40 Tex. Tech L. Rev. 151

Texas Tech Law Review
Fall, 2007

Comments
Clark Crapster

THE COMMON SENSE OF RE-CREATION: WHY TEXAS SHOULD CLOSE THE DOOR TO EXPERT TESTIMONY ON BUT-FOR CAUSATION IN LITIGATION MALPRACTICE

I. It's a But-For Jungle Out There

Everyone knows the trouble with expert testimony:

> A man may go, and does sometimes, to half-a-dozen experts . . . . He takes their honest opinions, he finds three in his favor and three against him; he says to the three in his favor, 'will you be kind enough to give evidence?' and he pays the three against him their fees and leaves them alone; the other side does the same . . . . I am sorry to say the result is that the Court does not get ***152** that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect. [1]

The problem with experts is one of reliability. [2] It is also a problem the law must tolerate to a certain extent. [3] There comes a point, however, where the helpfulness of such testimony is so attenuated, its basis so questionable, and its consequences so grave, that tolerance becomes a leap of faith that undermines public policy. [4] Unfortunately, in Texas, expert testimony may have reached this point in the context of litigation malpractice, posing a serious threat to every lawyer who tries cases. [5]

Like most people in the world, trial lawyers make mistakes in their work. [6] But unlike most people in the world, the mistakes of a trial lawyer can have consequences far beyond loss of business or employment. [7] An erring trial lawyer may also face threats of civil liability, often to a devastating degree. [8] Moreover, well paid legal experts are always ready and willing to testify and encourage this liability. [9] Depending on their level of charisma, legal experts can, and do, successfully convince juries that an array of acts and omissions in litigation are negligent. [10] For better or worse, there is no other way to resolve fact issues regarding the duty and breach elements in legal malpractice cases than to display this battle of the experts before the fact-finder. [11] Similarly, with respect to proximate cause, which deals with the foreseeability of the plaintiff's injury, expert testimony may be necessary and permissible. [12]

But should the battle extend to but-for causation in litigation malpractice cases when the lawyer's alleged negligence occurred in the course of trial? [13] That is, should expert opinion be permissible to prove that, but for the lawyer's negligence, the malpractice plaintiff's claim or defense in the first trial would have been successful? [14] In Texas, the answer

has perhaps always been "maybe." [15] Texas law has never provided meaningful guidance on what ***153** constitutes appropriate proof of causation in legal malpractice. [16] Commentators in Texas have similarly skirted outlining the details of causation and are nearly silent on the expert testimony question. [17] And now, recent cases strongly suggesting that expert testimony is proper proof of but-for causation have created a degree of confusion and conflict that can no longer be ignored. [18]

At least one aspect of the puzzle is clear: litigation malpractice plaintiffs in Texas must satisfy the but-for causation requirement, or as courts call it, the "suit within a suit" requirement. [19] The oft-quoted phrase stems from the application of the but-for element to litigation malpractice cases, which requires a determination of the likely outcome of the underlying litigation. [20] Some commentators in other states have criticized this basic causation element, but it is settled law in Texas, and ample commentary supports it. [21]

The critical question, and the subject of this Comment, is how plaintiffs in Texas should be able to prove the suit within a suit requirement. [22] Some guidance on this question exists in the commentaries, but to a large extent the precise requirements remain either unexplored or unstated. [23] This is also the case with Texas appellate decisions. [24] Consequently, the assertions in this Comment are, in part, independent suggestions based on what is available in more authoritative works. However, this Comment's suggestions may help struggling practitioners create their own evidentiary arguments when confronting these uncharted waters.

With the underlying purpose of assisting attorneys, the following discussion has three main sections. [25] Part II analyzes the relevant case law in Texas and shows how recent suggestions that legal experts can satisfy the suit within a suit element are undermining public policy. [26] Part III explains why the alternative "re-creation" method of proving the suit within a suit is more desirable in light of public policy, concerns of reliability, and fundamental ***154** differences between litigation malpractice and other negligence claims. [27] Although the basic theory of this re-creation method has the strong support of most commentators and authorities, detailed explanation of what re-creation is and how it should apply is unfortunately sparse. [28] Therefore, Part III suggests a working definition of the re-creation method, and Part IV analyzes some of the complicated, but important, questions of the method's application, including how to mitigate occasional harshness on plaintiffs. [29]

Causation in litigation malpractice is an inherently complex inquiry, but the expediency of using expert testimony to satisfy the suit within a suit requirement does not necessarily equate with justice or good policy. [30] To the contrary, justice and public policy require the more reliable assurances of the re-creation method of proving but-for causation. [31]

II. The Texas Turmoil in Litigation Malpractice

A. The Undisputed Basics of Litigation Malpractice

A litigation malpractice claim is like most other legal malpractice claims in that it is one of ordinary negligence. [32] The distinction is that in litigation malpractice the alleged negligence consists of mishandling the client's claim or defense in the course of litigation. [33] As in other negligence cases, the 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. [34] With respect to duty and breach, "[a] lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney." [35] A plaintiff can satisfy the foreseeability

requirement by proving that a reasonable lawyer should have anticipated the risk of the damage that occurred. [36] To prove duty, breach, and sometimes foreseeability, expert testimony is often necessary. [37]

***155** 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." [38] This requirement is the but-for element that Texas courts call the "suit within a suit," and it is the barrier protecting lawyers from liability for harm they did not cause. [39] As to the question of what kind of proof plaintiffs must offer to avoid this barrier, Texas case law is currently in a state of ambiguity and conflict, with superficially reasoned statements undermining important public policy concerns. [40]

B. Policy Concerns: Second Chances and Abuse of the System

Litigators may take some comfort in knowing that the law in Texas has a somewhat unreceptive attitude towards unsuccessful litigants who bring litigation malpractice suits. [41] This philosophy is evident, for example, in the context of the duty and breach elements: "Attorneys cannot be held strictly liable for all of their clients' unfulfilled expectations. An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect." [42] This philosophy also surfaces in the rationale behind the rule prohibiting assignments of litigation malpractice cases: "To allow assignability would make possible the commercial marketing of legal malpractice causes of action by strangers, which would demean the legal profession. This is a legitimate concern." [43] Even more significant, however, is Texas's general disinclination toward lax causation standards in litigation malpractice cases. [44] Understandably, courts are averse to the notion that losing defendants can diminish their own liability by obtaining compensation from their trial lawyers. [45] Similarly, an unsuccessful plaintiff, although having no liability to avoid, should not reap from the trial lawyer what the judicial system would not otherwise sow. [46]

This aversion against lax causation standards in litigation malpractice is especially prominent in the criminal law sector. [47] In contrast to malpractice suits arising out of civil trials, when convicted criminals sue their lawyers, they must do more than convince a malpractice jury that their trial would have ended ***156** differently but for their lawyer's negligence. [48] As a prerequisite to a malpractice claim against the lawyer, the judicial system must actually overturn the criminal conviction. [49] The Texas Supreme Court reasoned in Peeler v. Hughes & Luce that an "innocence requirement" is necessary to avoid any shifting of the responsibility that the judicial system imposed on the convict. [50] The basic premise is that separate legal action should not alter the effects of judicial outcomes that are otherwise final under the judicial system. [51] More difficulty ensues for the criminal pursuing a litigation malpractice claim than in other negligence actions, but the policy concerns call for the stringency. [52] Negligence is a common law claim, and rights at common law vary according to the particular circumstances involved. [53]

The situation is different with respect to malpractice claims arising out of civil litigation. [54] In civil litigation, the policy justifications for such stringency are not as strong. [55] In these situations, because convicted criminals are not using the law to avoid the bite of responsibility and perhaps benefit from their crimes, any abuse of the system is not as intolerable. [56] There is no justification for requiring a reversal of the underlying matter before a non-criminal plaintiff can succeed in a malpractice case. [57] The basic premise of Peeler, however, still has some force-when an outcome is final under the judicial system, there are no second chances. [58] Viewed from the perspective of established policies in Texas, all litigation

malpractice claims are inherently different from ordinary negligence claims. [59] When any unsuccessful litigant sues his trial lawyer, the most basic concerns of Peeler are ever present. [60]

The cases logically suggest that a generally stringent causation requirement is the solution for the lingering concerns in the civil sector, perhaps as the strict "innocence requirement" accounted for the more serious concerns in the criminal sector. [61] Indeed, the causation element is capable of encompassing policies broader than those underlying the elements of ordinary negligence. [62] In addition to furthering the basic purposes of tort law, a rigorous causation requirement in litigation malpractice-using only the most reliable ***157** proof-helps ensure that the underlying matter would have been favorable to the plaintiff but for the lawyer's negligence. [63] This causation requirement also provides a higher degree of assurance that the client will not use the malpractice claim to steal a second chance from the judicial system. [64] Although such a causation standard need not be as stringent as the "innocent requirement," it must necessarily be more exacting than the normal methods of proving but-for causation. [65]

The Texas legal malpractice cases, however, give no meaningful description of the stringent causation requirement that is supposed to be "particularly challenging for the plaintiff." [66] The cases merely describe this challenging standard with boilerplate language: "This causation burden is commonly referred to as the 'suit within a suit' requirement." [67] The courts' discussion of this suit within a suit delves no deeper than the surface; it states only the obvious and basic standard-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. [68] The latest Texas Supreme Court decision on point elaborates no further and merely restates the basic rule that "the plaintiff must produce evidence from which a jury may reasonably infer that the attorney's conduct caused the damages alleged." [69] The cases provide no definitive answer to whether additional evidentiary or procedural requirements implement the policy concerns. [70]

