



7-2018

Causation and "Legal Certainty" in Legal Malpractice Law

Vincent R. Johnson

St. Mary's University School of Law, vjohnson@stmarytx.edu

Follow this and additional works at: <https://commons.stmarytx.edu/lmej>



Part of the [Courts Commons](#), [Evidence Commons](#), [Legal Education Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), [Legal Remedies Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Vincent R. Johnson, *Causation and "Legal Certainty" in Legal Malpractice Law*, 8 ST. MARY'S JOURNAL ON LEGAL MALPRACTICE & ETHICS 374 (2018).

Available at: <https://commons.stmarytx.edu/lmej/vol8/iss2/4>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Journal on Legal Malpractice & Ethics by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact jilloyd@stmarytx.edu.

ARTICLE

Vincent R. Johnson

Causation and “Legal Certainty” in Legal Malpractice Law

Abstract. A line of California cases holds that causation of damages in legal malpractice actions must be proven with “legal certainty.” This Article argues that judicial references to legal certainty are ambiguous and threaten to undermine the fairness of legal malpractice litigation as a means for resolving lawyer-client disputes. Courts should eschew the language of legal certainty and plainly state that damages are recoverable if a legal malpractice plaintiff proves, by a preponderance of the evidence, that those losses were factually and proximately caused by the defendant’s breach of duty.

Author. South Texas Professor of Law at St. Mary’s University School of Law, San Antonio, Texas. Professor Johnson has served as a Fellow at the United States Supreme Court and a Fulbright Scholar in China, Romania, and Burma. An elected member of the American Law Institute, he earned a B.A. at St. Vincent College, a J.D. at the University of Notre Dame, an LL.M. at Yale University, and an executive LL.M. at the London School of Economics and Political Science. By appointment of the Texas Supreme Court, Professor Johnson serves as a member of the Texas Committee on Disciplinary Rules and Referenda. Preparation of this Article was ably assisted by Professor Johnson’s research assistant Robert W. Derner.

ARTICLE CONTENTS

I.	The Meaning of Legal Certainty.....	376
II.	Causation in Legal Malpractice Litigation.....	380
III.	The Legal Certainty Standard in California	387
	A. The Origin of “Legal Certainty” in <i>Thompson v. Halvonik</i>	387
	B. Subsequent Decisions of the California Court of Appeal.....	391
	C. California Supreme Court Precedent.....	395
	D. California Jury Instructions	397
IV.	Preponderance of the Evidence Is the Proper Standard.....	397
V.	Conclusion	402

I. THE MEANING OF LEGAL CERTAINTY

A line of California opinions,¹ issued almost exclusively by the Court of Appeal, states that causation of damages in a legal malpractice action must

1. This Article cites numerous California cases, some of which have been published, and many of which are “unpublished.” Rule 8.1115(a) of the California Rules of Court provides, with various exceptions, that “an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.” CAL. R. 8.1115. Some scholars have argued that the California rule should be abandoned. See, e.g., Rafi Moghadam, Note, *Judge Nullification: A Perception of Unpublished Opinions*, 62 HASTINGS L.J. 1397, 1397 (2011) (“Segregation of cases based on publication status, . . . is an unconstitutional practice . . . at odds with the state’s judicial notice statute and the judiciary’s ethical obligation to maintain an appearance of fairness. Bringing an end to the no-citation rule, which enables discrimination against unpublished opinions, . . . is legally justified and ethically required.”). Regardless of what rules apply to citation of cases in litigation, courts may not insulate their decisions from scholarly examination and criticism by designating opinions as unpublished. Any such step would raise serious constitutional issues. See Steve Sheppard, *The Unpublished Opinion Opinion: How Richard Arnold’s Anastasoff Opinion is Saving America’s Courts from Themselves*, 2002 ARK. L. NOTES 85, 89 (2002) (examining the history of opinion non-publication and the meaning of non-citation rules, and concluding that “the reality [is] that unpublished opinions are nearly everywhere banned but are nearly everywhere pled, argued, and used for later judgement”). Sheppard explains that, “[t]he courts cannot discount the effects of the law upon one litigant because the judge found that litigant’s case uninteresting or repetitious or, more dangerously, less well understood or less favored.” *Id.* at 98. Sheppard notes that:

Judge [Richard] Arnold . . . [found] that the [federal] judge who would prevent an opinion from being cited by later litigants and courts exceeds the judicial power conferred on the judge in Article III. In the debate that has followed, others have argued that the no citation rules not only violate the freedom of speech in the First Amendment, the equal protection and due process clauses, but also limit access to the courts, harm the credibility of the courts, and are philosophically incompatible with the common law.

Id. at 97–98 (footnotes omitted). At the federal level, the issue has been resolved by court rules. See FED. R. APP. P. 32.1(a) (“Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgements, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.”). State practices regarding citation of unpublished opinions vary widely. See Lauren S. Wood, Comment, *Out of Cite, Out of Mind: Navigating the Labyrinth That is State Appellate Courts’ Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561, 594 (2016) (“Although they once may have been an effective method to combat unmanageable appellate caseloads, no-citation rules, in whole or part, have no place in today’s technological age. The trend is clearly supportive of citation to unpublished opinions for persuasive value, so as to maintain a predictable, transparent, and cohesive body of law.”); Daniel Schlein, *Rethinking the Role of Unpublished Authority*, 281 N.J. LAW. 80, 83 (2013) (“Court rules often lag behind the realities of the legal profession and technological change. New Jersey’s civil court rules embody an archaic philosophy that creates an artificial distinction between published and unpublished opinions, and in doing so subtly propagate the fiction that only those opinions selected for publication have a significant influence in shaping the evolution of the law.”). Judicial no citation rules are arguably inconsistent with the privilege, widely recognized in American law, that protects defendants from tort liability based on fair and accurate reports of official actions. See RESTATEMENT

be proven with “legal certainty.”² If this means simply that factual and proximate causation of damages must be proved by the plaintiff by a

(SECOND) OF TORTS § 611 cmts. a, d (1977) (“The basis of this privilege is the interest of the public in having information made when available to it as to what occurs in official proceedings. . . . The privilege is therefore one of general publication and is not limited to publication to any person of groups of persons. . . . The privilege is . . . applicable to the report of proceedings before any court[.]”).

2. See *Mauzey v. Morschauser*, Nos. D070681, D070683, 2017 WL 836602, at *5 (Cal. Ct. App. Mar. 3, 2017) (“Damage to be subject to a proper award must be such as follows the fact complained of as a *legal certainty*.” (quoting *Namikas v. Miller*, 171 Cal. Rptr. 3d 23, 29 (Ct. App. 2014))); *Fraze v. Proskauer Rose, L.L.P.*, No. B254569, 2016 WL 6236400, at *4 (Cal. Ct. App. Oct. 25, 2016) (“Proof of damages to a legal certainty is particularly difficult to show in [settle and sue] cases, which are inherently speculative.” (quoting *Namikas*, 171 Cal. Rptr. at 29–30)); *Kley v. Gwilliam*, No. A143943, 2016 WL 3541215, at *14 (Cal. Ct. App. June 21, 2016) (finding the plaintiffs “failed to demonstrate causation of damages—certainly not to a legal certainty” (citing *Filbin v. Fitzgerald*, 149 Cal. Rptr. 3d 422, 431 (Ct. App. 2013))); *Davis v. Brown, Wegner & Berliner, L.L.P.*, No. G050439, 2016 WL 520252, at *5 (Cal. Ct. App. Feb. 9, 2016) (“A plaintiff in a legal malpractice action must prove the claimed damage was [such as follows the fact complained of as a *legal certainty* . . .]” (citation omitted) (quoting *Namikas*, 171 Cal. Rptr. 3d at 29)); *Satnick v. Kanin*, Nos. B259826, B261665, 2015 WL 6472222, at *8 (Cal. Ct. App. Oct. 23, 2015) (imposing a requirement that the plaintiff “prove damages to ‘a legal certainty’” (quoting *Namikas*, 171 Cal. Rptr. 3d at 29)); *Peters v. Smith*, No. E058163, 2015 WL 4776126, at *8 (Cal. Ct. App. Aug. 13, 2015) (“[T]he requirement that a plaintiff need prove damages to ‘a legal certainty’ is difficult to meet in any case.” (quoting *Namikas*, 171 Cal. Rptr. 3d at 29)); *Robertson v. Robertson*, No. B246472, 2014 WL 3529689, at *12 (Cal. Ct. App. July 17, 2014) (“Damages to be subject to a proper award must be such as follows the act complained of as a *legal certainty*.” (quoting *Barnard v. Langer*, 1 Cal. Rptr. 3d 175, 182 (Ct. App. 2003))); *Syers Props. III, Inc. v. Rankin*, No. A136018, 2014 WL 1761923, at *7 (Cal. Ct. App. May 5, 2014) (“[T]he rule that plaintiff must prove damages to ‘a legal certainty’ applies beyond [settle and sue cases].”); *Nguyen v. Margolis*, No. H038268, 2014 WL 1648888, at *7 (Cal. Ct. App. Apr. 25, 2014) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty . . .” (quoting *Thompson v. Halvonik*, 43 Cal. Rptr. 2d 142, 146 (Ct. App. 1995))); *Namikas*, 171 Cal. Rptr. 3d at 29 (“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[,] . . . which are inherently speculative.” (quoting *Filbin*, 149 Cal. Rptr. 3d at 431)); *Augusta v. Keehn & Assocs*, No. D062002, 2013 WL 4136611, at *6 (Cal. Ct. App. Aug. 13, 2013) (“[D]amages must be proven to a legal certainty, not to a mere probability.” (citing *Slovensky v. Friedman*, 49 Cal. Rptr. 3d 60, 67 (Ct. App. 2006))); *Filbin*, 149 Cal. Rptr. 3d at 432 (“The requirement that a [legal malpractice] plaintiff need prove damages to ‘a legal certainty’ is difficult to meet in any case.”); *Fields v. Ratfield*, No. A132766, 2012 WL 5359775, at *7 (Cal. Ct. App. Nov. 1, 2012) (“To win a legal malpractice action, the plaintiff must prove damages to a legal certainty, not to a mere probability.” (quoting *Slovensky*, 49 Cal. Rptr. 3d at 67)); *Lewellen v. Phillips*, No. C062277, 2010 WL 4851362, at *7 (Cal. Ct. App. Nov. 30, 2010) (“In the settlement context, the plaintiff must prove [to] a legal certainty[] that, had the case not settled, he or she would have obtained a better result at trial.” (quoting *Barnard*, 1 Cal. Rptr. 3d at 182)); *Bergen v. Murphy, Pearson, Bradley & Feeney, P.C.*, No. B201217, 2009 WL 1845219, at *4 (Cal. Ct. App. June 29, 2009) (“To win a legal malpractice action, the plaintiff must prove damages to a legal certainty, not to a mere probability. Thus, a plaintiff who alleges an inadequate settlement . . . must prove that, if not for the malpractice, she would certainly have received more money in settlement or at trial.” (citation omitted) (quoting *Barnard*, 1 Cal. Rptr. 3d at 182)); *Shopoff & Cavallo, L.L.P. v. Hyon*, 85 Cal. Rptr. 3d 268, 287 (Ct. App. 2008) (“Damages to be subject to a proper award

