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## Misapplication of the Attorney Malpractice Paradigm to Litigation Services: "Suit Within a Suit" Shortcomings Compel Witness Immunity for Experts

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# Misapplication of the Attorney Malpractice Paradigm to Litigation Services: “Suit Within a Suit” Shortcomings Compel Witness Immunity for Experts

Adam J. Myers III\*

I.	INTRODUCTION . . . . .	3
II.	CAUSATION AND DAMAGES IN MALPRACTICE ACTIONS . . . . .	7
	A. <i>The General Professional Malpractice Paradigm</i> . . . . .	7
	B. <i>The Attorney Litigation Malpractice Paradigm</i> . . . . .	9
III.	THE <i>MATTCO FORGE</i> CASES . . . . .	11
	A. <i>The Underlying Case</i> . . . . .	11
	B. <i>The Litigation Services Malpractice Trial</i> . . . . .	13
	C. <i>Consideration of the SWAS Doctrine on Appeal</i> . . . . .	15
IV.	MISAPPLICATION OF THE ATTORNEY LITIGATION MALPRACTICE PARADIGM TO LITIGATION SERVICES MALPRACTICE . . . . .	16
	A. <i>Use of the SWAS Doctrine is Improper for Proving Causation</i> . . . . .	16
	B. <i>Proof of Significance Will be Too Speculative</i> . . . . .	19
	C. <i>The SWAS Doctrine is Inappropriate for Proving Damages</i> . . . . .	20
V.	REVISITING WITNESS IMMUNITY . . . . .	25
	A. <i>History</i> . . . . .	25

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B.	<i>Compensation and Friendliness do not Make a Difference</i>	27
C.	<i>Specific Professional Standards are not Feasible</i>	31
D.	<i>Pretrial Services Deserve Immunity</i>	32
E.	<i>Immunity is Needed Against Negligence as Well as Defamation</i>	33
F.	<i>Lack of a Sufficient Method of Proving Causation and Damages Justifies Immunity</i>	34
IV.	CONCLUSION	34

## I. INTRODUCTION

Is an expert who performs litigation services<sup>1</sup> more like an attorney or more like a lay witness? The answer to this question should determine whether experts should be immune from liability for malpractice committed in rendering litigation services. Until recently, attorneys were generally the only participants in the litigation process who were subject to malpractice liability.<sup>2</sup> Experts relied on common law or statutory witness immunity for protection from liability for litigation services malpractice.<sup>3</sup> In 1992, two state court decisions in California and Missouri, *Mattco Forge, Inc. v. Arthur Young & Co.*<sup>4</sup> (*Mattco Forge I*) and *Murphy v. A.A. Mathews*,<sup>5</sup> respectively, limited the scope of witness immunity specifically to exclude compensated, friendly experts (party experts) who perform litigation services. This limitation has increased the possibility of multi-million-dollar jury verdicts against party experts for litigation services malpractice.<sup>6</sup> This Article attacks the rationale used by these courts to justify limitation of witness immunity for party experts.

Attorneys increasingly hire experts to perform litigation services, not only as testifying expert witnesses, but also as consultants to assist with pretrial preparation and during trial.<sup>7</sup> Attorneys now call upon

1. In this Article, the term "litigation services" shall mean any professional assistance provided by a non-attorney to an attorney in the litigation process, including both consulting services and testimony. See *Providing Litigation Services*, CONSULTING SERVS. PRACTICE AID 93-4 § 70/110.06 (American Inst. of Certified Pub. Accountants 1993) [hereinafter PRACTICE AID].

2. See *infra* text accompanying notes 128-43.

3. See *infra* text accompanying notes 128-43.

4. 6 Cal. Rptr. 2d 781 (Cal. Ct. App. 1992) (*Mattco Forge I*) (holding that witness immunity was not available for compensated, friendly firm of certified public accountants).

5. 841 S.W.2d 671 (Mo. 1992) (holding that witness immunity was not available for compensated friendly engineering expert).

