to prove cause-in-fact, the plaintiff must show that he would have prevailed in the underlying suit but for the lawyer's negligence"); Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial—A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40, 57 (1989) ("[I]n 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, or the client would have achieved a better result in the underlying action, if not for negligence or other improper conduct of the attorney." (footnotes omitted)). "When the plaintiff's allegation is that some failure on the attorney's part caused an adverse result in prior litigation, the plaintiff must produce evidence from which a jury may reasonably infer that the attorney's conduct caused the damages alleged." *Alexander*, 146 S.W.3d at 117. "To succeed in a legal malpractice action, the plaintiff must prove 'a suit within a suit' by showing that he would have prevailed in the underlying action but for his attorney's negligence." Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied). "Where a client sues his attorney on the ground that the latter caused him to lose his cause of action, the burden of proof is on the client to prove that his suit would have been successful but for the negligence of his attorney, and to show what amount would have been collectible had he recovered the judgment." Jackson v. Urban, Coolidge, Pennington & Scott, 516 S.W.2d 948, 949 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

29. *Mackie*, 900 S.W.2d at 449; *Jackson*, 516 S.W.2d at 949; *see also Greathouse*, 982 S.W.2d at 172–73 (detailing the suit-within-a-suit requirement); Hinson & Snyder, *supra* note 1, at 1021 (explaining "the suit-within-a-suit requirement" under Texas law); Mahaffey, *supra* note 21, at 410–13 (discussing the case-within-a-case requirement in detail). "With respect to the but-for causation element, because 'the claim concerns the attorney's handling of a litigated matter,' the plaintiff 'must show that he would have prevailed in the underlying suit but for the attorney's negligence and that he would have been able to collect some or all of a favorable judgment.' This requirement is the but-for element that Texas courts call the 'suit within a suit . . . .'" Crapster, *supra* note 1, at 155 (quoting Hall v. White, Getgey, Meyer & Co., 347 F.3d 576, 585 (5th Cir. 2003)).

30. *See Greathouse*, 982 S.W.2d at 172–73 (providing information on the suit-within-a-suit approach and explaining that it requires a plaintiff to prove he would have won but for the negligence

on the plaintiff to prove not only the elements of the malpractice case at hand, but also that he would have been successful in the underlying case.[31]

The second element of causation is proximate causation.[32] The question of proximate causation is essentially a question of whether it is fair to impose liability for the injury that occurred.[33] In other words, proximate causation determines that even where factual causation exists, liability will not be imposed unless it is fair to do so.[34] Foreseeability and cause-in-fact are the two elements of establishing proximate causation, and the existence of both elements makes it fair to impose liability upon the

of the attorney); *Mackie*, 900 S.W.2d at 449 (detailing the suit-within-a-suit requirement and explaining but-for causation); Gibson v. Johnson, 414 S.W.2d 235, 238–39 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.) (explaining the suit-within-a-suit approach to establishing causation). "[T]he plaintiff would have to conduct a 'trial within a trial' in which both the malpractice and the underlying claims are tried to the same jury, with the malpractice defendant forced to represent the opponent in the underlying action." *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1568.

31. *Mackie*, 900 S.W.2d at 449; *Jackson*, 516 S.W.2d at 949; *see also* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 107–08 (2011) (detailing the but-for test of factual causation and stating that the plaintiff must show that but for the negligence of the defendant-attorney, the plaintiff would have won the underlying case). "In a situation involving the attorney-client relationship where the client seeks to recover against his attorney on the ground that the latter caused him to lose his cause of action, the burden of proof is on the client to prove that his suit would have been successful but for the negligence of his attorney, and to show what amount would have been collectible had he recovered judgment." *Gibson*, 414 S.W.2d at 238–39; *see also* Koffler, *supra* note 28, at 65–66 (explaining the burden on the plaintiff to prove the trial within a trial). "[T]he plaintiff must prove by a preponderance of the evidence that, but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 53 cmt. b (2000). "'But for' causation is often difficult to establish." VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 103 (2011). "[E]ven if an attorney was negligent in not filing an action within the statute of limitations, if the client cannot establish that his case would have been meritorious, no damages are shown and no recovery can be had." Nika v. Danz, 556 N.E.2d 873, 882 (Ill. App. Ct. 1990).

32. *See* 7A C.J.S. *Attorney and Client* § 302 (2010) (explaining causation requires both factual and proximate causation); *see also* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 117–18 (2011) (describing proximate causation as an element of causation); Mahaffey, *supra* note 21, at 407–09 (detailing factual and proximate causation).

33. *See* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 117 (2011) ("The requirement of proximate causation is a policy-based inquiry into fairness."); Mahaffey, *supra* note 21, at 408 (explaining that proximate cause is essentially whether that person should be responsible for what occurred).

34. *See* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 117 (2011) (explaining proximate causation and stating that even when the defendant has factually caused the harm, there will be no liability unless it is fair to impose it); Mahaffey, *supra* note 21, at 408 ("Proximate cause, however, accepts that the defendant's action was a cause of the plaintiff's alleged injury but seeks to determine 'whether that tortuous cause should be treated as a proximate (responsible) cause.'" (emphasis omitted) (quoting Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1011 (1988))).

defendant.[35] Cause-in-fact is proven by showing that the negligence was a "substantial factor" in bringing injury to the plaintiff, and without which harm would not have occurred.[36] The second element, foreseeability, is proven by showing that the actor, "as a person of ordinary intelligence and prudence, should have anticipated the dangers that his negligent act created for others."[37] In legal malpractice actions, the "person of ordinary intelligence" is the reasonable attorney.[38] The reasonable attorney standard of care does not necessarily mean that an act made by an attorney is negligent just because the result is undesirable.[39] Rather, it means that as long as an attorney makes a decision that a reasonably prudent attorney *could* make in the same or similar circumstance, it is not an act of negligence simply because the result in the action was not desired.[40]

35. First Assembly of God, Inc. v. Tex. Utils. Elec. Co., 52 S.W.3d 482, 493 (Tex. 2001); Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 477 (Tex. 1995); Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 549 (Tex. 1985); McClure v. Allied Stores of Tex., Inc., 608 S.W.2d 901, 903 (Tex. 1980).

36. *First Assembly of God*, 52 S.W.3d at 493; *see also* 7A C.J.S. *Attorney and Client* § 302 (2010) ("For an attorney's conduct to be a cause in fact of the plaintiff's harm, the act or omission must have been 'a substantial factor in bringing about the injury and [one] without which no harm would have occurred.'" (quoting *McClure*, 608 S.W.2d at 903)).

37. *First Assembly of God*, 52 S.W.3d at 493; *accord* El Chico Corp. v. Poole, 732 S.W.2d 306, 311–13 (Tex. 1987) (discussing foreseeability and negligence in detail); *McClure*, 608 S.W.2d at 903 (citing Clark v. Waggoner, 452 S.W.2d 437, 440 (Tex. 1970)) (defining foreseeability as the anticipated danger created by a person of ordinary intelligence).

38. *See* Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989) (holding that an attorney is held to a reasonable attorney standard); *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1562 ("The hypothetical person standard an attorney is held to is a 'reasonable attorney' standard.").

39. "Attorneys cannot be held strictly liable for all of their clients' unfulfilled expectations." *Cosgrove*, 774 S.W.2d at 665.

> The jury must evaluate his conduct based on the information the attorney has at the time of the alleged act of negligence. In some instances an attorney is required to make tactical or strategic decisions. Ostensibly, the good faith exception was created to protect this unique attorney work product. However, allowing the attorney to assert his subjective good faith, when the acts he pursues are unreasonable as measured by the reasonably competent [practitioner] standard, creates too great a burden for wronged clients to overcome.

Id. at 664.

40. "An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect." *Id.* at 665. Courts have held that the good faith of the attorney is a factor to be considered when determining liability for malpractice. *See id.* at 664 ("Some courts have held that if an attorney makes an error in judgment, but acted in good faith and in what the attorney believed was the client's best interest, the attorney is not liable for malpractice.").