must be such as follows the act complained of as a legal certainty.” (quoting *Barnard*, 1 Cal. Rptr. 3d at 182)); *Johnson v. Greenberg*, No. B197894, 2008 WL 2298464, at *4 (Cal. Ct. App. June 5, 2008) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty” (quoting *Thompson*, 43 Cal. Rptr. 2d at 146)); *Kresich v. Stolpman, Krissman, Elber & Silver, L.L.P.*, No. E042245, 2008 WL 2231683, at *4 (Cal. Ct. App. June 2, 2008) (“To establish harm or damage, the plaintiff must show more than a ‘mere probability’ that she would have prevailed if the breach had not occurred; she must show to ‘a legal certainty’ that the damages resulted from her lawyer’s negligence.” (quoting *Barnard*, 1 Cal. Rptr. 3d at 182)); *Fuller v. Ceasar*, No. A117805, 2008 WL 1875954, at *5 (Cal. Ct. App. Apr. 29, 2008) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty.” (quoting *Marshak v. Ballesteros*, 86 Cal. Rptr. 2d 1, 3 (Ct. App. 1999))); *Panther v. Mazzarella*, No. D049332, 2008 WL 152756, at *20 (Cal. Ct. App. Jan. 17, 2008) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty” (quoting *Thompson*, 43 Cal. Rptr. 2d at 146)); *Rosenberg v. Hillshafer*, No. B191950, 2007 WL 4157636, at *17 (Cal. Ct. App. Nov. 26, 2007) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty” (quoting *Goehring v. Chapman Univ.*, 17 Cal. Rptr. 3d 39, 47 (Ct. App. 2004))); *Panther v. Micheli*, No. D048047, 2007 WL 1413392, at *8 (Cal. Ct. App. May 15, 2007) (affirming a judgment where the trial court “concluded ‘plaintiff has not met his burden to show there is a triable issue of material fact regarding a legal certainty that plaintiff would have had a better result but for Micheli’s alleged negligence’”); *Shaver, Korff & Castronovo v. Bhola*, No. B186712, 2007 WL 1218696, at *10 (Cal. Ct. App. Apr. 26, 2007) (“[I]he malpractice action was not viable unless Shaver Korff’s alleged negligence resulted in injury to Medina, and he could prove damages to a legal certainty.” (citing *Slovensky*, 49 Cal. Rptr. 3d at 67)); *Slovensky*, 49 Cal. Rptr. 3d at 67 (“To win a legal malpractice action, the plaintiff must prove damages to a legal certainty, not to a mere probability.” (citing *Barnard*, 1 Cal. Rptr. 3d at 182)); *Smith v. Choate*, No. D047002, 2006 WL 2130430, at *5 (Cal. Ct. App. Aug. 1, 2006) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty.” (quoting *Marshak*, 86 Cal. Rptr. 2d at 3)); *Kairos Sci. Inc. v. Fish & Richardson P.C.*, Nos. A107085, A107486, 2006 WL 171921, at *4 (Cal. Ct. App. Jan. 24, 2006) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty.” (quoting *Marshak v. Ballesteros*, 86 Cal. Rptr. 2d 1, 3 (Ct. App. 1999))); *Praxis Dev. Grp., Inc. v. Richman, Lawrence, Greene & Chizever*, No. A104874, 2005 WL 1607784, at *6 (Cal. Ct. App. July 8, 2005) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty.” (quoting *Marshak*, 86 Cal. Rptr. 2d at 3)); *Farnham v. William Rehwald, Inc.*, No. B170124, 2005 WL 757627, at *13 (Cal. Ct. App. Apr. 5, 2005) (“Damages to be subject to a proper award must be such as follows the act complained of as a legal certainty.” (quoting *Barnard*, 1 Cal. Rptr. 3d at 182)); *Diehl v. Konoske*, No. D043362, 2004 WL 1789633, at *8 (Cal. Ct. App. Aug. 11, 2004) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty” (quoting *Thompson*, 43 Cal. Rptr. 2d at 146)); *Kolev v. Prescott*, No. G032337, 2004 WL 1260028, at *3 (Cal. Ct. App. June 9, 2004) (“The plaintiff in [a legal malpractice case arising out of a marital dissolution] must do more than allege the possibility of damage; rather, it must be shown ‘as a legal certainty.’” (quoting *Marshak*, 86 Cal. Rptr. 2d at 3)); *Smith v. Rosenberg*, No. E034199, 2004 WL 1447939, at *7 (Cal. Ct. App. June 29, 2004) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty.” (quoting *Marshak*, 86 Cal. Rptr. 2d at 3)); *Faerber v. Hyde Law Corp.*, No. A103678, 2004 WL 838571, at *5 (Cal. Ct. App. Apr. 20, 2004) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty.” (quoting *Marshak*, 86 Cal. Rptr. 2d at 3)); *Ferguson v. Lief, Cabraser, Heimann & Bernstein, L.L.P.*, 135 Cal. Rptr. 2d 46, 54 (2003) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty” (quoting *Agnew v. Parks*, 343 P.2d 118, 125

preponderance of the evidence,³ there is nothing exceptional about what this line of California cases asserts. If, however, legal certainty imposes a more demanding burden of proof than the preponderance of the evidence standard,⁴ then these California cases reflect a dubious departure from principles widely accepted in American law, and a serious threat to the fairness of legal malpractice litigation. This issue is important because the ambiguous language of legal certainty now appears in dozens of California cases.⁵

This Article explores the meaning of legal certainty in legal malpractice law.⁶ Part II discusses the basic rules governing proof of causation in legal

(Cal. Ct. App. 1959)); *Hilger v. Lerner*, Moore, Mammano, Strasser & Silva, No. E031934, 2003 WL 22457070, at *3 (Cal. Ct. App. Oct. 30, 2003) (“[D]amages to be subject to a proper award must be such as follows the act complained of as a *legal certainty*.” (quoting *Barnard*, 1 Cal. Rptr. 3d at 182)); *Jaros v. Peterson & Chapman*, No. D039877, 2003 WL 21783833, at *6 (Cal. Ct. App. Aug. 4, 2003) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty” (quoting *Thompson*, 43 Cal. Rptr. 2d at 146)); *Barnard*, 1 Cal. Rptr. 3d at 182 (“Damages to be subject to a proper award must be such as follows the act complained of as a *legal certainty*.” (quoting *Marshak*, 86 Cal. Rptr. 2d at 3)); *Shure ex rel. Shure v. Fox*, No. B156375, 2003 WL 190787, at *3 (Cal. Ct. App. Jan. 29, 2003) (“Damage to be subject to a proper award must be such as follows the act complained of as a *legal certainty*.” (quoting *Marshak*, 86 Cal. Rptr. 2d at 3)); *Ins. Co. of the W. v. Haight Brown & Bonesteel, L.L.P.*, Nos. C037535, C038478, 2002 WL 31630879, at *8 (Cal. Ct. App. Nov. 22, 2002) (“Damage must be demonstrated as a legal certainty, and cannot be a matter of surmise or conjecture.”); *Poway Land, Inc. v. Hillyer & Irwin*, No. D038642, 2002 WL 31623603, at *6 n.3 (Cal. Ct. App. Nov. 21, 2002)) (“Damage to be subject to a proper award must be such as follows the act complained of as a *legal certainty*.” (quoting *Marshak*, 86 Cal. Rptr. 2d at 3)); *Marshak*, 86 Cal. Rptr. 2d at 3 (“Damage to be subject to a proper award must be such as follows the act complained of as a *legal certainty*.” (quoting *Agnew*, 343 P.2d at 125)); *Thompson*, 43 Cal. Rptr. 2d at 146 (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty”) (quoting *Agnew*, 343 P.2d at 125)).

3. See *Carter v. Brooks*, No. B250194, 2014 WL 4088089, at *6 (Cal. Ct. App. Aug. 20, 2014) (“The plaintiff must prove, by a preponderance of the evidence, that but for the attorney’s negligent acts or omissions, he would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred.” (citing *Viner v. Sweet*, 70 P.3d 1046, 1052 (Cal. 2003))).

4. See *Augusta*, 2013 WL 4136611, at *6 (“[D]amages must be proven to a legal certainty, not to a mere probability.” (citing *Slovensky*, 49 Cal. Rptr. 3d at 67)); see also *Slovensky*, 49 Cal. Rptr. 3d at 67 (“To win a legal malpractice action, the plaintiff must prove damages to a legal certainty, not to a mere probability.” (citing *Barnard*, 1 Cal. Rptr. 3d at 182)).

5. See *supra* note 1 (collecting California cases using the “legal certainty” language).

6. The most common theory of liability for legal malpractice is negligence, but lawyers may be held liable to clients and non-clients on other legal theories, including breach of fiduciary duty and fraud. See *Swahn Grp., Inc. v. Segal*, 108 Cal. Rptr. 3d 651, 658 (Ct. App. 2010) (“The legal malpractice complaint states causes of action in professional negligence, breach of contract, breach of fiduciary duty, and fraud.”); see also SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION 19–258 (2d ed. 2015) [hereinafter LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION] (discussing liability to clients for negligence and breach of

malpractice cases. Part III considers the emergence of the legal certainty standard in California jurisprudence. Part IV argues that preponderance of the evidence is the appropriate standard of proof for causation in legal malpractice litigation. Part V offers concluding thoughts on the social importance of according viable remedies to clients harmed by culpable attorney conduct.

II. CAUSATION IN LEGAL MALPRACTICE LITIGATION

In legal malpractice litigation, the most difficult challenge⁷ for plaintiffs is often proving that a breach of duty caused damages.⁸ Absent such a showing, the claimant will recover nothing, no matter how serious the defense lawyer's error or misconduct.⁹

Professional malpractice sometimes causes harm, but often does not—whether because of the surrounding circumstances, the success of remedial

fiduciary duty, and liability to non-clients under more than a dozen theories). This Article is focused on the liability of lawyers to clients for negligence, but the discussion favoring a preponderance of the evidence standard is generally applicable to other theories of lawyer liability. *See* *Jones v. Feldsott*, No. G053974, 2017 WL 4534433, at *6 (Cal. Ct. App. Oct. 11, 2017) (“[A] client seeking to hold an attorney liable in compensatory damages for breach of fiduciary duty must prove each element of these causes of action by a preponderance of the evidence: duty, breach of duty, and proximately caused damages. The same goes for a cause of action for malpractice.”).

7. *Cf.* *Robertson v. Robertson*, No. B246472, 2014 WL 3529689, at *12 (Cal. Ct. App. July 17, 2014) (“We recognize that the plaintiff’s burden to show causation and damages in a legal malpractice action is significant . . .”).

8. *See* HERBERT M. KRITZER & NEIL VIDMAR, *WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* 181 (2018) (“One of the major challenges facing plaintiffs in LPL [lawyer professional liability] cases is proving that the lawyer’s actions caused the plaintiff financial harm.”); *see, e.g.,* *Namikas v. Miller*, 171 Cal. Rptr. 3d 23, 33 (Ct. App. 2014) (“[W]e agree with the trial court that Namikas did not produce evidence to justify a finding of triable issues of fact about whether, without any legal malpractice occurring, he would have received a more favorable settlement or outcome at trial. Nor does the record as a whole support a conclusion that causation questions remain about damages . . .”).

9. *See Fuller*, 2008 WL 1875954, at *7 (denying recovery based on a lack of proof of causation of damages, even though the malpractice plaintiff “presented evidence showing that Ceasar breached her fiduciary duty and may have committed fraud in settling the claims without authority”); *see also* *Poway Land, Inc. v. Hillyer & Irwin*, No. D038642, 2002 WL 31623603, at *4 (Cal. Ct. App. Nov. 21, 2002) (noting that although “expert evidence was not necessary to establish that faxing confidential legal strategy to an individual connected to the opposition is improper[,]” the plaintiff was not entitled to recover damages because it failed to show the misdirected fax caused any harm); *Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 119 (Tex. 2004) (stating, in a legal malpractice case involving inadequate supervision and serious errors in trying a case, that “even when negligence is admitted, causation is not presumed” (citing *Haynes & Boone v. Bowser*, 896 S.W.2d 179, 181 (Tex. 1995))).

efforts, or the simple fortuity of events.¹⁰ It is therefore important to think carefully about causation issues. Just as it would be unfair to deny a plaintiff compensation for harm the defendant’s negligence in fact caused,¹¹ so too it would be unfair to hold a defendant liable for harm the defendant did not cause.