6. See generally *Mattco Forge I*, 6 Cal. Rptr. 2d 781; *Murphy*, 841 S.W.2d 671.

7. See PRACTICE AID, *supra* note 1, § 70/120.01.

As an expert witness, the CPA presents opinions publicly in an objective fashion, but as a consultant, the CPA advises and assists the attorney or client in private [by providing] assistance more like that of an advocate to help the attorney identify the case's strengths and weaknesses or to develop a strategy against opposition.

*Id.* §§ 70/100-7. Trial consulting can cover a variety of services, such as investigation of claims, document production assistance, calculation of damages, business valuation, assistance in trial preparation, and jury consulting. See Randall K. Hanson et al., *Liti-*

experts to provide litigation services for run-of-the-mill cases, not solely for highly technical cases as in the past.<sup>8</sup> Some litigators believe that failure to use an expert in some cases may be legal malpractice.<sup>9</sup> Experts are available in myriad disciplines, and include professionals as diverse as certified public accountants (CPAs),<sup>10</sup> engineers, and arborists.<sup>11</sup>

To the losers in litigation, experts are tempting deep-pockets to be pursued as scapegoats to blame for unfavorable outcomes.<sup>12</sup> As the use of litigation services becomes more prevalent, experts become more vulnerable to malpractice suits from dissatisfied clients.<sup>13</sup> Rather than promoting adherence to professional standards, this threat of expert liability seems more likely to result in expert opinions motivated by the client's interest.

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*gation Support Liability—The Mattco Decision*, CPA J., Mar. 1, 1995, at 28.

8. See Claire P. Rattigan, *Making Experts Accountable: How Far Must Attorneys Go in Investigating Their Experts?*, MASS. L. WKLY., May 22, 1995, at B1; see also LITIGATION SERVICES HANDBOOK § 1.1(c), at 1-2 (Roman L. Weil et al. eds., 2d ed. 1995).

9. See Melvin M. Belli, Sr., *The Expert Witness: Modifying Roles & Rules to Meet Today's Needs*, TRIAL, July 1982, at 35 ("The cost may be high to employ the expert, but it may well be higher not to employ one. Indeed, counsel who chooses to proceed without an expert may be flirting with malpractice."); Robert C. Strodel, *The Expert Witness: The Cornerstone of the Medical Negligence Case*, TRIAL, June 1982, at 37 ("For an attorney to go to court without an expert waiting in the wings is legal malpractice.").

10. With a slow-down in traditional accounting and auditing services, increased competition, and fee pressure from clients, many CPAs are now turning to litigation services to diversify and expand services, and to increase profits and growth. See Scott Peltz & R. Michael Yesh, *The CPA as Expert Witness—Does Liability Loom?*, AM. BANKR. J., Mar. 1995, at 15. More and more CPAs are preparing damages analyses, performing business valuations, assisting counsel in document productions, participating in settlement negotiations, and providing expert witness testimony. See Michael A. Cain et al., *Liability: Expert Witnesses—In Jeopardy?*, J. OF ACCT., Dec. 1994, at 42.

11. See Belli, *supra* note 9, at 35 ("In this modern age an 'expert' is found in any field, no matter how esoteric.").

12. See Douglas Pahl, Note, *Absolute Immunity for the Negligent Expert Witness: Bruce v. Byrne-Stevens*, 26 WILLAMETTE L. REV. 1051, 1051 (1990) ("With their deep pockets and ample malpractice insurance policies, professionals have become an increasingly inviting target for injured plaintiffs." (footnote omitted)).