Luckily, Texas law is not completely silent on this question. [71] The legal malpractice cases provide guidance in exemplar form by demonstrating permissible methods of proving the merits of an underlying claim or defense. [72] For example, the court finds no error when a plaintiff produces evidence properly proving all the elements of the underlying claim and then proposes jury questions on each of those elements. [73] In Ballesteros v. Jones and Cosgrove v. Grimes, the jury questions included the actual elements of the underlying claim, and the evidence on those elements was the kind that would have been used in the underlying trial. [74] In both cases, when the jury found in favor of the plaintiff on the underlying elements, there was no question that the ***158** plaintiff would have prevailed on the underlying claim. [75] Similarly, in Rangel v. Lapin, the court suggested that proof of an underlying claim must be proved by evidence that would have been admissible in the underlying trial. [76]

This general approach has support in the comment to the Pattern Jury Charges. [77] As one commentator noted, "[t]he comment . . . clarifies that the plaintiff must prove in the legal malpractice case the elements of the underlying cause of action that the plaintiff claims to have lost due to the attorney's negligence." [78] Thus, when the cases refer to the suit within a suit, the intention may be that the fact-finder must literally decide two cases-(1) the malpractice case and (2) the underlying case based on evidence that would have been admissible in that underlying case. [79] Certainly under Texas law, the suit within a suit is a sufficient method of determining the merit of an underlying claim or defense. [80] Texas cases, however, do not expressly require such evaluation. [81] Rather, in the wake of a particularly ambiguous Texas Supreme Court decision, the cases suggest that a conflicting and less reliable method is permissible. [82]

C. Alexander v. Turtur & Associates

Ironically, in an opinion that was a victory for a defendant-lawyer, the Texas Supreme Court helped those who routinely prosecute litigation malpractice claims. [83] The easiest method of proving the merit of an underlying claim or defense is merely to offer experts who will opine on that merit, just as experts in a medical malpractice case opine on the chance of success absent a doctor's negligence. [84] But according to the Texas Supreme Court's language in Alexander v. Turtur, even construing the case as narrowly as possible, when an underlying claim is tried before a judge, and the malpractice claim is tried to a jury, such expert opinion on actual cause is not only permissible but often required. [85] Moreover, a careful look at the court's language and the facts of the case suggests that the holding is much broader-it may even apply to malpractice suits in which the underlying case was tried to a jury. [86]

***159** The facts of Alexander are somewhat complex, which may explain the court's apparent impulse to require expert testimony. [87] Ultimately, however, the facts do not bode well for future defendant-lawyers. [88] At the outset, the underlying litigation was not atypical and was set for an ordinary jury trial. [89] Turtur, the plaintiff in both the underlying case and the legal malpractice case, sued McKellar for basic fraud and breach of contract. [90] The only unusual aspect of the case arose when McKellar sought bankruptcy protection, at which point the claims were severed and incorporated into an adversary proceeding before a bankruptcy court. [91] Then the alleged negligence occurred. [92] While the parties tried their case before the bankruptcy judge, Turtur's lawyer, Alexander, allowed "a new associate and former assistant district attorney with no civil trial or bankruptcy court experience" to act as lead trial counsel. [93] The bankruptcy judge ruled against Turtur and awarded damages to McKellar. [94] Consequently, Turtur sued Alexander for negligence, and the parties tried this case before a jury in state court. [95]

Turtur's malpractice lawyer may have handled the malpractice case more poorly than Alexander handled the previous case. [96] Turtur presented substantial proof of negligence but no meaningful evidence on but-for causation-the merit of the fraud and contract claims absent Alexander's negligence. [97] Turtur's expert, Steve Peterson, did not even assert that Alexander's negligence caused the adverse result. [98] As for causation, the only testimony was that the bankruptcy judge ruled on the evidence before him. [99] Peterson even expressly "disclaimed knowledge of any other evidence that might have changed the judge's decision." [100] Although the evidence of negligence understandably convinced the jury to award Turtur damages, the judge entered judgment for Alexander. [101] Undoubtedly, this result was proper because there was no evidence of causation; however, it was based on perilous grounds. [102]

Alexander never argued that Turtur's failure to retry the underlying claims to the malpractice jury failed to comply with what the courts in Ballesteros and ***160** Cosgrove seemed to call the suit within a suit requirement. [103] Unlike in Ballesteros and Cosgrove, the jury in Alexander did not answer any questions regarding the elements of Turtur's underlying claims of fraud and breach of contract. [104] The jury merely found causation based on the substantial evidence of negligence and Peterson's testimony, both of which appear to be insufficient under any method of proving causation. [105] Perhaps these aspects of the case swayed the court in Alexander's favor, but they did not appear in Alexander's argument. [106] The argument was that the proper evidence of but-for causation was expert opinion. [107] Under this theory, the jury must choose between competing experts in order to determine "whether the result of the underlying adversary proceeding would have been different but for the alleged malpractice." [108] Of course, the argument won Alexander his case, for Peterson did not even offer testimony that "there would have been a different result in the underlying trial." [109] The ultimate effect, however, is adverse precedent for future defendant-lawyers. [110]

D. Dangerous Implications of the Alexander Holding

The logical import of the Alexander opinion is that expert testimony on but-for causation is desirable and permissible. [111] Arguably, the court's impulse to require expert testimony in Alexander may have stemmed from the obvious problems in asking a jury to determine what a bankruptcy judge would have decided absent the alleged negligence. [112] Commentators note this glitch in Alexander and argue that a judge should sit as fact-finder when the underlying case was a bench trial. [113] The fact remains, however, that the underlying fraud and contract claims in Alexander were within the province of a jury, as they were to be originally tried to a jury. [114] With respect to the underlying claims, the bankruptcy judge merely sat as judge and fact-finder, but applied no special knowledge in the latter capacity. [115]

Furthermore, the court dispelled any notion that this "judge-jury" dichotomy was the reason for requiring expert testimony. [116] The court reasoned that, in general, decisions made in litigation are "invariably" complex matters ***161** of judgment and thus "beyond the ken of most jurors." [117] Because the causal link, according to the court, was "beyond the jury's common understanding, expert testimony [was] necessary." [118] The court even cited with approval cases from other jurisdictions that allow expert opinion on the issue of whether "the result of the underlying proceeding would have been different but for the alleged negligence . . . ." [119] Indeed, the court joined a group of other jurisdictions that allow expert opinion on but-for causation. [120]

The reasoning of the Alexander opinion is not novel. It corresponds with a growing number of other states that eschew any limits on proof of causation. [121] Ohio has gone as far as removing the requirement that the plaintiff prove that the underlying claim or defense would have been successful. [122] Ohio only requires the plaintiff to show some evidence "that there is a causal connection between the conduct complained of and the resulting damage or loss." [123] Federal courts applying Pennsylvania law have reached a similar result. [124] Most noteworthy is a Third Circuit opinion finding no reason to impose special causation requirements and allowing expert testimony on but-for causation. [125] Maine and New Jersey have reached similar conclusions. [126] New Mexico, Oregon, and Idaho similarly have unlocked the door to expert opinion. [127] The Supreme Court of Oregon was particularly adamant:

> Since plaintiff . . . had to convince the trier of fact by a preponderance of the evidence that the result in the earlier trial would have been favorable to her . . . we know of no other way in which the jury could have been guided in determining the issue than the presentation of opinion by properly qualified experts. . . . We do not believe that this ultimate fact could be 'equally well decided' by the jury from the same evidence upon which the experts based their opinions. [128]

***162** The Texas Supreme Court in Alexander quoted and agreed with the Supreme Court of Oregon's language in support of its holding that expert opinion was required. [129]

E. The Rise of the Experts

The result in Alexander is not a victory for defendant-lawyers as the opinion suggests. [130] The decision eases the burden on plaintiffs without accounting for obvious policy concerns. [131] This result is also inconsistent with what the Ballesteros and Cosgrove opinions suggest to be the suit within a suit requirement. [132] Yet the issue seems to elude

both commentators and courts. [133] One commentator recognized that the supreme court now seems to require expert opinion on "what effect on the outcome proper conduct would have had," but provides no further discussion beyond that recognition. [134] Other commentators fail to mention the inconsistencies, even though they believe that the law in Texas requires "the malpractice client [to] reconstruct the underlying action." [135] The concurring opinion by Justice Hecht in Alexander never disapproved of expert testimony but merely questioned whether a jury should decide what a judge might have done differently by pointing out that "the Court [did] not decide that . . . the issue was properly one for the jury." [136] Neither Justice Hecht nor any other appellate judge after Alexander questioned whether expert opinion could satisfy the suit within a suit requirement. [137] On the contrary, an alarming number of appellate decisions since Alexander clearly suggest that expert opinion on but-for causation is sufficient evidence. [138]

***163** However, the inconspicuousness of the issue could mean that these troubling developments in Texas are inadvertent-the result of well-intended court opinions based on self-interested or ill-informed appellate arguments. Once courts recognize the problem, the possibility for clarification and revision may still exist. If trial and appellate lawyers make the right arguments, they may be able to ultimately replace these unsettling developments with a more desirable suit within a suit rule. [139]

III. The Re-Creation Method: A More Desirable Suit Within a Suit

A. The Re-Creation Theory of the Suit Within a Suit

According to the boilerplate language in the case law, the phrase "the suit within a suit" is merely a description of but-for causation. [140] The plain meaning of the term conveys that a fact-finder will be deciding the merit of an underlying claim or defense to determine causation in the legal malpractice suit. [141] One might logically interpret this abstraction to permit any type of proof on the merit of the underlying claim or defense, even expert opinions. [142] Indeed, the Texas Supreme Court seemed to make this interpretation. [143]

Unfortunately, the concept of but-for causation in litigation malpractice is so abstract that even the most well-known authorities do not give a singular definition of what they believe to be the suit within a suit requirement. [144] Their discussions suggest, however, that the suit within a suit is actually a special "re-creation" procedure that requires more reliable proof of the merit of the underlying claim than expert testimony. [145]