In legal malpractice litigation, causation of damages is rarely presumed.¹² Instead, a plaintiff must come forward with persuasive evidence showing that legally cognizable¹³ adverse consequences¹⁴ flowed from the lawyer’s breach of professional obligations.¹⁵ The evidence adduced at trial must

10. See KRITZER & VIDMAR, *supra* note 8, at 48 (“Not all breaches cause harm. . . . [I]n a case in which a lawyer negligently fails to raise a particular issue on appeal, and the appeal is unsuccessful on the grounds raised, there is no causation if the appeal would have been unsuccessful even if that issue had been raised.”); see also *id.* at 17 (“Some errors cause great harm, some cause a minimal amount of harm, and some cause no harm at all. In the practice of law many, probably most, errors are detected and corrected before any harm occurs.”).

11. Cf. Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the “Captured” Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 459 (2002) (“Judge-made rules should never appear to unfairly benefit the bar.”).

12. One kind of case in which a presumption of harm might be applicable involves spoliation of evidence. If the critical evidence for proving causation is missing, a court might instruct a jury to presume that the missing evidence would have been favorable to the plaintiff and would have established that a breach of duty caused damages. Courts may craft procedural remedies to address spoliation issues. See generally *Trevino v. Ortega*, 969 S.W.2d 950, 960 (Tex. 1998) (“Texas courts have broad discretion in instructing juries. Thus, when a party improperly destroys evidence, trial courts may submit a spoliation presumption instruction. . . . [T]he trial court should first find that there was a duty to preserve evidence, the spoliating party breached that duty, and the destruction prejudiced the nonspoliating party.” (citation omitted) (citing *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1975))); see also RONALD E. MALLEEN, *LEGAL MALPRACTICE*, 1877–1878, at § 37:146 (2017 ed.) (surveying legal malpractice cases and addressing spoliation issues); Justice Rebecca Simmons & Michael J. Ritter, *Texas’s Spoliation “Presumption”*, 43 ST. MARY’S L.J. 691, 783–84 (2012) (arguing that the negligent destruction of evidence will rarely, if ever, justify the submission of a spoliation instruction).

13. “There is no single measure of damages” applicable to every legal malpractice case, and “the appropriate measure must be determined by [reference to] the facts and circumstances.” *Smith v. McLaughlin*, 769 S.E.2d 7, 17 (Va. 2015) (quoting Lyle, Siegel, Croshaw & Beale, *P.C. v. Tidewater Capital Corp.*, 457 S.E.2d 28, 33 (Va. 1995)).

14. Some types of harm, such as emotional distress, may not be legally cognizable on the facts of a particular case. See *Long-Russell v. Hampe*, 39 P.3d 1015, 1015 (Wyo. 2002) (“[E]motional damages may be an element of a claim for damages, in the context of a legal malpractice action, under certain limited circumstances, but not the circumstance of mere negligence.”); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. g (AM. LAW. INST. 2000) (“General principles applicable to the recovery of damages for emotional distress apply to legal-malpractice actions. In general, such damages are inappropriate in types of cases in which emotional distress is unforeseeable.”).

15. See, e.g., *Davis v. Brown, Wegner & Berliner, L.L.P.*, No. G050439, 2016 WL 520252, at *5 (Cal. Ct. App. Feb. 9, 2016) (“In a legal malpractice action, [t]he elements of causation and damage are

give the “trier of fact . . . some basis for understanding the causal link between the attorney’s negligence and the client’s harm.”¹⁶ In other words, the facts of the case must persuasively “connect the dots”¹⁷ running from the defendant’s breach of duty to the plaintiff’s claimed damages.¹⁸

particularly closely linked.[.] The plaintiff must prove, by a preponderance of the evidence, that *but for* the attorney’s negligent acts or omissions, [s]he would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred.” (citation omitted)).

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

17. “In some jurisdictions . . . [expert testimony on causation] may be permitted because the expert helps the jury to understand the case by connecting the dots between breach of duty and damages. However, in other cases, the testimony may be rejected as impermissible speculation by the expert.” VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 84–85 (2d ed. 2016) [hereinafter *LEGAL MALPRACTICE LAW IN A NUTSHELL*]. For example:

[S]uppose that a lawyer breached a duty of candor by failing to tell a client that the client was entrusting funds to a person the lawyer knew to have been previously convicted of, and incarcerated for, a felony involving financial fraud. The expert may firmly believe that the client would not have entrusted money to the former felon, and that the funds would not have been lost, had the lawyer disclosed the information to the client. A court might permit such testimony on causation of damages because it does not seem particularly speculative. On those facts, a judge may allow the testimony in order to assist the jury.

In other cases, it is harder for an expert to trace the lines of factual and proximate causation that run between breach of duty and alleged damages. Assume that a lawyer has serious conflicts of interest that are undisclosed and that the transaction in which the lawyer is assisting a client (say, acquisition of certain assets) fails. Although the expert may offer convincing testimony about the conflicts of interest, it may be difficult for the expert to persuade a judge or jury that the expert, based on professional knowledge and experience, knows to a reasonable degree of certainty that, but for the breach of the conflicts rules: the defendant lawyer would have withdrawn; an independent lawyer without conflicts would have been hired; better advice or assistance would have been provided by the new, unconflicted lawyer; and the plaintiff would have been able to consummate the purchase of assets on acceptable terms.

Id. at 83–85.

18. In *Talmage v. Harris*, 486 F.3d 968 (7th Cir. 2007), a legal malpractice plaintiff argued that a lawyer’s negligence meant that a bad faith claim against an insurance company (United Fire) related to the destruction of a shop could not be pursued and sought to recover damages for interest he was charged. The Seventh Circuit wrote:

Talmage’s theory was that United Fire’s delays and under-payments required him to carry large balances on his credit cards, for which he paid a substantial amount of interest. The only evidence Talmage offered on this point was a report from his accounting expert . . . [which] displayed and quantified the interest charges that he paid during the period after the shop was destroyed. It does not, however, segregate charges related to the reconstruction from other charges he may have incurred during that period. This evidence fell so far short of anything revealing a causal link between the interest paid and United Fire’s alleged bad faith that the district court properly kept it from the jury.

Id. at 975.

According to the *Restatement (Third) of the Law Governing Lawyers*, the usual rules for proving causation in tort actions apply to legal malpractice claims.¹⁹ This means that the plaintiff must demonstrate that the defendant's conduct was both a factual cause and a proximate cause of the harm for which compensation is sought.²⁰ These are demanding standards.

To establish factual causation, the plaintiff must normally²¹ prove that the defendant made a substantial and indispensable contribution to the production of the harm.²² That is, the plaintiff must prove that but for the

19. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. a (AM. LAW. INST. 2000) ("Legal-malpractice actions (for negligence . . . and for fiduciary breach . . .) are subject to generally applicable principles of causation and damages."); see also *Shopoff & Cavallo, L.L.P. v. Hyon*, 85 Cal. Rptr. 3d 268, 285 (Ct. App. 2008) ("Actionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence: duty, breach of duty, causation, and damage." (quoting *Loube v. Loube*, 74 Cal. Rptr. 2d 906, 911 (Ct. App. 1998))).

20. Susan S. Fortney and Vincent R. Johnson, *Legal Malpractice* § 5-2.3, in LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (West Academic Press, 2018) ("The usual inquiry into causation has two aspects. Factual causation requires that the defendant's conduct be significantly linked to the damages the plaintiff alleges, and proximate causation requires that it be fair to hold the defendant responsible for damages factually caused.>").

21. In cases involving concurrent causes, proof that either was independently sufficient to cause the harm will be sufficient to establish factual causation, even though neither of the causes made an indispensable contribution. See LEGAL MALPRACTICE LAW IN A NUTSHELL, *supra* note 17, at 114 ("Consider the following scenario: Lawyer #3 and Lawyer #4 are each asked to draft separate provisions for a complex document. Each lawyer does so negligently, and each act of negligence is sufficient to render the document entirely invalid, causing losses to the client. Lawyer #3 does not escape liability because Lawyer #4's conduct would have precipitated the same losses, and vice versa. Because each lawyer's conduct was independently sufficient to cause the invalidity of the document, each lawyer will be held responsible even though it cannot be said that either was a 'but for' cause of the damages."); cf. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 27 (AM. LAW. INST. 2010) ("If multiple acts occur, each of which . . . alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm."). But see *Yanez v. Plummer*, 164 Cal. Rptr. 3d 309, 313 (Ct. App. 2013) ("In a legal malpractice action where, as here, there is a combination of causes, none of which is sufficient without the others to have caused the harm, the test for causation is the 'but for' test: but for the defendant's conduct, the harm would not have occurred." (citing *Viner v. Sweet*, 70 P.3d 1046, 1050 (Cal. 2003))).

22. See *Taylor v. Alonso, Cersonsky & Garcia, P.C.*, 395 S.W.3d 178, 184 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (stating, in a legal malpractice action, that "[t]he test for cause in fact is whether the act or omission was a substantial factor in causing the injury without which the harm would not have occurred" (citing *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995))); see also *McCullough v. Ellis*, No. D063607, 2014 WL 1101445, at *3 (Cal. Ct. App. Mar. 21, 2014) ("To prove the element of causation, a plaintiff generally must show by a preponderance of the evidence that the defendant's breach of duty (e.g., his or her negligent conduct) was a substantial factor in bringing about the plaintiff's harm." (citation omitted) (citing *Leslie G. v. Perry & Assocs.*, 50 Cal. Rptr. 785, 789 (Ct. App. 1996))).

alleged malpractice the harm would not have occurred.²³ “It is appropriate in legal malpractice cases for a plaintiff to use circumstantial evidence to satisfy his or her burden of showing triable issues regarding causation.”²⁴

The proximate causation test means that even if the defendant’s conduct was in fact a cause of harm to the plaintiff, liability will not be levied unless that is fair.²⁵ Courts apply a variety of tests to assess the fairness of imposing liability. They variously speak about whether the harm was foreseeable,²⁶ or within the risks that made the defendant’s conduct tortious,²⁷ or a normal result,²⁸ or one that flowed in a natural and

23. See *Slovensky v. Friedman*, 49 Cal. Rptr. 3d 60, 67 (Ct. App. 2006) (“Causation [in legal malpractice actions] means that but for the attorneys’ negligence the client would have prevailed in the underlying action.” (citing *Kurninij v. Hanna & Morton*, 64 Cal. Rptr. 2d 324, 330 (Ct. App. 2012))); *Diehl v. Konoske*, No. D043362, 2004 WL 1789633, at *7 (Cal. Ct. App. Aug. 11, 2004) (“The ‘but for’ test of causation applies to a claim of legal malpractice in the settlement of litigation” (quoting *Viner*, 70 P.3d at 1052)); *Hilger v. Lerner, Moore, Mammano, Strasser & Silva*, No. E031934, 2003 WL 22457070, at *3 (Cal. Ct. App. Oct. 30, 2003) (detailing the but for test); *Williams v. Wrxall*, 39 Cal. Rptr. 2d 658, 664 (Ct. App. 1995) (“The element of causation demands proof by the plaintiff that the defendant’s negligent conduct resulted in damages, [t]his burden involving, usually, the difficult task of demonstrating that, but for the negligence complained of, the client would have been successful in the prosecution or defense of the action in question.”) (citing *Sukoff v. Lemkin*, 249 Cal. Rptr. 42, 44 (Ct. App. 1988)); see also *Praxis Dev. Grp., Inc. v. Richman, Lawrence, Greene & Chizever*, No. A104874, 2005 WL 1607784, at *10 (Cal. Ct. App. July 8, 2005) (“Praxis . . . lost its rights in the property once the option period expired as specified in the agreement. Consequently, [attorney] Greene’s failure to file a claim against Specialty in the adversary proceeding was not, as a matter of law, the cause of Praxis’s loss of interest in the property or project.”).

24. *Diehl*, 2004 WL 1789633, at *7.

25. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. f (2010) (“[T]he jury [is] entrusted with drawing the lines that release defendants from liability when the harm is too far outside the risk posed by their tortious acts, or the events resulting in harm are so extraordinary that liability would be unfair or substantially disproportionate to the wrongdoing involved.”).

