LEGAL MALPRACTICE DAMAGES

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LEGAL MALPRACTICE DAMAGES

This paper provides an overview of a legal malpractice claim before exploring in detail a number of hot topics and recurring issues regarding legal malpractice damages.

I. OVERVIEW OF A LEGAL MALPRACTICE CLAIM

Legal malpractice is a tort cause of action based on negligence. *See Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989). Accordingly, it has the same elements as any negligence claim: duty, breach, causation, and damages. *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995). In the legal malpractice context, the elements take the following forms: "(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." *Id.*; *see also Rangel v. Lapin*, 177 S.W.3d 17, 22 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). The ultimate inquiry is "whether the attorney exercised that degree of care, skill and diligence as lawyers of ordinary skill and knowledge commonly possess and exercise." *Isaacs v. Schleier*, 356 S.W.3d 548, 556 (Tex. App.—Texarkana 2011, pet. denied) (internal quotation omitted).

A. Duty

The duty element of a legal malpractice claim focuses on the question of who can sue a lawyer. The most common way to form a duty is by establishing an attorney-client relationship between the attorney and the legal malpractice plaintiff. *See Yaklin v. Glusing, Sharpe & Krueger*, 875 S.W.2d 380, 383 (Tex. App.—Corpus Christi 1994, no writ) ("The duty implicated is that which an attorney owes a client, and before any duty arises there must first be an attorney-client relationship."); *see also Law Office of Oscar C. Gonzalez, Inc. v. Sloan*, 447 S.W.3d 98, 107 (Tex. App.—San Antonio 2014, pet. filed). "The attorney-client relationship is a contractual relationship whereby an attorney agrees to render professional services for a client. The relationship may be expressly created by contract, or it may be implied from the actions of the parties. The determination of whether there is a meeting of the minds must be based on objective standards of what the parties did and said and not on their alleged subjective states of mind." *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 254 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (citations omitted). The existence of an attorney-client relationship is generally a question of fact. *Id.*

The duty element often arises in the context of determining whether the attorney and alleged client were in privity. The basic rule is that "an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent representation of the client." *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996).

One common setting for this issue is the estate-planning context. *See, e.g.*, *Rogers v. Walker*, No. 13-12-00048-CV, 2013 WL 2298449, at *5-6 (Tex. App.—Corpus Christi-Edinburg May 23, 2013, pet. denied) (no privity between a client and a lawyer who was associated with a firm in which another lawyer prepared the client's will). The Texas Supreme Court has wrestled with the privity issue in this context in a string of cases. The first of these was *Barcelo*, a case in which the intended beneficiaries of a trust attempted to sue the attorney who set up the trust for malpractice. *Barcelo*, 923 S.W.2d at 576. The Court identified the issue as one of duty: "The sole issue presented is whether [the attorney] owes a duty to the grandchildren that could give rise to malpractice liability even though he represented only [the client], not the grandchildren, in preparing and implementing the estate plan." *Id.* at 577. The Court noted that many states have relaxed the privity rule in this context, but it refused to follow their lead. *Id.* at 577-78. Instead, it recognized the dangers of chipping away at the bright-line privity rule: "Such a cause of action would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. This potential tort liability to third parties would create a conflict during the estate-planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries." *Id.* at 578. For that reason, the Court stood firm on the privity rule, even in the estate-planning context: "We therefore hold that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust." *Id.* at 579.

The Texas Supreme Court returned to the estate-planning context again in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006). The issue in *Belt* was not whether the beneficiaries could sue the attorney, but instead whether the personal representative of the estate could do so. *Id.* at 784. The Court focused on whether a legal malpractice cause of action survives the decedent because the personal representative has the capacity to bring survival actions. *Id.* The Court reasoned that because a legal malpractice claim in the estate-planning context "involves injury to the decedent's property," then it is a claim alleging economic loss. *Id.* For that reason, it survives the decedent: "[I]n accordance with the long-standing, common-law principle that actions for damage to property survive the death of the injured party, we hold that legal malpractice claims alleging pure economic loss survive in favor of a deceased

client's estate, because such claims are necessarily limited to recovery for property damage." *Id.* at 785. Therefore, the estate's personal representative can bring the claim. *Id.* at 786-87.

Notably, the Court in *Belt* explained that its rule does not give rise to the conflicts of interest that concerned the Court in *Barcelo*: "[W]hile the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate. Thus, the conflicts that concerned us in *Barcelo* are not present in malpractice suits brought on behalf of the estate." *Id.* at 787. Further, the Court reasoned that even when the personal representative is also a beneficiary, the temptation to bring a legal malpractice claim in an attempt to obtain a greater share of the inheritance "will likely be tempered [] by the fact that a personal representative who mismanages the performance of his or her duties may be removed from the position." *Id.* at 788. Finally, the Court recognized that prohibiting the personal representative from bringing legal malpractice claims "would essentially immunize estate-planning attorneys from liability for breaching their duty to their clients," which the court saw as a result best avoided. *Id.* at 789.

The natural question after *Belt* was whether the holding was limited to its factual context—estate-planning-related malpractice claims—or if it extended to all legal malpractice claims. The Texas Supreme Court took on that issue in *Smith v. O'Donnell*, 288 S.W.3d 417 (Tex. 2009). The Court noted that the legal and policy concerns were essentially the same regardless of whether the legal malpractice claim arose in the estate-planning context or for some other legal service. *Id.* at 421-23. For those reasons, the Court held that the result should be the same as well: "We see no reason to create a rule that would deprive an estate of any remedy for wrongdoing that caused it harm by prohibiting the estate from pursuing survivable claims the decedent could have brought during his lifetime." *Id.* at 422.

Estate-planning is often the context in which this issue arises and thus is illustrative of the question of duty, *see, e.g.*, *Messner v. Boon*, No. 06-14-00020-CV, 2014 WL 7204729, at *10 (Tex. App.—Texarkana Dec. 19, 2014, no pet. h.), but it is not the only context. *See, e.g.*, *DLA Piper US, LLP v. Linegar*, No. 11-12-00201-CV, 2014 WL 3698289, at *1-2 (Tex. App.—Eastland July 24, 2014, pet. filed) (privity issue in a case involving a law firm's advice on a loan). As is evident from these cases, the key questions for duty are whether there is an attorney-client relationship and whether extending a duty to a new context is sound, both in legal and policy terms.

B. Breach

The breach element looks at whether the attorney violated the standard of care. The basic standard of care is that of a "reasonably prudent attorney." *Cosgrove*, 774 S.W.2d at 664. "The standard is an objective exercise of professional judgment, not the subjective belief that [the attorney's] acts [were] in good faith." *Id.* at 665. Importantly, the fact that an attorney's decision leads to an undesirable result is immaterial as long as a reasonably prudent attorney could have made the same decision: "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.*

Breaches of this standard of care can take many forms. "For example, an attorney can commit legal malpractice by giving an erroneous legal opinion or erroneous advice, by failing to give any advice or opinion when legally obliged to do so, by disobeying a client's lawful instruction, by taking an action when not instructed by the client to do so, by delaying or failing to handle a matter entrusted to the attorney's care by the client, or by not using an attorney's ordinary care in preparing, managing, and presenting litigation that affects the client's interests." *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 923-24 (Tex. App.—Fort Worth 2002, pet. denied). But all of these examples come back to the basic principle that the attorney has not acted as a reasonably prudent attorney.

Expert testimony is typically used to demonstrate what the requisite standard of care is in each case. *Edwards v. Dunlop-Gates*, 344 S.W.3d 424, 433 (Tex. App.—El Paso 2011, pet. denied). The expert is generally an attorney familiar with the locality and the subject matter of the underlying suit, and the standard of care itself derives in part from the local standards among the practicing bar. *See Ballesteros v. Jones*, 985 S.W.2d 485, 494 (Tex. App.—San Antonio 1998, pet. denied). For example, in a divorce case, a plaintiff might call family law attorneys as expert witnesses to testify to the standard of care required of family law attorneys in a certain locality. *See id.* As with all expert testimony, an attorney's testimony to the standard of care owed by an attorney serves to impart knowledge, skill, experience, and training that an average juror likely would not have. *See id.* at 495.

Expert testimony likewise plays a role in establishing an attorney's noncompliance with the standard of care. *Edwards*, 344 S.W.3d at 433. These experts may testify to a variety of types of noncompliance, such as an attorney's negligence in failing to investigate and conduct discovery properly, the results of which would have prompted a reasonably prudent attorney to advise a client against settling prematurely. *See Ballesteros*, 985 S.W.2d at 495.

Despite the general rule mandating expert testimony on these issues, such testimony may not be

required "if the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge." *James V. Mazuca & Assocs. v. Schumann*, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied); *see also Pierre v. Steinbach*, 378 S.W.3d 529, 534 (Tex. App.—Dallas 2012, no pet.). For example, if an attorney allowed the statute of limitations to run on a client's claim, the attorney's lack of care would be obvious and thus not require expert testimony. *See Mazuca*, 82 S.W.3d at 97; *see also infra* section V.

C. Causation

The causation element focuses on whether the attorney's negligence had any real effect on the client's case. The traditional rule is that the plaintiff has to prove that, but for the attorney's breach of duty, the plaintiff would have prevailed in the underlying case. *Grider v. Mike O'Brien, P.C.*, 260 S.W.3d 49, 55 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). This essentially compels the plaintiff to prove the elements of the underlying claim, or in other words to try the underlying case within the legal malpractice case. *Kelley & Witherspoon, LLP v. Hooper*, 401 S.W.3d 841, 847 (Tex. App.—Dallas 2013, no pet.); *see also Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013). For this reason, the causation element is commonly referred to as including the "suit-within-a-suit" requirement. *Grider*, 260 S.W.3d at 55; *see also infra* section III.

For example, if the underlying claim was a medical-malpractice claim, the plaintiff would have to prove each element of that claim: that the physician had a duty and breached that duty, that the plaintiff's harm was proximately caused by that breach, and that the plaintiff suffered damages. *See Grider*, 260 S.W.3d at 57. If the plaintiff cannot satisfy every element of the underlying medical-malpractice case, then the plaintiff's legal malpractice claim will fail because the attorney's "negligence did not proximately cause [the plaintiff's] damage." *See id.* at 59.

In addition to this traditional statement of the "suit-within-a-suit" analysis, it may also be possible in some cases for a plaintiff to prove its claim based on the plaintiff missing out on a larger settlement—or for a defendant being forced to pay more in a settlement—regardless of the ultimate merits of the underlying claim. *See Elizondo v. Krist*, 415 S.W.3d 259, 263 (Tex. 2013). This is an evolving area of legal malpractice law, and it will be discussed in some detail later in the paper. *See infra* section IV.