13. For purposes of this Article, the "client" of the expert is the actual party to the litigation, regardless of whether the expert is retained directly by that party or by that party's attorney. See PRACTICE AID, *supra* note 1, § 70-100-8. Usually, the expert is retained directly by the attorney, rather than by the actual party to the litigation. See *id.* Under such arrangement, the expert's work product may be protected by the attorney work product doctrine, which shields an attorney's work product from discovery by the opposing party. See *id.*

A major problem resulting from the lack of immunity for party experts is the uncertainty involved in proving that expert malpractice, rather than some other factor in the litigation process, was the cause of the client's unfavorable outcome in the underlying lawsuit. Recent commentators have jumped on the expert-bashing bandwagon and argue that an expert should be liable when the expert receives compensation and fails to act as a reasonably prudent professional in rendering litigation services.<sup>14</sup> None of these commentators, however, has seriously considered the problems of proving causation and damages in litigation malpractice cases. In early 1997, the California Court of Appeal in *Mattco Forge v. Arthur Young & Co. (Mattco Forge II)*,<sup>15</sup> reviewing the jury verdict, held that a trial court should apply the controversial "suit within a suit" (SWAS) doctrine,<sup>16</sup> and should instruct the jury on the "substantial factor" rule of causation in fact, to prove causation and damages in malpractice lawsuits against party experts who provide litigation services.<sup>17</sup> The *Mattco Forge II* decision was based on the assumption that, for purposes of applying the SWAS doctrine, an expert's act of consulting on a case is analogous to an attorney's act of trying a case or an insurer's act of defending a case.<sup>18</sup> Courts apply the SWAS doctrine primarily in attorney litigation malpractice lawsuits and in lawsuits against insurers for negligence in defending a lawsuit.<sup>19</sup>

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14. See Randall K. Hanson, *Witness Immunity Under Attack: Disarming "Hired Guns"*, 31 WAKE FOREST L. REV. 497, 511 (1996) (arguing that increased witness liability may result in fewer extreme positions taken by experts); Douglas R. Richmond, *The Emerging Theory of Expert Witness Malpractice*, 22 CAP. U. L. REV. 693, 710 (1993) ("This emerging malpractice theory is warranted and reasonable, especially given experts' contractual and special relationships with their clients, and the absence of other controls or remedies."); Eric G. Jensen, Comment, *When "Hired Guns" Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness*, 62 UMKC L. REV. 185, 206 (1993) ("The decisions holding experts liable are correct when measured against the recognized goals of tort law."); Pahl, *supra* note 12, at 1078-80 (arguing that as an alternative to immunity, the client should be allowed to use the "suit within a suit" (SWAS) approach in an action against an expert for negligent preparation).

15. 60 Cal. Rptr. 2d 780 (Cal. Ct. App. 1997) (*Mattco Forge II*).

16. See *id.* at 787 (noting that "trial within a trial" and "case within a case," are alternative means of referring to the SWAS doctrine).

17. See *infra* text accompanying notes 43-50 (discussing the SWAS doctrine as a method to determine causation and damages in an attorney malpractice suit).

18. See *Mattco Forge II*, 60 Cal. Rptr. 2d at 789.

19. See 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 32.8, at 168-70 (4th ed. 1996) (discussing the trial within a trial approach) [hereinafter MALLEN & SMITH]; cf. *Coleman v. Gurwin*, 503 N.W.2d 435, 437 (Mich. 1993), which stated:

Commentators have discussed the appropriateness of the use of the SWAS doctrine in attorney litigation malpractice cases for almost forty years, and many commentators still question the validity of outcomes in cases in which it is used.<sup>20</sup>

This Article first compares the handling of causation in the non-attorney professional malpractice paradigm (applied in cases involving services other than litigation services) with the handling of causation in the attorney malpractice paradigm.<sup>21</sup> Then, the Article reviews the *Mattco Forge* cases to provide a background for discussion of the two major issues addressed in that litigation—the availability of witness immunity for experts who perform litigation services and the application of the SWAS doctrine in litigation services malpractice lawsuits.<sup>22</sup> The Article proceeds to show the impropriety of applying the attorney malpractice paradigm to litigation services malpractice lawsuits.<sup>23</sup> Finally, the Article critically analyzes the rationale used to justify denial of witness immunity to experts and concludes that the rationale for protecting witnesses from lawsuits, the differences between experts and attorneys, the existence of other incentives for experts to adhere to professional standards, and the lack of a sufficient method of proving causation and damages together justify applying witness immunity to party experts.<sup>24</sup>