26. See *Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016) (stating that in a legal malpractice action “[b]reach of a duty proximately causes an injury if the breach is a cause in fact of the harm and the injury was foreseeable” (citing *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat’l Dev. and Res. Corp.*, 209 S.W.3d 106, 122 (Tex. 2009))); see also KRITZER & VIDMAR, *supra* note 8, at 49 (“The analysis of proximate cause turns somewhat on foreseeability.”).

27. See generally RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 (AM. LAW. INST 2010) (“An actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”).

28. See generally RESTATEMENT (SECOND) OF TORTS § 443 (“The intervention of a force which is a normal consequence of a situation created by the actor’s negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.”).

continuous unbroken sequence²⁹ from the defendant’s conduct.³⁰ Though usually a less formidable obstacle to recovery than the factual causation but for test, lack of proximate causation bars some legal malpractice claims.³¹

“Actual damages are never presumed in a legal malpractice action[,]”³² and must be proved with reasonable certainty.³³ The evidence must be

29. Cf. *Stanfield*, 494 S.W.3d at 97 (“[In a legal malpractice action] a new and independent, or superseding, cause may ‘intervene [] between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause[.]’ A new and independent cause thus destroys any causal connection between the defendant’s negligence and the plaintiff’s harm, precluding the plaintiff from establishing the defendant’s negligence as a proximate cause.” (first alternation in original) (citation omitted) (citing *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006))); see also KRITZER & VIDMAR, *supra* note 8, at 49 (“The analysis of proximate cause . . . also turns on whether there were any significant intervening causes.”).

30. As I state in my torts casebook:

There are different ways of talking about the fairness of imposing liability—and thus different ways of phrasing the proximate causation inquiry. Some say that it is fair to hold a defendant liable for harm that directly results from tortious conduct, and unfair to impose liability for harm that is indirect, attenuated, remote, or the product of intervening forces Others say that foreseeability, not directness, is the key consideration in proximate causation inquiries, and that it is fair to hold a tortfeasor liable for harm that was foreseeable, but unfair to hold a defendant liable for unforeseeable consequences Some say that the relevant question is whether the injurious result falls within the scope of the risks that made the defendant’s conduct tortious. If so, it is fair to impose liability; but if not, liability should not be imposed. In some cases, determining whether a result was within the scope of the risks created by the defendant’s conduct requires an assessment of whether the negligence had “run its course,” or whether things were “back to normal,” at the time the injury occurred Finally, some say that it is fair to impose liability for results that are “normal” or “ordinary” rather than “bizarre” or “extraordinary. . . .”

None of these four ways of talking about proximate causation—directness, foreseeability, risk, or normality—is inevitably preferable to the others. Each makes sense in certain contexts. On a given set of facts, it may be wise (and indeed necessary under State precedent) to employ one of these rubrics, but on other occasions it may be preferable (and possible) to discuss in different terms whether the defendant should be held liable.

VINCENT R. JOHNSON, *STUDIES IN AMERICAN TORT LAW* 418–19 (5th ed. 2013); see also *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION*, *supra* note 6, at 125–31 (discussing proximate causation in legal malpractice law).

31. See *Stanfield*, 494 S.W.3d at 104 (“Because the unfavorable usury judgment was reversed on the basis of a trial-court error and the record bears no evidence the Attorneys contributed to the error or that the error was reasonably foreseeable under the circumstances, any unrelated negligence of the Attorneys . . . is not the proximate cause of the Neubaums’ appellate litigation costs as a matter of law.”); see also *McPeake v. William T. Cannon, Esquire, P.C.*, 553 A.2d 439, 443 (Pa. Super. Ct. 1989) (holding that an attorney’s allegedly negligent representation of a client could not be the proximate cause of the client’s suicide after a guilty verdict was returned).

32. *Stevens v. McGuireWoods, L.L.P.*, 43 N.E.3d 923, 927 (Ill. 2015).

33. In *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, L.L.P.*, 69 P.3d 965 (Cal. 2003), Justice Kennard wrote in his concurring and dissenting opinion:

sufficient to support a finding, without speculation,³⁴ about the nature and amount of the losses the defendant's conduct caused to the plaintiff. Absent such evidence, a legal malpractice claim will fail.³⁵ The standard of proof is the preponderance of the evidence rule that is applicable to most civil liability claims.³⁶ The term preponderance of the evidence "means what it

Lost punitive damages, like any other item of compensatory damage in a malpractice action, must be proven to a degree of reasonable certainty.

Id. at 976 (Kennard, J., concurring and dissenting) (emphasis added) (citing *Clemente v. State of California*, 707 P.2d 818, 828 (Cal. 1985)). In *Clemente v. State of California*, 707 P.2d 818 (Cal. 1985), the California Supreme Court explained:

In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish "by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit." . . . It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.

Id. at 455 (citations omitted).

34. *See Hand v. Howell, Sarto & Howell*, 131 So. 3d 599, 605 (Ala. 2013) (rejecting a legal malpractice claim because there was no evidence that additional insurance coverage would have been available had the employer been named as a defendant, and that there was "only speculation" that the plaintiff would have secured a higher settlement if the employer had been made a party); *see also Shopoff & Cavallo, L.L.P. v. Hyon*, 85 Cal. Rptr. 3d 268, 286 (Ct. App. 2008) ("Hyon's theories of recovery for legal malpractice . . . suffer from a critical infirmity: they pled speculative damages that might occur in the future, but had not yet occurred. Our high court has repeatedly stressed, ["]The mere breach of a professional duty, causing only *nominal damages, speculative harm, or the threat of future harm—not yet realized—* does not suffice to create a cause of action for negligence . . . ["]" (citation omitted) (quoting *Jordache Enterprises, Inc. v. Brobeck, Phelger & Harrison*, 958 P.2d 1062, 1070 (Cal. 1998))).

35. *See United Genesis Corp. v. Brown*, No. 04-06-00355-CV, 2007 WL 1341358, at *2 (Tex. App.—San Antonio May 9, 2007, no pet.) (finding a conclusory assertion, unsupported by evidence, that alleged malpractice had caused \$75,000 in damages was insufficient to raise a fact issue that would defeat the defendant's motion for summary judgment).

36. Vincent R. Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 FRONTIERS OF L. IN CHINA 321 (2014). In that article, I explained:

In American law, there are three well known, but conceptually different, standards of proof: "preponderance of the evidence," "beyond a reasonable doubt," and "clear and convincing evidence." The "preponderance of the evidence" standard is broadly applied to proof of factual issues in civil litigation. It requires the party bearing the burden of proof (normally the plaintiff, but usually the defendant with respect to affirmative defenses) to prove that the evidence more likely than not supports that party's legal position. Thus, in terms of the common visual

says . . . [namely] that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, *not necessarily in number of witnesses or quantity*, but in its effect on those to whom it is addressed.”³⁷

III. THE LEGAL CERTAINTY STANDARD IN CALIFORNIA

A. *The Origin of “Legal Certainty” in Thompson v. Halvonik*

The term “legal certainty” was first used³⁸ by a California court as a measure for testing whether a plaintiff adduced sufficient evidence that a lawyer’s alleged malpractice caused damages in the 1995 case, *Thompson v. Halvonik*.³⁹ In that lawsuit, a former client asserted legal malpractice and other claims against the defendant’s lawyers, alleging that their delay in prosecuting a claim damaged the client by reducing the value

metaphor, in order for a party to prevail, it is only necessary for the evidence to tilt the scales of justice slightly in that party’s favor.

The standard applied by American courts in criminal matters is the “beyond a reasonable doubt standard.” Because the life or liberty of the defendant is often at stake, all doubts must be resolved against conviction. Only when there is no reasonable doubt as to the defendant’s guilt will criminal responsibility be imposed. In terms of the visual metaphor, tilting the scales only slightly against the defendant comes nowhere close to what the law requires. Rather, the scales must shift so extremely against the defendant that there is no reasonable doubt as to the defendant’s guilt.

Between these two very different standards of proof—the “preponderance of the evidence” standard and the “beyond a reasonable doubt” standard—there is an intermediate view, “clear and convincing evidence.” This third standard of proof requires more than a probability, but less than the elimination of all reasonable doubts. Thus, it has been said that “the clear and convincing evidence standard does not refer to the quantity or kind of evidence presented, but to the apparent probability that the assertion is true: the party with the burden of proof must convince the trier of fact that it is highly probable that the facts he alleges are correct.” In terms of the visual metaphor, the evidence must tilt the scales of justice clearly and convincingly in favor of the party who bears the burden of proof.

Id. at 341–42 (footnotes omitted).

37. *Glage v. Hawes Firearms Co.*, 276 Cal. Rptr. 430, 435 (Ct. App. 1990) (quoting *People v. Miller*, 154 P. 468, 469 (Cal. 1916)) (holding it was prejudicial misconduct for jurors to refer to the dictionary for a definition of the word “preponderance”).

38. One earlier case used the term “legal certainty” in discussing a statute requiring court approval to file a complaint containing civil conspiracy allegations against attorneys. *See Hung v. Wang*, 11 Cal. Rptr. 2d 113, 128 (Ct. App. 1992) (“[I]n federal courts, the absence of the minimum amount-in-controversy must be established to a ‘legal certainty’ in order to protect against violation of the right to jury trial.” (citation omitted) (citing *Walker v. Superior Court*, 279 Cal. Rptr. 576, 584 (Ct. App. 2005) (en banc))).

39. *Thompson v. Halvonik*, 43 Cal. Rptr. 2d 142 (Ct. App. 1995).

of the recovery that was obtained.⁴⁰ The Court of Appeal affirmed a judgment that the client could not recover in the malpractice action because there was no evidence⁴¹ establishing that the delay had caused any damage. In expressing that conclusion in light of its review of the evidence, the court expansively wrote:

None of this evidence does more than suggest speculative harm, because it does not demonstrate that but for respondents' delay, appellant's underlying case would have settled at all, let alone at an earlier date, for the same amount, or with the same structure. "Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty . . ." Even if appellant would have benefited by receiving money for therapy and other care at an earlier date, absent evidence that Vesper would have settled with respondents under exactly the same circumstances it settled with the Padway firm, actual harm from respondents' conduct is only a subject of surmise, given the myriad of variables that affect settlements of medical malpractice actions. "[T]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages."⁴²

There is no reason to think that the *Thompson* court, or any of the decisions it cited, intended to hold that a legal malpractice plaintiff must establish causation of damages by any standard more demanding than preponderance of the evidence. In *Thompson*, the court simply concluded that the evidence of causation of damages was "speculative."⁴³ It is always true that causation of damages cannot be speculative and must be established with reasonable certainty⁴⁴ (namely, reasonable certainty demonstrated by a preponderance of the evidence, more-likely-than-not

40. *See id.* at 144 ("[Appellant] alleged generally that respondents failed to act with reasonable care and diligence in prosecuting his case, resulting in loss of value of his claim . . .").

41. *See id.* at 145 ("[S]ummary judgment was properly granted because of the absence of evidence of damage resulting from any delay in prosecuting the action.").

42. *Id.* at 146 (citation omitted) (quoting *Agnew v. Parks*, 343 P.2d 118, 125–26 (Cal. Ct. App. 1959); *Campbell v. Magana*, 8 Cal. Rptr. 32, 36 (Ct. App. 1960); *Williams v. Wraxall*, 39 Cal. Rptr. 2d 658, 664 (Ct. App. 1995)).

43. *Id.*

44. *See, e.g., Ferguson v. Lief, Cabraser, Heimann & Bernstein, L.L.P.*, 69 P.3d 965, 976 (Cal. 2003) (Kennard, J., concurring and dissenting) ("Lost punitive damages, like any other item of compensatory damages in a malpractice action, must be proven to a degree of reasonable certainty.").

showing). There are sometimes⁴⁵ too many logical gaps in a legal malpractice plaintiff’s evidence to allow this standard to be met.