Like proof of duty and breach, "[i]n general, one proves causation in a legal malpractice suit by expert testimony." *Grider*, 260 S.W.3d at 55. The basic rule is that "when the causal link is beyond the jury's common understanding, expert testimony is necessary." *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 119-20 (Tex. 2004). This rule establishes a broad expert-testimony requirement because "the wisdom and consequences of [an attorney's] tactical choices made during litigation are generally matters beyond the ken of most jurors." *Id.* While there are some limited circumstances that lend themselves to proof of causation by the client testimony alone, those are the exception. *See id.*; *see also infra* section V.

The expert testimony itself can take many forms depending upon the nature of the underlying suit. In the context of an underlying medical-malpractice suit, a plaintiff would need medical expert testimony concerning the elements of the medical-malpractice claim. *See Cantu v. Horany*, 195 S.W.3d 867, 874 (Tex. App.—Dallas 2006, no pet.). Similarly, in the context of an underlying complex commercial case, a plaintiff would likely need legal expert testimony to explain nuances such as the legal significance of omitted evidence. *See Alexander*, 146 S.W.3d at 117-20.

Finally, although the breach inquiry may seemingly overlap with the causation inquiry, the Texas Supreme Court has made clear that the two elements are separate: "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." *Id.* at 119. Even when negligence is admitted, causation is not presumed. *Id.*; s*ee also infra* section II.

D. Damages

The damages element focuses on whether and how the client has been harmed. The damages element overlaps with the causation element because it requires analysis of the "case-within-a-case" to determine the existence and amount of damages, but it is distinct because it focuses on those issues, as opposed to what was the cause of any such harm. *See infra* section II. The proper measure of damages is the amount that the plaintiff would have recovered and collected in the underlying suit if the suit had been properly prosecuted. *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009). The Texas Supreme Court has emphasized that "legal malpractice damages are the difference between the result obtained for the client and the result that would have been obtained with competent counsel." *Elizondo*, 415 S.W.3d at 263; *see also Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 181 (Tex. 1995) ("[A] plaintiff must produce evidence from which the jury may reasonably infer that the damages sued for have resulted from the conduct of the defendant."), *abrogated on other grounds by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007); *Keck, Mahin & Cate v. Nat'l Union*

Fire Ins. Co. of Pittsburgh, Pa., 20 S.W.3d 692, 703 & n.5 (Tex. 2000). Notably, this calculation does not "require that damages can only be measured against the result the client would have obtained if the case had been tried to a final judgment." *Elizondo*, 415 S.W.3d at 263; *see also infra* section IV.

Importantly, the plaintiff may also recover damages for attorney's fees paid in the underlying case to the extent that the fees were proximately caused by the defendant attorney's negligence. *Akin, Gump*, 299 S.W.3d at 122. Finally, as with breach and causation, the damages element also typically requires expert testimony, and the required testimony will usually mirror that required for the causation issue because of the close relationship between the two elements. *See Elizondo*, 415 S.W.3d at 262-66.

II. THE DISTINCTION BETWEEN CAUSATION AND DAMAGES

One issue recently raised in the Texas Supreme Court, but not addressed in the Court's opinion, is the distinction between the causation and damages elements of a legal malpractice claim. This often-overlooked issue demands attention because it affects how parties should prosecute and defend claims.

Causation and damages in a legal malpractice case are separate inquiries. Causation concerns whether "the result of the underlying proceeding would have been different" without the attorney's negligence. *See Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 120 (Tex. 2004); TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS PJC 61.5 (2012). The damages element asks whether there was any compensable harm. *See id.* PJC 84.3, 84.4 (Sample B). Of course, the causation inquiry subsumes some element of harm, just as proximate cause does in any negligence case, but that does not mean that damages is not a distinct element. As further confirmation of the distinct nature of causation and damages, the Texas Pattern Jury Charges lists separate questions for causation and damages. *See id*. PJC 61.5, 84.3, 84.4 (Sample B).

The law and logic aside, the distinction between causation and damages can still cause problems, as demonstrated by the dissent in the court of appeals in *Elizondo v. Krist*, 338 S.W.3d 17 (Tex. App.—Houston [14th Dist.] 2010), *aff'd*, 415 S.W.3d 259 (Tex. 2013).[1] In that case, the attorneys won a no-evidence summary judgment motion on damages in the trial court, and the plaintiff appealed. *Id.* at 20. The attorneys prevailed on appeal, but the panel was divided.

The dissenting justice found the distinction between causation and damages to be dispositive. *Id.* at 29 (Christopher, J., dissenting). She reasoned that because the summary judgment motion dealt solely with damages and not causation, the plaintiff was not required to show there was some evidence on certain points: "The no-evidence motion for summary judgment on damages did not address causation; it only addressed the existence of damages. Thus, [the plaintiff] was not required to prove through expert testimony that the Lawyers breached the standard of care, that the breach was a proximate cause of damages and that the damages are collectible. The plaintiff was not required to prove what [the defendant in the underlying case] would have settled her case for because that implicates causation." *Id.* Instead, under the dissent's view, the plaintiff need only testify about her underlying claim so that the jury can evaluate whether it had any value: "A jury can evaluate the plaintiff's own testimony and determine whether or not the claim had a monetary value. [The plaintiff]'s testimony provides some evidence of damages for loss of consortium that a jury could evaluate." *Id.* Under this view, the consequences of challenging *only damages* were significant because it limited the arguments that the defendants could make. This was not the majority view, but it should cause litigants to tread carefully in this area. Litigants should challenge both elements instead of just one or the other, and make arguments under both grounds when there is any chance that the argument could be applicable to both. That will minimize the impact of any distinction between causation and damages.

III. THE CASE-WITHIN-A-CASE REQUIREMENTS

As part of proving the attorney's malpractice, a client must establish that he would have prevailed on his underlying claim "but for" his attorney's negligence—otherwise, he was not harmed as a matter of law, no matter how negligent the attorney's conduct. *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 115 (Tex. 2004). As with any negligence cause of action, courts require proof beyond that which is "mere conjecture, guess, or speculation." *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004). The traditional procedure for proving the merits of an underlying claim is known as a "case-within-a-case," a "suit-within-a-suit," or a "trial-within-a-trial." In Texas, this procedure dates back to at least the turn of the last century:

[I]n pursuing such an inquiry in a suit between an attorney and client the court is, in a sense, compelled to try a "moot case,"—a suit without a plaintiff and

[1] Some authors of this paper were co-counsel for the defendants-attorneys in *Elizondo v. Krist*, in both the court of appeals and the Texas Supreme Court.

without a defendant. It is impossible to say what defenses would have been urged by the defendants in the compromised cause. It also presents the anomaly of trying two suits in one, in which the liability of persons not parties to the suit on trial is in question.

Lynch v. Munson, 61 S.W. 140, 142 (Tex. Civ. App. 1901, no writ). As explained above, the "case-within-a-case" analysis impacts both causation and damages.

In a "case-within-a-case," the client must reconstruct the underlying action before proceeding to the merits of his malpractice claim. As a threshold matter, the plaintiff-client must prove: (1) that he had a viable claim; (2) that he would have won a favorable judgment; and (3) that the judgment would have been collectible. *Ballesteros v. Jones*, 985 S.W.2d 485, 489 (Tex. App.—San Antonio 1998, pet. denied) (citing *Cosgrove v. Grimes*, 774 S.W.2d 662, 666 (Tex. 1989)). If the client was a defendant in the underlying case, he must prove a meritorious defense to the underlying claims. *See Green v. McKay*, 376 S.W.3d 891, 898 (Tex. App.—Dallas 2012, pet. denied).

For example, if the client alleges that his attorney negligently represented him in a medical-malpractice claim, causing the client to receive less money than he would have if he had been competently represented, then the plaintiff would have to prove each element of the medical-malpractice claim: that the physician had a duty and breached that duty, that the plaintiff's harm was proximately caused by that breach, and that the plaintiff suffered damages. *See Grider v. Mike O'Brien, P.C.*, 260 S.W.3d 49, 55 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). If the plaintiff cannot satisfy every element of the underlying medical-malpractice case, then the plaintiff's legal malpractice claim will fail because the attorney's "negligence did not proximately cause [the plaintiff's] damage." *See id.* at 59.

The decisionmaker in the malpractice case considers the evidence as it should have been presented in the underlying case in order to determine whether and to what extent the plaintiff would have prevailed. *See* 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 37:15 (2014 ed.). This objective standard avoids "mere conjecture, guess, or speculation" by requiring the plaintiff to actually produce sufficient evidence as would have been necessary to prevail in the underlying action. Once the client has produced sufficient evidence to show that he would have prevailed on his underlying claim or defense, the proceeding can then turn to the other elements of the malpractice claim.

IV. USE OF SETTLEMENT-VALUE IN LEGAL MALPRACTICE CASES

A hot topic in legal malpractice jurisprudence is the status of using settlement-value to prove causation and damages. Until very recently, the Texas Supreme Court had been generally silent or even hostile toward using settlement-value, but a recent case signals a change in that policy.

A. An Alternative to Case-Within-A-Case

As described above, in the litigation context, courts facing a legal malpractice claim traditionally require that the plaintiff prove it would have prevailed at trial if not for the malpractice of the attorney: "[T]he plaintiff has the burden to prove that, 'but for' the attorney's breach of duty, he or she would have prevailed on the underlying cause of action and would have been entitled to judgment." *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). This also serves as the basis for measuring the plaintiff's damages. *See Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 703 & n.5 (Tex. 2000). In this classic formulation, the plaintiff's damages for the legal malpractice claim are the difference between what the plaintiff received with the malpractice and what it would have received following a trial with reasonably competent, malpractice-free counsel. *See id.*

One alternative method of proving causation and damages focuses on establishing the settlement-value of a claim. The idea is that the plaintiff needs to demonstrate only that, but for the legal malpractice, it would have obtained a better result through a favorable or more favorable settlement. The damages are then the difference between what the plaintiff obtained with the malpractice and the settlement the plaintiff would have obtained without it.

The settlement-value approach is an attractive alternative for plaintiffs in certain circumstances. It eliminates the high hurdle of proving that a plaintiff would have actually won at trial in the underlying suit. It also reflects the reality that most lawsuits end in settlement.

B. Texas Law on Settlement-Value

The history on the propriety of using settlement-value for causation and damages reveals a recent shift in favor of settlement-value at the Texas Supreme Court, with a more varied set of approaches to the issue in the courts of appeals. This chapter is by no means finished, and a review of the evolution of this body of law will serve both to trace how the law arrived at where it is today and to provide a foundation for predicting the future course of the law on this issue.

1. The Texas Supreme Court Pre-*Elizondo v. Krist*: Focus is on Case-Within-A-Case

The discussion of the history of settlement-value in Texas should begin with *Cosgrove v. Grimes*, 774

S.W.2d 662 (Tex. 1989). Although the Court in *Cosgrove* did not discuss the settlement-value measure of damages, the opinion still offers a good starting point for the discussion because the Court did address damages issues in an attorney malpractice setting and it laid out the basic standard for causation and damages. *Id.* at 664-66.