III. TEXAS LAW: THE TRIAL-WITHIN-A-TRIAL METHOD AND EXPERT TESTIMONY

As previously mentioned, Texas law requires the plaintiff to prove all elements of a legal malpractice claim, including the element of causation.[41] Requiring the plaintiff to establish causation leads to the suit-within-a-suit problem.[42] In 1989, the Texas Supreme Court first recognized the "case-within-a-case" method of proving factual causation in *Cosgrove v. Grimes*.[43] In order to prove but-for causation in the case-within-a-case method, Texas courts typically use expert testimony.[44] Expert testimony is used to assist the juror in understanding the legal process the defendant attorney may have utilized in the previous action, thus allowing them to establish a causal link between the negligence and the harm.[45] In *Alexander v. Turtur & Associates, Inc.*,[46] the Texas Supreme Court stated that proof of causation of injury often requires

41. *See supra* Part II (discussing the plaintiff's burden of proving causation in every legal malpractice action).

42. *See* Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied) (explaining that in order to succeed in a legal malpractice case using the trial-within-a-trial method the plaintiff must establish causation); Jackson v. Urban, Coolidge, Pennington & Scott, 516 S.W.2d 948, 949 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (holding the trial-within-a-trial method places the burden on the plaintiff to prove causation and to show she would have won but for the negligence of the attorney); *see also* Greathouse v. McConnell, 982 S.W.2d 165, 172–73 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (discussing the general requirements of a legal malpractice cause of action).

43. Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989); *see also* McConnico et al., *supra* note 1, at 992 (listing *Cosgrove* as the first case in which the Texas Supreme Court recognized the case-within-a-case method).

44. *See* Hoover v. Larkin, 196 S.W.3d 227, 231 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("In general, one proves causation in a legal malpractice suit by expert testimony."); *see also* Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117–19 (Tex. 2004) (demonstrating the importance of the use of expert testimony in legal malpractice actions); Onwuteaka v. Gill, 908 S.W.2d 276, 281 (Tex. App.—Houston [1st Dist.] 1995, no writ) ("Both the breach of the standard of care and proximate cause must be proven by expert testimony."). "An expert must be qualified and provide a reasoned basis for his opinion." Allbritton v. Gillespie, Rozen, Tanner & Watsky, P.C., 180 S.W.3d 889, 892 (Tex. App.—Dallas 2005, pet. denied).

45. *See Alexander*, 146 S.W.3d at 119–20 ("[T]he wisdom and consequences of these kinds of tactical choices made during litigation are generally matters beyond the ken of most jurors. And when the causal link is beyond the jury's common understanding, expert testimony is necessary."); *see also* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 66 (2011) (explaining that expert testimony is generally necessary to prove a causal link when it is beyond the knowledge of an ordinary layperson-juror to be able to establish the link themselves, and therefore, unless the link is apparent, expert testimony will always be necessary).

46. Alexander v. Turtur & Assocs., 146 S.W.3d 113 (Tex. 2004).

expert testimony relating to what the attorney should have done under the circumstances.[47]

Often, judgment is entered for the defendant attorney because plaintiffs cannot establish elements of the malpractice claim due to the insufficiency or complete lack of expert testimony on the issue.[48] In *Gammill v. McElroy*,[49] the Fort Worth court of appeals granted summary judgment to an attorney in a legal malpractice action because the plaintiff failed to present sufficient expert testimony.[50] The court held that the plaintiff failed to present any evidence due to the lack of expert testimony, thus making summary judgment applicable for the defendant.[51] The court in *Gammill* stated that in Texas, "a plaintiff in a legal malpractice suit is

47. *See id.* at 119–20 (requiring expert testimony to prove negligence); *see also* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 81 (2011) (noting that some jurisdictions require expert testimony in legal malpractice cases); Crapster, *supra* note 1, at 154 ("To prove duty, breach, and sometimes foreseeability, expert testimony is often necessary."). *But see* Delp v. Douglas, 948 S.W.2d 483, 495 (Tex. App.—Fort Worth 1997) (declining to require the use of expert testimony in all malpractice cases), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999); Arce v. Burrow, 958 S.W.2d 239, 252 (Tex. App.—Houston [14th Dist.] 1997) (requiring expert testimony only when the causal link is beyond the juror's general understanding), *aff'd in part, rev'd in part*, 997 S.W.2d 229 (Tex. 1999).

> Settlements of personal injury and wrongful death cases involve experience and specialized knowledge. An attorney must review and analyze, among other things, the underlying liability facts, the identity of the defendant, the damage elements available to a plaintiff, the specific injuries or losses incurred by a plaintiff, the settlement amounts received in similar cases, the complexity of the case, as well as the strength and resources of the opposing counsel. This information and its evaluation in the context of a settlement offer requires specialized knowledge of the law. This is a skill not ordinarily possessed by lay persons. A lay jury cannot be expected to ascertain, without guidance from a legal expert, whether an attorney obtained a reasonable settlement for his or her client. We hold that whether the attorneys in this case caused damage to appellants is a question upon which the trier of fact must be guided solely by expert testimony.

Id. The Texas Court of Appeals for the Fourteenth Circuit seems to suggest that a determination of causation is almost always beyond the general understanding of a layperson-juror; therefore, expert testimony is almost always required to prove it. *Id.*

48. *See* Rangel v. Lapin, 177 S.W.3d 17, 23 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (holding that the plaintiff "failed to raise a material fact issue on the suit-within-a-suit causation element of his legal malpractice claim" because of lack of expert testimony on the issue); Gammill v. McElroy, No. 2-02-388-CV, 2003 WL 22674728, at *3 (Tex. App.—Fort Worth Nov. 13, 2003, no pet.) (mem. op.) (entering judgment for the attorney because the plaintiff failed to present evidence of causation due to the insufficiency of expert testimony).

49. Gammill v. McElroy, No. 2-02-388-CV, 2003 WL 22674728 (Tex. App.—Fort Worth Nov. 13, 2003, no pet.) (mem. op.).

50. *Id.* at *3.

51. *Id.* at *2.

required to present expert testimony regarding the standard of skill and care ordinarily exercised by an attorney."[52] Expert testimony is so important that, without it, the plaintiff was unable to prove elements of the malpractice claim and lost the case.[53] As discussed in Part V, finding proper expert testimony is often very difficult for plaintiffs in malpractice cases.

However, some jurisdictions in Texas have declined to put so much emphasis on the use of expert testimony to prove causation.[54] For example, in *Coastal Tankships U.S.A., Inc. v. Anderson*[55] the First Court of Appeals held that the use of expert testimony is not necessarily required in all cases.[56] The court held that expert testimony is not necessary where "general experience and common sense will enable a lay person fairly to determine the causal nexus . . . ."[57] However, in *Tankships*, the court ultimately decided expert testimony was necessary to prove causation because the causal link was beyond the understanding of a layperson-juror without expert assistance.[58]

On the federal level, in *Streber v. Hunter*,[59] the United States Court of Appeals for the Fifth Circuit stated that expert testimony is not required to prove causation in all circumstances.[60] Similar to *Tankships*, the court held that expert testimony should only be used in cases where an ordinary layperson would not be able to decide the issue of causation without

52. *Id.* at *2–3 (citing Ersek v. Davis & Davis, P.C., 69 S.W.3d 268, 271 (Tex. App.—Austin 2002, pet. denied)); *see also Alexander*, 146 S.W.3d at 118–19 (demonstrating the importance of the use of expert testimony in legal malpractice actions); Hoover v. Larkin, 196 S.W.3d 227, 231 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (stating causation is generally proved by expert testimony in a legal malpractice suit); Onwuteaka v. Gill, 908 S.W.2d 276, 281 (Tex. App.—Houston [1st Dist.] 1995, no writ) (requiring expert testimony for a legal malpractice suit).

53. *Gammill*, 2003 WL 22674728, at *3.

54. *See* Coastal Tankships, U.S.A., Inc. v. Anderson, 87 S.W.3d 591, 603 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (holding that expert testimony is not required but only necessary when a layperson's general experience will not enable that person to determine causation); Delp v. Douglas, 948 S.W.2d 483, 495 (Tex. App.—Fort Worth 1997) (declining to require the use of expert testimony in all malpractice cases), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999).

55. Coastal Tankships, U.S.A., Inc. v. Anderson, 87 S.W.3d 591 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

56. *Id.* at 603.