In *Agnew v. Parks*,⁴⁶ a case cited by *Thompson*, which involved an allegedly fraudulent conspiracy arising out of a failed medical malpractice action, the court wrote that:

Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty and we conclude that the difficulty in ascertaining damages herein is insurmountable[,] they are too remote, speculative and uncertain [and] the damage depends on the act of a third person or the happening of a certain event.⁴⁷

The *Agnew* court made no mention of the preponderance of the evidence standard of proof that is generally applicable to civil actions. It is therefore unreasonable to think that the court intended to hold that a preponderance of the evidence is insufficient to prove causation of damages in a legal malpractice action, and that something more compelling is required. Instead, a reasonable reading of the opinion is that the court found that the plaintiff had failed to produce evidence capable of satisfying the preponderance standard. The *Agnew* court found that the “plaintiff’s alleged loss [of expenditures for court costs and legal fees in the earlier failed medical malpractice litigation was] too uncertain, remote and speculative to constitute a proper basis for computation of damages”⁴⁸ The court noted, somewhat incredulously, that in order to prevail the plaintiff would have to show that “Parks [a doctor who had testified in the earlier medical malpractice action] actually gave prejudiced testimony, his fraud caused the

45. *E.g.*, *Starwood Mgt., L.L.C. By and Through Gonzalez v. Swaim*, 530 S.W.3d 688, 697–98 (Tex. App.—Dallas 2016, *rev’d* 530 S.W.3d 673 (Tex 2017)) (“Expert testimony fails to create a fact issue if there is ‘simply too great an analytical gap between the data and the opinion proffered.’ This Court is not required ‘to ignore fatal gaps in an expert’s analysis or assertions.’ In a legal-malpractice case, even where an attorney-expert is qualified to give expert testimony, his affidavit ‘cannot simply say, ‘Take my word for it. . . .’” (footnotes omitted) (citing *Elizondo v. Krist*, 415 S.W.3d 259, 264 (Tex. 2013))).

46. *Agnew v. Parks*, 343 P.2d 118 (Cal. Ct. App. 1959).

47. *Id.* at 125–26 (citations omitted) (citing *Taylor v. Hopper*, 276 P. 990, 991 (Cal. 1929); *Ramsey v. Penry*, 128 P.2d 399 (Cal. Ct. App. 1942); *Campbell v. Birch*, 122 P.2d 902 (Cal. 1942); *Commercial Union Assur. Co. v. Pacific Gas & Electric Co.*, 31 P.2d 793 (Cal. 1934); *Griffith Co. v. San Diego College for Women*, 289 P.2d 476 (Cal. 1955) (en banc); *McQuilkin v. Postal Tel. Cable Co.*, 151 P. 21 (Cal. Ct. App. 1915); *McGregor v. Wright*, 3 P.2d 624 (Cal. Ct. App. 1931)).

48. *Id.* at 126.

trial judge to enter the judgment of nonsuit against her, and had the cause gone to the jury she would have prevailed and in a definite amount.”⁴⁹

The other two cases cited by the *Thompson* court also provide no support for the idea that causation of damages in a legal malpractice action must be proven by anything more than a preponderance of the evidence. *Campbell v. Magana*⁵⁰ never used the terms “legal certainty” nor “preponderance of the evidence.” It merely held that the plaintiff failed to show that the defendant’s alleged malpractice had caused a loss of the settlement value of the case. According to the court, the record showed “that the best offer of settlement that plaintiff ever had was \$350 and she declared ‘she would settle for nothing less than \$100,000.’”⁵¹ On those facts, the court concluded, “[a]ny possibility of adjustment outside of court plainly fell in the category of speculation, conjecture and contingency.”⁵²

The other case cited in *Thompson*, *Williams v. Wraxall*,⁵³ also did not use the terms “legal certainty” or “preponderance of the evidence.” However, what *Williams* does say strongly supports the idea that the preponderance of the evidence standard—not some higher standard set by “legal certainty”—governs proof of causation of damages in a legal malpractice action. As the *Williams* court explained:

A plaintiff cannot recover damages based upon speculation or even a mere possibility that the wrongful conduct of the defendant caused the harm. Evidence of causation must rise to the level of a reasonable probability based upon competent testimony. “A possible cause only becomes ‘probable’ when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action.” The defendant’s conduct is not the cause in fact of harm “where the evidence indicates that there is less than a probability, i.e., a 50-50 possibility or a mere chance,” that the harm would have ensued.⁵⁴

49. *Id.* at 125. The *Agnew* court did not find that the \$250 the plaintiff spent to engage an expert witness was “subject to the same objections” as being too uncertain, remote and speculative to constitute a proper basis for computation of damages. *Id.* at 126.

50. *Campbell v. Magana*, 8 Cal. Rptr. 32 (Ct. App. 1960).

51. *Id.* at 36.

52. *Id.*

53. *Williams v. Wraxall*, 39 Cal. Rptr. 2d 658 (Ct. App. 1995).

54. *Id.* at 665 (citations omitted) (quoting *Duarte v. Zachariah*, 28 Cal. Rptr. 2d 88, 91 (Ct. App. 1994)); see also JUDICIAL COUNCIL OF CALIFORNIA, CIVIL JURY INSTRUCTIONS 3 (LexisNexis 2018 ed.) (“To simplify the instructions’ language, the drafters avoided the phrase

Williams held that the plaintiff failed to prove that there was a reasonable probability that he would have been acquitted at his first trial if certain test results and expert testimony had been made available for use in his defense.⁵⁵

B. *Subsequent Decisions of the California Court of Appeal*

Subsequent to *Thompson*, most of the cases at the California Court of Appeal that have mentioned legal certainty have merely quoted or paraphrased a sentence from the *Thompson* case using that term without exploring the relationship between legal certainty and the preponderance of the evidence standard.⁵⁶ Generally, the need for legal certainty is asserted in opinions arising from cases where the plaintiff showed only a possibility⁵⁷ (often a weak possibility)⁵⁸ or provided no evidence at all⁵⁹ that the defendant’s alleged malpractice caused harm.

preponderance of the evidence and the verb preponderate. The instructions substitute in place of that phrase reference to evidence that is ‘more likely to be true than not true.’”)

55. *Williams*, 39 Cal. Rptr. at 665–66.

56. *See Jaros v. Peterson & Chapman*, No. D039877, 2003 WL 21783833, at *6 (Cal. Ct. App. Aug. 4, 2003) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty” (citation omitted) (quoting *Thompson v. Halvonik*, 43 Cal. Rptr. 2d 142, 146 (Ct. App. 1995)); *Poway Land, Inc. v. Hillyer & Irwin*, No. D038642, 2002 WL 31623603, at *6 n.3 (Cal. Ct. App. Nov. 21, 2002) (“Damage to be subject to a proper award must be such as follows the act complained of as a *legal certainty*.” (quoting *Marshak v. Ballesteros*, 86 Cal. Rptr. 2d 1, 3 (Ct. App. 1999))).

57. *See, e.g., Filbin v. Fitzgerald*, 149 Cal. Rptr. 3d 422, 437 (Ct. App. 2012) (“[W]hatever Fitzgerald may have done or failed to do, the Filbins presented no evidence showing to a legal certainty that those acts or omissions proximately caused any injury. There is certainly no basis for believing that a greater settlement was lost.” (citing *Viner v. Sweet*, 70 P.3d 1046, 1053 (Cal. 2003))).

58. *Cf. Lewellen v. Phillips*, No. C062277, 2010 WL 4851362, at *8 (Cal. Ct. App. Nov. 30, 2010) (“[I]t was incumbent upon Wade to provide nonspeculative evidence that, had she not settled, she would have come out better financially Wade utterly failed to make this showing.” (citation omitted) (citing *Marshak*, 86 Cal. Rptr. 2d at 4)); *Johnson v. Greenberg*, No. B197894, 2008 WL 2298464, at *4 (Cal. Ct. App. June 5, 2008) (“[I]he complaint includes only the barest allegation concerning the settlement, which is that it happened. There are no allegations about the terms of the settlement or the facts and circumstances under which it was reached. Even when read liberally, the complaint fails to allege that respondents’ failure to timely file the *lis pendens* affected the settlement in any way.” (emphasis added)).

59. *See Davis v. Brown, Wegner & Berliner, L.L.P.*, No. G050439, 2016 WL 520252, at *6 (Cal. Ct. App. Feb. 9, 2016) (“Davis failed to introduce evidence to suggest she would have fared better in this arbitration matter but for the alleged conduct or actions of defendants. Although she claims she would have received more in an award for attorney fees, she offers no evidence in support of the contention.”); *Nguyen v. Margolis*, No. H038268, 2014 WL 1648888, at *7 (Cal. Ct. App. Apr. 25, 2014) (“Here, the damages that Nguyen alleged flowed from her lender’s refusal to modify her loan and from the foreclosure that followed. She provided no evidence establishing a connection between

For example, in *Poway Land, Inc. v. Hillyer & Irwin*,⁶⁰ a case involving a misdirected fax, the Court mentioned in a footnote the need for legal certainty.⁶¹ However, the facts of the case fell far short of proving causation by a preponderance of the evidence. As the court explained:

The mere fact that the case may have been potentially worth more than the amount of the settlement is not sufficient to satisfy the damages element of a legal malpractice claim or to survive summary judgment. [Plaintiff's expert] MacAuley's declaration, given its failure to criticize [defendant] Hillyer & Irwin's analysis of the various disputed issues encompassed by the settlement or to explain in what manner this analysis was affected by the mistaken fax, provides only an opinion of speculative harm and damages. Damages and harm that are merely speculative will not support a legal malpractice claim.⁶²

As the discussion above suggests, several of the cases mentioning the need for legal certainty have involved nothing more than claims relating to allegedly lost settlement opportunities where the malpractice plaintiffs failed

any alleged misrepresentation by Margolis and the failed loan modification and ensuing foreclosure."); *Smith v. Choate*, No. D047002, 2006 WL 2130430, at *3 (Cal. Ct. App. Aug. 1, 2006) (holding that the plaintiff "provided no evidence a triable issue existed regarding damages").

60. *Poway Land, Inc. v. Hillyer & Irwin*, No. D038642, 2002 WL 31623603 (Cal. Ct. App. Nov. 21, 2002).

61. *Id.* at *6 n.3 (citing *Marshak v. Ballesteros*, 86 Cal. Rptr. 2d 1, 3 (Ct. App. 1999)).

62. *Id.* at *6 (citation omitted) (citing *Marshak*, 86 Cal. Rptr. 2d at 3).

to show that a settlement could have been reached.⁶³ For example, in *Marshak v. Ballesteros*,⁶⁴ the court wrote:

Damage to be subject to a proper award must be such as follows the act complained of as a *legal certainty*.