Cosgrove involved a claim of malpractice against an attorney who had failed to properly file his client's personal-injury action within the statute of limitations. *Id.* at 663. After dealing with some of the other issues in the case, the Court turned to the jury instructions on damages. *Id.* at 665-66. On that issue, the Court cited the Texas Pattern Jury Charges in support of its view that the proper measure of damages was "the amount of damages recoverable and collectible from [the defendant] if the suit had been properly prosecuted." *Id.* at 666. With that statement of the law, the Court adopted the case-within-a-case measure of damages. The Court in *Cosgrove* did not speak to the propriety of using settlement-value.

The cases following *Cosgrove* generally adhered to the same path. The Court would reaffirm the case-within-a-case standard and not address settlement-value. One exception to this rule is *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). The Court in *Burrow* focused on the validity of an affidavit concerning the damages element. *Id.* at 234-37. Accordingly, the Court did not directly address the question of whether settlement-value could substitute for the case-within-a-case requirement. But the Court did criticize the affiant for not exploring the settlement-value of the underlying claims in greater depth: "[The affiant] might have analyzed the Clients' injuries by type, or related settlement amounts to medical reports and expenses, *or compared these settlements to those of similar claims*, or provided other information showing a relationship between the plaintiffs' circumstances and the amounts received." *Id.* at 236 (emphasis added). That suggestion of engaging in a comparable settlement analysis was perhaps some indication that settlement-value might be a valid alternative.

After *Burrow v. Arce*, the Court returned to the usual approach of using the case-within-a-case standard and not discussing settlement-value. The next major case on this topic was *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692 (Tex. 2000). *Keck, Mahin & Cate* involved claims by an excess insurer against the primary insurer and the primary insurer's attorneys, and in the course of resolving the issues in the case, the Court addressed the damages stemming from the alleged malpractice by the primary insurer's attorneys. *Id.* at 695, 703 & n.5.

Specifically, the Court looked at the potential damages from the attorneys' role in bringing about a $7 million settlement from the excess insurer. *Id.* at 703. The Court held that the correct measure of damages was "the difference between the true and inflated value less any amount saved by the settlement." *Id.* Critically, the Court defined the "true value" as "the recovery [the plaintiff in the underlying case] would have obtained following a trial in which [the defendant in the underlying case] had a reasonably competent, malpractice-free defense." *Id.* at 703 n.5. The Court in *Keck, Mahin & Cate* thus appeared to favor the traditional case-within-a-case approach, and indeed it even specified that the recovery after a *trial* is the key. While settlement-value was not an issue in the case, this language appearing to foreclose it was nonetheless powerful.

The Texas Supreme Court again weighed in on the issue in *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106 (Tex. 2009). The Court in *Akin, Gump* stuck to the traditional case-within-a-case standard, but it placed a greater emphasis on the collectability of the recovery in the underlying claim: "When the claim is that lawyers improperly represented the plaintiff in another case, the plaintiff must prove and obtain findings as to the amount of damages that would have been recoverable and collectible if the other case had been properly prosecuted." *Id.* at 112. In this case, too, the Court did not discuss settlement-value.

2. The Courts of Appeals Pre-*Elizondo v. Krist*

During the time in which the Texas Supreme Court was announcing and reaffirming the case-within-a-case standard, the courts of appeals were having a difficult time with the settlement-value issue. There was no clear trend on the issue, and instead courts were reaching seemingly conflicting results on this central question.

A number of appellate courts were hostile to the use of settlement-value in this timeframe. One early case in this mold is *Green v. Brantley*, 11 S.W.3d 259 (Tex. App.—Fort Worth 1999, pet. denied). The court in *Green* did not directly address the settlement-value measure of damages, but it nevertheless indicated that it might be hostile to that approach. *Id*. at 267-68. The plaintiff in *Green* sought malpractice damages arising out of an $850,000 settlement of a wrongful-death suit. *Id*. In discussing the evidence of damages, the court criticized an affidavit submitted by the appellant that admitted that the affiant "could not predict what a jury would have done in the suit," but nevertheless pegged the "settlement value" of the suit at $750,000, an amount less than the allegedly negligent attorney actually obtained. *Id.* The court held that this and another affidavit did not constitute evidence of damages because they did not speak to "the amount of money Appellants would have won and collected in the

wrongful death suit or the theoretical *Stowers* action if there had been no settlement." *Id*. at 268.

After *Green*, a few cases from the Fourteenth Court of Appeals also took a firm view on having a case-within-the-case that includes a trial. *See Duerr v. Brown*, 262 S.W.3d 63, 76 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *McInnis v. Mallia*, 261 S.W.3d 197, 201 (Tex. App.—Houston [14th Dist.] 2008, no pet.). In *Duerr*, the court made clear that a plaintiff must prove that it would have been entitled to judgment in the underlying action: "When the asserted legal malpractice involves the results of prior litigation, the plaintiff bears the additional burden of proving that, 'but for' the attorney's breach of duty, he would have prevailed on the underlying cause of action and would have been entitled to judgment." 262 S.W.3d at 76. The court's pronouncement in *McInnis* was substantively identical: "[The plaintiff] must prove a 'suit within a suit' by demonstrating that 'but for' the Law Firm's negligence, she would have prevailed on the underlying medical-malpractice suit and would have been entitled to judgment." 261 S.W.3d at 201

Perhaps the most extreme case against settlement-value in this timeframe was *Cooper v. Harris*, 329 S.W.3d 898 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). The court in *Cooper* defined the general causation question as whether there is evidence that the plaintiff would have "recovered a money judgment against BASF if he had been represented by a reasonably prudent attorney." *Id*. at 903. It then held that the plaintiff's evidence was insufficient to meet this burden because it spoke only to the "reasonable settlement value" of the case. *Id*. at 904. The court made clear that it required evidence that the plaintiff would have prevailed at trial, or at least survived summary judgment. *See id*. (identifying the deficiencies in plaintiff's evidence as (1) it does not address whether the claims "would have survived a summary-judgment motion on the merits" and (2) it does not address whether plaintiff "would have recovered a money judgment").

In contrast to these cases, other courts of appeals cases were supportive of settlement-value. *Stonewall Surplus Lines Ins. Co. v. Drabek*, 835 S.W.2d 708 (Tex. App.—Corpus Christi 1992, writ denied), is one early example. In *Stonewall*, the court confronted the question of "whether the value of the underlying lawsuit changed as a result of the alleged [attorney] negligence." *Id*. at 712. To answer that question, the court turned to affidavits noting the settlement-value of the case before and after the alleged negligence. *Id*. The court held these affidavits created a fact issue and, further, specifically pointed out that the appellees had "failed to offer any summary judgment evidence of the settlement value of the case." *Id*. *Stonewall* thus appears to be a full embrace of settlement-value.

The First Court of Appeals also exhibited some support for settlement-value in *Goffney v. O'Quinn*, No. 01-02-00192-CV, 2004 WL 2415067 (Tex. App.—Houston [1st Dist.] Oct. 28, 2004, no pet.). Although the court identified the issue as whether there was evidence to satisfy the case-within-a-case requirement, the court discussed both the traditional case-within-a-case measure of damages and the settlement-value measure of damages during the course of its analysis. *Id*. at *5-6. Indeed, the court seemed to hold that evidence on either of these measures of damages would be sufficient: "[E]xpert testimony was . . . required to show that, but for appellees' alleged acts and omissions, appellants would have received a settlement amount or jury verdict greater than that which they actually received." *Id*. at *6. Thus, although it identified the issue as the case-within-a-case requirement, *Goffney* favors using settlement-value to satisfy this requirement.

The First Court of Appeals reaffirmed this stance a few years later in *Hoover v. Larkin*, 196 S.W.3d 227 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). The court in *Hoover* focused on causation, but in doing so it shed light on its view of damages as well. *Id*. at 231. At first, the court appeared to take a hardline case-within-a-case approach: "If 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." *Id*. But in faulting the plaintiff for failing to adduce evidence on this requirement, the court revealed that it would accept proof either that the plaintiff would have prevailed in the lawsuit or that the plaintiff would have obtained a settlement: "Hoover presented no evidence to demonstrate that she would have been successful in her underlying suit, or that her brother-in-law would have agreed to the settlement she wanted to achieve." *Id*. Accordingly, like in *Goffney*, the court expressed openness to settlement-value approach.

Another case favorable toward settlement in this timeframe was *Walker v. Morgan*, No. 09-08-00362-CV, 2009 WL 3763779 (Tex. App.—Beaumont Nov. 12, 2009, no pet.). The court in *Walker* discussed settlement-value extensively in the section of the opinion on the proof needed for causation. *Id*. at *5 (listing "the viability of a case, the likelihood of settlement, an appropriate amount for settlement, and the timing of settlement" as factors relevant to the causation and damages inquiries). The court also faulted the plaintiff for failing to raise a fact issue "on whether he would have prevailed in the coin company lawsuit, or could have obtained a different, more beneficial recovery but for the conduct of his attorneys." *Id*.

Thus, the courts of appeals had not reached a consensus on the settlement-value question during and

after the Texas Supreme Court's *Cosgrove-Burrow-Keck, Mahin & Cate-Akin, Gump* line of cases.

3. *Elizondo v. Krist*: Opening the Door for Settlement-Value

A few years after *Akin, Gump*, the Texas Supreme Court finally resolved at least some part of the settlement-value debate in *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013). The basic question in *Elizondo* was whether the plaintiffs offered sufficient evidence of malpractice damages. *Id.* at 262-66. But, as part of that, the parties addressed whether settlement-value can be a legitimate measure of damages. *Id.* at 263.

Ultimately, the Supreme Court dismissed the notion that, for the purpose of proving damages, its precedents required proof that a malpractice plaintiff would have prevailed *at trial*: "These cases recognize that legal malpractice damages are the difference between the result obtained for the client and the result that would have been obtained with competent counsel. They do not require that damages can only be measured against the result the client would have obtained if the case had been tried to a final judgment." *Id.* In doing so, the Court opened the door for using settlement-value for the measure of legal malpractice damages.

But the Court was careful to only crack the door and not swing it wide open, as the Court tailored its analysis to the mass-tort context of the case. It noted that the defendant in the underlying case was "a large, solvent corporation, [that] made the decision to settle every case arising from the plant explosion." *Id.* The Court then approved of the settlement-value approach in these circumstances: "Here, where the same defendant settled thousands of cases, and indeed made the business decision to settle all cases and not try any to a verdict, we see no reason why an expert cannot base his opinion of malpractice damages on a comparison of what similarly situated plaintiffs obtained from the same defendant." *Id.* The Court then confirmed that this evidence would meet the "true value" standard of *Keck, Mahin & Cate*. 415 S.W.3d at 263.