1. A Basic Definition

The implication in the commentaries is that this re-creation theory of the suit within a suit requires the plaintiff to retry the underlying case to a new trier of fact within the bounds of both the law and admissible evidence available at the time the underlying claim was or would have been brought. [146] The goal is to determine what a reasonable fact-finder would have decided absent the lawyer's alleged negligence. [147] Just as in Ballesteros and Cosgrove, the jury should both observe a proper presentation of the underlying claim or defense ***164** and answer jury questions regarding the elements of that underlying claim or defense. [148]

2. How Re-Creation Applies to Litigation Malpractice: Complete Impermissibility of Expert Testimony on But-For Causation

When applying the re-creation method to litigation malpractice cases, there should be no expert testimony on the merit of the underlying claim or defense. [149] To begin with, such testimony serves no purpose. [150] The malpractice fact-

finder does not endeavor to specifically address the question of what the outcome of the underlying case likely would have been. [151] The fact-finder merely hears the evidence anew and decides for itself the outcome by answering jury questions regarding the elements of the underlying claims and defenses. [152] If the malpractice fact-finder resolves the underlying case in favor of the plaintiff, then but-for causation exists and the plaintiff has satisfied the suit within a suit requirement. [153] Expert opinion on the likely outcome of the underlying case is therefore not necessary or even helpful. [154]

In fact, expert opinion is unnecessary and infringes upon the jury's province and can prejudice either party. [155] Under the re-creation method, the malpractice fact-finder decides the merits of the underlying case on its own, a process that becomes impossible when expert opinion taints independent fact-finding. [156] Expert opinion on the likely outcome of the underlying case would essentially usurp the province of the jury, for an expert in an ordinary negligence trial could never tell a jury how other juries typically decide similar cases. [157] The jury would likely get confused, give undue weight to the expert opinion, and ultimately become biased. [158] Depending on which expert the jury favors, the expert opinion might prejudice either party. [159]

Thus, while expert opinion should perhaps be permissible on duty, breach, and foreseeability, it should be impermissible on but-for causation, at least when the claim is for litigation malpractice. [160] Even when the alleged ***165** negligence does not occur during litigation but merely causes clients to lose their case, expert testimony should be limited on but-for causation. [161]

3. Application to "Lost Claim" Situations: Limited Use of Expert Testimony on But-For Causation

The but-for causation analysis is slightly different when clients sue their lawyer for somehow losing a legal claim before the litigation stage begins. [162] "Lost claim" situations are a subcategory of litigation malpractice; the distinction is that the alleged negligence does not occur during the course of trial but rather in the events leading up to a trial that never occurs. [163] A plaintiff may have a lost claim cause of action, for example, when the lawyer misses a statute of limitations or negligently advises the client to settle. [164]

The re-creation theory applies to these lost claim situations in the same way it applies to other litigation malpractice cases, and thus expert testimony on the likely outcome of the lost claim is impermissible. [165] The justification for applying the re-creation method in lost claim situations is readily apparent. [166] To ask plaintiffs to try their claims only once before receiving compensation is no burden and requires no special justification. [167] There is some controversy in the commentaries over whether the plaintiff may prove the "reasonable settlement value" of the lost claim instead of proving its merit. [168] Texas commentators addressing the issue, however, argue that the plaintiff must prove the true merit of the lost claim under Texas law. [169] An additional argument is that the amount of a fair settlement is typically proportionate to the apparent merit of the threatened claim or defense. [170] There is no greater inspiration to settle fairly than a looming trial date on which the law will test the validity of claims and defenses. [171]

A lost claim malpractice plaintiff should therefore have to try the lost claim to the malpractice jury. As in Ballesteros, the jury should then answer questions regarding the elements of the underlying claim. [172] If the jury does not find for the plaintiff on the underlying claim, the plaintiff cannot prove but-for causation. [173] If the jury does find in favor of the plaintiff on the underlying claim, then only a portion of the but-for ***166** analysis is satisfied-the claim would have

been successful if it had been tried. [174] The litigation of the underlying claim alone does not resolve the most important aspect of the but-for inquiry-whether the lawyer's alleged negligence was the reason the claim was not tried. [175]

Because the alleged negligence, in contrast to litigation malpractice, did not occur during trial, the jury must use ordinary, pragmatic reasoning to complete the actual causation analysis. [176] The jury cannot re-create the events leading up to trial; it can only rely on ordinary life experience to imagine what would have happened if the lawyer had not acted negligently. [177] If the matter is too complicated for a lay person to make such a prediction, expert testimony may be necessary. [178] The task may be so simple that expert testimony is unnecessary, as when the alleged mistake was missing the statute of limitations by a narrow margin. [179] But other possible causes could factor in, such as a decision to settle or other client action. [180] In that event, a simple but-for analysis would turn into a complex substantial factor inquiry. [181] In these narrow situations, the defendant-lawyer cannot object to expert testimony on whether the same result would have occurred. [182]

In all other respects, however, the re-creation method should apply, just as it would in other litigation malpractice cases. [183] Indeed, there is no reason to not require lost claim malpractice plaintiffs to litigate the underlying issues. [184] Lost claim plaintiffs aside, however, the re-creation method requires more thorough and significant justification. [185]

B. Justification for Re-Creation: Fundamental Differences Between Litigation Malpractice and Other Negligence Claims

Why should courts apply the re-creation method instead of the expert method condoned in Alexander? Unfortunately, finding adequate justification for the re-creation theory in the commentaries is even more difficult than identifying definitions. [186] Yet reflection reveals that such a method of ***167** determining actual causation is very different from the method used in all other forms of negligence cases. [187] Why should there be re-creation of the underlying trial? In other negligence cases, the fact-finder merely hears the facts as they occurred and answers the but-for causation question. [188]

This is the regular procedure for determining but-for causation. [189] The inquiry is a pragmatic one, and the rationale is obvious: juries cannot replay history like a tape and substitute negligence with reasonable actions to see what would have happened. [190] Rather, the fact-finder reviews the facts that occurred, and the plaintiff posits appropriate action that the defendant should have taken. [191] Replacing negligence with reasonable action, the fact-finder then draws upon everyday experience to imagine what would have happened but for the negligence. [192] This task may require expert help, as in medical malpractice, when only a doctor's mind can realistically make but-for predictions. [193] In litigation malpractice, however, the situation is critically different in a way that commentators have never articulated. [194]

Commentators have certainly identified good reasons for requiring a re-creation method. [195] One obvious justification is Texas's professed policy against causation standards that give losing litigants a second bite at the apple. [196] Thus, tugging at the reliability strings of Texas policy, commentators justify a re-creation procedure by noting that it is the "most powerful predictor of the correct result." [197] This assertion is certainly true, but courts may not consider the public policy of reliability as sufficient justification for treating litigation malpractice claims in such a fundamentally different way than all other negligence claims. [198] To require strict re-creation and still have peace of mind, one must identify more inherent differences between litigation malpractice claims and other negligence claims. [199]

Another popular justification is that anything less than re-creation would render "the attorney the guarantor of his client's results." [200] While expert testimony on but-for causation may be grossly unreliable, it is not so inept as to completely

circumvent the but-for element and make attorneys guarantors of success.[201] Satisfying the but-for element is never a foregone conclusion, even ***168** when expert testimony is sufficient proof, as is the case in medical malpractice.[202] This "alarmist" justification is again grounded only on reliability concerns and has nothing to do with any fundamental difference between litigation malpractice and other negligence claims.

There is a fundamental difference between the two claims, however, due to the setting in which the negligence occurs.[203] Most negligence takes place in "the real world"; thus, replaying history is impossible and re-creation is impracticable.[204] Hence, the pragmatic but-for inquiry ensues and necessitates the aid of expert prediction.[205] Litigation negligence, however, while technically taking place in "the real world," actually occurs within a very different and quite unreal world-the judicial system.[206] This system and the trials that occur within it are not completely immune from unforeseeable forces of nature, but the system was nevertheless built to work according to a structured plan.[207] The rules and principles of operation are not chaotic, but man-made, and on the whole, the results are the product of an unchanging machine, not the whim of nature.[208]

The machinery consists of special roles.[209] Qualifying members of the public take on the roles of judges, jury members, and lawyers and follow the guidelines of their respective roles to create the product the law desires.[210] The jury members become the objective, impartial fact-finders.[211] The lawyers become the reasonably skilled adversaries whose competition will ultimately make the truth apparent to the impartial fact-finder.[212] The judicial system in fact assumes that the participants properly fill these roles, unless a party clearly shows otherwise on appeal.[213] When the participants follow the rules, the result is the just, fair, and legally accurate outcome the law desires.[214]

***169** The law can use the artificial, unchanging nature of the judicial system to determine the merit of an underlying claim or defense by obviating the normal pragmatic inquiry and its attendant experts.[215] Despite the use of different lawyers, a different judge, and a different jury, relitigating the underlying action without the alleged negligence is, for the purposes of the judicial system, the equivalent of actually replaying the underlying trial.[216] Unlike medical malpractice cases, neither imagination nor the use of paid experts is necessary to determine the outcome in litigation malpractice cases.[217] The judicial system assumes that the lawyers, judge, and jury properly filled their objective roles in both the underlying trial and the malpractice retrial.[218]