63. See *Namikas v. Miller*, 171 Cal. Rptr. 3d 23, 29 (Ct. App. 2014) (“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[,] . . . which are inherently speculative.” (citing *Filbin v. Fitzgerald*, 149 Cal. Rptr. 3d 422, 432 (Ct. App. 2012))); *Bergen v. Murphy*, Pearson, Bradley & Feeney, P.C., No. B201217, 2009 WL 1845219, at *6 (Cal. Ct. App. June 29, 2009) (“[P]laintiff failed to establish . . . that he would have recovered more through trial or settlement, absent the alleged impact of defendants’ negligence on the fees case.”); *Fuller v. Ceasar*, No. A117805, 2008 WL 1875954, at *7 (Cal. Ct. App. Apr. 29, 2008) (“Fuller produced no evidence showing defendants would have settled for more than they did, or that following a trial, she would have obtained a judgment more favorable than the settlement.” (citing *Herrington v. Superior Court*, 132 Cal. Rptr. 2d 658, 662 (Ct. App. Apr. 11, 2003))); *Smith*, 2006 WL 2130430, at *4 (“Here, as in a similar case, ‘actual harm from respondents’ conduct is only a subject of surmise, given the myriad of variables that affect settlements of . . . malpractice actions.” (alteration in original) (quoting *Thompson v. Halvonik*, 43 Cal. Rptr. 2d 142, 146 (Ct. App. 1995))); *Smith v. Rosenberg*, No. E034199, 2004 WL 1447939, at *8 (Cal. Ct. App. June 29, 2004) (“[I]o proceed to trial on her malpractice claim, plaintiff had to present evidence on which a reasonable trier of fact could find, by a preponderance of the evidence, that if the stipulated judgment had been vacated plaintiff could have negotiated a more favorable settlement or achieved a better result after a trial However, *nowhere* . . . did plaintiff even assert that she would have received \$400,000 or any sum exceeding what she actually received.”); *Kolev v. Prescott*, No. G032337, 2004 WL 1260028, at *3 (Cal. Ct. App. June 9, 2004) (“[I]t was not enough for plaintiff to allege facts showing ‘the case was worth more than he settled it for.’ Plaintiff had to allege facts showing 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.’” (citation omitted) (citing *Marshak*, 86 Cal. Rptr. 2d at 4)); *Faerber v. Hyde Law Corp.*, No. A103678, 2004 WL 838571, at *7 (Cal. Ct. App. Apr. 20, 2004) (“Faerber has failed to produce any evidence that Wilding would have offered a greater amount in settlement or that he would have achieved a better result at trial but for respondents’ alleged failure to fully prepare the underlying action for trial.” (footnote omitted)); *Hilger v. Lerner, Moore, Mammano, Strasser & Silva*, No. E031934, 2003 WL 22457070, at *7 (Cal. Ct. App. Oct. 30, 2003) (“There is nothing in plaintiff’s evidence that shows that, had the case gone to trial, plaintiff could have achieved a result better than \$10,000 in new money for his claims.”); *Barnard v. Langer*, 1 Cal. Rptr. 3d 175, 182 (Ct. App. 2003) (“Barnard did not and could not prove damages, which in this context required proof that, but for the Perona firm’s negligence, the inverse condemnation action would have had a better outcome, either by a higher settlement or at trial.”); *Shure ex rel. Shure v. Fox*, No. B156375, 2003 WL 190787, at *5 (Cal. Ct. App. Jan. 29, 2003) (“[A]ppellants have failed to create a triable issue of fact as to whether a judgment would have been entered in their favor for more than \$2 million or as to whether Collins and Cedars would have settled with them for more than \$2 million were it not for respondents’ alleged errors and omissions.”); *Ins. Co. of the W. v. Haight Brown & Bonesteel, L.L.P.*, Nos. C037535, C038478, 2002 WL 31630879, at *8 (Cal. Ct. App. Nov. 22, 2002) (“Plaintiff introduced no evidence whatsoever of any settlement negotiations nor did plaintiff even outline its efforts to obtain that information. There is no evidence to support plaintiff’s claim that postjudgment negotiations would have led to a settlement at a cost less than the jury’s verdict.”).

64. *Marshak v. Ballesteros*, 86 Cal. Rptr. 2d 1 (Ct. App. 1999).

. . . Breach of duty causing only speculative harm is insufficient to create such a cause of action.

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.⁶⁵

The language of legal certainty is often nothing more than a substitute for saying that the plaintiff's proof of damages cannot rest on speculation or conjecture.⁶⁶ In some instances, the Court of Appeal has carefully differentiated the elements of damages and causation, stating, for example, that it was not necessary to "reach the issue of causation because [the court was] affirming on the basis of failure to present as a matter of law evidence of damages that are not speculative."⁶⁷ In other instances, the Court of Appeal has found that evidence of both causation and damages was lacking.⁶⁸

65. *Id.* at 3–4 (citations omitted) (first quoting *Agnew v. Parks*, 343 P.2d 118, 125 (Cal. 1959); and then citing *Budd v. Nixen*, 491 P.2d 433, 436 (Cal. 1971)).

66. See *Hilger*, 2003 WL 22457070, at *3–7 (“[D]amages to be subject to a proper award must be such as follows the act complained of as a *legal certainty*. . . . [But here] plaintiff's damages claims are nothing more than speculation and conjecture.” (first alteration in original) (citation omitted) (quoting *Barnard*, 1 Cal. Rptr. 3d at 182)); see also *Farnham v. William Rehwal, Inc.*, No. B170124, 2005 WL 757627, at *13 (Cal. Ct. App. Apr. 5, 2005) (“[I]n this case Farnham presented only a ‘wish list’ of damages and alternative scenarios with only speculative outcomes.”).

67. *Faerber*, 2004 WL 838571, at *5.

68. See *Smith*, 2004 WL 1447939, at *4–7 (“[P]laintiff was required to present evidence on which a reasonable trier of fact could find, by a preponderance of the evidence that (1) if the motion to vacate had been pursued it would have been granted (causation), and (2) if the stipulated judgment had been vacated, plaintiff would have received a more favorable disposition either by a new settlement or after a trial (damages)” (citation omitted) (citing *Aguilar v. Atlantic Richfield Co.*, 24 P.3d 493, 510 (Cal. 2001))). The court found that the “plaintiff failed to raise a triable issue on the element of damages.” *Id.*

C. California Supreme Court Precedent

The sole decision of the California Supreme Court to use the term “legal certainty” in relation to proof of damages in a legal malpractice action is *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*.⁶⁹ In holding that “lost punitive damages” are not recoverable in a legal malpractice action, the *Ferguson* court stated:

[P]ermitting recovery of lost punitive damages would violate the public policy against speculative damages. “[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable.” “Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty[.]”

Because an award of punitive damages constitutes a moral determination, lost punitive damages are too speculative to support a cause of action for attorney negligence. In determining compensatory damages in a legal malpractice action, “[t]he jury’s task is to determine what a reasonable judge or fact finder would have done[.]” in the underlying action absent attorney negligence. The standard is “an *objective* one.” Lost punitive damages, however, are not amenable to an objective determination. “[U]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a [‘fact’] [‘tried’] by the jury.[.]” Instead, a jury’s “imposition of punitive damages is an expression of its moral condemnation.” . . . Thus, to award lost punitive damages, the trier of fact must determine what *moral* judgment would have been made by a reasonable jury. Because moral judgments are inherently subjective, a jury cannot objectively determine whether punitive damages should have been awarded or the proper amount of those damages with any legal certainty. Lost punitive damages are therefore too speculative to support a cause of action for legal malpractice.⁷⁰

It seems clear from the quoted language that the California Supreme Court views “legal certainty” as a prohibition against speculation regarding

69. *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, L.L.P.*, 69 P.3d 965 (Cal. 2003).

70. *Id.* at 971–72 (citations omitted) (first quoting *In re Easterbrook*, 244 Cal. Rptr. 652, 654 (Ct. App. 2003); then quoting *Agnew*, 343 P.2d at 118; then quoting *Matteo Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 780, 793 (Ct. App. 1997); then quoting *id.*; then quoting *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 535 U.S. 424, 437 (2001); then quoting *id.* at 432; then citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. h (AM. LAW. INST. 2000); then citing *In re Easterbrook*, 244 Cal. Rptr. at 654; and then citing *Agnew*, 343 P.2d at 125–26).

whether particular damages were caused by legal malpractice. However, there is no indication in *Ferguson* that the court sought to embrace any standard of proof other than the preponderance of the evidence rule. Indeed, one of the rationales offered by the court in support of its holding that “lost punitive damages” are not recoverable clearly recognized that recovery of compensatory damages in legal malpractice cases is governed by the preponderance of the evidence standard.⁷¹ As the court explained:

[T]he complex standard of proof applicable to claims for lost punitive damages militates against the recovery of such damages. Because the standards of proof governing compensatory and punitive damages are different (compare Evid. Code, § 115 [“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence”] with Civ. Code, § 3294, subd. (a) [plaintiff may recover punitive damages only “where it is proven by *clear and convincing evidence* that the defendant has been guilty of oppression, fraud, or malice”]), the standard of proof for lost punitive damages will be, in essence, a standard within a standard. To recover lost punitive damages, a plaintiff must prove *by a preponderance of the evidence* that but for attorney negligence the jury would have found *clear and convincing evidence* of oppression, fraud or malice. In light of this complex standard, “[t]he mental gymnastics required to reach an intelligent verdict would be difficult to comprehend much less execute.” This pragmatic difficulty provides additional support for barring recovery of lost punitive damages in a legal malpractice action.⁷²

A leading decision of the California Supreme Court in the field of legal malpractice law, decided shortly after the *Ferguson* case, makes clear that, despite its reference to legal certainty in *Ferguson*, the Court remained committed to the preponderance of the evidence standard for proof of causation in legal malpractice cases. In *Viner v. Sweet*,⁷³ the California Supreme Court wrote:

Determining causation always requires evaluation of hypothetical situations concerning what might have happened, but did not.

71. See *Ferguson*, 69 P.3d at 972 (“To recover lost punitive damages, a plaintiff must prove *by a preponderance of the evidence* that but for attorney negligence the jury would have found *clear and convincing evidence* of oppression, fraud or malice.”).

72. *Id.* at 972 (citation omitted) (quoting *Wiley v. Cty. of San Diego*, 966 P.2d 983, 990 (Cal. 1998)).

73. *Viner v. Sweet*, 70 P.3d 1046 (Cal. 2003).

. . . . In transactional malpractice cases, as in other cases, the plaintiff may use circumstantial evidence to satisfy his or her burden. An express concession by the other parties to the negotiation that they would have accepted other or additional terms is not necessary. And *the plaintiff need not prove causation with absolute certainty. Rather, the plaintiff need only* [“introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.”]⁷⁴

D. California Jury Instructions

The California Judicial Council pattern jury instructions,⁷⁵ in their supporting notes,⁷⁶ mention the *Filbin* case decided by the Court of Appeal in 2012, which talked about legal certainty.⁷⁷ However, the blackletter rule for jury instructions in California says nothing about legal certainty. Instead, the proposed instruction for “Damages for Negligent Handling of a Legal Matter” states simply:

To recover damages from [name of defendant], [name of plaintiff] must prove that [he/she/it] would have obtained a better result if [name of defendant] had acted as a reasonably careful attorney. [Name of plaintiff] was not harmed by [name of defendant]’s conduct if the same harm would have occurred anyway without that conduct.⁷⁸

IV. PREPONDERANCE OF THE EVIDENCE IS THE PROPER STANDARD

The principles of legal malpractice law are meant to protect both clients and lawyers.⁷⁹ On the one hand, clients need protection from the unnecessary losses that result from lawyers’ carelessness, as well as from

74. *Id.* at 1052–53 (emphasis added).

75. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 54.

76. *See id.* at 497 (“Damage to be subject to a proper award must be such as follows the act complained of as a *legal certainty*” Conversely, “[t]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages.” (quoting *Filbin v. Fitzgerald*, 149 Cal. Rptr. 3d 422, 431–32 (Ct. App. 2012))).

77. *See, e.g., Filbin*, 149 Cal. Rptr. 3d at 432 (“The requirement that a [legal malpractice] plaintiff need prove damages to ‘a legal certainty’ is difficult to meet in any case.”).

78. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 54, at 496.

79. *See* LEGAL MALPRACTICE LAW IN A NUTSHELL, *supra* note 17, at 84–85 (“[L]egal malpractice law attempts to strike a fair balance between the public’s interest in consumer protection and the legal profession’s need to exercise discretion in representing clients.”).

forms of lawyer misconduct more blameworthy than mere negligence, such as theft,⁸⁰ fraud,⁸¹ and physical abuse.⁸² On the other hand, lawyers must be protected from being second guessed in malpractice litigation based on conduct that was a reasonable exercise of discretion under the facts and circumstances that existed when action was required, from claims of responsibility for unsuccessful client business transactions which fail for reasons unrelated to the lawyers' performance,⁸³ and from liability for judicial errors they did not cause.⁸⁴

For legal malpractice litigation to remain a viable system for resolving lawyer-client disputes, each side must have a fair chance of winning when the facts and equities are on their side. Otherwise, on the one hand, clients might resort to violence against lawyers and other self-help remedies, just as patients today in China, who are deprived of viable medical malpractice remedies, hire gangs to beat up doctors⁸⁵ and otherwise disrupt hospital business.⁸⁶ And, on the other hand, lawyers might decline to represent some types of clients, just as it is said that doctors in the United States

80. *See* Davis v. Crafts, No. 44582, 2017 WL 2838133, at *1 (Idaho Ct. App. July 3, 2017) (involving the alleged theft of a coin collection).