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[SWAS has] “vitality only in a limited number of situations, such as where an attorney’s negligence prevents the client from bringing a cause of action, . . . where the attorney’s failure to appear causes judgment to be entered against his client or where the attorney’s negligence prevents an appeal from being perfected.”

*Id.* (quoting *Basic Foods Indus., Inc. v. Grant*, 310 N.W.2d 26, 30 (Mich. Ct. App. 1981)); *Gautam v. DeLuca*, 521 A.2d 1343, 1348 (N.J. Super. Ct. App. Div. 1987) (“[I]t should be within the discretion of the trial judge as to the manner in which the plaintiff may proceed . . . .”) (quoting *Lieberman v. Employers Ins.*, 419 A.2d 417, 427 (N.J. 1980)).

20. See Richard G. Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. VA. L. REV. 225, 234 (1958) (“[M]any objections have been raised to the ‘suit within a suit’ method of determining damages.”); Manuel R. Ramos, *Legal Malpractice: The Profession’s Dirty Little Secret*, 47 VAND. L. REV. 1657, 1691 (1994) (“A ‘bad’ underlying case becomes a winner; insignificant damages suddenly grow to two, three, or four times the true value of the underlying case.”); Noreen L. Slank, *Suit Within a Suit: A Doctrine Michigan Courts Hate to Love*, 72 MICH. BAR J. 1174, 1177 (1993) (“Suit with a suit principles must continue to be refined.”).

21. See *infra* notes 25-50 and accompanying text.

22. See *infra* notes 51-82 and accompanying text.

23. See *infra* notes 89-127 and accompanying text.

24. See *infra* notes 128-91 and accompanying text.

## II. CAUSATION AND DAMAGES IN MALPRACTICE ACTIONS

A. *The General Professional Malpractice Paradigm*

As with any common law negligence action, the mere breach of a duty by a professional does not create an action for malpractice.<sup>25</sup> In a malpractice case, the plaintiff must also prove that the breach of the professional duty caused harm to the plaintiff.<sup>26</sup> This satisfies the essential tort element of causation.<sup>27</sup> The plaintiff may then recover the damages caused by the malpractice.<sup>28</sup> The plaintiff cannot recover damages in such actions when no actual harm has occurred, when the harm is nominal or speculative, or when harm has been threatened but not yet realized.<sup>29</sup>

Causation is also known as "proximate cause" or "legal cause," a component of which is "cause in fact" or "actual cause."<sup>30</sup> The two

25. A claim against an attorney for litigation malpractice, or against a CPA for malpractice for audit and tax services, is most frequently in the form of common law negligence. See DANIEL L. GOLDWASSER & M. THOMAS ARNOLD, ACCOUNTANT'S LIABILITY § 1.4[A], at 1-22 to 1-23 (1996) [hereinafter GOLDWASSER & ARNOLD]; 1 MALLEN & SMITH, *supra* note 19, § 8.12, at 601 (discussing negligence). The elements of a cause of action for professional negligence of both lawyers and accountants are the same as any ordinary negligence action and include the following: (1) existence of a duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) causation; and (4) actual harm or damages. See *Budd v. Nixen*, 491 P.2d 433, 436 (Cal. 1971) (discussing negligence); GOLDWASSER & ARNOLD, *supra*, § 4.2, at 4-3 to 4-4; 1 MALLEN & SMITH, *supra* note 19, § 8.12, at 602-08; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984) [hereinafter PROSSER & KEETON]; Travis Morgan Dodd, Note, *Accounting Malpractice and Contributory Negligence: Justifying Disparate Treatment Based Upon the Auditor's Unique Role*, 80 GEO. L.J. 909, 912 (1992) (discussing negligence as applied to accountants).