Certainly, every jury is unique, and an infinite number of factors might affect the jury's decision.[219] But this fact is yet another fundamental difference between litigation malpractice and other negligence claims that justifies the re-creation requirement.[220] At least in most cases, the unpredictability of jury verdicts would render expert opinion on but-for causation inherently unreliable to an absurd degree.[221] So long as the merit of the underlying claim or defense is genuinely in dispute, any type of opinion on the merit of that underlying claim or defense defies both common sense and well-established principles of evidentiary reliability.[222] Practitioners, commentators, and Justice Hecht of the Texas Supreme Court have all expressed serious doubt that any person can predict jury verdicts.[223] Some plaintiffs' lawyers argue that experienced lawyers, judges, or jury selection experts might possess that skill.[224] They do not deny, however, "the one thing that every trial lawyer realizes"-that nobody knows "what a jury is going to do."[225] Even the best trial lawyers can only guess "based on probability, hope and prayer."[226] As the Virginia Supreme Court stated, no person "can predict the decision of a jury" and therefore such speculation "could not be the subject of expert testimony."[227]

In contrast to expert opinion, an objective retrial is not only more reliable but will actually reveal what the proper product of the judicial system would ***170** have been if the lawyer had not been negligent. [228] If the malpractice jury, after hearing the properly presented underlying case, finds in favor of the malpractice plaintiff, the but-for causation analysis is resolved in favor of the malpractice plaintiff. [229] In such a case, the re-creation is the equivalent of replaying the "tape" without the alleged error and proves to the fact-finder that, if everything had occurred properly, the result would have been favorable to the malpractice plaintiff. [230]

Thus, in light of both the policy against unreliability and the inherent differences between litigation malpractice and ordinary negligence, there appears to be ample justification for requiring re-creation. [231] Without question, re-creation is more reliable than the expert testimony approach condoned by the court in Alexander, because re-creation provides far more assurance than what even the most qualified "jury expert" might offer. Moreover, although explanation in the cases and commentaries may be sparse, the most authoritative writers, especially those in Texas, clearly favor a strict re-creation method. [232]

In this last respect, however, the Texas Supreme Court's opinion in Alexander seems to erroneously suggest otherwise, and courts and lawyers should not allow this opinion to mislead them. [233] In support of its apparent rule requiring expert testimony on the likely outcome of the underlying case, the Alexander court quoted a small and ambiguous passage from a widely acclaimed treatise on legal malpractice:

> A failure of proof can result if expert testimony is limited to whether the defendant violated the standard of care. Proof of causation of injury often requires expert testimony concerning what the attorney should have done under the circumstances. The expert testimony must be tied to the specific conduct that is in issue. [234]

The court's reliance on the treatise is almost certainly misplaced. [235] Taken in context, the quoted language merely conveys that an expert may testify as to what the defendant-lawyer should have done differently, and this testimony is only to enable the fact-finder to replace the alleged negligence with proper actions. [236] Overall, the treatise does not condone expert opinion on how the ***171** outcome might have changed. [237] To the contrary, the treatise generally favors a re-creation version of the suit within a suit. [238]

Critics of the strict re-creation method may argue that the method is potentially time consuming. [239] But expediency is not a true friend of justice. [240] Moreover, "expert battles" can likewise extend for long periods, consuming even more time and expense than an ordinary trial. [241] Critics may also argue that applying the re-creation method will raise too many unanswerable, complicated questions and sometimes create an undue burden on the plaintiff. [242] Requiring reliable proof of causation, however, is normally not an undue burden. [243] As for complexity, an ordinary trial, albeit a trial within a trial, may often be simpler than the expert approach. [244] For example, the expert approach will not only involve inquiry into a hypothetical trial within a trial, but will also spawn a confusing "standard within a standard" effect, which forces the malpractice jury to undergo the following daunting inquiry: whether the plaintiff in the malpractice case adduced experts that proved by a preponderance of the evidence that the plaintiff in the underlying case would have produced evidence that would have proved a particular claim by a preponderance of the evidence. [245]

The re-creation method, on the other hand, simply requires that the jury decide whether the plaintiff proved the underlying claim by a preponderance of the evidence. [246] To the extent the re-creation method creates complex questions and undue burdens, however, courts are capable of handling such issues. [247]

IV. The Details of Applying the Re-Creation Method

Although the basic re-creation theory discussed above is the best way to ensure that the underlying claim or defense would have been successful, it is not a perfect theory. [248] The theory's greatest shortcoming is its complex, abstract nature in light of the sparse explanation by courts and commentators. [249] Many lingering questions of application will invariably arise in practice. [250] ***172** Does the malpractice fact-finder decide what the underlying fact-finder would have decided absent the alleged negligence, or does the malpractice fact-finder decide the merit of the underlying claim, or defense, anew? [251] To what extent is the underlying trial re-created? [252] Do evidentiary limitations during the underlying trial apply in the retrial? [253] Is the entire underlying case retried, or should the transcript suffice for those portions that did not include the allegedly negligent acts of the defendant-lawyer? [254] What are the evidentiary and procedural repercussions? [255] The most authoritative supporters of the re-creation method disagree on answers to these questions and often fail to fully examine all of their complications. [256] Luckily, these are problems that courts and commentators are able to solve. [257] In the hope of moving in that direction, the following sections attempt to provide analysis of some important issues that are likely to arise in applying the re-creation method: the extent of re-creation, the use of a transcript, the procedural and evidentiary repercussions, and the ability to mitigate undue harshness on plaintiffs. [258]

A. The Extent of Re-Creation

A re-creation procedure necessarily involves an objective inquiry. [259] The question cannot be what the actual fact-finder would have decided absent the alleged negligence. [260] Rather, the question should be what a reasonable fact-finder would have decided. [261] This objective standard, however, must be limited in purpose and in application. [262] The purpose of an objective standard is to accommodate the impracticalities, and near impossibility, of re-creating all aspects of an underlying trial, except for the alleged negligent acts. [263] Leading commentators have noted that subjective considerations are not always irrelevant. [264]

In many respects, the standard should be subjective. [265] Objectivity should only apply to the ultimate issue of how the result of the underlying trial would ***173** have been different. [266] Applied only to that question, the standard will serve its practical purpose without unfairly altering the re-creation. [267] In other words, the objective standard merely ensures that the malpractice jury is able to decide the merit of the underlying case on its own, instead of trying to determine what the prior jury would have decided. [268]

Other causation questions should be resolved under a normal, subjective standard. [269] For example, the question of whether the plaintiff would have been able to collect a favorable judgment in the underlying case depends on whether the actual defendant in the underlying case had the funds to satisfy the judgment. [270] The implicit rationale of this standard is that the law should not fault the lawyer for something that might have occurred in a hypothetically reasonable situation but, in fact, could not have occurred as the facts existed. [271]

Therefore, any evidence, including the testimony of a witness, that was unavailable either for practical reasons or for legal reasons, should be treated as irrelevant and inadmissible on the causation issue in the legal malpractice trial. [272] One Texas appellate decision may support a contrary view, however. [273] The court in Green v. Brantley reasoned that such limitation of evidence would pave the way for requiring the exact re-creation of the underlying trial, including a recall of the same jury members. [274] This rationale overlooks the unfairness of imposing liability based on evidence that would

not have been available in the underlying case, and the goal is to determine what a reasonable fact-finder would have done, not what the actual underlying fact-finder would have done. [275] The reasoning of Green would, in fact, impose liability on lawyers more readily than the law would otherwise impose on the lay person in an ordinary negligence claim, and in that respect, it does not comport with Texas policy. [276]

A subjective standard should also apply with respect to other limitations in the underlying trial, such as time restraints. [277] Any existing time limitations imposed in the underlying trial should likewise be imposed in the re-creation portion of the legal malpractice trial. [278] A good example of this particular ***174** problem of inconsistent time limits is found in Alexander. [279] The bankruptcy judge in the underlying trial limited the plaintiff's case to only two days, while the plaintiff's presentation of experts in the malpractice case stretched over many weeks. [280] Such inconsistencies clearly raise concerns of prejudice:

> [A]llowing the plaintiff in the malpractice action to take whatever time it felt appropriate to present its "case within a case" to the malpractice jury, and then to permit the plaintiff to contrast that effort with the forcibly truncated presentation of that matter . . . ran a substantial risk of unduly prejudicing the attorney defendants. [281]

Courts could create exceptions in situations when replicating the limitations of the underlying trial would put an undue burden on the plaintiff. [282] For example, when evidence that was unavailable during the underlying trial is the only available evidence at the time of the legal malpractice trial, such evidence might be permissible. [283] Otherwise, requiring the parties to limit their re-creation evidence to what was or would have been admissible and available in the underlying trial is consistent with basic causation principles and does not run afoul of existing case law in Texas. [284]

B. Substituting a Transcript for Re-Creation

Exalting expediency over fairness and accuracy, some commentators carve out an exception to the re-creation method when the underlying case was partially or fully tried. [285] According to these commentators, a relaxed re-creation method "is appropriate where the error concerns a matter that was tried." [286] This relaxed method consists of retrying only those points of the trial during which the defendant-lawyer performed negligently. [287] Under this theory, the remainder of the trial, both what occurred prior and subsequent to the alleged negligent actions, would not be re-created at all. [288] Rather, some argue that, for the sake of expedience, the underlying transcript should serve as ***175** the remainder of the trial because the goal is "to decide whether the attorney's error prevented the proper result." [289]

This particular use of the underlying trial record would ease the burden on the plaintiff but prejudice the defendant. A portion of the transcript is indispensable evidence of the defendant-lawyer's negligence. But using the remainder of the record as the "re-creation" of the underlying trial binds the lawyer to the decisions of the opposing counsel in the underlying case. This essentially deprives lawyers of their right to independent counsel and a day in court, at least for the purposes of retrying the issues in the underlying case. Such use of the record is contrary to a Texas case, which reasoned that a lawyer's "defense to a legal malpractice claim should not rest on the underlying defendant's handling of its own defense." [290] The judicial system not only contemplates adversaries correctly handling litigation, but also having the ability to freely do so. [291] This relaxed re-creation method, in fact, prevents any meaningful re-creation of the underlying case. [292]