81. *See* DLA Piper, L.L.P. (US) v. Linegar, No. 11-12-00201-CV, 2017 WL 6559658, at *2 (Tex. App.—Eastland Dec. 21, 2017, no pet.) (affirming a judgment for a plaintiff who alleged fraud and other theories of attorney liability).

82. *See* Stender v. Blessum, 897 N.W.2d 491, 497 (Iowa 2017) (affirming a judgment for a client based on assault and battery).

83. *Cf.* Panther v. Mazzarella, No. D049332, 2008 WL 152756, at *17 (Cal. Ct. App. Jan. 17, 2008) (“[T]he record does not support plaintiff’s claims that this interest was predominantly lost through legal malpractice, rather than through other business factors . . .”).

84. *See* Stanfield v. Neubaum, 494 S.W.3d 90, 104 (Tex. 2016) (“[A]ttorneys should be liable when their incompetence prevents vindication of their clients’ rights; however, attorneys cannot guarantee a perfectly functioning judiciary or an error-free trial. Attorneys should be responsible for harm they actually cause—not harm caused by judicial error.”).

85. *See* XIAOWEI YU, PREVENTING MEDICAL MALPRACTICE AND COMPENSATING VICTIMISED PATIENTS IN CHINA: A LAW AND ECONOMICS PERSPECTIVE 9–11 (Intersentia 2017) (“In China, there are often ‘incidents of violence or protest arising from medical disputes.’ . . . Some of these coercive measure are extremely violent, such as assault and battery, false imprisonment and vandalism. . . . Besides reports in the Chinese media, violence against Chinese doctors has also made the headlines in English media . . .” (footnotes omitted)).

86. *See id.* at 9 (discussing hospital disturbances, including disruptions caused by “professional hospital trouble makers,” who work on a contingent fee basis and share the settlement paid by hospitals to aggrieved patients or family members to secure an end to the disruptions).

stopped practicing obstetrics⁸⁷ when, a generation ago, medical malpractice principles allegedly imposed liability too readily for birth-related maladies.⁸⁸

In legal malpractice litigation, the preponderance of the evidence standard operates against a backdrop of substantive rules which already go far⁸⁹—many would say too far⁹⁰—to protect lawyers from liability.⁹¹ Expert testimony is ordinarily required to establish the standard of care, and many cases fail due to the plaintiff’s inability to meet this requirement.⁹² Strict privity rules, in numerous states, bar claims by most nonclients.⁹³ Suits by clients may flounder because the matter in question fell outside the

87. See Lauren Elizabeth Rallo, *The Medical Malpractice Crisis—Who Will Deliver the Babies of Today, the Leaders of Tomorrow?*, 20 J. CONTEMP. HEALTH L. & POL’Y 509, 509 (2004) (“Skyrocketing medical liability premiums are forcing doctors in high-risk specialty areas, such as obstetrics, to stop practicing medicine.”).

88. “The [Texas] legislature enacted the Medical Liability Act to remedy the so-called medical malpractice insurance ‘crisis’ arising from an inordinate increase in the frequency of health care liability claims and the amounts being paid out on these claims, resulting in a shortage of affordable medical malpractice insurance.” Darrell L. Keith, *The Texas Medical Liability and Insurance Improvement Act—A Survey and Analysis of Its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 266 (1984).

89. Cf. Susan S. Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033, 2056 (2017) (“[I]t is time to reexamine whether our civil liability regime provides meaningful remedies to numerous consumers injured by attorney misconduct.”); Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 491 (2008) (“It is much harder to prove legal malpractice than medical malpractice. This is because the legal profession has enjoyed several unique advantages as defendants in malpractice actions, and doctrinal changes that have been applied in medical malpractice have been barred or adopted much more slowly in legal malpractice.”).

90. See Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the “Captured” Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 457 (2002) (“[C]onsumers of legal services have been left with the meager rights provided by unmodified nineteenth-century doctrine.”).

91. See generally Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 65–66 (2008) (explaining that exoneration and innocence requirements “are simply doctrinal overkill. . . . The difficulty of finding an attorney to initiate a malpractice action, the nature of the jury system, the demanding requirements of the ‘trial within a trial’ causation analysis, and the rules that protect a lawyer’s exercise of discretion all conspire to defeat a malpractice claim raised by one charged with or convicted of a crime” (footnotes omitted)).

92. See, e.g., *Straass v. DeSantis*, No. D064040, 2014 WL 3749986, at *8 (Cal. Ct. App. 2014) (“[T]he conduct Karen alleges is neither so clearly malpractice nor so within the common knowledge of laypersons as to remove it from the general rule requiring expert testimony in legal malpractice actions. Qualified expert testimony is required.”).

93. See *Baker v. Wood, Ris & Hames, P.C.*, 364 P.3d 872, 874 (Colo. 2016) (“We decline to abandon the strict privity rule, and we reaffirm that where non-clients . . . are concerned, an attorney’s liability is generally limited to the narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation.”); see also *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1172 (Ohio 2008) (“We decline to change the rule of law in this state that bars an action for negligence against a lawyer by a plaintiff who is not in privity with the client.”).

scope of the representation,⁹⁴ involved a permissible exercise of lawyer discretion,⁹⁵ or resulted in nothing more than the client's "loss of chance" to secure a more favorable result.⁹⁶ Even otherwise meritorious claims may produce no recovery because of a statute of limitations defense.⁹⁷ In addition, compensation for harm caused by negligence will be barred or reduced if the plaintiff's own carelessness contributed to the harm.⁹⁸

To this formidable array of rules which protect lawyers from liability, it is unnecessary and inappropriate to add a standard mandating that a legal

94. See *Ratonel v. Roetzel & Andress, L.P.A.*, 67 N.E.3d 775, 777 (Ohio 2016) ("To prove that an attorney owed a duty to a plaintiff with regard to a specific legal matter, the plaintiff must establish that the scope of the attorney-client relationship included the specific legal matter."); *Svaldi v. Holmes*, 986 N.E.2d 443, 447 (Ohio Ct. App. 2012) ("[A]n attorney only owes a duty to a client if the alleged deficiencies in his performance relate to matters within the scope of representation."); *Blakely v. Kahrs*, No. 74765-7-I, 2017 WL 1534133, at *1 (Wash. Ct. App. Apr. 24 2017) (affirming the dismissal of claims for legal malpractice and breach of fiduciary duty because the plaintiff failed "to show that his attorney was obligated to assist him with legal matters outside the scope of his representation as defined by a court order"); see also Vincent R. Johnson & Stephen C. Loomis, *Malpractice Liability Related to Foreign Outsourcing of Legal Services*, 2 ST. MARY'S J. ON LEGAL MAL. & ETHICS 262, 288 (2012) ("A lawyer owes a client numerous demanding duties, such as competence, diligence, and loyalty. However, those important obligations extend only as far as the scope of the representation." (footnote omitted)).

95. See *Smith v. McLaughlin*, 769 S.E.2d 7, 14 (Va. 2015) ("[I]f an attorney exercises a 'reasonable degree of care, skill, and dispatch' while acting in an unsettled area of the law . . . then the attorney does not breach the duty owed to the client." (citing *Ripper v. Bain*, 482 S.E.2d 832, 835–36 (Va. 1997); *Heyward & Lee Constr. Co. v. Sands, Anderson, Marks & Miller*, 453 S.E.2d 270, 272 (Va. 1995))); *Kandalaft v. Peters*, Nos. 267471, 267497, 2007 WL 1138395, at *3 (Mich. Ct. App. Apr. 17, 2007) ("[A]n appellate attorney's decision pertaining to which issues to raise is a matter of judgment and generally does not comprise grounds for claiming malpractice if the attorney acts in good faith and exercises reasonable care." (citing *Simko v. Blake*, 532 N.W.2d 842 (Mich. 1995))).

96. See *Drollinger v. Mallon*, 260 P.3d 482, 491 (Or. 2011) (en banc) ("[T]he loss of chance doctrine should not be imported into the legal malpractice context. . . . [A]ny allegation in plaintiff's complaint that defendants' negligence caused plaintiff to lose his *chance* for relief from his convictions would be legally insufficient."); KRITZER & VIDMAR, *supra* note 8, at 181–83 (discussing loss of a chance in lawyer professional liability cases); see also *id.* at 183 ("[S]ome states require the plaintiff to produce an expert who will testify that the plaintiff would have won at trial, and absent that testimony the defendant will win a summary judgment motion, ending the case.").

97. See *Neurorepair, Inc. v. Nath Law Grp.*, No. 09CV0986 JAH (WMC), 2011 WL 13042824, at *10 (S.D. Cal. July 13, 2011), *vacated and remanded*, 781 F.3d 1340 (Fed. Cir. 2015) (holding that the plaintiff's claims for professional negligence, breach of written contract, breach of oral contract, breach of implied covenant of good faith and fair dealing, negligent misrepresentation, and breach of fiduciary duty were time barred). *But see* *Augusta v. Keehn & Assocs.*, No. D062002, 2013 WL 4136611, at *1 (Cal. Ct. App. Aug. 13, 2013) ("[T]here are triable issues of fact as to whether the one-year statute of limitations was tolled by defendants' continuous representation.").

98. See *Yale v. Bowne*, 215 Cal. Rptr. 3d 266, 275 (Ct. App. 2017) ("We conclude that the court correctly instructed the jury on the principles of comparative fault."); Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 457 S.E.2d 28, 32 (Va. 1995) ("[C]ontributory negligence is available as a defense in a legal malpractice action.").

malpractice plaintiff must prove causation of damages with legal certainty if that means proof more compelling than a preponderance of the evidence. Doing so would amount to excessive protectionism on behalf of negligent lawyers. It would threaten to destroy public confidence in legal malpractice law as a fair and equitable system for resolving disputes between lawyers and clients.

The preponderance of the evidence standard of proof is widely applied in civil litigation,⁹⁹ and it should apply to ordinary negligence claims against lawyers alleging legal malpractice, as many cases have so held.¹⁰⁰ When tied

99. See *Weiner v. Fleischman*, 816 P.2d 892, 895 (Cal. 1991) (en banc) (“The general rule in this state is that “[i]ssues of fact in civil cases are determined by a preponderance of testimony.” (alteration in original) (quoting *Liodas v. Sahadi*, 562 P.2d 316 (Cal. 1977))).