57. *Id.*

58. *Id.*

59. Streber v. Hunter, 221 F.3d 701 (5th Cir. 2000).

60. *Id.* at 726.

assistance.[61] In some cases, the client's testimony alone could be sufficient to provide the jury with a basis for a causal link, but in those where it is not, expert testimony is necessary.[62] For example, in a malpractice suit where the claim is that the attorney did absolutely nothing (i.e. allowing a case to default), expert testimony is not required because a jury, with no specialized legal knowledge, will be able to establish the causal link between the harm and the negligence without the assistance of an expert.[63]

IV. LOUISIANA LAW: THE BURDEN-SHIFTING APPROACH

Under Louisiana law, the elements a plaintiff must prove in a legal malpractice claim are: "(1) there was an attorney-client relationship; (2) the attorney was negligent[;] and (3) that negligence caused plaintiff some loss."[64] However, the plaintiff may establish a prima facie case of

61. *Id.*; *see also Coastal Tankships*, 87 S.W.3d at 603 (holding that when a layperson's general experience will not enable that person to determine causation, expert testimony is required); McConnico et al., *supra* note 1, at 1005 (explaining that expert testimony may be required to prove causation when the causal link is beyond the common knowledge of the layperson-juror).

> "[Defendants] urge[] us to adopt a rule that would require expert testimony regarding proximate cause in all legal malpractice cases. . . . While we agree that expert testimony on proximate cause may be required to prove some legal malpractice claims, we refuse to hold that it is required to prove all such claims. Instead, we believe that the proper rule is one that would only require expert testimony on proximate cause in cases where determination of that issue is not one that lay people would ordinarily be competent to make."

Streber, 221 F.3d at 726 (alterations in original) (quoting Delp v. Douglas, 948 S.W.2d 483, 495 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999)). Expert testimony is required when the jury will not be able to establish the causal link without the specialized knowledge of an expert. *See* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 66–67 (2011) (discussing when expert testimony is needed in legal malpractice suits).

62. *See* Alexander v. Turtur & Assocs., 146 S.W.3d 113, 119 (Tex. 2004) (holding that expert testimony is necessary in cases where it is required by the jury to establish the causal link); VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 67 (2011) (stating that expert testimony is completely unnecessary in the "rarest of cases" where even laypersons will be able to know that the causal link exists without the assistance of specialized knowledge).

63. *See* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 67 (2011) (describing situations where expert testimony will not be necessary because the layperson-juror can see that the lawyer obviously acted improperly without the assistance of additional legal knowledge from an expert). Other jurisdictions have held that expert testimony is not always necessary. *See* House v. Maddox, 360 N.E.2d 580, 584 (Ill. App. Ct. 1977) (discussing the situations where expert testimony is not required); Cent. Cab Co. v. Clarke, 270 A.2d 662, 667 (Md. 1970) (holding that expert testimony is not necessary in all cases).

64. Prince v. Buck, 2006-CA-1603 (La. App. 4 Cir. 5/16/07); 969 So. 2d 641, 643 (citations omitted); *see also* Couture v. Guillory, 98-CA-2796 (La. App. 4 Cir. 4/15/98); 713 So. 2d 528, 530 (providing the elements a plaintiff must prove in a legal malpractice case); Finkelstein v. Collier, 93-CA-999 (La. App. 5 Cir. 4/14/94); 636 So. 2d 1053, 1058 (establishing the same elements of a legal

negligence by showing that there was an attorney–client relationship and that the attorney was negligent.[65] Once the plaintiff establishes the first two elements, the burden shifts to the defendant to rebut the presumption that the negligence caused some loss.[66] The defendant attorney must then present enough evidence to prove that the plaintiff would not have succeeded in the underlying case.[67]

In *Jenkins v. St. Paul Fire & Marine Ins. Co.*,[68] the Louisiana Supreme Court reasoned that shifting the burden to the defendant attorney prevents an undue burden from being placed upon the plaintiff.[69] The court held

malpractice claim in Louisiana); Scott v. Thomas, 543 So. 2d 494, 495 (La. Ct. App. 1989) (showing the elements of legal malpractice claims under Louisiana law).

65. Gibson v. Herman, Herman, Katz & Cotlar, L.L.P., 2004-CA-2204 (La. App. 4 Cir. 2/15/06); 927 So. 2d 1178, 1184; Guidry v. Coregis Ins. Co., 04-325 (La. App. 3 Cir. 12/29/04); 896 So. 2d 164, 172; *see also* Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So. 2d 1109, 1110 (La. 1982) (holding that the plaintiff established a prima facie case that the attorney's negligence caused him some loss once he proved that the attorney accepted employment and failed to timely assert his claim).

66. *Prince*, 969 So. 2d at 643; *see also Jenkins*, 422 So. 2d at 1110 (imposing on the negligent attorney "the burden of going forward with evidence to overcome the client's prima facie case by proving that the client could not have succeeded on the original claim."); Rawboe Props., L.L.C. v. Dorsey, 2006-CA-0070 (La. App. 4 Cir. 3/21/07); 955 So. 2d 177, 183 (finding the attorney not liable for damages after shifting the burden to the attorney to disprove the presumption of some loss); *Guidry*, 896 So. 2d at 172 (shifting the burden of disproving causation to the attorney after the plaintiff established a prima facie case of negligence).

> Using this approach, a putative plaintiff would have to demonstrate that an attorney-client relationship existed, and that the plaintiff's underlying claim was lost at the hands of the negligent attorney. If the plaintiff demonstrates these two elements, the burden shifts to the defendant-attorney to demonstrate that the plaintiff's underlying claim was not meritorious.

Mahaffey, *supra* note 21, at 429.

67. *Prince*, 969 So. 2d at 643; *Guidry*, 896 So. 2d at 172; *see also Jenkins*, 422 So. 2d at 1110 (shifting the burden to the attorney to prove the plaintiff could not have succeeded in the underlying case); *Dorsey*, 955 So. 2d at 183 (demonstrating the attorney was able to disprove the presumption of some loss in a jurisdiction using the burden-shifting approach).

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

69. *See id.* (holding that keeping the burden upon the plaintiff to prove causation presents an undue burden).

> Causation, of course, is an essential element of any tort claim. However, 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. In such a situation, a rule which requires the client to prove the amount of damages by trying the "case within a case" simply imposes too great a standard of certainty of proof. Rather, the more logical approach is to impose on the negligent attorney, at this point in the trial, the burden of going forward with evidence to overcome the client's prima facie case by proving that the client could not have succeeded on the original claim, and the causation and damage

that it was "more logical" to shift the burden to the attorney after the plaintiff established the first two elements of a legal malpractice claim.[70] The court also reasoned that if the plaintiff established the first two elements, the attorney-client relationship was created (i.e. the attorney accepted to represent the client in the case) and that the attorney was negligent. The plaintiff had established a prima facie case because it could be presumed there was some loss to the plaintiff because it is unlikely the case was completely devoid of merit to begin with if the attorney agreed to represent the client in the underlying case.[71] Therefore, once the two elements are established, the burden shifts to the attorney to rebut the presumption that the negligence injured the plaintiff.[72]

In *Couture v. Guillory*,[73] the Louisiana Fourth Circuit Court of Appeals affirmed partial summary judgment on the proof-of-loss element of a legal malpractice claim.[74] The court held that after the plaintiff proved the first two elements of the malpractice claim she had established that it was proper for partial summary judgment on the proof-of-loss element under Louisiana Code of Civil Procedure.[75] However, the Louisiana Fourth

> questions are then up to the jury to decide. Otherwise, there is an undue burden on an aggrieved client, who can prove negligence and causation of some damages, when he has been relegated to seeking relief by the only remedy available after his attorney's negligence precluded relief by means of the original claim.

Id. at 1110; *accord Prince*, 969 So. 2d at 643 (allowing the burden to shift to the defendant-attorney once the plaintiff has established the first two elements of the legal malpractice claim); *Guidry*, 896 So. 2d at 172 (utilizing the burden-shifting analysis to prevent an undue burden from being placed upon the plaintiff).

70. *See Jenkins*, 422 So. 2d at 1110 (discussing how an "undue burden" is placed upon the plaintiff if they are required to prove all the elements of a legal malpractice claim); *see also Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (suggesting an undue burden is placed upon the plaintiff in the trial-within-a-trial method by stating plaintiffs are likely to be discouraged from filing a suit due to the "complexity" of the trial within a trial).