Elizondo was the most important settlement-value case in over two decades, but if the past is any guide, caution is the correct approach when predicting how lower courts will interpret this case. The courts of appeals have struggled with this issue for decades without reaching any real consensus.

With this caution in mind, at least some things are clear in the post-*Elizondo* world. First, there are at least some circumstances in which a malpractice plaintiff does not have to prove that it would have prevailed at trial absent the malpractice, at least as far as the damages element is concerned. Second, in the mass-tort context where a solvent defendant decides to settle every case arising out of an incident, one proper way to prove settlement-value is to compare the case with the other cases arising out of the incident and the resulting settlements. That is the basic point of the Court's case-specific analysis in *Elizondo*.

But *Elizondo* leaves many questions unanswered. We do not know the status of settlement-value as a measure of damages outside the mass-tort context. Further, the Court offered no guidance on what it would deem sufficient to prove settlement-value in a lone case if no comparable settlements were available. Indeed, we do not even know if it is possible to prove settlement-value in that situation. Finally, we also do not know if settlement-value is a valid approach to proving *causation* in a legal malpractice case. Accordingly, as important a case as *Elizondo* is, it will not be the last word on the settlement-value issue.

What little post-*Elizondo* case law there is confirms these observations. One case offers an example of circumstances particularly ill-suited to the settlement-value measure of damages, and the court accordingly ignored the approach on those facts. *See Borrell v. Williams*, No. 01-13-00099-CV, 2014 WL 1318920 (Tex. App.—Houston [1st Dist.] Apr. 1, 2014, no pet.). The alleged malpractice in *Borrell* consisted of an attorney making a decision at trial to drop a breach of contract claim and instead pursue only quantum meruit and estoppel claims. *Id.* at *2-3. The case came down to causation, and the court focused solely on whether the plaintiff would have prevailed on the breach of contract claim. *Id.* at *4-7. There was no mention of settlement-value.

This absence of any settlement-value discussion in *Borrell* should not be surprising, and it just confirms that while *Elizondo* was an important case, it did not throw open the door to using settlement-value in all circumstances. Quite simply, *Borrell* was not a settlement-value case. The plaintiff approached the causation issue using the case-within-a-case approach rather than settlement-value. And that was probably the right approach because *Borrell* had all the features that make settlement-value unappealing. The timing of the alleged malpractice at issue—dropping a claim when trial was underway—makes it much more likely that the only recovery that would have been had without the malpractice would have come from a favorable judgment, not a settlement. *See id.* at *2-3. Additionally, there were no indications that any settlement had been discussed in the underlying case. And further, the underlying case was a one-off contract dispute, which likely meant that there were no available comparable settlements. *Id.* In short, *Borrell* serves as a reminder that the vast majority of cases are still case-within-a-case cases even after *Elizondo*.

Another case after *Elizondo* teed up the issue of settlement-value, but was ultimately decided on other grounds. *See Hearn v. Snapka*, No. 13-11-00332-CV, 2012 WL 7283791 (Tex. App.—Corpus Christi-Edinburg Dec. 28, 2012, pet. denied). *Hearn* centered on an attorney's conduct in failing to bring asbestos claims against certain parties within the statute of limitations. *Id.* at *1. There were a number of issues in the case, but the one of interest here is that the plaintiff attempted to prove its legal malpractice case based on the settlement-value of the claims. *Id*. at *3-5. The court of appeals rejected the expert testimony on settlement-values, and for that reason it never reached the question of whether settlement-value could be a valid measure of damages. *Id.* The Texas Supreme Court requested full briefing in *Hearn* and the parties squarely presented the settlement-value issue, but the petition for review was ultimately denied.

The Fourteenth Court of Appeals recently referenced in passing the issue of settlement-value, but ultimately decided the case on other grounds. *See Hernandez v. Abraham, Watkins, Nichols, Sorrels & Friend*, No. 14-13-00567-CV, 2014 WL 5780388 (Tex. App.—Houston [14th Dist.] Oct. 21, 2014, no pet. h.). The claims in *Hernandez* arose out of the same BP explosion settlements that gave rise to the claims in *Elizondo*. The trial court awarded the law firm a declaratory judgment. On appeal, the plaintiffs raised the issue of whether Texas recognizes a cause of action for negligent settlement. *See id.* at *5. The court of appeals referenced the language in *Elizondo* that "what similarly situated plaintiffs obtained from the same defendant . . . is perhaps the best evidence of the real-world settlement value in the case," *see Elizondo*, 415 S.W.3d at 263, but ultimately found that the plaintiffs had not met their burden to tailor their requests for production narrowly enough and thus affirmed the trial court's declaratory judgment. *See Hernandez*, 2014 WL 5780388 at *6. The plaintiffs in *Hernandez* have filed a motion for extension of time to file their petition for review in the Texas Supreme Court (No. 14-1025); however, even if the petition is filed and the Court grants review, any decision will still be in the mass-torts context. Whether the Court will recognize or expand the use of settlement-value beyond mass-torts cases remains an open question.

C. Other States' Law on Settlement-Value

Outside of Texas, other states' views on the propriety of settlement-value as a measure of damages vary widely. Some jurisdictions simply have not addressed the issue. Those that have confronted the question have done so with varying degrees of specificity, and thus the state of the law in many of these states is still in flux to some extent. Some states, even in the inadequate-settlement context, still require the traditional case-within-a-case. That said, the majority of states that have addressed the issue have been at least generally supportive of using settlement-value as a measure of damages in a legal malpractice case. However, even in those states that recognize the claim, many clients face an uphill battle in offering proof of damages that is not too speculative. The decisions of the states that have addressed this issue are discussed in more detail below.

1. States generally allowing settlement-value

Arizona

One recent Arizona decision suggests that a client can use settlement-value when proving damages. *Mendoza v. Burke*, No. 2 CA-CV 2012-0048, 2013 WL 313930, at *2 (Ariz. Ct. App. Jan. 28, 2013) ("Mendoza must show that Burke breached the applicable standard of care, and that, but for that breach, Mendoza would have obtained a more favorable settlement in the underlying action."). However, the court ultimately found that the client's evidence was not probative enough to raise a genuine issue of material fact whether the attorney breached a duty. *Id.* at *4.

Arkansas

Arkansas allows recovery based on inadequate settlement-value. *See Callahan v. Clark*, 901 S.W.2d 842 (Ark. 1995). In *Callahan*, a client sued her attorney for negligent advice, leading the client to accept a lower property settlement agreement in a divorce proceeding. The Arkansas Supreme Court looked to whether there was evidence that the other party in the underlying litigation "would have agreed to a more favorable settlement, or that litigation to judgment would have yielded a better result . . . ." *Id.* at 847. The court affirmed a jury verdict in the client's favor, holding that the damages found were not too remote or speculative. *Id.*

California

California seems to allow a client to prove her damages in an inadequate-settlement claim by showing that she would have received more money either in settlement or at trial. *See, e.g., Filbin v. Fitzgerald*, 211 Cal. App. 4th 154, 166 (Cal. Ct. App. 2012) (citing *Slovensky v. Friedman*, 142 Cal. App. 4th 1518, 1528 (Cal. Ct. App. 2006)). However, California courts often rule against clients who cannot prove their damages beyond mere speculation. *See id.* ("The requirement that a plaintiff need prove damages to 'a legal certainty' is difficult to meet in any case. It is particularly so in 'settle and sue' cases."). Because there was no support in the record to suggest that the clients could have secured a greater settlement than what was achieved, the *Filbin* court reversed the lower

court's judgment in favor of the clients. *Id.* at 171. The court held that the failure to offer proof that a more favorable settlement could have been obtained meant that there was no evidence of causation. *Id.* at 172.

For other applications of this stringent evidentiary standard, see also *Barnard v. Langer*, 109 Cal. App. 4th 1453, 1461 (Cal. Ct. App. 2003) ("It is not enough for Barnard to simply claim, as he did at the trial of this malpractice action, that it was possible to obtain a better settlement or a better result at trial. The mere probability that a certain event would have happened will not furnish the foundation for malpractice damages."); *Marshak v. Ballesteros*, 72 Cal. App. 4th 1514, 1519 (Cal. Ct. App. 1999) ("Here, plaintiff simply alleges that the case was worth more than he settled it for. He proffered no evidence to establish the value of his case, other than his own declaration that the family residence was worth more, and the accounts receivable were worth less, than they were valued at for the purposes of settlement. Even if he were able to prove this, however, he would not prevail. For he must *also* prove that his ex-wife would have settled for less than she did, or that, following trial, a judge would have entered judgment more favorable than that to which he stipulated. Plaintiff has not even intimated how he would establish one or the other of these results with the certainty required to permit an award of damages.") (emphasis in original).

Illinois

Illinois has sent mixed signals about the proper measure of damages, even within the same case, but it seems as though settlement-value may be proper. *See, e.g., Merritt v. Goldenberg*, 841 N.E.2d 1003 (Ill. App. Ct. 2005). In *Merritt*, the court explained that the law in malpractice cases is case-within-a-case: "The malpractice plaintiff must prove a case within a case, that is, the plaintiff is required to prove the underlying action and what his recovery would have been in that prior action absent the alleged malpractice." *Id.* at 1010. However, the evidence offered at trial, and scrutinized on appeal, was the settlement-value of the underlying case. *Id.* at 1011-12; *see also Brooks v. Brennan*, 255 Ill. App. 3d 260, 267 (Ill. App. Ct. 1994) (initially stating that "[t]he type of procedure required to prove the underlying action is often referred to as a 'trial within a trial,'" but then discussing the client's failure to prove her damages by showing that she "had any possibility of settling the case for a greater amount or receiving greater damages from a judge or jury"). *But see McKnight v. Dean*, 270 F.3d 513, 519 (7th Cir. 2001) (applying Illinois law) ("[T]here is no basis for believing that McKnight would have done better by rejecting the settlement and *going to trial*.") (emphasis added). Regardless, in Illinois, the fact of settlement will not judicially estop a client from pursuing a legal malpractice claim. *See McCarthy v. Pedersen & Houpt*, 250 Ill. App. 3d 166, 172 (Ill. App. Ct. 1993).

Indiana

Indiana allows a client to recover on her inadequate-settlement claim so long as the client can prove that her case "had a settlement value of more than what she accepted." *See Dammeyer v. Miller*, 872 N.E.2d 707, at *7 (Ind. Ct. App. Aug. 28, 2007) (unpublished); *see also Sanders v. Townsend*, 509 N.E.2d 860, 863 (Ind. Ct. App. 1987), *rev'd on other grounds*, 582 N.E.2d 355 (Ind. 1991) ("As for damages, the majority of recent cases requires a plaintiff, in proving attorney negligence in the context of challenging a settlement or jury award as inadequate, must show, had the attorney not been negligent, the settlement *or* verdict award would have been greater.") (emphasis added).