In a litigation malpractice case, as in any negligence case, the plaintiff must substitute proper acts for the defendant-lawyer's allegedly negligent act. [293] Such a change, however, will significantly affect other events at the litigation malpractice trial. [294] The plaintiff cannot change one event-the lawyer's allegedly negligent act-and then expect all other subsequent decisions and tactics in the re-creation of the underlying trial to occur exactly as they did in the transcript. [295] Although decisions made in trial are drawn upon a collage of complex judgment factors, they are by necessity ad hoc, often depending largely on the lawyer's immediate analysis of the opponent's tactical decisions. [296] A lawyer's judgment calls with respect to tactics, evidence, demeanor, and even effort may change in response to the other side's decisions. [297] After all, the purpose of a trial is to test the strength and veracity of claims and defenses. [298] This objective is accomplished by allowing every ***176** party to be a true adversary for his or her side by responding to an opponent's adversarial attacks and defenses in the way the party believes will best show the merits of his or her own contentions. [299]

Therefore, in relitigating the underlying claim in a legal malpractice trial, when the plaintiff substitutes proper acts for the defendant-lawyer's alleged negligence, the defendant-lawyer still must be able to attack freely the strength of the plaintiff's underlying claim. Otherwise, the trial process may not be an accurate re-creation. Uninhibited and adequate advocating is hardly feasible when the transcript suffices for the remainder of the underlying trial. A reasonable lawyer, responding to what the plaintiff retroactively changes, might have done something different than what was actually recorded in the transcript. [300] The law should thus allow the defendant-lawyer to stand in the shoes of his opponent-lawyer in the underlying trial and start from scratch, at least from the point of the alleged negligent act, when the events might logically change. Anything less would impose liability on the grounds that the lawyer negligently lost a case that should have been won, while in reality it perhaps should not have been won if a reasonable adversary had been able to freely act in response to the alteration of the facts. For example, when the alleged negligence is the failure to list a certain type of expert witness, rectifying that error might alter events in a myriad of ways, from the designation of counter-experts through final argument.

When both sides in the legal malpractice case desire to use all or part of the underlying transcript, however, courts should not force complete re-creation. [301] If the defendant-lawyer agreed that replacing the alleged negligence with proper acts would not significantly change the events in the underlying transcript, the law should not oblige the parties to nevertheless relitigate the post-negligent portion of the underlying trial. For example, if the alleged negligence was the failure to present some particular evidence or witness, the plaintiff could, absent objection from the defendant-lawyer, present the new evidence and the underlying transcript to the legal malpractice jury, which would then reach a verdict on the merit of the underlying claim to determine causation. The defendant-lawyer, however, should have the option of delving deeper into the issues and evidence of the underlying case than was done in the underlying trial.

C. Procedural and Evidentiary Repercussions

Re-creating the underlying litigation is a unique method of determining but-for causation, and as a result, it creates some unique effects on ***177** the application of procedural and evidentiary rules. [302] With respect to procedural rules, in some situations a "summary judgment within a summary judgment" effect may exist. [303] Because the re-creation method requires actual proof of the elements of the plaintiff's underlying claim or defense, the plaintiff must legitimately raise a fact issue on the elements of the underlying claim or defense to withstand summary judgment on the causation element. [304] When expert testimony on the merit of that claim or defense was impermissible in the underlying trial, such expert opinion in an affidavit should not be sufficient summary judgment proof on but-for causation. Whether this theory should be the rule when the lawyer's negligence occurred after the pretrial phase, however, presents a difficult question. [305] Arguably, if the plaintiff's claim or defense already withstood a summary judgment motion, the law should perhaps not test it again. In the lost claim scenario, however, when there was neither a summary judgment motion nor

a trial, the defendant-lawyer should be able to insist that the plaintiff raise fact issues on the elements of the lost claim with affidavits that would have been admissible had the claim gone to trial.

Important evidentiary repercussions also stem from the conflict between the re-creation method and the use of a transcript to prove the merits of the underlying case. [306] To prevent the jury from becoming confused or biased, the defendant-lawyer may seek to fully exclude portions of the transcript of the underlying case. [307] To begin with, use of the underlying transcript to prove causation is hearsay. [308] The transcript constitutes an out-of-court statement offered for the truth of the matter asserted and thus is generally inadmissible. [309] The inadmissibility of the transcript comports with one of the main purposes of the hearsay rule because the defendant-lawyer had no opportunity to meaningfully cross-examine any of the witnesses in the underlying trial. [310] The defendant-lawyer may have cross-examined many of the witnesses in the underlying trial, but that examination has no value to the defendant-lawyer in the malpractice case. [311] In the underlying trial, the defendant-lawyer had an ethical duty not to expose the weaknesses of his own client's proffered witness ***178** testimony. [312] Thus, such examination would always tend to prove the merit of the client's underlying claim or defense. Moreover, the hearsay concerns are not ameliorated merely because the plaintiff agrees to let the declarant testify to the subject matter of the prior statements if those prior statements are still put into evidence. [313] The hearsay rule excludes those recorded statements, and the declarant must testify anew to the matter asserted in the prior statement unless an exception applies. [314]

The plaintiff will probably wish to use the recorded statements of the defendant-lawyer in the underlying trial. [315] Such statements will be very useful to the plaintiff because they will tend to prove the merit of the plaintiff's underlying claim or defense and make the defendant-lawyer appear hypocritical. [316] The defendant-lawyer, however, may rely on the principle that the court will exclude the evidence, which then confuses the jury, causes prejudice, and has minimal probative value. [317] Statements made by a party-opponent, like the defendant-lawyers in a malpractice case, fall under the admissions exception to the hearsay rule, but this exception does not guarantee admissibility. [318] Although there might be some relevance and probative value to use of the transcript, plaintiffs could achieve the same results without prejudicing the defendant-lawyer by presenting arguments or evidence directly to the legal malpractice jury. [319]

From the plaintiff's perspective, inadmissibility of the transcript on the issue of but-for causation poses no real inconvenience. Conversely, admissibility of the transcript on but-for causation is extremely prejudicial to the defendant-lawyer. The portion of the transcript sought to be admitted would consist of the defendant-lawyer's own zealous argument that the client's claim or defense has merit. [320] Even without hearing what occurred in the underlying trial, the jury in the malpractice case would know that the defendant-lawyer once advocated in favor of the plaintiff's position, a position directly opposed to the one now taken by the defendant-lawyer. [321] This knowledge alone is prejudicial because it may cause the jury to question the defendant-lawyer's position in the malpractice case. [322] But by revealing the defendant-lawyer's actual arguments in the underlying case, the plaintiff will ***179** undoubtedly succeed in marking the lawyer as a hypocrite in the jury's eyes. [323] Further, merely excluding the lawyer's opening statements and closing arguments would not remedy this prejudice because the inconsistency would pervade every question and objection the defendant-lawyer made during the testimony of each witness in the underlying trial. Given the gross prejudice to the lawyer and the existence of alternative proof, a court should exclude the defendant-lawyer's prior statements when offered to prove the merit of the underlying claim or defense. [324]

D. Ameliorating Harshness of the Re-Creation Method

Overall, requiring plaintiffs to reliably prove the merit of their underlying claims or defenses before imposing liability on a negligent lawyer is not unfair. [325] Unfortunately, in some situations, application of the re-creation method seems inequitable and harsh. [326] This occasional harshness is what spawns criticism of the method. [327] Special exceptions to the general re-creation rule would address these valid concerns and reinforce the desirability of re-creation. [328]

The harshness of re-creation can result from an evidentiary hindrance on the plaintiff. [329] Occasionally, the plaintiff cannot obtain critical evidence that would have been admissible in the underlying trial. [330] This situation might occur as a result of no individual's fault, such as when a critical witness dies before the malpractice trial. [331] Alternatively, the lack of evidence might result from the defendant-lawyer's negligence. [332] In one glaring Texas example, Rangel v. Lapin, the defendant-lawyer advised the client to destroy a car that could have been the subject of a serious product liability case. [333] A more typical example is when the defendant-lawyer loses crucial evidence. [334] On the ***180** other hand, the client himself could create the same problem, either by losing evidence or waiting too long to sue for legal malpractice. [335]

Exceptions to the re-creation method's evidentiary requirements may be desirable depending on the reason for the lack of evidence. [336] If bad luck or "bad lawyering" causes the lack of evidence, some form of mitigation is probably in order. [337] Some jurisdictions with a re-creation rule recognize the need for mitigation and thus shift the burden to the defendant-lawyer to show that there was no causation. [338] For example, California, which has a generally strict re-creation rule, shifts the burden of proof on causation to the defendant-lawyer when the plaintiff shows that the lawyer's negligence prevents adequate re-creation. [339] A similar measure also appears in the comments to section 53 of the Restatement of the Law Governing Lawyers. [340]

Additionally, in these unusual circumstances, a court might choose not to apply some of the stricter aspects of the re-creation method. [341] For example, if a necessary witness dies before a malpractice trial, the underlying record of that witness's testimony could suffice under the former testimony exception to the hearsay rule. [342] If evidence that was not available in the underlying trial is the only available proof in a the malpractice trial, the court might admit such evidence if it is of the same general quality as what was originally available. [343] In an egregious case like Rangel, when there was never a trial and the lawyer destroyed critical evidence, the court might even permit various forms of expert testimony on the merit of the underlying claim. [344] In such a case, the expert opinion would be the only available proof, and because the lawyer is to blame for the lack of available proof, the admissibility of the expert opinion is both necessary and fair. [345]

These sorts of ameliorations remove some of the bite from the re-creation version of the suit within a suit. But no lawyer should ever be immune from liability, and courts cannot blindly apply a strict re-creation method across the board. Rather, variations are sometimes necessary to preserve both fairness to all parties and the validity of re-creation itself. [346] In this sense, a slightly bending re-creation rule may ultimately be the strictest re-creation rule. In arguing for re-creation in malpractice suits, lawyers should recognize that they may go too far and thus give critics more reasons to insist on an expert testimony method. Moreover, litigation malpractice defendants cannot forget ***181** that, in the wake of Alexander, the suit within a suit rule is a vague guideline which Texas courts have not officially developed. [347] Trial lawyers can only hope that courts will favor re-creation. But perhaps if lawyers and commentators provide more thorough explanation of applying re-creation, including how to mitigate its harshness, courts will come to see that re-creation is a more reliable, practical, and sensible option than mere expert testimony.