71. *Jenkins*, 422 So. 2d at 1110 (establishing that the first two elements of the malpractice claim provides prima facie evidence that the attorney's negligence caused injury "as it is unlikely the attorney would have agreed to handle a claim completely devoid of merit").

72. *Id.* ("[T]he more logical approach is to impose on the negligent attorney, at this point in the trial, the burden of going forward with evidence to overcome the client's prima facie case by proving that the client could not have succeeded on the original claim, and the causation and damage questions are then up to the jury to decide.").

73. Couture v. Guillory, 98-CA-2796 (La. App. 4 Cir. 4/15/98); 713 So. 2d 528.

74. *Id.* at 530.

75. *See id.* ("[W]e find that defendants have established under La. Code Civ. Proc. art. 966 C that partial summary judgment is proper on the third element of a legal malpractice claim: proof of loss.").

Court of Appeals in *Rawboe Properties, L.L.C. v. Dorsey*[76] clarified the holding in *Jenkins* and held that a prima facie case of some loss does not necessarily mean that a loss was suffered that would allow monetary damages.[77] Ultimately in *Dorsey*, the court decided the defendant-attorneys presented enough evidence to prove that the plaintiff would not have won the previous trial, and therefore, they were not liable for damages.[78]

V. PROBLEMS RESULTING FROM THE TRIAL-WITHIN-A-TRIAL METHOD OF PROVING CAUSATION

Plaintiffs in legal malpractice suits, who are more than likely laypersons, often have difficulty proving they would have succeeded in the underlying suit.[79] It is difficult to "re-create" a trial, especially one that never occurred in the first place.[80] For example, if malpractice is claimed against a lawyer who failed to timely file the underlying case, the plaintiff will be required to prove she would have won a case that was never actually tried

76. Rawboe Props., L.L.C. v. Dorsey, 955 So. 2d 177 (La. Ct. App. 2007).

77. *See id.* at 183 ("While the court in *Jenkins* stated that proof of failure to timely assert a claim constitutes prima facie evidence that an attorney's negligence has caused the client 'some loss,' this does not automatically translate to a loss for which a party could have recovered monetary damages." (citation omitted)).

78. *See id.* at 182 (holding that the attorneys presented a "substantial amount of evidence" to prove that the plaintiff in the malpractice case would not have prevailed in the underlying cause).

79. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1568–69 (describing the difficulties that proving a case within a case presents for plaintiffs); Polly A. Lord, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1482–83 (1986) (pointing out problems with the trial-within-a-trial method). "We recognize that the 'suit within a suit' rule may well suffer from an undue rigidity." Gautam v. De Luca, 521 A.2d 1343, 1348 (N.J. Super. Ct. App. Div. 1987).

80. *See* Thomas v. Bethea, 718 A.2d 1187, 1197 (Md. 1998) (criticizing the suit-within-a-suit approach in that it does not accurately replicate the original trial when attempting to prove causation in the malpractice trial); *Gautam*, 521 A.2d at 1348 (noting it is often difficult for parties to re-create an accurate reflection of the previous action to establish causation in the suit-within-a-suit method); *see also* Hinson & Snyder, *supra* note 1, at 1024 (explaining the difficulties in re-creating a trial and noting "it would be very difficult, if not impossible, to accurately re-create the original trial such that the effect of different trial strategies could be measured"). "[S]uch an attempted 'suit within a suit' could well skew the proofs so that the present trial would not really mirror the earlier suit and thus a jury in the current case would not obtain an accurate evidential reflection or semblance of the original action. . . ." Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 845 A.2d 602, 613 (N.J. 2004). Re-creating a suit that never occurred can be complicated when evidence must be brought in, not only to succeed in the present malpractice action, but also to prove the underlying case. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1568–69 (discussing the complications of re-creating a trial within a trial).

due to the negligence of the attorney.[81] In such an instance, re-creation of the previous trial would be particularly problematic for a plaintiff, resulting in a situation where the negligence of the defendant attorney would actually help shield him from liability.[82]

A. *Defendant-Attorneys Receive an Unfair Advantage Through the Attorney-Client Relationship*

In addition, it is unfair to require the plaintiff to litigate a case that never happened against the lawyer who has the benefits of knowing what the client previously disclosed while the attorney–client relationship was ongoing,[83] and the attorney may use this information against the plaintiff in the malpractice action.[84] Although the plaintiff will have the assistance of her own counsel in the malpractice trial, the former attorney will still be at an advantage and have the benefit of any statements the plaintiff made in confidence to him and be able to use those statements against the plaintiff in the malpractice suit. In *Thomas v. Bethea*,[85] the Maryland Court of Appeals criticized the trial-within-a-trial method in this regard noting that, "it is unfair to require the plaintiff to litigate the case against his or her own lawyer, who has superior knowledge about the strengths and weaknesses of the case."[86]

81. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1568–69 (describing the difficulties that proving a "case within a case" presents for plaintiffs); Koffler, *supra* note 28, at 71 (explaining that the negligence of attorneys can cause a lapse in time and changes in circumstances that can then make it difficult for the plaintiff to prove causation).

82. *See* Jernigan v. Giard, 500 N.E.2d 806, 807 (Mass. 1986) (noting that an attorney should not be able to rely on his own negligence to bar recovery against him).

> 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, 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.

Koffler, *supra* note 28, at 71.

83. *See Thomas*, 718 A.2d at 1197 (explaining the unfairness associated with requiring a layperson-plaintiff to re-create a case that never occurred against her former lawyer who has the benefit of knowledge obtained while the fiduciary duty existed); *see also* Hinson & Snyder, *supra* note 1, at 1024 (acknowledging the difficulties for a plaintiff to re-create a case against his former lawyer).

84. *See Thomas*, 718 A.2d at 1197 (discussing the problem presented for plaintiffs when the defendant-attorney has obtained information during the attorney-client relationship that may now be used against the plaintiff).

85. Thomas v. Bethea, 718 A.2d 1187 (Md. 1998).

86. *Id.* at 1197.

B. *Evidence Issues with "Re-creating" the Previous Case*

The lack of available evidence in legal malpractice cases also makes it difficult to prove the plaintiff in the underlying trial would have succeeded but for the attorney's negligence.[87] The plaintiff may only introduce evidence that would have been admissible in the original trial.[88] Thus, the passage of time becomes an issue with regard to the availability of evidence.[89] It is possible that witnesses that were available in the underlying trial might not still be available to testify in the second trial.[90] Also, documents that were available in the first trial could be lost between the underlying case and the malpractice case.[91]

Another evidentiary problem in proving causation occurs when the alleged malpractice involves the lawyer inadequately compiling evidence.[92]

87. *See id.* (noting that the evidence used to prove the malpractice claim "may not be of the same quality" as the evidence that was available in the underlying case); Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 845 A.2d 602, 612 (N.J. 2004) (explaining that evidence may not be of the same quality or may have changed with the passage of time when attempting to re-create the underlying case).

88. *See* Lord, *supra* note 81, at 1483 ("The evidence is restricted to what would have been admitted had the underlying action taken place . . . ."). "Thus, the malpractice plaintiff may be limited to the evidentiary material as inadequately compiled by the defendant, and may be unable to prove that the case otherwise would have had a different outcome." *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569.

89. *See Garcia*, 845 A.2d at 612 ("[T]he passage of time itself can be a significant factor militating against the 'suit within a suit' approach."). Many jurisdictions and commentators have drawn attention to the effect the passage of time has on the ability to re-create the original suit within the suit. *See Thomas*, 718 A.2d at 1197 ("[T]he evidence may not be of the same quality as that which would have been offered in the underlying case . . . ."); Gautam v. De Luca, 521 A.2d 1343, 1348 (N.J. Super. Ct. App. Div. 1987) (acknowledging the evidentiary hardships to the malpractice plaintiff due to the passage of time between the original case and the malpractice suit); *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1568–69 (indicating that, in order to prove the trial within a trial, witnesses from the previous case must be called and cross-examined); Lord, *supra* note 81, at 1483 (noting that "the passing of time is bound to impact the quality of the evidence").

90. *See Garcia*, 845 A.2d at 611–12 (explaining that witnesses available in the underlying case may no longer be available or may not be able to perform in the same form or effect in the malpractice trial as they would have been in the original trial).