100. See *Mauzey v. Morschauser*, Nos. D070681, D070683, 2017 WL 836602, at *7 (Cal. Ct. App. Mar. 3, 2017) (“Concededly, a plaintiff ‘need not prove causation with absolute certainty[.]’ but Ruth was required to [‘]introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of [Morschauser] was a cause in fact of the result.[’]” (citation omitted) (quoting *Viner v. Sweet*, 70 P.3d 1046, 1053 (Cal. 2003))); *Swahn Grp., Inc. v. Segal*, 108 Cal. Rptr. 3d 651, 668 (Ct. App. 2010) (“S&K also claims the complaint fails to state a cause of action because the Swahns must plead and prove to a legal certainty that but for the alleged malpractice it would have obtained a better result. The proper standard is: ‘To show damages proximately caused by the breach, the plaintiff must allege facts establishing that, “but for the alleged malpractice, it is more likely than not the plaintiff would have obtained a more favorable result.”’” (citation omitted) (quoting *Charnay v. Cobert*, 51 Cal. Rptr. 3d 471, 478 (Ct. App. 2006))); *Panther v. Mazzarella*, No. D049332, 2008 WL 152756, at *12 (Cal. Ct. App. Jan. 17, 2008) (“Although a plaintiff alleging legal malpractice is not required to offer proof that establishes causation ‘with absolute certainty,’ the plaintiff must [‘]introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.[’]” (quoting *Viner*, 70 P.3d at 1052–53)); *Panther v. Micheli*, No. D048047, 2007 WL 1413392, at *11–14 (Cal. Ct. App. May 15, 2007) (“Although a plaintiff alleging legal malpractice is not required to offer proof that establishes causation ‘with absolute certainty,’ the plaintiff must [‘]introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.[’] The record . . . does not support plaintiff’s contention that it was reasonably probable he would have retained his interest in the development project, absent any legal malpractice as alleged” (quoting *Viner*, 70 P.3d at 1052–53)); *Smith v. Rosenberg*, No. E034199, 2004 WL 1447939, at *4 (Cal. Ct. App. June 29, 2004) (“[I]he standard of proof in a legal malpractice action, as in other negligence actions, is proof by a preponderance of the evidence.” (citing *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 69 P.3d 965, 972 (Cal. 2003))); see also *Tran v. Kanter*, No. D069307, 2017 WL 4682697, at *1 (Cal. Ct. App. 2017) (affirming a judgment holding that the plaintiff failed to prove legal malpractice where the trial court had found that the “plaintiff failed to carry his burden to prove by a preponderance of evidence that careful management and proper prosecution of the underlying defamation case would have resulted in a favorable judgment and collection thereof”); *Davis v. Brown, Wegner & Berliner, L.L.P.*, No. G050439, 2016 WL 520252, at *5 (Cal. Ct. App. Feb. 9, 2016) (“In a legal malpractice action . . . [‘]he plaintiff must prove, by a preponderance of the evidence, that *but for* the attorney’s negligent acts or omissions, [s]he would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred.” (quoting *Namikas v. Miller*, 171 Cal. Rptr. 3d 23, 29

to the demanding rules governing factual and proximate causation, the preponderance of the evidence standard imposes a formidable evidentiary burden on plaintiffs seeking recovery. There is little chance, if any, that frivolous claims will succeed. A plaintiff must normally demonstrate, by a more likely than not evidentiary showing, not simply that the defendant committed malpractice, but that the malpractice made a substantial and indispensable contribution to specific harm for which the plaintiff seeks compensation,¹⁰¹ and that damages can be calculated with reasonable accuracy.¹⁰² These requirements are sufficient to protect lawyers from the risk of unjust imposition of civil liability.

V. CONCLUSION

If the line of California cases asserting that causation of damages in legal malpractice litigation must be proved with legal certainty requires proof more compelling than that required by the preponderance of the evidence standard, then those cases are troublesome for two reasons. First, a legal certainty standard seems sure to affect how cases that are actually litigated are resolved.¹⁰³ Judges faced with the language of legal certainty are likely

(Ct. App. 2014)); *Tillman v. Petrus*, No. D050489, 2008 WL 821568, at *8 (Cal. Ct. App. Mar. 28, 2008) (“Plaintiffs did not submit any evidence showing they more likely than not would have obtained a more favorable result in settlement or at trial . . .” (citing *Viner*, 70 P.3d at 1054; *Marshak v. Ballesteros*, 86 Cal. Rptr. 2d 1, 3 (Ct. App. 1999); *Jalali v. Root*, 1 Cal. Rptr. 3d 689, 695 (Ct. App. 2003); *Orrick Herrington & Sutcliffe v. Superior Court*, 132 Cal. Rptr. 2d 658, 662 (Ct. App. 2003))).

101. *See Taylor v. Alonso, Cersonsky & Garcia, P.C.*, 395 S.W.3d 178, 184 (Tex. App.—Houston [1st. Dist.] 2012, no pet. h.) (“[T]he test for cause in fact is whether the act or omission was a substantial factor in causing the injury without which the harm would not have occurred.” (citing *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1996))); *see also McCullough v. Ellis*, No. D063607, 2014 WL 1101445, at *3 (Cal. Ct. App. Mar. 21, 2014) (“To prove the element of causation, a plaintiff generally must show by a preponderance of the evidence that the defendant’s breach of duty (e.g., his or her negligent conduct) was a substantial factor in bringing about the plaintiff’s harm.” (citation omitted) (citing *Leslie G. v. Perry & Assocs.*, 50 Cal. Rptr. 2d 785, 789 (Ct. App. 1996))).

102. *See Ferguson*, 69 P.3d at 976 (Kennard, J., concurring and dissenting) (“Lost punitive damages, like any other item of compensatory damage in a malpractice action, must be proven to a degree of reasonable certainty.” (citing *Clemente v. State of California*, 219 Cal. Rptr. 445, 455 (1985))).

103. *Cf. Fuller v. Ceasar*, No. A117805, 2008 WL 1875954, at *8 (Cal. Ct. App. Apr. 29, 2008) (finding that an expert report fell “far short of the showing of damage that must be made to survive summary judgment [because] to be subject to a proper award [damages] must be such as follows the act complained of as a *legal certainty*” (second alteration in original) (citations omitted) (citing *Marshak*, 86 Cal. Rptr. 2d at 3)); *Tillman v. Petrus*, No. D050489, 2008 WL 821568, at *3 (Cal. Ct. App. Mar. 28, 2008) (affirming a judgment in a case where, at the lower court, “Petrus [the legal malpractice defendant] argued the exhibits cited by Tillman [a plaintiff] were speculative, and did not prove to a

to decide trial motions and appeals relating to the sufficiency of the evidence in ways that tend to close the courthouse doors to plaintiffs with otherwise meritorious legal malpractice claims. This is the type of risk that was created when the Court of Appeal wrote in *Slovensky v. Friedman*.¹⁰⁴

To win a legal malpractice action, the plaintiff must prove damages to a legal certainty, not to a mere probability. Thus, a plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would certainly have received more money in settlement or at trial.¹⁰⁵

The quoted language clearly implies that a preponderance of the evidence is not enough to prove causation of damages.¹⁰⁶ Any such assertion would be erroneous under the law of most jurisdictions, but it was unnecessary in the *Slovensky* case. The court in that case had explained that “[b]ecause plaintiff’s claim was time-barred on the day she filed it, she was entitled to no recovery and would inevitably have lost the case had it not settled.”¹⁰⁷

Only rare judicial opinions invoking the language of legal certainty have announced judgments favoring malpractice plaintiffs.¹⁰⁸ More often, a reference to legal certainty is just a signal that the plaintiff is going to lose. In addition, if the language of legal certainty is used in jury instructions, it seems certain to influence, in a manner highly unfavorable to legal

legal certainty that she would have recovered the amount set forth . . . [and] the trial court issued an order granting Petrus’s motion for summary judgment . . .”).

104. *Slovensky v. Friedman*, 49 Cal. Rptr. 3d 60 (Ct. App. 2006).

105. *Id.* at 67 (citations omitted) (citing *Barnard v. Langer*, 1 Cal. Rptr. 3d 175, 182 (Ct. App. 2003)).

106. See *Augusta v. Keehn & Assocs.*, No. D062002, 2013 WL 4136611, at *6 (Cal. Ct. App. Aug. 13, 2013) (“[D]amages must be proven to a legal certainty, not to a mere probability.” (citing *Slovensky*, 49 Cal. Rptr. 3d at 67)).

107. *Slovensky*, 49 Cal. Rptr. 3d at 67.

108. See *Robertson v. Robertson*, No. B246472, 2014 WL 3529689, at *12 (Cal. Ct. App. July 17, 2014) (“Here, the evidence established that David was in a position and would have acted to prevent the South Gate property from falling into foreclosure, yet he received no information about the Probate action despite having filed a special notice that obligated Bowman to provide him with notice of the proceedings. We agree with the trial court that this evidence satisfied David’s burden to show more than a mere probability that the Estate would have been able to preserve the property but for Bowman’s negligence.” (citing *Barnard*, 1 Cal. Rptr. 3d at 181)); *Kairos Sci., Inc. v. Fish & Richardson P.C.*, Nos. A107085, A107486, 2005 WL 3346199, at *4–8 (Cal. Ct. App. Dec. 9, 2005) (quoting the legal certainty standard, but affirming a trial court finding for a legal malpractice plaintiff on causation); *Diehl v. Konoske*, No. D043362, 2004 WL 1789633, at *8–11 (Cal. Ct. App. Aug. 11, 2004) (“Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty . . . [and] we believe all the circumstantial evidence together shows there are triable issues regarding causation.” (citing *Thompson v. Halvonik*, 43 Cal. Rptr. 142, 146 (Ct. App. 1995))).

malpractice plaintiffs, how lay jurors view the evidence that is presented to them.

Second, the language of legal certainty is likely to discourage lawyers from representing plaintiffs in legal malpractice cases despite the fact that they may have worthy claims. In other words, the obstacles to recovery can become so great that it would not be economically sensible for lawyers to represent legal malpractice plaintiffs, as they normally do, on a contingent fee basis.¹⁰⁹ As Professor Susan Fortney has written:

Legal malpractice cases are frequently expensive and difficult to try. The amount of damages may not be large enough to persuade a plaintiff's attorney to represent the injured person on a contingent fee basis.¹¹⁰

Discouraging lawyers from representing malpractice plaintiffs with legitimate claims might be good for some potential legal malpractice defendants, but it will not be good for the legal profession as a whole. If litigation does not offer a fair and viable avenue for resolving malpractice disputes, aggrieved clients may turn to violence or other undesirable forms of self-help.

During the past fifty years—since Clark Committee's report on the scandalous deficiencies of lawyer discipline and the embarrassing involvement of many lawyers in the Watergate Scandal¹¹¹—the legal profession has done much to raise its standards, police its ranks, protect the public, and set an enviable example for lawyers in emerging democracies to follow.¹¹² The profession, and in particular the courts, should not allow

109. See *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1557, 1580 (1994) (“[A] client must usually retain a lawyer on a contingent-fee basis to recover compensation for legal malpractice injuries.”).

110. Susan Saab Fortney, *Foreword: Legal Malpractice Is No Longer the Profession's Dirty Little Secret*, 44 HOFSTRA L. REV. 281, 287 (2015); see also KRITZER & VIDMAR, *supra* note 8, at 11 (“[T]he costs of pursuing an LPL [lawyer professional liability] claim, both in an attorney's fees and in expenses such as expert witness fees, means that knowledgeable attorneys will consider cases only with losses sufficient to produce what the lawyer views as an adequate fee.”).

111. See Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 37 (2005) (discussing the Clark Committee and Watergate).

112. See Vincent R. Johnson, *Legal Malpractice in a Changing Profession: The Role of Contract Principles*, 61 CLEV. ST. L. REV. 489, 490 (2013) (“In little more than four decades, the field of American legal ethics has been transformed. . . . Today, this complex matrix of substantive provisions and enforcement mechanisms ensures, to a great extent, that clients are protected from unnecessary harm, that lawyers are safeguarded from improper accusations, and that the provision of legal services is consistent with the public interest.” (footnotes omitted)).

the rules of legal malpractice law to overreach the legitimate interests of clients and the general public via misguided efforts to protect lawyers from liability.

As a standard of proof for establishing damages in legal malpractice litigation, the preponderance of the evidence standard, much more than the language of legal certainty, is likely to strike a fair balance between the interests of plaintiffs and defendants, not to mention the interests of the legal profession and the public at large. If there is certainty to be found in the language of legal certainty, it is only the certainty that this language will mislead some judges and juries to conclude that the halls of justice are, or should be, closed to cases where the evidence falls short of establishing certainty of causation. That has never been the standard in American law. Courts should abandon the misleading language of legal certainty and speak plainly about the need of legal malpractice plaintiffs to prove causation of damages by a more likely than not preponderance of the evidence showing.