V. Conclusion

In describing the state of litigation malpractice law around the nation, Dan Dobbs noted that "the case within a case puzzle probably has not been finally solved." [348] In Texas, this description is an understatement. Perhaps the only certainty in Texas at this time is that, in light of Alexander, lawyers and trial courts are on their own regarding the question of how plaintiffs may meet the suit within a suit requirement. [349] The commentaries only vaguely suggest that some kind of re-creation method is desirable. [350] Texas appellate decisions are either silent as to what the suit within a suit is or they blatantly suggest that it involves expert testimony on but-for causation. [351] The Alexander opinion alone may be enough to convince most trial judges to allow expert testimony on but-for causation, regardless of what commentators say.

Texas has too much at stake to allow its civil justice system to continue to operate without modifying the causation requirement in legal malpractice suits. [352] If a party can prove causation by merely purchasing a transcript and a favorable expert, more and more losing litigants-and the lawyers seeking to represent them-will quickly catch on and step in line to get their second and nearly free chance. After all, every trial produces a winner and a loser, even litigation malpractice trials. Without adoption of a new approach, unsuccessful litigants may not only seek a second chance by bringing a malpractice claim, but possibly even a third or fourth chance. Clearly, the situation is ripe for abuse when losing litigants realize that mere expert testimony is sufficient to prove the merit of the underlying case.

Lawyers in Texas must recognize that litigation malpractice is fundamentally different from ordinary negligence. [353] Basic evidentiary principles of reliability, public policy, and the weight of authority are all against Texas's apparent exaltation of expert testimony on but-for causation in litigation malpractice. [354] No single method can cover the panoply of possible scenarios, but in general, only a re-creation version of the suit within a suit ***182** maintains a fair balance between the rights of injured clients and policy concerns. [355] Re-creation merely requires offering the most sensible form of proof that the underlying claim or defense would have been successful absent the lawyer's negligence. [356] The law must demand reasonable assurance that the lawyer caused harm and that the client is not stealing a second chance at a foregone matter. Without question, the issues surrounding the causation inquiry in litigation malpractice arenumerous and complex. But the problem is simply too important for lawyers and courts to ignore. Ultimately, it is our traditional system of civil justice at stake, and Texas deserves better.

Footnotes

1 Thorn v. Worthing Skating Rink Co., (1876) 6 Ch.D. 415, 416 (U.K.), quoted in Charles McCormick, McCormick On Evidence 80 (John W. Strong ed., West Group 5th ed. 1999) (1954).

2 See Tex. R. Evid. 702.

3 See id.

4 See infra Part II.E.

5 See infra Part II.D.

6 See, e.g., Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004).

7 See, e.g., id.

8 See, e.g., id.

9 See, e.g., Mark Donald, Texas High Court Demands Expert Testimony In Legal Mal Case, Tex. Law., Sept. 6, 2004.

10 See id.

11 See 2 Dan B. Dobbs, The Law of Torts § 486, at 1391 (West Group 2001).

12 See Fed. R. Evid. 702; Tex. R. Evid. 702.

13 E.g., Alexander, 146 S.W.3d at 118-20. Causation consists of two elements: proximate cause, or "legal cause," and "but-for" causation. David W. Robertson, The Common Sense of Cause in Fact, 75 Tex. L. Rev. 1765, 1767 (1997).

14 See, e.g., Alexander, 146 S.W.3d at 118-20.

15 See discussion infra Part II.

16 See discussion infra Part II.

17 See, e.g., 5 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §§ 33:8, 33:9, 33:18 (6th ed. 2007); Stephen E. McConnico et al., Unresolved Problems in Texas Legal Malpractice Law, 36 St. Mary's L.J. 989, 994-1010 (2005).

18 See infra Part II.E.

19 See, e.g., Hall v. White, Getgey, Meyer & Co., 347 F.3d 576, 585 (5th Cir. 2003).

20 See Dwayne J. Hermes et al., Leveling the Legal Malpractice Playing Field: Reverse Bifurcation of Trials, 36 St. Mary's L.J. 879, 888 (2005).

21 See, e.g., Allbritton v. Gillespie, Rozen, Tanner & Watsky, P.C., 180 S.W.3d 889, 892-93 (Tex. App.-Dallas 2005, pet. denied); Hermes et al., supra note 20, at 900-01 (countering criticism of the basic suit within a suit requirement). For the purposes of this Comment, the phrase "the suit within a suit" and "but-for causation" are synonymous; both denote the rule in Texas that the plaintiff must prove that but for the lawyer's negligence the underlying claim or defense would have been successful. Texas courts appear to use the phrases interchangeably. Allbritton, 180 S.W.3d at 892-93.

22 See infra Parts II-IV.

23 See, e.g., 5 Mallen & Smith, supra note 17, §§ 33:8, 33:9, 33:17, 33:18; McConnico et al., supra note 17, at 1044.

24 See infra Part II.D.

25 See infra Parts II-III, IV.

26 See infra Part II.

27 See infra Part III.

28 See infra Part III.

29 See infra Parts III-IV.

30 See infra Parts III-IV.

31 See infra Part III.B.

32 See, e.g., Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004).

33 See, e.g., id.

34 See, e.g., Read v. Scott Fetzer Co., 990 S.W.2d 732, 735-37 (Tex. 1998); Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989).

35 Cosgrove, 774 S.W.2d at 664; see McConnico et al., supra note 17, at 1010-11 (discussing whether the locality rule is still viable in Texas).

36 See Read, 990 S.W.2d at 737.

37 See Fed. R. Evid. 702; Tex. R. Evid. 702; Allbritton v. Gillespie, Rozen, Tanner & Watsky, P.C., 180 S.W.3d 889, 894 (Tex. App.-Dallas, 2005, pet. denied).

38 Hall v. White, Getgey, Meyer & Co., 347 F.3d 576, 585 (5th Cir. 2003).

39 Id.

40 See infra Part II.B-C.

41 See, e.g., Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004); Peeler v. Hughes & Luce, 909 S.W.2d 494, 496-98 (Tex. 1995).

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

43 State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 707-08 (Tex. 1996).

44 See, e.g., Hall, 347 F.3d at 585; Peeler, 909 S.W.2d at 496-98.

45 See, e.g., Peeler, 909 S.W.2d at 496-98.

46 See id.

47 See id.

48 See id.

49 Id.

50 Id.

51 See id.

52 See id.

53 State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 706-08 (Tex. 1996).

54 See Peeler, 909 S.W.2d at 496-98.

55 See id.

56 See id.

57 See id.

58 See id.; Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., 48 S.W.3d 865, 874-75 (Tex. App.-Houston [14th Dist.] 2001, pet. denied).

59 See Peeler, 909 S.W.2d at 496-98; Swinehart, 48 S.W.3d at 874-75.

60 See Peeler, 909 S.W.2d at 496-98.

61 See, e.g., Hall v. White, Getgey, Meyer & Co., 347 F.3d 576, 585 (5th Cir. 2003); Swinehart, 48 S.W.3d at 874-75.

62 See infra Part III.

63 See infra Part III.

64 See infra Part III.

65 Cf. Peeler, 909 S.W.2d at 496-98 (holding that plaintiffs who have been convicted of a crime must be exonerated before bringing a legal malpractice claim against their attorneys).

66 Hall, 347 F.3d at 585 (interpreting Texas law).

67 Id.

68 See, e.g., Hoover v. Larkin, 196 S.W.3d 227, 231 (Tex. App.-Houston [1st Dist.] 2006, pet. denied); Rangel v. Lapin, 177 S.W.3d 17, 22-23 (Tex. App.-Houston [1st Dist.] 2005, pet. denied); Ballesteros v. Jones, 985 S.W.2d 485, 489 (Tex. App.-San Antonio 1998, pet. denied).

69 Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004).

70 See supra notes 66-69 and accompanying text.

71 See Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989); Ballesteros, 985 S.W.2d at 489.

72 See Cosgrove, 774 S.W.2d at 665; Ballesteros, 985 S.W.2d at 489.

73 See Cosgrove, 774 S.W.2d at 665; Ballesteros, 985 S.W.2d at 489.

74 See Cosgrove, 774 S.W.2d at 665; Ballesteros, 985 S.W.2d at 489.

75 See Cosgrove, 774 S.W.2d at 665; Ballesteros, 985 S.W.2d at 489.

76 See Rangel v. Lapin, 177 S.W.3d 17, 22-23 (Tex. App.-Houston [1st Dist.] 2005, pet. denied).

77 See McConnico et al., supra note 17, at 994.

78 Id. at 995.

79 See Cosgrove, 774 S.W.2d at 663; Ballesteros, 985 S.W.2d at 489.

80 See Cosgrove, 774 S.W.2d at 663; Ballesteros, 985 S.W.2d at 489.

81 See, e.g., Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004); Ballesteros, 985 S.W.2d at 489.

82 See infra Part II.C-D.

83 See Alexander, 146 S.W.3d at 117-20.

84 See, e.g., Jernigan v. Langley, 195 S.W.3d 91, 94 (Tex. 2006) (per curiam) (holding that expert testimony is proper evidence for showing medical malpractice).