91. *See id.* at 612 ("[P]arties must cope with the disadvantage of not having the same access to evidence or of having evidence grow stale with the passage of time."). The passage of time itself can affect evidence, making it more difficult to reach former witnesses or produce documents that were once readily available. *See Gautam*, 521 A.2d at 1348 (discussing the effect of the passage of time on the re-creation method); *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (indicating that in order to prove the trial within a trial, witnesses from the previous case must be called and cross-examined).

92. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (recognizing the problems that may result for plaintiffs who are required to prove causation where evidence was inadequately compiled by the negligent attorney in the underlying case).

If the suit is based on the inadequate compilation of evidence, and the evidence used in the malpractice trial is restricted to that which was used in the underlying case, it presents a particular burden on the plaintiff to prove causation based on that limited amount of evidence.[93] It is especially unfair to require the plaintiff to prove causation if they are limited to inadequate evidence negligently compiled by the defendant-attorney.[94] Again, this is an example of the trial-within-a-trial method of allowing the attorney's own negligence to protect and shield him from liability.[95]

Perhaps the most difficult obstacle associated with gathering evidence to use in the malpractice trial is that the original defendant is no longer a party to the case, therefore making it difficult to conduct discovery regarding the underlying case.[96] The inability to conduct discovery makes it very difficult for the plaintiff to find enough evidence to use in the malpractice suit to prove the merits of the underlying case, or that he would have prevailed in that suit.[97]

In addition to the problems with gathering evidence, it is possible that it

93. *See id.* (pointing out the problems a malpractice plaintiff may have in proving a case with limited evidence that may have been inadequately compiled by the defendant in the first place). When the original defendant in the underlying claim is no longer a party to the malpractice action, it is difficult for the plaintiff to discover evidence that, if not for the negligence of the attorney, would have helped her case. *See id.* (discussing the problem of discovery when the defendant is no longer a party to the suit).

94. *See id.* ("Thus, the malpractice plaintiff may be limited to the evidentiary material as inadequately compiled by the defendant, and may be unable to prove that the case otherwise would have had a different outcome."); *see also* Koffler, *supra* note 28, at 71 (explaining that an attorney's own negligent conduct should not be allowed to now help protect him from liability by making it difficult for the plaintiff to establish causation due to the attorney's negligence).

95. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 ("[T]he trial-within-a-trial method may allow an attorney's negligence to shield him from malpractice liability.").

96. *See Garcia*, 845 A.2d at 612 (explaining that plaintiffs must often deal with the disadvantage of not having access to evidence or not having the same quality of evidence in the malpractice trial); Thomas v. Bethea, 718 A.2d 1187, 1197 (Md. 1998) (noting the problem presented in conducting discovery into the merits of the underlying case when the defendant from that suit is no longer a party); *see also* Hinson & Snyder, *supra* note 1, at 1024 (discussing the difficulties involving discovery presented when the defendant in the underlying action is no longer a party to the malpractice suit).

97. *See Thomas*, 718 A.2d at 1197 (explaining the difficult nature of proving the merits of the underlying case when restricted in discovery in that case because the defendant is no longer a party to the suit); *see also* Hinson & Snyder, *supra* note 1, at 1024 (acknowledging the problem presented when attempting to prove the merits of the underlying case when discovery is not available because the previous defendant is no longer a party to the suit); *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (showing that the inability to conduct discovery in the underlying case makes it difficult to prove the merits of that case in the malpractice trial).

could be difficult for a plaintiff lacking legal skills to be able to utilize *any* amount of evidence available to him to establish causation.[98] It is also unfair to a plaintiff to require him to prove that he had a valid defense in a case where the knowledgeable and trained lawyer neglected to present one.[99] This is especially a concern when the malpractice suit is based on the failure of the lawyer to present a valid defense for the plaintiff in the underlying trial.[100] This is another example of the trial-within-a-trial method allowing an attorney's own negligence and failure to present a valid defense in the underlying claim to help shield him from liability in the malpractice trial.[101]

C. *The Problem of Finding Expert Testimony to Establish Causation and Other Elements of the Malpractice Claim*

In Texas, courts have placed a great amount of importance on the necessity of expert testimony to establish elements of the legal malpractice claim, and in some cases, have decided against the plaintiff for lack of expert testimony on the issues.[102] However, finding proper expert testimony to prove they would have succeeded in the underlying case can present a problem for the plaintiff.[103] The best evidence possible in

98. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (pointing out the problems a malpractice plaintiff may have in proving a case with limited evidence that may have been "inadequately compiled" by the defendant-attorney in the first place).

99. *See Thomas*, 718 A.2d at 1197 ("[I]t is unfair to require the plaintiff to litigate the case against his or her own lawyer, who has superior knowledge about the strengths and weaknesses of the case . . . ."); *see also* Koffler, *supra* note 28, at 41 (explaining the difficulties the trial-within-a-trial method presents for plaintiffs that seek to establish they had a meritorious defense in the underlying claim).

100. *See Garcia*, 845 A.2d at 612 (noting the unfairness associated with requiring a plaintiff to re-create and "litigate the underlying claim against the lawyer who originally prepared it"); *Thomas*, 718 A.2d at 1197 (discussing the difficulties that burden a plaintiff who must now litigate a case against his attorney who has in-depth knowledge of the underlying case).

101. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (addressing the inequities of the trial-within-a-trial practice); *see also* Lord, *supra* note 81, at 1483 (explaining that the trial-within-a-trial method may allow an attorney's own negligence to protect him from liability in the malpractice action).

102. *See* Alexander v. Turtur & Assocs., 146 S.W.3d 113, 118–19 (Tex. 2004) (demonstrating the importance of the use of expert testimony in legal malpractice actions); Hoover v. Larkin, 196 S.W.3d 227, 231–32 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (noting the importance of expert testimony in legal malpractice suits); Onwuteaka v. Gill, 908 S.W.2d 276, 281 (Tex. App.—Houston [1st Dist.] 1995, no writ) (requiring expert testimony to establish the elements of a legal malpractice suit).

103. *See* McConnico et al., *supra* note 1, at 1003 (discussing the different areas of expert

proving but for causation is the testimony of the previous trial judge because she is in the best position to answer whether the plaintiff in the malpractice action would have succeeded in the underlying case.[104] However, while the trial judge's expert testimony would help to determine causation, the testimony is likely inadmissible due to ethical concerns.[105] The Texas Supreme Court in *Joachim v. Chambers*[106] held that Canon 2 of the Code of Judicial Conduct[107] prohibited the judge in the underlying trial, who had since retired as a district judge but still continued to serve as a judicial officer, from testifying as an expert witness in the legal malpractice suit.[108] The court noted that although Canon 2 only prohibits a judge from voluntarily testifying in a case as a "character witness," the principle extended to prohibit a judge from testifying as an expert witness due to the risk of the appearance of impropriety.[109] A juror's decision in the malpractice suit may be persuaded or influenced by the testimony of a judge because the judge "confers the prestige and credibility of judicial office" to a party's position when testifying as an expert.[110] Also, a judge's expert testimony for one party gives the suggestion that a judge is "taking sides," thus creating an appearance of impropriety that goes against the principles of Canon 2 of the Code of Judicial Conduct.[111] The court in *Joachim* noted that, "[e]xpert witnesses, unlike judges, rarely appear impartial"; therefore, it is improper

testimony and the problems with its admissibility).

104. *See id.* at 1003 (explaining that the trial judge himself would be in the best position to answer the question of whether the plaintiff would have succeeded in the previous action). *But see* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 107 (2011) (noting the former judge's expert testimony is inadmissible due to ethical concerns).

105. *See* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 107 (2011) (stating that it is not permitted for judges or jurors from the underlying case to testify at the malpractice trial because of ethical and practical reasons); Stephen E. McConnico et al., *supra* note 1, at 1003 (discussing that expert testimony from the previous trial judge, while relevant, may not be admissible because of trial time restraints).

106. Joachim v. Chambers, 815 S.W.2d 234 (Tex. 1991).

107. MODEL CODE OF JUD. CONDUCT Canon 2 (2004).

108. *Joachim*, 815 S.W.2d at 240.

109. *Id.* at 238.