Kansas

Kansas allows a client to rely on settlement-value, but imposes a high standard for proving those damages. *See Dupree v. Sutton*, 120 P.3d 808 (Kan. Ct. App. Oct. 7, 2005) (unpublished). Not only must the client be able to prove that the defendant in the underlying suit would have *actually paid* a greater settlement, *see id.* at *7, but in *Dupree*, the court ruled against the client because to establish causation and damages he "should have come forward with an expert who could evaluate his claims and accurately estimate the settlement or judgment that Dupree might have received in this case" but for any alleged negligence. *Id.* at *8.

Maryland

Maryland appears to allow the use of settlement-value, although in the case discussing this standard the plaintiff only asserted damages under the standard case-within-a-case procedure. *See Thomas v. Bethea*, 718 A.2d 1187, 1197-98 (Md. 1998) ("To prevail under a trial within a trial approach, [the client] was required to prove . . . (5) the amount of damages that (i) would have been awarded by the jury had the case against [the defendant] proceeded to trial, and (ii) would have been collectible with reasonable effort."). The court, however, noted that the plaintiff presented no evidence of what a reasonable settlement would have been. *Id.* at 1196. The court also discussed using the alternative measure of reasonable settlement-value. *Id.* at 1196-97. This case also contains an excellent discussion of issues in attorney liability for negligently recommending settlement. *Id.* at 1190-97.

Minnesota

Minnesota recognizes that a client can prove

damages by showing the result would have been better either by reaching a different settlement or by prevailing at trial. In an excessive-settlement suit, a Minnesota court affirmed summary judgment in the attorneys' favor because "[t]here is no evidence in the record of this case that would permit a jury to conclude that [the client] would have won at trial or would have obtained a better settlement if the dispute . . . had not been settled as it was." *Carlson v. Fredrikson & Byron, P.A.*, 475 N.W.2d 882, 886 (Minn. Ct. App. 1991), *overruled on other grounds by Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406 (Minn. 1994).

In *Rouse*, the Minnesota Supreme Court did not address the proper measure of damages or refute the propriety of relying on settlement-value, as recognized in *Carlson*. Rather, the court held that, at the summary judgment stage, when a client has foregone a claim he need only show that he would have survived summary judgment on the underlying claim. *See id.* at 410 ("We cannot imagine what type of evidence a plaintiff in a legal malpractice action could produce at summary judgment to show that a factfinder in the underlying matter necessarily would have resolved factual disputes and credibility issues in his or her favor, nor do the defendant attorneys here suggest what that evidence would be. . . . [T]o the extent that [*Carlson*] suggested that plaintiffs must show at summary judgment that it is more likely than not that the issue of causation would be decided in their favor, . . . we reject that standard."). The court noted that this rule might not apply where a case was settled and the client believes that he could have done better but for the attorney's negligence. *Id.* at 410 n.6.

Montana

While Montana allows a client to rely on settlement-value, such proof must not be too speculative in nature. *See Merzlak v. Purcell*, 830 P.2d 1278 (Mont. 1992). A client sued his attorney for recommending the client accept a lower offer. However, the client ultimately lost because the evidence presented was insufficient to establish a settlement-value and was speculative. *See id.* at 1280 ("We have carefully reviewed the evidence and conclude that the District Court was correct in its finding that insufficient evidence was presented to establish a settlement value different from the value negotiated by Purcell. We further agree with the conclusion of the District Court that the testimony regarding the settlement value of the plaintiffs' claims was speculative and did not afford a sufficient basis for an award of damages.").

New Jersey

One New Jersey appellate court has explicitly recognized that case-within-a-case is not the only approach to prove malpractice damages. *See Kranz v. Tiger*, 914 A.2d 854, 863 (N.J. Super. Ct. App. Div. 2007) (plaintiff can "try[] to prove his case, not by a suit-within-a-suit, but by a comparison of the actual settlement with what the settlement should have been."). The court noted that reasonableness of the underlying settlement is only an issue where the plaintiff is proving damages by comparing the actual settlement with what the settlement should have been. *Id.*

Interestingly, New Jersey has a long, conflicting history of whether settlement-value cases are allowable. In 2005, the New Jersey Supreme Court held that a client was judicially estopped from bringing an inadequate--settlement claim when she had represented to the court that the settlement was acceptable and fair. *See Puder v. Buechel*, 874 A.2d 534, 540 (N.J. 2005). However, five years later, the court distinguished *Puder* and allowed a claim for inadequate settlement when the client had not stated that the settlement was fair or adequate, but only that the client understood the settlement. *See Guido v. Duane Morris LLP*, 995 A.2d 844, 853-54 (N.J. 2010).

New York

New York allows use of settlement-value in both excessive and inadequate settlements. *See Gottlieb v. Karlsson*, 295 A.D.2d 158, 158 (N.Y. App. Div. 2002). A client was entitled to summary judgment on her excessive settlement claim when her attorney recommended the client pay $120,000 to settle the claim against her after an appellate court had already set her maximum liability at $16,000. *Id.*

In other cases for inadequate settlement, while allowing evidence of settlement-value, courts have found that the plaintiffs' claimed damages are too speculative or conclusory. *See, e.g., Rapp v. Lauer*, 229 A.D.2d 383, 384 (N.Y. App. Div. 1996) ("Thus, Kirby's assertion that the settlement with Briarcliff would not have cured all the defects in the house amounts to no more than a conclusory assertion insufficient to defeat a motion for summary judgment."); *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 396 (S.D.N.Y. 2000) (applying New York law) ("Plaintiff's allegation that he would have recovered more if the underlying action had gone to trial or if his lawyers had not confined themselves to settlement within the limits of the relevant insurance coverage does not demonstrate the 'actual and ascertainable' damages necessary for a malpractice claim. The speculative nature of what a plaintiff might have recovered at trial is precisely the risk that pre-trial settlement avoids.").

South Carolina

South Carolina will not find that a settlement judicially estops a client from pursuing a claim for inadequate settlement. *See Crowley v. Harvey & Battey, P.A.*, 488 S.E.2d 334, 335 (S.C. 1997). However, the client must put forward expert testimony on the settlement-value; the absence of such evidence will preclude a client's recovery. *See Doe v. Howe*, 626 S.E.2d 25, 32 (S.C. Ct. App. 2005) (jury verdicts of other plaintiffs do not show that plaintiff would have made a similar recovery).

Washington

Washington seems to accept, without much discussion or case analysis, that a client can rely on settlement-value. *See Griswold v. Kilpatrick*, 27 P.3d 246 (1st Div. Wash. 2001). However, the client ultimately lost because the evidence of damages presented was too speculative. *See id.* at 249 ("The record reveals no substance behind [expert's] opinion that the case would have settled for $300,000 more before the heart attack. His opinion is speculative and conclusory and for that reason is inadmissible to create an issue of material fact."). In fact, the court suggested that the client's burden, at least where the alleged negligence was the attorney's delay in acting, is nearly insurmountable. *Id.* ("Cases from other jurisdictions confirm that it is difficult to escape the realm of speculation when trying to prove that delay by plaintiff's counsel in settling a case caused harm to the plaintiff.") (citing *Thompson v. Halvonik*, 36 Cal. App. 4th 657 (Cal. Ct. App. 1995)).

2. States requiring case-within-a-case methodology

Yet some states continue to require the case-within-a-case methodology.

Massachusetts

In Massachusetts, it appears a client must proceed on his inadequate-settlement claim under the traditional case-within-a-case approach. *See Fishman v. Brooks*, 487 N.E.2d 1377 (Mass. 1986). A client sued his attorney for failing to conduct an adequate investigation, for failing to know what the available insurance coverage was, and for delay in handling the case. The client engaged in a trial-within-a-trial and won a jury verdict in his favor, which the Massachusetts Supreme Court affirmed. *See id.* at 1380 ("A plaintiff who claims that his attorney was negligent in the prosecution of a tort claim will prevail if he proves that he probably would have obtained a better result had the attorney exercised adequate skill and care. . . . This is the traditional approach in the trial of such a case. The original or underlying action is presented to the trier of fact as a trial within a trial.").

New Hampshire

New Hampshire apparently retains the case-within-a-case mechanism for proving legal malpractice arising from an allegedly inadequate settlement. *See Witte v. Desmarais*, 614 A.2d 116, 121 (N.H. 1992) ("Where the question whether the breach caused any damages is judged not too speculative, the fact-finder is left to decide what should have happened in the original action. . . . This process then becomes in essence a trial within a trial. . . . The measure of damages is a mechanical computation: the difference between what the fact-finder determines the plaintiff should have recovered and what the plaintiff actually recovered.") (internal citations omitted).

North Carolina

Even when a client alleges a claim for inadequate settlement, North Carolina still imposes the case-within-a-case rule. *See Young v. Gum*, 649 S.E.2d 469, 473 (N.C. App. Ct. 2007) (client must prove that the original claim would have resulted in a judgment in the client's favor).

Ohio

The Ohio Supreme Court may insist on the case-within-a-case methodology. *See Envtl. Network Corp. v. Goodman Weiss Miller, L.L.P.*, 893 N.E.2d 173, 178-79 (Ohio 2008) ("[T]he evidence is insufficient to support their claim because appellees had to establish more than a prima facie case—they had to establish that they actually would have won their case."). In that case, however, the only damages theory alleged by the plaintiff was that the plaintiff would have received a better outcome if the underlying case has been tried instead of settled. *Id.* at 174-75.

Wisconsin

Wisconsin allows recovery for inadequate settlement, but only within the case-within-a-case parameters. *See Helmbrecht v. St. Paul Ins. Co.*, 362 N.W.2d 118 (Wis. 1985). In *Helmbrecht*, a client sued his attorney for failing to investigate the marital assets or properly advise the client in a divorce proceeding, and the Wisconsin Supreme Court affirmed the judgment. *See id.* at 131 ("The plaintiff satisfies her burden of proving causation and damages by establishing that the divorce award she actually received is less than what a reasonable judge who was aware of all of the facts would have awarded. . . .").

3. States that have an additional settlement measure of damages

Alabama

The Alabama Supreme Court allowed a client to survive a motion to dismiss and pursue a malpractice claim against her attorney for negligent investigation

and advice that allegedly caused the client to accept a lower settlement. However, the Court did not discuss in any detail the proper measure of damages. *See Edmondson v. Dressman*, 469 So. 2d 571, 574 (Ala. 1985).

Alaska

In a different context not involving an inadequate settlement, the Alaska Supreme Court noted two prior decisions that "approvingly mentioned the trial-within-a-trial approach," but also stated that it had "not expressly adopted it" as the measure of damages in a legal malpractice case, indicating that a trial court was "not necessarily constrained to use it." *See Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 30 (Alaska 1998).