85 See Alexander, 146 S.W.3d at 119.

86 See id. at 115.

87 See id. at 115-17.

88 See id.

89 Id. at 116.

90 Id.

91 Id.

92 Id.

93 Id. at 118.

94 Id. at 116.

95 Id. at 117.

96 See id. at 116-18.

97 Id. at 115.

98 Id. at 120-21.

99 Id.

100 Id.

101 Id. at 117.

102 See id. at 115.

103 See id.

104 Id. at 117.

105 Id. at 115.

106 See id.

107 See id. at 119.

108 See id.

109 See id. at 121.

110 See infra Part II.D.

111 See Alexander, 146 S.W.3d at 118-20.

112 See id.

113 See McConnico et al., supra note 17, at 1004.

114 See Alexander, 146 S.W.3d at 115-17.

115 See id.

116 See id. at 118-20.

117 Id. at 119.

118 Id. at 119-20.

119 Id. at 120.

120 See infra notes 122-30 and accompanying text.

121 See 2 Dobbs, supra note 11, at 1390-92; infra notes 122-28 and accompanying text.

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

123 Id. at 1169.

124 See Honeywell, Inc. v. Am. Standards Testing Bureau, Inc., 851 F.2d 652, 655-56 (3rd Cir. 1988); Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc., 299 F. Supp. 2d 400, 409-10 (D.N.J. 2003).

125 Honeywell, 851 F.2d at 655-56.

126 See Niehoff v. Shankman & Assocs. Legal Ctr., 763 A.2d 121, 124 (Me. 2000); Corey v. Norman, Hanson & DeTroy, 742 A.2d 933, 940 (Me. 1999); Lieberman v. Employers Ins. of Wausau, 419 A.2d 417, 427 (N.J. 1980).

127 See Jarman v. Hale, 731 P.2d 813, 816 (Idaho Ct. App. 1986) (stating that expert testimony is generally required on causation); Sanders v. Smith, 496 P.2d 1102, 1104-05 (N.M. Ct. App. 1972); Shields v. Campbell, 559 P.2d 1275, 1280 (Or. 1977).

128 Shields, 559 P.2d at 1280.

129 Alexander v. Turtur & Assocs., 146 S.W.3d 113, 120 (Tex. 2004).

130 See id.

131 See supra Part II.B.

132 See Cosgrove v. Grimes, 774 S.W.2d 662, 663-64 (Tex. 1989); Ballesteros v. Jones, 985 S.W.2d 485, 489 (Tex. App.-San Antonio 1998, pet. denied).

133 See infra notes 134-39 and accompanying text.

134 McConnico et al., supra note 17, at 1017.

135 Hermes et al., supra note 20, at 892. There is no such reconstruction when mere expert opinion proves the merit of the underlying action, as Alexander apparently condones. See Alexander, 146 S.W.3d at 118-20.

136 Alexander, 146 S.W.3d at 122.

137 See id. at 122-23.

138 See, e.g., Lewis v. Nolan, No. 01-04-00865-CV, 2006 WL 2864647, at *3-4 (Tex. App.-Houston [1st Dist.] Oct. 5, 2006, pet. filed) (mem. op.) (finding error in lack of expert testimony on causation); Cantu v. Horany, 195 S.W.3d 867, 873-74 (Tex. App.-Dallas 2006, no pet.) (requiring expert opinion on but-for causation); Hoover v. Larkin, 196 S.W.3d 227, 230-32 (Tex. App.-Houston [1st Dist.] 2006, no pet.) (suggesting that expert opinion on but-for causation would be sufficient evidence); Allbritton v. Gillespie, Rozen, Tanner & Watsky, P.C., 180 S.W.3d 889, 894 (Tex. App.-Dallas 2005, pet. denied) (remanding for trial because plaintiff's expert on but-for causation was sufficient to defeat summary judgment on that element); Rangel v. Lapin, 177 S.W.3d 17, 22 (Tex. App.-Houston [1st Dist.] 2005, pet. denied) (upholding summary judgment for defendant because plaintiff "did not offer expert testimony from which one could infer that the underlying case would have had merit"); Goffney v. O'Quinn, No. 01-02-00192-CV, 2004 WL 2415067, at *6 (Tex. App.-Houston [1st Dist.] Oct. 28, 2004, no pet.) (mem. op.) (holding that expert testimony was required "to show that, but for appellees' alleged acts and omissions, appellants would have received a . . . jury verdict greater than that which they actually received").

139 See infra Parts III-IV.

140 See, e.g., Rangel, 177 S.W.3d at 22.

141 See id. at 22-23.

142 See id.

143 See Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117-20 (Tex. 2004).

144 See 5 Mallen & Smith, supra note 17, §§ 33:8, 33.9; McConnico et al., supra note 17, at 1003-20.

145 See, e.g., Hermes et al., supra note 20, at 892.

146 See 5 Mallen & Smith, supra note 17, §§ 33:8, 33:9.

147 See id.

148 See Cosgrove v. Grimes, 774 S.W.2d 662, 663-65 (Tex. 1989); Ballesteros v. Jones, 985 S.W.2d 485, 489 (Tex. App.-San Antonio 1998, pet. denied).

149 See 5 Mallen & Smith, supra note 17, § 33:18.

150 See id.

151 See id.

152 See id.

153 See id.

154 See id.

155 See id.

156 See id.

157 See id.

158 See id.

159 See id.

160 See id.

161 See infra notes 163-86 and accompanying text.

162 See, e.g., Ballesteros v. Jones, 985 S.W.2d 485, 489 (Tex. App.-San Antonio 1998, pet. denied).

163 See, e.g., id. at 492-94 (discussing a lost claim situation).

164 See, e.g., James v. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90, 97 (Tex. App.-San Antonio 2002, pet. denied) (noting that missing a statute of limitations is an example of legal malpractice); Ballesteros, 985 S.W.2d at 489.

165 See infra notes 166-75 and accompanying text.

166 See, e.g., Ballesteros, 985 S.W.2d at 489.

167 See, e.g., id.

168 See McConnico et al., supra note 17, at 1005-10.

169 See id.

170 See Johnson v. Scott, 113 S.W.3d 366, 373 (Tex. App.-Beaumont 2003, pet. denied) (describing the factors used to determine a settlement's fairness).

171 See id.

172 See, e.g., Johnson, 113 S.W.3d at 373; see also Ballesteros, 985 S.W.2d at 489.

173 See, e.g., Johnson, 113 S.W.3d at 372-73.

174 See, e.g., id.

175 See Robertson, supra note 13, at 1768-75.

176 See id.

177 See id.

178 See id.

179 See id.

180 Id.

181 See id.

182 See id.

183 See supra notes 165-75 and accompanying text.

184 See supra notes 172-82 and accompanying text.

185 See infra Part III.B.

186 See 5 Mallen & Smith, supra note 17, § 33:1.

187 See Robertson, supra note 13, at 1768-75.

188 See id.

189 See id.

190 See id.

191 See id.

192 See id.

193 See Jernigan v. Langley, 195 S.W.3d 91, 93 (Tex. 2006) (per curiam).

194 See infra notes 195-99 and accompanying text.

195 See, e.g., Hermes et al., supra note 20, at 901.

196 See supra Part II.B.

197 Hermes et al., supra note 20, at 901.

198 See id.

199 See infra notes 203-18 and accompanying text.

200 Hermes et al., supra note 20, at 913.

201 See Jernigan v. Langley, 195 S.W.3d 91, 93 (Tex. 2006) (per curiam).

202 See id.

203 See infra notes 205-18 and accompanying text.

204 See Robertson, supra note 13, at 1768-75.

205 See id.

206 Cf. id. (describing the court's process of framing and answering the but-for question).

207 See, e.g., Tex. R. Civ. P. 226a, 265-95 (providing detailed rules controlling trials and ensuring objectivity of roles); Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749 (Tex. 2006) (noting examples of legislatures passing laws to ensure the objectivity

of trials); see also Milner S. Ball, The Promise of American Law: A Theological, Humanistic View Of Legal Process 47-62, 136-38 (1981) (discussing the parts of a trial as judicial theater).

208 See infra notes 209-18 and accompanying text.

209 See Ball, supra note 207, at 47-62 (describing the objective roles in a trial).

210 See id.

211 See id.

212 See id.

213 See id. The refutable presumption that the roles of the judicial system function properly is a basic necessity recognized in case law; for example, courts have presumed juries are impartial when they are selected according to the procedures that ensure juror qualification. See, e.g., Hegar v. State, 11 S.W.3d 290, 299 (Tex. App.-Houston [1st Dist.] 1999, no pet.) (O'Connor, J., dissenting) ("When these procedures are followed, we presume a defendant was tried by an impartial jury."). Similarly, there is a "presumption that the jury followed the instructions in the jury charge." Miles v. State, 154 S.W.3d 679, 682 (Tex. App.-Houston [14th Dist.] 2004), pet. granted, 204 S.W.3d 822 (Tex. Crim. App. 2006).

214 See supra notes 209-13 and accompanying text.

215 See Robertson, supra note 13, at 1768-75.

216 See id.

217 See id.

218 See, e.g., Miles, 154 S.W.3d at 682.

219 See Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749-53 (Tex. 2006).

220 See id.

221 See id. at 752 (noting the unpredictability of juries even when the individual members' inclinations are known).

222 See, e.g., Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589-90 (1993) (explaining that an expert's testimony must be based on accepted scientific methods, not "subjective belief or unsupported speculation").