110. *Id.*

111. *See id.* ("An expert witness is offered to support a party's position, and if the expert is a judge, the jury may mistake that support for an official endorsement."); *see also* MODEL CODE OF JUD. CONDUCT Canon 2 (2004) (stating that a judge should avoid impropriety and maintain impartiality).

for a judge to testify because it violates concepts of judicial impartiality.[112]

Expert testimony on causation may also come from former judges (those not involved in the underlying case) or other trial lawyers.[113] These lawyers and judges would only be able to give their objective opinion on what the result of the underlying case would have been, based on their expert experience.[114] It is also noteworthy that testifying experts would be forced to document the basis for their opinion.[115] In *Burrow v. Arce*,[116] the Texas Supreme Court held that the expert's testimony was insufficient because he failed to state the basis for his opinion.[117] The court stated that it is not qualifications of an expert alone that settles a question of law, but rather there must be some basis for the opinion given.[118] In *Burrow*, the court classified the expert's words as simply saying: "Take my word for it, I know: the settlements were fair and reasonable."[119] The court held that this was merely restating credentials, and failed to present a basis for his opinion on the matter and his testimony was therefore inadmissible.[120] It is clear that many Texas jurisdictions place a great emphasis on the use of expert testimony in malpractice actions.[121] However, it is important to

112. *Joachim*, 815 S.W.2d at 238.

113. *See* McConnico et al., *supra* note 1, at 1003 (giving examples of forms of expert testimony on causation issues). Jurors from the previous trial are not allowed to testify as experts on the issue. VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 107 (2011).

114. *See* McConnico et al., *supra* note 1, at 1003 (stating that lawyers and former judges could only give testimony based on their objective opinion resulting from their experience).

115. *See* Burrow v. Arce, 997 S.W.2d 229, 235 (Tex. 1999) (holding that experts must state the basis for their opinion when offering testimony).

116. Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999).

117. *Id.* at 235–36.

118. *See id.* ("But it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.").

119. *Id.* at 236.

120. *See id.* (classifying the expert's testimony as having no basis for the opinion and holding that credentials alone do not make an expert's opinion valid). "Credentials qualify a person to offer opinions, but they do not supply the basis for those opinions. The opinions must have a reasoned basis which the expert, because of his knowledge, skill, experience, training, or education, is qualified to state. That basis is missing in [the expert's] affidavit." *Id.* (footnote omitted) (quoting TEX. R. EVID. 702).

121. *See* Alexander v. Turtur & Assocs., 146 S.W.3d 113, 118–20 (Tex. 2004) (demonstrating the importance of the use of expert testimony in legal malpractice actions); *Burrow*, 997 S.W.2d at 235 (describing the importance of the use of expert testimony in malpractice actions); Hoover v. Larkin, 196 S.W.3d 227, 231 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (stating that causation is generally proven through the use of expert testimony); Allbritton v. Gillespie, Rozen, Tanner & Watsky, P.C., 180 S.W.3d 889, 892 (Tex. App.—Dallas 2005, pet. denied) (discussing

note that problems could arise when a lawyer gives an expert opinion and testifies against another lawyer in the community.[122]

D. *Defendant-Attorneys Put in the Place of the Defendant from the Original Proceeding*

Another issue with the trial-within-a-trial method is that it is inconsistent with the common law principles of an adversarial proceeding between the actual parties in interest.[123] This is because the attorney is now forced to put himself in place of the defendant in the underlying action, thus advocating a position he once opposed.[124] The Tyler court of appeals noted in *Gibson v. Johnson*[125] that "'[t]he attorney stands in exactly the same position as that in which the defendant in the lost suit would have stood in the trial against him, and is entitled to present to the jury every fact that would have tended to lessen the damages against that defendant.'"[126] The attorney is now forced to oppose his former client's case that he previously supported, in order to prevail in the malpractice case.[127]

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the importance of expert testimony); Onwuteaka v. Gill, 908 S.W.2d 276, 281 (Tex. App.—Houston [1st Dist.] 1995, no writ) ("Both the breach of the standard of care and proximate cause must be proven by expert testimony.").

122. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1566 (noting that local attorneys may be unwilling to testify against each other).

123. *See* Koffler, *supra* note 28, at 41 (explaining the inconsistency of the trial-within-a-trial approach with common law principles of an adversarial proceeding because the attorney must put himself in the place of a cause he once fought against); *see also* Thomas v. Bethea, 718 A.2d 1187, 1197 (Md. 1998) (noting that the attorney must take a different position than the one she took in the underlying suit, which does not align with common law principles of an adversarial proceeding).

124. *See Thomas*, 718 A.2d at 1201 (Chasanow, J., concurring and dissenting) ("[T]he attorney is forced to switch hats and now disparage the former client's case that the attorney had previously been extolling."); Koffler, *supra* note 28, at 41 ("The defendant is the attorney, rather than the person who would have been the defendant in the underlying action."); *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1568 (describing how the malpractice-defendant is forced to represent the opponent in the underlying case); Lord, *supra* note 81, at 1483 ("[T]he attorney is placed in an adversary position and must oppose a cause which he once advocated."). "Moreover, the attorney has better insights concerning weaknesses in the client's case than did the original defendant." *Id.*

125. Gibson v. Johnson, 414 S.W.2d 235 (Tex. Civ. App.—1967, writ ref'd n.r.e.).

126. *Id.* at 239 (quoting 7 TEX. JUR. 2d, § 135, at 205 (1964)).

127. *See Thomas*, 718 A.2d at 1201 (Chasanow, J., concurring and dissenting) (explaining that the attorney is now forced to switch positions and put himself in the place of the former defendant); *Gibson*, 414 S.W.2d at 239 (discussing that the defendant-attorney must now argue a case he once opposed); Koffler, *supra* note 28, at 41 (criticizing the fact that the attorney must switch positions and put himself in the place of the defendant in the previous action); *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1568 (describing that the malpractice defendant is forced to represent the

E. *Ethical Issues and Fairness*

The difficulties associated with the plaintiff proving a legal malpractice case under the trial-within-a-trial approach may actually discourage those aggrieved from filing malpractice suits.[128] Some problems facing the plaintiff in a legal malpractice case include: the inability to conduct discovery to gather evidence, the difficulty of establishing a valid defense when the attorney negligently failed to present one, and proving causation against a more knowledgeable attorney, in general.[129] In this regard, the use of the trial-within–a-trial method may actually help insulate attorneys from liability because plaintiffs may be discouraged from taking action against them in the first place.[130]

Although the majority of problems burden the plaintiff, the suit-within-a-suit approach can also be unfair to the attorney as well.[131] This is because statements made by the attorney in the underlying action, including statements about damage estimates or the probability of success in the plaintiff's case, will now be available to use against him in the malpractice case as admissions by a party-opponent.[132]

opponent in the underlying case); Lord, *supra* note 81, at 1483 (noting that the attorney must oppose a cause he once advocated).

128. *See* Lord, *supra* note 81, at 1482–84 (discussing the plaintiff's difficult burden of proof with the trial-within-a-trial analysis and the presenting problems). "[T]he complexity of the trial within a trial may discourage clients from suing their lawyers. Moreover, the trial-within-a-trial method may allow an attorney's negligence to shield him from malpractice liability." *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569.

129. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (pointing out the problems a plaintiff may have in proving a case with limited evidence).

130. "Commentators assert that the trial-within-a-trial method actually insulates attorneys from liability and is inaccurate because 'parties face academic claims of liability and use evidence which is not quite what it seems.'" Lord, *supra* note 81, at 1483 (quoting R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 650, at 797 (2d ed. 1981)); *see also Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (explaining that the attorney's own negligence can shield him from liability under the trial-within-a-trial approach).

131. *See Thomas*, 718 A.2d at 1199–200 (Chasanow, J., concurring and dissenting) (discussing that the trial-within-a-trial method of proving causation can be unfair to attorneys because it frequently allows prejudicial and irrelevant evidence to be used against them); Hinson & Snyder, *supra* note 1, at 1024 (noting that the trial-within-a-trial method can also be unfair to attorneys).

132. *See* Hinson & Snyder, *supra* note 1, at 1024 ("[I]t can be unfair to the defendant-attorney that all of the optimistic statements and high-damage estimates he made in the underlying lawsuit may now be used against him as admissions by a party-opponent.").