Colorado

By utilizing the case-within-a-case procedure, a client prevailed on a claim for inadequate settlement when his attorney told the client his case was worthless after seeking and accepting an offer of employment from the law firm representing the defendant in the underlying suit. *See McCafferty v. Musat*, 817 P.2d 1039, 1043-45 (Colo. App. 1990). The court affirmed the jury award on appeal, but did not discuss the use of settlement-value as a measure of damages. *Id.* at 1042. Another Colorado court refused to adopt a per se rule barring legal malpractice suits when the underlying suit has settled. *See White v. Jungbauer*, 128 P.3d 263, 265 (Colo. App. 2005) (citing *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1269-70 (Colo. 2002) (malpractice suit against attorneys where underlying suit settled) and *McCafferty v. Musat*, 817 P.2d at 1039).

Connecticut

While the Connecticut Supreme Court has allowed recovery for inadequate settlement, it did so after a client prevailed on a case-within-a-case. *See Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 646 A.2d 195, 203-04 (Conn. 1994). After an attorney did not sufficiently investigate the finances of the client's husband during a divorce proceeding, the client sued for malpractice. The court affirmed a jury verdict in the client's favor. *Id.* at 204. The court did not discuss whether settlement-value is an appropriate measure of damages.

Florida

One Florida court allowed a client to survive dismissal, but the plaintiff in that case only sought damages under a case-within-a-case theory. *See Bill Branch Chev. v. Burnett*, 555 So. 2d 455, 456 (Fla. Dist. Ct. App. 1990) ("The complaint alleged that the settlement subjected the appellant to greater liability than would have a *verdict* in a properly tried case.") (emphasis added). The court refused to find that the settlement at issue judicially estopped the client from pursuing his malpractice claim. *Id.* ("We cannot say as a matter of law that the settlement of this case negates any alleged legal malpractice as a proximate cause of loss."). The court did not discuss whether settlement-value is an appropriate measure of damages.

Louisiana

Louisiana recognizes a claim for inadequate settlement. *See Braud v. New England Ins. Co.*, 534 So. 2d 13 (La. Ct. App. 1988). An attorney failed to make a prima facie case when seeking a default judgment, thus causing the default judgment to be defective. After the clients settled with the defendant for less than the default judgment, they sued the attorney for malpractice. In allowing the clients to survive summary judgment, the court found that "[i]f the attorney negligence caused them to settle the suit then it also caused their loss." *Id.* at 15. However, the court did not specify the measure of damages.

Michigan

Michigan courts have not said what the proper measure of damages is in an inadequate-settlement claim. A client could survive summary disposition when she claimed that her attorney flatly refused to try case after the client informed the attorney that she did not want to settle, a dispute arising so close to trial that it would have been very difficult, if not impossible, for the client to obtain other counsel. *See Lowman v. Karp*, 476 N.W.2d 428, 431 (Mich. Ct. App. 1991). But in so holding, the court did not discuss whether the client could rely on settlement-value.

Michigan courts will generally allow a client to pursue a malpractice claim even though she has settled the underlying claim. *See Runco v. Hauer*, No. 305611, 2013 WL 3836235, at *4 (Mich. Ct. App. July 25, 2013) ("When a settlement is compelled by the plaintiff's lawyer's mistakes, the lawyer may be 'held liable for causing the client to settle for less than a properly represented client would have accepted.'") (quoting *Espinoza v. Thomas*, 472 N.W.2d 16 (Mich. Ct. App. 1991)).

Mississippi

The Mississippi Supreme Court has refused to allow a client to recover on an excessive-settlement claim, not based on the measure of proof, but because the evidence presented was too speculative. *See Nause v. Goldman*, 321 So. 2d 304, 308 (Miss. 1975) ("[I]t is not shown that the defendant attorney caused the plaintiff to pay money he did not owe, but, rather, that some other attorney could have settled the amount owed by the plaintiff for less than the appellee settled

the claims."). Thus, the question of whether settlement-value is proper remains unanswered.

Nebraska

Nebraska will not apply a rule of judgmental immunity to protect lawyers from claims of malpractice. *See Wood v. McGrath, North, Mullin & Kratz, P.C.*, 589 N.W.2d 103, 104, 108 (Neb. 1999) (judgmental immunity does not apply to attorney's failure to inform a client of unsettled legal issues relevant to a settlement agreement). However, no Nebraska court has specified the proper measure of damages in an inadequate-settlement claim.

Nevada

When a client alleged that his attorney failed to properly investigate the nature and value of his case, he raised a genuine issue of material fact precluding summary judgment, but the court did not state what the measure of damages would be moving forward. *See Malfabon v. Garcia*, 898 P.2d 107, 109 (Nev. 1995). It appears that the plaintiff was seeking damages on a case-within-a-case theory. *Id.* at 109-110.

New Mexico

New Mexico has allowed recovery on an inadequate-settlement case, after a trial using a case-within-a-case damages theory. *Collins ex rel. Collins v. Perrine*, 108 N.M. 714, 717 (N.M. Ct. App. 1989). The court noted that the plaintiff did not have to prove that the settlement would have been greater but for the attorney's negligence. *Id.* ("It was not necessary, as Perrine appears to maintain, for plaintiffs to question opposing counsel in the Presbyterian case and obtain an admission that a higher settlement was possible."). This suggests that settlement-value may be allowable if that damages theory was alleged.

Oregon

Oregon recognizes a claim for inadequate settlement. *See Stafford v. Garrett*, 613 P.2d 99 (Or. Ct. App. 1980). However, the client ultimately lost because the court found as a matter of law that he would not have received any more money on appeal than he did by settling after the judgment. *See id.* at 103 ("The Supreme Court of Oregon on appeal would have sustained Roderick's demurrer to the plaintiff's first cause of action and remanded the case for either the entry of a judgment for $100 general damages and $300 punitive damages on only the second cause of action or a new trial on only the second cause of action. It follows that the defendants' advice to the plaintiff to settle the case for $10,000 was not negligent."). Because there was no question that the client could not have recovered at trial any amount greater than his settlement, the court did not discuss whether a settlement-value measure of damages could be appropriate.

Utah

Utah allows recovery on an inadequate-settlement claim. *See Hipwell v. Sharp*, 858 P.2d 987 (Utah 1993). When attorneys advised their clients to settle for the statutory cap on allowable damages six days after the Utah Supreme Court ruled that the cap was unconstitutional, the court held as a matter of law that the attorneys' decision to recommend settlement was unreasonable. *Id.* at 988-89. The court did not discuss the proper measure of damages.

4. States rejecting claims for inadequate settlement

Georgia

Georgia seems to bar legal malpractice claims if the client has settled the underlying suit. *See Duncan v. Klein*, 313 Ga. App. 15, 20 (Ga. Ct. App. 2011) (citing *Duke Galish, L.L.C. v. Arnall Golden Gregory, L.L.P.*, 288 Ga. App. 75, 76 n.3 (Ga. Ct. App. 2007) ("In a case where a plaintiff's pending claims remain viable despite the attorney's alleged negligence, the plaintiff severs proximate causation by settling the case, an act which makes it impossible for his lawsuit to terminate in his favor.")).

Hawaii

A federal court, applying Hawaii law, did not allow a client to introduce evidence of settlement, which would essentially preclude a client (at least in federal court) from ever relying on settlement-value as proof of damages. *See McDevitt v. Guenther*, 522 F. Supp. 2d 1272 (D. Haw. 2007) (applying Hawaii law). A client failed in his excessive settlement claim because the Federal Rules of Evidence precluded him from relying, for proof of damages, on the difference between the settlement he paid to his wife and the amount he would have allegedly paid under a cap in a different prenuptial agreement. *See id.* at 1287 ("His two alternative calculations of damages are either the difference between the amount he paid Yoakam in settlement and the amount he would have paid under his desired premarital agreement (with a cap at $250,000) or the difference between the settlement amount and the written premarital agreement (with the sliding scale provision). Because he is barred by Rule 408 from relying on his settlement amount to prove his amount of damages, Plaintiff has failed to assert damages with sufficient certainty."). Despite minor differences in language, the commentary to Hawaii Rule of Evidence 408 indicates an intention to be "identical with FED. R. EVID. 408." *See* HAW. R. EVID. 408 (commentary). No Hawaii state court has cited *McDevitt* or has confronted the issue of inadequate settlement in a legal malpractice suit.

Idaho

Idaho rejects a claim for inadequate settlement unless the alleged malpractice was not discovered until after the settlement had been approved. *See McKay v. Owens*, 937 P.2d 1222, 1229 (Idaho 1997). The Idaho Supreme Court found that by agreeing to the settlement, the client was judicially estopped from suing her attorney for malpractice. However, the court made clear that judicial estoppel is only appropriate "when the party maintaining the inconsistent position either did have, or was chargeable with, full knowledge of the attendant facts prior to adopting the initial position." *Id.*

Pennsylvania

Pennsylvania has case law going both ways—allowing and disallowing a claim for inadequate settlement. In one of the most often cited (and often distinguished) cases on this issue, the Pennsylvania Supreme Court held that a client cannot maintain a legal malpractice claim against her attorney after agreeing to a settlement. *See Muhammad v. Strassburger*, 587 A.2d 1346, 1349 (Pa. 1991) ("We refuse to endorse a rule that will discourage settlements and increase substantially the number of legal malpractice cases. A long-standing principle of our courts has been to encourage settlements; we will not now act so as to discourage them.").

The court later limited the holding of *Muhammad* to the facts of that case and allowed a claim for inadequate settlement to proceed. *See McMahon v. Shea*, 688 A.2d 1179, 1182 (Pa. 1997) ("Mr. McMahon merely seeks redress for his attorneys' alleged negligence in failing to advise him as to the controlling law applicable to a contract. Based on the foregoing, it is clear that Mr. McMahon has set forth a cause of action for legal malpractice.").

Despite *McMahon*'s attempt to sideline *Muhammad*, one federal court has resurrected *Muhammad*'s sway, applying it to bar clients from recovering the difference between a hypothetically larger settlement or jury award and the actual agreed-upon settlement. *Phinisee v. Layser*, No. 14-3896, 2014 WL 5780935, at *2 (E.D. Pa. Nov. 5, 2014) ("This is exactly the type of damages claim prohibited by *Muhammad*.") (citing *Moon v. Ignelzi*, No. 260 WDA 2008, 2009 Pa. Super. LEXIS 7016, at *20 n.8 (Pa. Super. Ct. Dec. 11, 2009) (concluding that *Muhammad* precluded a legal malpractice action arising from attorneys' alleged failure to inform the plaintiffs of the consequences of a subrogation lien, as the plaintiffs' recovery would require an assumption of a jury award larger than the settlement)). Thus it appears that the law is quite unsettled in Pennsylvania.

D. Lost Settlement Opportunity

A related issue, not raised as often as inadequate settlement, is whether the attorney's negligence caused the plaintiff to lose the opportunity to settle his case. Many of the states surveyed recognize such a claim, but often deny recovery on the claim because of the speculative nature of the evidence offered.