223 See Donald, supra note 9 (discussing Alexander v. Turtur & Assocs., 146 S.W.3d 113 (Tex. 2004)).

224 Id.

225 Id.

226 Id.

227 Whitley v. Chamouris, 574 S.E.2d 251, 253 (Va. 2003).

228 See supra notes 215-18 and accompanying text.

229 See supra notes 215-18 and accompanying text.

230 See supra notes 215-18 and accompanying text.

231 See supra notes 215-18 and accompanying text.

232 See 5 Mallen & Smith, supra note 17, §§ 33:8, 33:9, 33:18; McConnico et al., supra note 17, at 1003-20.

233 See Alexander v. Turtur & Assocs., 146 S.W.3d 113, 119 (Tex. 2004).

234 Id. (quoting 5 Mallen & Smith, supra note 17, § 33:18 at 1148).

235 See 5 Mallen & Smith, supra note 17, § 33:18.

236 See id.

237 See id.

238 See id.

239 See, e.g., Polly A. Lord, Comment, Loss of Chance in Legal Malpractice, 61 Wash. L. Rev. 1479, 1482-83 (1986).

240 See Sw. Ref. Co. v. Bernal, 22 S.W.3d 425, 437 (Tex. 2000).

241 See, e.g., Shockome v. Hernandez, 587 S.W.2d 535, 537 (Tex. Civ. App.-Corpus Christi 1979, no writ).

242 See infra Part IV.

243 See infra Part IV.

244 See 5 Mallen & Smith, supra note 17, §§ 33:8, 33:9.

245 See id. In other situations, a combination of different standards could exist-such as a clear and convincing standard-in addition to a preponderance standard. See id.

246 See id.

247 See infra Part IV.

248 See supra Part III.

249 See supra Part II.B.

250 See infra Part IV.A-D.

251 See McConnico et al., supra note 17, at 1003-20 (arguing that the inquiry is an objective one).

252 See Honeywell, Inc., v. Am. Standards Testing Bureau, Inc., 851 F.2d 652, 655-56 (3d Cir. 1988); Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc., 299 F. Supp. 2d 400, 409 (D.N.J., 2003).

253 See infra Part IV.A.

254 See infra Part IV.B.

255 See infra Part IV.C.

256 See, e.g., 5 Mallen & Smith, supra note 17, §§ 33:8, 33:9, 33:18; Hermes et al., supra note 20, at 900-13; McConnico et al., supra note 17, at 1003-20.

257 See infra Parts IV.A-D, V.

258 See infra Parts IV.A-D, V.

259 See 5 Mallen & Smith, supra note 17, §§ 33:8, 33:9.

260 See id.

261 See id.

262 See id.

263 See id.

264 Id. at 1019.

265 See infra notes 266-71 and accompanying text.

266 See 5 Mallen & Smith, supra note 17, § 33:9.

267 See id.

268 See id.

269 See id.

270 Id.

271 See id.

272 See id.

273 See Green v. Brantley, 11 S.W.3d 259, 267 (Tex. App.-Fort Worth 1999, pet. denied).

274 See id.

275 See id.

276 See id.

277 See Robert P. Schuwerk & Lillian B. Hardwick, Handbook of Texas Lawyer and Judicial Ethics: Attorney Tort Standards, Attorney Ethics Standards § 2.8(a), in 48 Tex. Practice Series (Thomson West 2006-2007 ed.).

278 See id.

279 See Alexander v. Turtur & Assocs., 146 S.W.3d 113, 116 (Tex. 2004).

280 See id.; Turtur & Assocs. v. Alexander, 86 S.W.3d 646, 649 (Tex. App.-Houston [1st Dist.] 2001, pet. granted).

281 Schuwerk & Hardwick, supra note 277, § 2.8(a).

282 See infra Part IV.D.

283 See infra Part IV.D.

284 See Hall v. White, Getgey, Meyer & Co., 347 F.3d 576, 580 (5th Cir. 2003); 5 Mallen & Smith, supra note 17, §§ 33:8, 33:9, 33:18. In Hall, the Fifth Circuit held that, under Texas law, a party could not raise a defense in the retrial of the underlying action when that defense was legally unavailable in the underlying action. Hall, 347 F.3d at 580.

285 See 5 Mallen & Smith, supra note 17, § 33:1.

286 See id. § 33:9, at 1054.

287 See id. §§ 33:9, 33:22.

288 See id. § 33:9.

289 See id. § 33:9, at 1054.

290 Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., 48 S.W.3d 865, 876 (Tex. App.-Houston [14th Dist.] 2001, pet. denied). The court held that the defendant-lawyer in the legal malpractice case was not bound by the decision of the defendant in the underlying case to not plead or use an available defense. Id.

291 See supra Part III.

292 See supra Part III.

293 See Robertson, supra note 13, at 1768-75.

294 See John Mixon & Kathleen McGlynn, A New Zoning and Planning Metaphor: Chaos and Complexity Theory, 42 Hous. L. Rev. 1221, 1250-51 (2006). "In a familiar example of what has been called the 'Butterfly Effect,' 'a butterfly stirring the air today in Peking can transform storm systems next month in New York.'" Id. (quoting James Gleik, Chaos: Making a New Science 8 (1987)).

295 See id.

296 See Ball, supra note 207, at 48-62 (distinguishing trial from theater on grounds that adversarial presentation artfully corresponds to the sometimes fortuitous sequence of events).

297 See id.

298 See generally David Luban, Lawyers And Justice: An Ethical Study 67-103 (1988) (discussing arguments advanced in support of the adversary system, which assert that the way to determine truth is by whole-hearted dialect of assertions and refutations in addition to attacks on the proof offered by either party).

299 See id.

300 See id.

301 See 5 Mallen & Smith, supra note 17, § 33:22.

302 See infra notes 303-24 and accompanying text.

303 See infra notes 303-05 and accompanying text.

304 See Tex. R. Civ. P. 166a(c).

305 See, e.g., Alexander v. Turtur & Assocs., 146 S.W.3d 113, 118-20 (Tex. 2004) (noting the opposite conclusions reached by the trial and appellate courts and addressing the problems juries have in reaching these decisions without expert testimony).

306 See infra notes 307-24 and accompanying text.

307 See Fed. R. Evid. 403; Tex. R. Evid. 403; Old Chief v. U.S., 519 United States 172, 180 (1997). Part IV.B of this Comment explained why plaintiffs should not be able to use the underlying transcript as a complete substitute for re-creation, but defendant-lawyers may also use evidentiary rules to fully exclude portions of the underlying transcript. See supra Part IV.B; infra notes 308-24 and accompanying text.

308 See Tex. R. Evid. 801.

309 See Tex. R. Evid. 801, 802.

310 See California v. Green, 399 U.S. 149, 154 (1970); Pointer v. Texas, 380 U.S. 400, 404 (1965).

311 See infra notes 312-15 and accompanying text.

312 See Model Rules of Prof'l Conduct pmbl. ¶ 1 (2003).

313 See Fed. R. Evid. 801, 802; Tex. R. Evid. 801, 802.

314 See Fed. R. Evid. 801, 802; Tex. R. Evid. 801, 802.

315 See, e.g., Woodruff v. Tomlin, 423 F. Supp. 1284, 1287 (W.D. Tenn. 1976).

316 See id.

317 Fed. R. Evid. 403; Tex. R. Evid. 403; Old Chief v. U.S., 519 United States 172, 180 (1997). When a party objects under Rule 403, the court must conduct a balancing test between the probative value and the risk of prejudice and confusion. See Fed. R. Evid. 403; Tex. R. Evid. 403.

318 See Fed. R. Evid. 801(d)(2), 802; Tex. R. Evid. 801(e)(2), 802.

319 See Old Chief, 519 U.S. at 184-85 (noting that an important factor in the balancing test is whether there are non-prejudicial alternatives to the evidence in question).

320 See, e.g., id.

321 See, e.g., id.

322 See, e.g., id.

323 See, e.g., id.

324 See Fed. R. Evid. 403; Tex. R. Evid. 403; Old Chief, 519 U.S. at 183. In the rare case that the transcript of the underlying trial contains testimony of a witness that is unavailable at the time the legal malpractice trial is conducted, the court may allow those portions of the underlying transcript under the former testimony exception, which requires the unavailability of the declarant. See Fed. R. Evid. 804(b)(1); Tex. R. Evid. 804(b)(1).

325 See supra Part III.B.

326 See, e.g., Rangel v. Lapin, 177 S.W.3d 17, 22-23 (Tex. App.-Houston [1st Dist.] 2005, pet. denied).

327 See, e.g., Lord, supra note 239, at 1482-83.

328 See id.

329 See, e.g., Rangel, 177 S.W.3d at 22-23.

330 Cf. id.

331 Cf. id.

332 See, e.g., id.

333 Id.

334 See, e.g., Dean Park & Constr. & Real Estate Inv. Corp. v. Meredith, Donnell & Abernethy, No. 13-03-730-CV, 2005 WL 1832046, at *1 (Tex. App.-Corpus Christi Aug. 4, 2005, pet. denied) (mem. op.) (noting that law firm "lost a file and video tape").

335 Cf. id.

336 See infra notes 342-45 and accompanying text.

337 See infra notes 342-45 and accompanying text.

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

339 Galanek v. Wismar, 81 Cal. Rptr. 2d 236, 242-43 (Cal. Ct. App. 1999).

340 Restatement (Third) of the Law Governing Lawyers § 53 cmt. b (2000).

341 See infra notes 347-48 and accompanying text.

342 See Fed. R. Evid. 804; Tex. R. Evid. 804.

343 See supra Part IV.A.

344 See Rangel v. Lapin, 177 S.W.3d 17, 22-23 (Tex. App.-Houston [1st Dist.] 2005, pet. denied).

345 See id.

346 See, e.g., Rangel, 177 S.W.3d at 22-23.

347 See supra Part II.E.

348 2 Dobbs, supra note 11, at 1392.

349 See supra Part II.C-E.

350 See supra Part III.A.

351 See supra Part II.D.

352 See supra Part I.

353 See supra Part III.B.

354 See supra Part III.B.

355 See supra Part III.B.

356 See supra Part III.B.

40 TXTLR 151

End of Document