VI. SOLUTION—THE BURDEN-SHIFTING APPROACH

There are obvious problems with the trial-within-a-trial method of proving causation including the effect of time on re-creating the previous suit, the difficulty in obtaining evidence and expert testimony, and the burden of accurately reconstructing a previous suit.[133] Some jurisdictions have pointed out the complications with the trial-within-a-trial approach in establishing the causation element of a legal malpractice claim.[134] This is evidenced by the fact that many jurisdictions have employed alternative methods to help combat the issues associated with the trial-within-in-a-trial method.[135] Burden-shifting analysis is an example of a method courts have employed to alleviate the problems associated with the suit-within-a-suit method.[136] Louisiana follows the burden-shifting method, and it appears to present a clearer way to establish causation in malpractice suits because it removes an undue burden on the plaintiff, eliminating the problems associated with the trial-within-a-trial system.[137] The

133. *See* Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 845 A.2d 602, 612 (N.J. 2004) (noting problems that arise with the suit-within-a-suit approach); *Thomas*, 718 A.2d at 1201 (Chasanow, J., concurring and dissenting) (referring to the trial-within-a-trial method as a '"debacle within a trial'").

134. "Courts and commentators alike acknowledge the various ways in which the 'suit within a suit' method can distort the underlying action." *Garcia*, 845 A.2d at 612. "The 'case within a case' or 'suit within a suit' approach has been criticized on a number of grounds—that it does not represent an accurate or complete reconstruction of the original lawsuit . . . ." *See Thomas*, 718 A.2d at 1197. "[A] rule which requires the client to prove the amount of damages by trying the 'case within a case' simply imposes too great a standard of certainty of proof." Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So. 2d 1109, 1110 (La. 1982).

135. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (noting alternatives to the suit-within-a-suit approach); Lord, *supra* note 81, at 1483 ("[C]ourts have experimented with the use of presumptions, burden shifting, and res ipsa loquitur to aid the legal malpractice plaintiff.").

136. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (listing burden shifting as a method courts use to alleviate the problems that the suit within a suit creates); *see also* Lord, *supra* note 81, at 1483 (explaining the alternatives to the suit-within-a-suit approach). "To combat this problem, some courts have employed presumptions, burden shifting, and res ipsa loquitur to force defendant lawyers to disprove causation once the plaintiff establishes duty and breach." *Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569.

137. *See Jenkins*, 422 So. 2d at 1110 (discussing that an "undue burden" is placed upon the plaintiff if she is required to prove all the elements of a legal malpractice claim); *see also* Gautam v. De Luca, 521 A.2d 1343, 1348 (N.J. Super. Ct. App. Div. 1987) (noting the suit-within-a-suit method may "suffer from an undue rigidity"). *See generally Jenkins*, 422 So. 2d at 1110 (demonstrating that shifting the burden of causation to the defendant-attorney eliminates the need for the plaintiff to prove success in the underlying trial in order to establish causation); Prince v. Buck, 2006-CA-1603 (La. App. 4 Cir. 5/16/07); 969 So. 2d 641, 643 (showing how burden-shifting analysis dispenses with the need to use the trial-within-a-trial method to establish causation); Lord, *supra* note 81, at

Massachusetts United States District Court has also employed the burden-shifting approach.[138] The court, in *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*,[139] held that the burden should shift to the attorney to disprove causation, stating that "'since the client had no obligation to prove his case in the underlying action . . . , he should not shoulder the burden of proving a defense in the malpractice action.'"[140] Based on this analysis, other jurisdictions within Massachusetts have also followed the same burden-shifting approach to alleviate the undue burden placed upon the plaintiff.[141]

A. *The Logic of Placing the Burden of Disproving Causation on the Attorney*

Placing the burden on the defendant-attorney to rebut the presumption of causation after the plaintiff has established the first two elements of the claim is more logical and more equitable than requiring a layperson to prove she would have won the underlying case but for the attorney's negligence.[142] Many courts have held that expert testimony is necessary to establish the causal link when the issue is beyond the common knowledge of a layperson-juror, or when a layperson's general experience is not enough to enable them to establish causation.[143] Therefore, it would

1482–83 (recognizing the burden-shifting approach as a method courts have used to alleviate the problems caused by the trial-within-a-trial method).

138. *See* St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP, 408 F. Supp. 2d 59, 60 (D. Mass. 2006) (allowing the burden to shift to the defendant-lawyer on the proof-of-loss issue).

139. St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP, 408 F. Supp. 2d 59 (D. Mass. 2006).

140. *Id.* at 60 (quoting Glidden v. Terranova, 427 N.E.2d 1169, 1171 (Mass. App. Ct. 1981) (internal quotation marks omitted)).

141. *See* Jernigan v. Giard, 500 N.E.2d 806, 807 (Mass. 1986) (allowing for the burden to shift to the attorney in some instances); *Glidden*, 427 N.E.2d at 1171–72 (holding that the attorney should bear the burden of disproving causation). "We would accept the concept that an attorney defending a malpractice action may not rely on the consequences of his own negligence to bar recovery against him." *Jernigan*, 500 N.E.2d at 807.

142. *See Jenkins*, 422 So. 2d at 1110 (discussing a burden-shifting approach, which would relieve the plaintiff from having to prove he would have succeeded in his underlying claim).

143. *Compare* Coastal Tankships, U.S.A., Inc. v. Anderson, 87 S.W.3d 591, 603 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (stating that where a layperson's general experience will not enable that person to determine causation, expert testimony is required), *and* Stephen E. McConnico et al., *supra* note 1, at 1005 (explaining that expert testimony may be required to prove causation when the causal link is beyond the common knowledge of the layperson-juror), *with* Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied) (acknowledging that the layperson-plaintiff must prove all elements of a legal malpractice claim, including causation).

only make sense that a plaintiff, who himself is a layperson, should be allowed to shift the burden of disproving causation to the knowledgeable attorney who is in a better position to do so, after the plaintiff has established a prima facie case of negligence.[144]

Similarly, with the burden-shifting approach, the more knowledgeable attorney will be in a better position to piece the evidence together to disprove causation than the layperson-plaintiff.[145] The attorney will have more legal knowledge of the evidence gathered from the underlying trial than the plaintiff; therefore, it makes more sense for the attorney to utilize the evidence instead of placing the burden on the plaintiff to prove causation without the same legal skills.[146]

B. *Conserving Judicial Resources*

The burden-shifting approach of proving causation more efficiently conserves judicial resources than the trial-within-a-trial method because the underlying case does not have to be tried, or tried again in some instances.[147] Alternatively, the burden-shifting approach eliminates the need to try both cases.[148] Instead, the jury can focus on the malpractice suit rather than expending time and energy to hear a case that has been previously decided or not even heard at all. The burden-shifting method is also more efficient in that it lessens the importance placed on the use of

144. *See* Thomas v. Bethea, 718 A.2d 1187, 1197 (Md. 1998) (pointing out the inequity of requiring a client to litigate against his own attorney).

145. *See* Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 845 A.2d 602, 612 (N.J. 2004) ("The 'suit within a suit' format has also drawn fire for being unfair to plaintiffs who must litigate the underlying claim against the lawyer who originally prepared it.").

146. *See Thomas*, 718 A.2d at 1197 (explaining that the attorney is more knowledgeable and that it is unfair to allow the burden to remain on the plaintiff to prove causation).

147. *Compare* Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004) (requiring proof of a trial within a trial, thus requiring the jury to hear both the underlying case and the malpractice case), *and* Peeler v. Hughes & Luce, 909 S.W.2d 494, 496–497 (Tex. 1995) (utilizing the trial-within-a-trial method which requires the plaintiff to prove both the underlying case and the malpractice case), *with* Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So. 2d 1109, 1110 (La. 1982) (commenting on the jurisdictions that utilize the burden-shifting approach, thus eliminating the need to try the underlying case again).