California

California recognizes a claim for lost settlement opportunity. *See Charnay v. Cobert*, 145 Cal. App. 4th 170 (Cal. Ct. App. 2006). The client stated a viable claim for relief when she alleged that but for her attorney's malpractice in advising her to defend a claim as opposed to settle it, she would have settled the case and "would have obtained a more favorable result than the $600,000-plus judgment ultimately rendered against her." *Id.* at 180.

Florida

Florida recognizes a claim for lost settlement opportunity. *See Sauer v. Flanagan & Maniotis, P.A.*, 748 So. 2d 1079 (Fla. Dist. Ct. App. 2000). The court found that there were issues of material fact precluding summary judgment when the client asserted that her attorneys negligently informed her, or failed to inform her, of the risks of not accepting the offer of judgment, misinformed her, and failed to properly advise her. *Id.* at 1080.

Georgia

Georgia recognizes a claim for lost settlement opportunity. *See Meiners v. Fortson & White*, 210 Ga. App. 612 (Ga. Ct. App. 1993). However, the evidentiary standard is quite high. A client must show that a settlement would have resulted. *See id.* at 613 ("In order to prevail on this claim, however, plaintiff would have to show that negotiations 'would have' resulted in a settlement; 'might have' or 'could have' is not enough. As there is no evidence that a settlement would have been reached had defendants provided Allstate with the requested bills and records, summary judgment for defendants was proper with respect to this issue as well.") (citations omitted).

Iowa

Iowa recognizes a claim for lost settlement opportunity claim. *See Whiteaker v. State*, 382 N.W.2d 112 (Iowa 1986). However, the evidentiary standard is quite high. A client must prove that settlement probably would have occurred. *Id.* at 116; *see also id.* at 117 ("Whiteaker did not establish as a matter of law on this record that his claim would have resulted in a favorable settlement if the State attorney had more fully counseled Whiteaker or otherwise handled the claim differently in any respect.").

Kansas

Kansas recognizes a claim for lost settlement opportunity. *See McConwell v. FMG of Kansas City, Inc.*, 861 P.2d 830 (Kan. Ct. App. 1993). However, if the client cannot put forward any evidence that the defendant had the ability and willingness to settle, then the client cannot establish that any negligence by the attorney proximately caused damages. *See id.* at 839.

Massachusetts

Massachusetts recognizes a lost settlement opportunity claim and shifts the burden to the attorney to prove that the alleged malpractice did not cause the client's loss. *See St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 408 F. Supp. 2d 59, 61 (D. Mass. 2006).

Michigan

Michigan recognizes a claim for lost settlement opportunity. *See Ignotov v. Reiter*, 390 N.W.2d 614 (Mich. 1986). The Michigan Supreme Court affirmed a jury award in the client's favor, finding that "[d]amages were properly awarded for the lost opportunity to resolve the matter by settlement. The settlement-value of a matter in controversy is determinable without regard to, and does not depend on, whether the parties are willing to settle on that basis." *Id.* at 617.

Missouri

Missouri recognizes a claim for lost settlement opportunity, but places a very high burden of proof on causation. To show that the inability to settle constitutes causation in the legal malpractice action, the plaintiff must prove that the underlying claim would have been successful; settlement-value is not sufficient because even frivolous claims have settlement-value. *See Novich v. Husch & Eppenberger*, 24 S.W.3d 734 (Mo. Ct. App. 2000). Such a claim is too speculative to maintain. *See id.* at 737 ("Novich cannot claim his inability to settle constitutes causation in a legal malpractice action. . . . Novich's claim that Landlord would have settled the claim against him is speculative.").

Nebraska

Nebraska allows recovery for a lost settlement opportunity. *See Bellino v. McGrath North Mullin & Kratz, PC LLO*, 738 N.W.2d 434 (Neb. 2007). The Nebraska Supreme Court allowed a rejected settlement offer to establish a baseline to resolve the underlying litigation. *See id.* at 452.

New Jersey

New Jersey recognizes a claim for lost settlement opportunity, but requires the traditional case-within-a-case methodology, not simply expert testimony as to the reasonable settlement-value. *See Fuschetti v. Bierman*, 319 A.2d 781, 784 (N.J. Super. Ct. Law Div. 1974) ("Because no expert can suppose with any degree of reasonable certainty the private blends of hopes and fears that might have come together to produce a settlement before or during trial, expert testimony as to reasonable settlement value will be excluded as irrelevant.").

Pennsylvania

In contrast to the above, Pennsylvania does not allow claims for lost settlement opportunity. *See McCartney v. Dunn & Conner, Inc.*, 563 A.2d 525, 530 (Pa. Super. Ct. 1989) ("In any event, this Court has not allowed legal malpractice actions based upon speculations regarding settlement negotiations.") (citing *Mariscotti v. Tinari*, 485 A.2d 56 (Pa. Super. Ct. 1984)).

E. The Future of Settlement-Value: Limited to Mass Torts?

As demonstrated by the above authority, settlement-value provokes controversy and the law rarely provides any clear answers. The common-law method will further refine the rules regarding settlement-value as it relates to causation and damages in a legal malpractice claim.

The changes could be sweeping, because the settlement-value measure of damages has great power. Many malpractice claims falter because of the difficulty in demonstrating that the plaintiff would have prevailed at trial if not for the malpractice. For example, it does not matter if the attorney missed a filing deadline if the client likely would have lost anyway. But settlement-value can change all that. Virtually every case has some settlement-value, often based on the nuisance value alone. That makes the causation and damages elements—that now are the key hurdles to most legal malpractice claims—much more manageable.

Courts may be hesitant to lower the causation and damages bars to legal malpractice claims for many reasons. One legitimate reason is that each step toward settlement-value is a step toward more and more speculative evidence. Experts opining about the nuisance value of a case when no clear comparable settlement is available smells a lot like speculation. Indeed, even in a typical meritorious case, there is a significant danger that assessing a reasonable settlement-value drifts into the realm of speculation. Pegging the settlement-value of the case itself involves the delicate balance of the likely result to be obtained (and collected) following a trial and the amount the opponent is willing to pay. Further, even the most skilled lawyer cannot know if a client has received the maximum possible settlement. There are simply too

many variables, including the unpredictable and sometimes irrational actions of the opposing party during the settlement negotiations. These are some of the reasons that courts appear wary of opening the door to evidence of settlement-value to prove a legal malpractice claim.

However, of the states surveyed, the vast majority seem at least willing to entertain the idea of using settlement-value to prove damages in a legal malpractice claim in an appropriate circumstance. Some states remain married to the case-within-a-case methodology. But others do allow recovery for the wronged client, perhaps because at its core, there is something intuitive about the settlement-value measure of damages in *some* situations. Thus, courts try to walk the tightrope of allowing settlement-value when it is appropriate, but prohibiting it in other contexts.

The Texas Supreme Court's opinion in *Elizondo* demonstrates this tension. As discussed above, *Elizondo* was a mass tort case arising out of one incident, and the defendant in the tort suits settled all the cases. 415 S.W.3d at 263. But even in *Elizondo*, the Court chose its words carefully and limited its endorsement of settlement-value to similar factual circumstances. And of course, *Elizondo* was limited to damages.

The future of the settlement-value issue will likely resemble the approach taken by the Court in *Elizondo*. In circumstances that minimize the dangers of speculation, courts likely will recognize the settlement-value measure of damages in narrow holdings, always being careful to crack the door rather than throw it wide open. The law on settlement-value will slowly creep toward more clarity. In the meantime, the best approach is to be aware of the existing precedents and the key concerns about settlement-value and frame one's arguments around these factors.

V. EXPERT TESTIMONY FOR CAUSATION AND DAMAGES

A recurring issue in legal malpractice cases is the kind of evidence that is sufficient to prove causation and damages. Many legal malpractice cases falter on this ground at summary judgment, and thus this is an important and ever-changing area of legal malpractice jurisprudence.

A. When Expert Testimony Is Required

Plaintiffs usually need expert testimony to meet their evidentiary burden on causation and damages in a legal malpractice case. Even if there is expert testimony on the attorney's negligence, the plaintiff must also explain with evidence how that negligence resulted in damages. This task is often beyond the competency of lay witnesses due to the complex nature of a legal malpractice claim.

The Texas Supreme Court provided a helpful overview of the reasoning behind the general rule in favor of expert testimony in *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113 (Tex. 2004): "Legal malpractice may include an attorney's failure to exercise ordinary care in preparing, managing, and presenting litigation. But '[d]ecisions of which witnesses to call, what testimony to obtain or when to cross-examine almost invariably are matters of judgment.' As such, the 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." *Id.* at 119-20 (citations omitted). Thus, expert testimony is generally needed because determining the effect of an attorney's malpractice on a claim is usually a task beyond the jury's common understanding.

But expert testimony is not always needed. Two examples of when expert testimony is not required are *Delp v. Douglas*, 948 S.W.2d 483, 495-96 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999), and *Streber v. Hunter*, 221 F.3d 701, 726-27 (5th Cir. 2000). The court in *Delp* first held that expert testimony on causation was not always necessary in legal malpractice cases: "[T]he 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." 948 S.W.2d at 495. In that case, an expert testified on the attorney's negligence, but only the plaintiffs testified about how that negligence caused harm. *Id.* at 495-96. The plaintiffs explained that based on their attorney's advice, they took various steps that resulted in them losing their ownership interest in a company and being forced into bankruptcy. *Id.* The court held that this testimony—that focused on the plaintiffs' own response to their attorney's advice—was well within the competency of a lay witness. *Id.* Accordingly, the court did not require any expert testimony on causation.

The Fifth Circuit followed *Delp*'s lead in *Streber*. The circumstances in the two cases were similar because the plaintiff in *Streber* also had expert testimony on the attorney's negligence, but only lay testimony on causation. 221 F.3d at 726-27. The negligence at issue in the case was the plaintiff's attorneys' advice to not pay a tax or settle the dispute because "[the plaintiff] was going to win the tax trial." *Id.* at 727. Several witnesses testified that this advice caused the plaintiff not to pay the tax: "[The plaintiff] thought she owed the tax, and would have paid it at any time, but did not pay based solely on her attorneys' advice." *Id.* at 726-27. The plaintiff also "testified, in detail, to the specific financial losses failing to settle

caused her." *Id.* at 727. The court held that this lay testimony was sufficient: "This testimony was sufficient to sustain the proximate cause finding on each type of damages awarded to [the plaintiff]." *Id.*

Taken together, *Delp* and *Streber* offer insights into the type of case suited for lay testimony on causation. The Texas Supreme Court looked to these two cases for guidance on that issue in *Alexander*. The Court explained these cases by focusing on the fact that the client's actions, based on bad advice from their attorneys, caused the injuries in both cases: "In both cases the clients themselves were the key decisionmakers, relying upon their attorney's advice with unfortunate consequences. Under these circumstances, the courts in *Delp* and *Streber* found sufficient the clients' testimony that, because of their lawyers' bad advice, they made the decisions and took the actions that resulted in their injuries." *Alexander*, 146 S.W.3d at 119. The Supreme Court's analysis hits on the distinguishing features of these cases—that the client's decisions, based on the attorney's bad advice, directly resulted in the injuries. The client is uniquely qualified to testify on that issue because the client is the best authority for what he or she would have done differently if the legal advice had been different. As the Austin Court of Appeals explained in a similar case: "[I]t was a simple question of fact as to whether [the plaintiff] would have followed competent advice." *Connolly v. Smith*, No. 03-03-00575-CV, 2004 WL 1898220, at *5 (Tex. App.—Austin Aug. 26, 2004, pet. denied). The client's testimony on that issue, combined with a straightforward causal chain between the client's decision and the damages, eliminates the need for expert testimony on causation in these types of cases.

