Causation and "Legal Certainty" in Legal Malpractice Law

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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.

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I. THE MEANING OF LEGAL CERTAINTY

A line of California opinions, 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 This Article cites numerous California cases, some of which have been published, and many of which are “unpublished.”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 See, e.g., Rafi Moghadam, Note, Judge Nullification: A Perception of Unpublished Opinions, 62 HASTINGS L.J. 1397, 1397 (2011) (“Segregation of cases based on publication status, .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 Bringing an end to the no-citation rule, which enables discrimination against unpublished opinions, .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litigation, courts may not insulate their decisions from scholarly examination and criticism by designating opinions as unpublished.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 See Steve Sheppard, The Unpublished Opinion Opinion: How Richard Arnold’s Anastasoff Opinion is Saving America’s Courts from Themselves, 2002 ARK.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

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preponderance of the evidence, 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, 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.

This Article explores the meaning of legal certainty in legal malpractice law. Part II discusses the basic rules governing proof of causation in legal
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 challenge for plaintiffs is often proving that a breach of duty caused damages. Absent such a showing, the claimant will recover nothing, no matter how serious the defense lawyer’s error or misconduct.

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.").


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 Caesar breached her fiduciary duty and may have committed fraud in settling the claims without authority”); see also Poway Land, Inc. v. Hillier & Irwin, No. D038642, 2002 WL 31625603, 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 misguided fax caused any harm); Alexander v. Turtur & Assoc., Inc., 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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{12} Instead, a plaintiff must come forward with persuasive evidence showing that legally cognizable\textsuperscript{13} adverse consequences\textsuperscript{14} flowed from the lawyer’s breach of professional obligations.\textsuperscript{15} The evidence adduced at trial must

\begin{itemize}
  \item \textsuperscript{10} See Kritzner & 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.").
  \item \textsuperscript{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. MALLEN, 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).
  \item \textsuperscript{13} 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, [the] the 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

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.\textsuperscript{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.\textsuperscript{20} These are demanding standards.

To establish factual causation, the plaintiff must normally\textsuperscript{21} prove that the defendant made a substantial and indispensable contribution to the production of the harm.\textsuperscript{22} That is, the plaintiff must prove that but for the
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
continuous unbroken sequence\(^{29}\) 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

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\(^{29}\). 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.’” (first alteration 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 Neubaurms’ 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).


\(^{33}\). 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,\textsuperscript{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.\textsuperscript{35} The standard of proof is the preponderance of the evidence rule that is applicable to most civil liability claims.\textsuperscript{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.


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.

\textit{Id.} at 455 (citations omitted).

\textsuperscript{34}. See \textit{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); \textit{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 \textit{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 \textit{Jordache Enterprises, Inc. v. Brobeck, Phelger & Harrison}, 958 P.2d 1062, 1070 (Cal. 1998))).

\textsuperscript{35}. \textit{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).

\textsuperscript{36}. Vincent R. Johnson, \textit{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)).

of the recovery that was obtained. The Court of Appeal affirmed a judgment that the client could not recover in the malpractice action because there was no evidence 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.”

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.” It is always true that causation of damages cannot be speculative and must be established with reasonable certainty (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. Lieff, Cabrer, 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 sometimes too many logical gaps in a legal malpractice plaintiff’s evidence to allow this standard to be met.

In *Agnew v. Parks*, 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.

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 . . . .”

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

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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)).


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.”

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.\(^54\)

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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.


51. Id. at 36.

52. Id.


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.
For example, in *Poway Land, Inc. v. Hillyer & Irwin*, a case involving a misdirected fax, the Court mentioned in a footnote the need for legal certainty. 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.

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

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

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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. Caesar, 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. Halvoni, 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) (“[T]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, Mannmano, 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.”).

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 Rehwald, 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.”).


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

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 Matco 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. 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. As the court explained:

The 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.

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, 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, fraud, and physical abuse. 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, and from liability for judicial errors they did not cause.

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 doctors and otherwise disrupt hospital business. 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

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


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 measures 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 obstetrics when, a generation ago, medical malpractice principles allegedly imposed liability too readily for birth-related maladies. In legal malpractice litigation, the preponderance of the evidence standard operates against a backdrop of substantive rules which already go far—many would say too far—to protect lawyers from liability. 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. Strict privity rules, in numerous states, bar claims by most nonclients. Suits by clients may flounder because the matter in question fell outside the

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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) (“It 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) (“Consumers 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) (“The 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, involved a permissible exercise of lawyer discretion, or resulted in nothing more than the client’s “loss of chance” to secure a more favorable result. Even otherwise meritorious claims may produce no recovery because of a statute of limitations defense. In addition, compensation for harm caused by negligence will be barred or reduced if the plaintiff’s own carelessness contributed to the harm.

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)).


96. See Drollinger v. Mallon, 260 P.3d 482, 491 (Or. 2011) (en banc) (“The loss of chance doctrine should not be imported into the legal malpractice context. . . . Any allegation in plaintiff’s complaint that defendants’ negligence caused plaintiff to lose his chance for relief from his convictions would be legally insufficient.”); Kritzler & Vidmar, supra note 8, at 181–83 (discussing loss of a chance in lawyer professional liability cases); see also id. at 183 (“Some 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. Kechn & Assoc., 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.”).

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

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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. Morschauer, 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 ‘[i]ntroduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of [Morschauer] 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 ‘[i]ntroduce 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 ‘[i]ntroduce 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)); Smith v. Rosenberg, No. E034199, 2004 WL 1447939, at *4 (Cal. Ct. App. June 29, 2004) (“[T]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 . . . ‘[i]f 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.’” (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, and that damages can be calculated with reasonable
accuracy. 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. Judges faced with the language of legal certainty are likely

101. See Taylor v. Alonso, Cersonsky & Garcia, P.C., 395 S.W.3d 178, 184 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (“[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 & Assoc., 50 Cal. Rptr. 2d 785, 789 (Ct. App. 1996))).

102. See Fergoun, 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))).

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.*

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.

The quoted language clearly implies that a preponderance of the evidence is not enough to prove causation of damages. 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.”

Only rare judicial opinions invoking the language of legal certainty have announced judgments favoring malpractice plaintiffs. 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 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)).


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.\footnote{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.”).}

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.\footnote{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.”).}

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 Scandal\footnote{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).}—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.\footnote{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 profession, and in particular the courts, should not allow
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.