148. *See Jenkins*, 422 So. 2d at 1110 (utilizing the burden-shifting approach and therefore not requiring the underlying case to be tried at the same time as the malpractice suit); Prince v. Buck, 2006-CA-1603 (La. App. 4 Cir. 5/16/07); 969 So. 2d 641, 643 (using the burden-shifting approach and not requiring the case-within-a-case approach); Guidry v. Coregis Ins. Co., 04-325 (La. App. 3 Cir. 12/29/04); 896 So. 2d 164, 172 (requiring the plaintiff to prove the malpractice case, but not the underlying case).

expert testimony to prove causation, thereby avoiding problems that exist in finding admissible and competent expert testimony.[149] Alternatively, the trial-within-a-trial method emphasizes the use of expert testimony to prove causation, which presents a procedural burden for the plaintiff.[150]

C. *Burden Shifting Answers Ethical Questions*

Burden-shifting analysis also resolves ethical issues involving attorney accountability associated with the trial-within-a-trial method.[151] Authorities have pointed out that the trial-within-a-trial method may actually help to insulate attorneys from liability by discouraging suits because of the undue procedural burden it places upon plaintiffs.[152] The burden-shifting method answers these issues by alleviating the harsh burden on the plaintiff, while maintaining fairness to the defendant-attorney with the introductory requirement that the plaintiff establish a prima facie case.[153]

Furthermore, burden-shifting analysis appears to be fair.[154] The

149. *See* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 107 (2011) (arguing that judges or jurors from the underlying case cannot testify at the malpractice trial); McConnico et al., *supra* note 1, at 1003 (discussing that expert testimony from the previous trial judge would be helpful to the issue of causation, but may not be admissible for procedural reasons).

150. *See Alexander*, 146 S.W.3d at 118–20 (demonstrating the importance of expert testimony in legal malpractice actions using the suit-within-a-suit method); Hoover v. Larkin, 196 S.W.3d 227, 231 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (stating that causation is generally proven by expert testimony in the trial-within-a-trial method); *see also* McConnico et al., *supra* note 1, at 1003 (demonstrating the problems in knowing which type of expert testimony is admissible, and acknowledging that the Texas Supreme Court has yet to answer concerns on the admissibility of some types of expert testimony).

151. "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." Koffler, *supra* note 28, at 67.

152. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 ("[T]he trial-within-a-trial method may allow an attorney's negligence to shield him from malpractice liability."); Lord, *supra* note 81, at 1483 (discussing how the trial-within-a-trial method of proving causation insulates attorneys from liability by making it very difficult for plaintiffs to prove causation, which discourages them from filing in the first place).

153. *See Jenkins*, 422 So. 2d at 1110 (La. 1982) (utilizing the burden-shifting method after the plaintiff presents a prima facie case of negligence, and holding that keeping the burden on the plaintiff to prove causation would cause an undue hardship); *Prince*, 969 So. 2d at 643 (removing the burden of causation from the plaintiff, but only after he has established a prima facie case of negligence); *Guidry*, 896 So. 2d at 172 (applying the burden-shifting approach and requiring the attorney to disprove causation after the plaintiff established a prima facie case of negligence).

154. *See generally Jenkins*, 422 So. 2d at 1110 (describing the burden-shifting approach as lifting an "undue burden" off of the plaintiff caused by the case-within-a-case method, thereby

burden of causation is shifted to the attorney only after the plaintiff establishes the existence of a duty and that the attorney was negligent, thereby reducing the chance for unmeritorious suits.[155] Also, burden shifting is more equitable in that it alleviates an undue burden otherwise placed upon the plaintiff, thus allowing plaintiffs to proceed with their claims instead of being discouraged from filing.

VII. CONCLUSION

There are obvious problems associated with the trial-within-a-trial method of proving causation in legal malpractice actions, and it is clear there should be a change in the way Texas handles the issue.[156] The burden-shifting approach, employed by Louisiana and other jurisdictions, provides a solution to many of the problems associated with the trial-within-a-trial method.[157] The burden-shifting approach is not only fair, but also promotes judicial efficiency by removing the need to try the

making the burden-shifting approach more fair). "But fundamental fairness weighs heavily against placing the burden of proof upon the client-plaintiff to prove causation in a 'trial within a trial.'" Koffler, *supra* note 28, at 67.

155. *See Jenkins*, 422 So. 2d at 1110 (providing for burden-shifting analysis on causation after the plaintiff establishes a prima facie case of negligence by proving the existence of a duty and the attorney's negligence); *see also* Prince, 969 So. 2d at 643 (allowing the burden of causation to shift to the defendant-attorney only after the plaintiff presents a prima facie case of negligence by showing: (1) there was an attorney-client relationship, and (2) the attorney was negligent).

156. *See* Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 845 A.2d 602, 612 (N.J. 2004) (acknowledging that many jurisdictions have criticized the trial-within-a-trial approach); Thomas v. Bethea, 718 A.2d 1187, 1197 (Md. 1998) (detailing criticisms of the trial-within-a-trial approach); Koffler, *supra* note 28, at 71 ("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."); Mahaffey, *supra* note 21, at 411 ("[M]any legal scholars (and several courts) have criticized the 'case-within-a-case' approach as placing too high a burden on already beleaguered plaintiffs because it forces the plaintiff to essentially litigate and try two separate actions.").

157. *See Jenkins*, 422 So. 2d at 1110 (employing the burden-shifting analysis and lifting the "undue burden" placed on the plaintiff by the suit-within-a-suit requirement in doing so); Prince, 969 So. 2d at 643 (lifting the burden off of the plaintiff to prove every element of malpractice using the burden-shifting approach); Rawboe Props., L.L.C. v. Dorsey, 955 So. 2d 177, 183 (La. Ct. App. 2007) (demonstrating the burden-shifting approach); Guidry v. Coregis Ins. Co., 04-325 (La. App. 3 Cir. 12/29/04); 896 So. 2d 164, 172 (shifting the burden of disproving causation to the attorney after the plaintiff established a prima facie case of negligence, thereby lifting the burden off the plaintiff to prove every element of malpractice); *see also* Jernigan v. Giard, 500 N.E.2d 806, 807 (Mass. 1986) (allowing for the burden to shift to the attorney in some instances); Glidden v. Terranova, 427 N.E.2d 1169, 1179 (Mass. App. Ct. 1981) (holding that the attorney should bear the burden of disproving causation).

underlying case.[158]

Additionally, the burden-shifting approach requires more accountability from attorneys, therefore making it more ethical.[159] A pitfall of the trial-within-a-trial method is that it can allow an attorney's own negligence to shield him from liability by making it difficult for the plaintiff to establish causation in a case where the attorney's negligence resulted in the underlying case never actually making it to trial.[160] Burden shifting also holds attorneys more accountable in that it does not discourage plaintiffs from filing suit in the way that the trial-within-a-trial method does.[161] An "undue burden" is removed from the plaintiff, thus making meritorious suits less onerous to prove and more likely to be filed when they should be. At the same time, the burden-shifting approach still requires the proof of a prima facie case of negligence before the burden is shifted to the attorney, thereby making malpractice actions fair and discouraging unmeritorious suits from being filed.[162]

The trial-within-a-trial method of proving causation in legal malpractice actions raises questions of fairness, ethics, accountability, and efficiency. The burden-shifting approach provides solutions for many of the questions and problems raised. A change should be made in the way Texas

158. *Compare* Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004) (requiring the jury to try both the underlying case and the malpractice case), *and* Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995) (using the trial-within-a-trial method and requiring the jury to hear both cases at the same time), *with Jenkins*, 422 So. 2d at 1110 (using the burden-shifting approach and, therefore, not requiring the plaintiff to prove she would have won the underlying suit).

159. *See* Koffler, *supra* note 28, at 73 ("The [a]ttorney–client relationship is fiduciary in nature 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.").

160. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (noting the hardship that the trial-within-a-trial method imposes on an aggrieved client). "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." Koffler, *supra* note 28, at 74.

161. *See Lawyers' Responsibilities to the Client*, *supra* note 7, at 1569 (noting that the "complexity of the trial within a trial may discourage clients from suing their lawyers").

162. *See Jenkins*, 422 So. 2d at 1110 (shifting the burden to disprove the presumption of injury only after the plaintiff establishes a prima facie case of negligence by proving the existence of a duty and the attorney's negligence); *see also Prince*, 969 So. 2d at 643 (La. Ct. App. 2007) (allowing the burden of causation to shift to the defendant-attorney only after the plaintiff presents a prima facie case of negligence).

jurisdictions handle proof of causation in malpractice suits. Based on its use in Louisiana and other jurisdictions, the burden-shifting approach appears to be an adequate solution to the problems presented by the trial-within-a-trial method.