Courts have carefully policed the boundaries of this exception to the general rule that expert testimony is required for causation. One common problem for plaintiffs is that the key decisionmaker in the underlying case must be the plaintiff, rather than some other outside force such as a jury or a judge. That is where the plaintiff went wrong in *Alexander*, as the Court explained when it distinguished *Delp* and *Streber*: "[T]he decisionmaker here was the bankruptcy judge, who quite properly was not asked to, and did not, testify as to how he might have ruled if the case had been presented differently. Without expert testimony, the jury had no direct evidence explaining the legal significance of the omitted evidence." 146 S.W.3d at 119. The First Court of Appeals followed *Alexander* on this issue in *Finger v. Ray*: "[B]oth in this case and in *Alexander*, whether the alleged wrongful conduct caused any damage hinges on the outcome of the underlying legal proceedings. The loss here does not stem from [the plaintiff] as the sole 'decision maker,' but requires a second piece: that, without hiring [the attorney], she would have obtained a better result, and netted more money than she did." 326 S.W.3d 285, 292 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

More recent cases on the need for expert testimony have offered additional insights into this area of legal malpractice law. One case confronted the question of whether expert testimony is required to prove that the plaintiff would have prevailed on a medical-malpractice claim if his attorney had actually filed suit on the claim. *Samson v. Ghadially*, No. 14-12-00522-CV, 2013 WL 4477863, at *4 (Tex. App.—Houston [14th Dist.] Aug. 20, 2013, no pet.). The court unsurprisingly held that expert testimony was needed: "The causal link in this case is beyond a lay person's common understanding. [The plaintiff] failed to adduce any evidence that he would have prevailed against [the doctor] if [the attorney] had prosecuted the medical malpractice claim, or if [the attorney] had not delayed in informing [the plaintiff] that the claim could not be prosecuted." *Id.* Thus, *Samson* seems to confirm the basic rule that expert testimony is generally required on causation absent the circumstances described *Delp* and *Streber*.

A recent case from the El Paso Court of Appeals interpreted *Alexander* to require expert testimony on causation: "In *Alexander*, the Texas Supreme Court made definite the need for expert testimony to prove causation in a legal malpractice claim alleging negligence in prior litigation." *Haddy v. Caldwell*, 403 S.W.3d 544, 547 n.4 (Tex. App.—El Paso 2013, pet. denied). The court acknowledged that the facts of the case were such that the causation issue was "not obvious" and thus the circumstances did not "obviate the need for expert testimony." *Id.* at 547.

Another recent case highlights a related issue involving expert testimony. In addition to needing expert testimony for the legal malpractice claim, sometimes the underlying claim requires expert testimony as well. This means that the expert testimony needed to prove the underlying claim must be presented as part of the legal malpractice case because that is how one satisfies the case-within-a-case requirement: "If the plaintiff would have needed medical-expert testimony to prevail in the underlying suit, then the same kind of testimony is required to prove the case within a case in the legal malpractice suit." *Kelley & Witherspoon, LLP v. Hooper*, 401 S.W.3d 841, 849 (Tex. App.—Dallas 2013, no pet.).

The overall message from these cases is that while there are some narrow circumstances in which expert testimony on causation is not needed, courts are careful not to stray outside of those circumstances. If there is another key decisionmaker involved, particularly if that decisionmaker is a judge or jury, then a plaintiff must have expert testimony on causation and damages.

B. Validity of Expert Testimony

When expert testimony on causation and damages is required, that expert testimony must meet the usual requirements to qualify as valid evidence. Courts have examined how these requirements apply to the types of expert testimony generally needed for causation and damages in the legal malpractice context.

The Texas Supreme Court addressed some of these issues in *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). The Court first recited the general rules governing expert testimony: "[I]t 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." *Id.* at 235. As such, "conclusory statements" by an expert are insufficient to qualify as valid evidence. *Id.*

According to the Supreme Court, the expert affidavit at issue in *Burrow* lacked a sufficient explanation of the basis of the conclusions and was therefore not valid evidence. *Id.* at 235-36. The affidavit merely recited the affiant's qualifications, indicated that the affiant had considered the relevant facts, and announced that the settlements in the case were "fair and reasonable." *Id.* The expert failed to include the critical element of a reasoned basis for his conclusions. *Id.* The affidavit essentially said: "Take my word for it, I know: the settlements were fair and reasonable." *Id.* The Court held that this was not enough. *Id.*

The Court went on to offer guidance on the type of explanation it had in mind: "[The expert] might have analyzed the Clients' injuries by type, or related settlement amounts to medical reports and expenses, or compared these settlements to those of similar claims, or provided other information showing a relationship between the plaintiffs' circumstances and the amounts received." *Id.* at 236. But the expert "did not do so," and "[t]he absence of such information . . . deprived [the expert's] opinions of any demonstrable basis." *Id.*

Burrow thus established the basic framework for evaluating the sufficiency of expert testimony in the legal malpractice context. The Court made clear that an expert cannot rest on his qualifications and must instead explain his analysis and demonstrate how he arrived at his conclusions.

The Texas Supreme Court further clarified its precedents on the legal-sufficiency rules regarding expert testimony in *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013). The factual setting of *Elizondo* was that the plaintiffs had sued their former attorneys over an allegedly inadequate settlement. *Id.* at 261. The question for the Court was whether the plaintiffs had raised a genuine issue of material fact on damages. *Id.* at 264-66. Because the key piece of damages evidence was an attorney-expert's affidavit, the Court focused on whether the affidavit met the requirements of sufficient expert testimony. *Id.* The Court first reviewed its prior precedents and reaffirmed the basic rules regarding expert testimony, including that conclusory reasoning and analytical gaps will render an expert opinion invalid. *Id.* at 264. Then it created a statement of these rules tailored to the facts of the case: "[A]n attorney-expert, however well qualified, cannot defeat summary judgment if there are fatal gaps in his analysis that leave the court to take his word that the settlement was inadequate." *Id.*

Applying these rules to the expert's affidavit in the case, the Court pinpointed the defect as the "lack of a demonstrable and reasoned basis on which to evaluate his opinion that the settlement was inadequate." *Id.* at 265. The affidavit indicated that the expert "considered the facts relevant to the case" and then pegged a proper settlement-value as between $2 million and $3 million, but did not connect the facts to the estimate: "A fatal analytical gap divides the recitation of the facts of the Elizondo case and the declaration of its settlement value." *Id.* Additionally, while the affidavit "lists the criteria [the defendant] used in 'determining the general value of a case for settlement purposes,'" it never applied those criteria to the facts of the case or explained why the settlement would have been higher based on the criteria if the alleged malpractice had not occurred. *Id.* at 265-66. Finally, the affidavit failed to conduct "an analysis of settlements of cases with injuries and circumstances similar to the Elizondo case," which "might [have been] sufficient to raise a fact issue as to the inadequacy of the settlement." *Id.* at 266.

In short, the affidavit was a list of facts followed by conclusions, with no attempt to connect them: "'[A]lthough [the expert] lists specific criteria he contends [the defendant] "focused on" when determining settlement values, he offers no analysis to explain how these factors would be applied to the Elizondos' situation. He also fails to link settlement amounts to specific injuries and circumstances, and provides no comparison of settlement amounts of similar claims.'" *Id.* at 266 (quoting *Elizondo v. Krist*, 338 S.W.3d 17, 21-22 (Tex. App.—Houston [14th Dist.] 2010), *aff'd*, 415 S.W.3d 259 (Tex. 2013)). All of this rendered the affidavit invalid because the Court was simply left to take the expert's word as to the adequacy of the settlement. *Id.*

The key takeaway from *Elizondo* is that proving malpractice damages requires much more than an expert listing his qualifications, reviewing the facts, and making a conclusion. As with any type of expert testimony, the Court has made clear that it will not take an expert's word for it, and that instead the expert must show the work when offering an opinion on legal malpractice and explicitly connect the dots between the

facts and the conclusions.

Because *Elizondo* specifically relates to the settlement-value measure of damages, the Court spoke favorably of the technique of comparable settlement analysis. *See supra* section IV. This analysis should include such points as how the defendant valued similar cases, what the defendant paid to settle similar cases, and how the defendant's settlement criteria apply to the facts of the case. If a comparable settlement analysis is not possible for whatever reasons, the expert should consider whether to explain the omission of a comparable settlement analysis.

The post-*Elizondo* case law has expanded on the Court's holdings. One case is *McMahon v. Zimmerman*, 433 S.W.3d 680 (Tex. App.—Houston [1st Dist.] 2014, no pet.). The question for the expert was how a trial court would have divided property and debt in a divorce. *Id*. at 686-89. The court focused on *Elizondo*'s discussion of the expert's opinion on settlement-value for guidance and applied those principles to this new context. *Id.* The court held that the expert's affidavit fell short of the *Elizondo* standard. *Id.* While the affidavit reviewed the facts of the case and then announced the expert's conclusions, it did not tie the two together. *Id.* For example, the expert "fail[ed] to explain . . . how the [] documents [discussed in the affidavit] or the facts asserted in them support his opinions." *Id*. at 688.

The *McMahon* court also applied *Elizondo*'s focus on comparable settlement evidence to a new factual situation, requiring comparable cases when the question there was how a court would have decided the issue. The court noted that the expert did not include any comparable divisions of property and debt in similar cases: "[The] affidavit fails to connect his opinion regarding the expected judicial division of community debt to actual divisions made in factually-similar divorces." *Id.* Instead, the affidavit mentioned only four cases and "fail[ed] to link these four cases to his opinion about the division that should have been expected in the . . . divorce." *Id.* For these reasons, the court held that "[t]here is too large an analytical gap between the data relied upon by [the expert] . . . and his opinion." *Id.*

The court's apparent requirement of comparables outside the settlement-value context is the most interesting part of the *McMahon* opinion. While the reasoning behind requiring comparable settlements likely extends to other contexts, it is still an extension of *Elizondo* to apply that rule to a more traditional case-within-a-case situation. This area of the law likely will continue to develop as courts decide how far the comparables requirement extends.