26. See *Budd*, 491 P.2d at 436 (discussing professional negligence).

27. See *id.*

28. See *id.*

29. See *id.*; PROSSER & KEETON, *supra* note 25, § 30, at 164-65.

30. According to Prosser and Keeton:

There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion [as in the determination of proximate cause]. Nor, despite the manifold attempts . . . to clarify the subject is there yet any general agreement as to the best approach.

PROSSER & KEETON, *supra* note 25, § 41, at 263. However, it is clear that proximate cause includes "cause in fact," which "embraces all things which have so far contributed to the result that without them it would not have occurred." See *id.* at 264-65;



widely-recognized tests for establishing cause in fact are the “but for” test and the “substantial factor” test.<sup>31</sup>

Under the but for test “[t]he defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct.”<sup>32</sup> “[C]onversely, the defendant’s conduct is not a cause of the event, if the event would have occurred without it.”<sup>33</sup> This test, however, is not appropriate if more than one cause brings about an event, and any one of the causes, “operating alone, would have been sufficient to cause the identical result.”<sup>34</sup>

If more than one cause brings about an event, the courts apply the substantial factor test.<sup>35</sup> If the negligence of the defendant is not a substantial factor in bringing about the harm to the plaintiff, the defendant is not liable.<sup>36</sup> This test is applicable where (1) a similar, but not necessarily identical, result would have occurred without the defendant’s act, or (2) one defendant’s act was only an insignificant contribution to the result.<sup>37</sup>

In the typical case involving a non-attorney professional who is not rendering litigation services, expert testimony may provide evidence of causation when the fact of causation is not commonly known.<sup>38</sup> The plaintiff does not have to prove with certainty that the malpractice caused harm to the plaintiff, but she must prove that it is more probable than not that the defendant’s conduct was a cause of the harm.<sup>39</sup>

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*see also* Mitchell v. Gonzales, 819 P.2d 872, 876 (Cal. 1991) (“One of the concepts included in the term proximate cause is cause in fact, also referred to as actual cause.”).

31. *See* PROSSER & KEETON, *supra* note 25, § 41, at 265-68; *Mitchell*, 819 P.2d at 876 (discussing the but for and substantial factor tests).

32. PROSSER & KEETON, *supra* note 25, § 41, at 266.

33. *Id.*

34. *Id.*; *see also* *Mitchell*, 819 P.2d at 876 (citing *Thomsen v. Rexall Drug & Chem. Co.*, 45 Cal. Rptr. 2d 642, 647 (Cal. Ct. App. 1995) (explaining limitations on the but for test)).

35. *See* PROSSER & KEETON, *supra* note 25, § 41, at 267.

36. *See id.*; *Mitchell*, 819 P.2d at 876 (citing *Vecchione v. Carlin*, 168 Cal. Rptr. 571, 576 (Cal. Ct. App. 1980) (stating that the substantial factor test applies where “concurrent, independent causes” exist)). A number of negligence suits against CPAs for audit or tax services have been successfully defended on lack of causation grounds, because the plaintiff did not show that the alleged negligence of the CPA substantially contributed to the plaintiff’s harm. *See* GOLDWASSER & ARNOLD, *supra* note 25; § 4.2[D][1], at 4-42. Instead, the losses resulted from the acts of other parties, from specific business decisions made by the client, or from the unusual method in which the client operated its business, among others. *See id.*

37. *See* PROSSER & KEETON, *supra* note 25, § 41, at 267-68.

38. *See generally id.* § 41, at 269 (stating that expert testimony may be used to establish causation).

39. *See id.* A mere possibility of causation is not enough; but the plaintiff is not

When the matter is one of speculation or conjecture, or the probabilities are at least equally balanced, the court must direct a verdict for the defendant.<sup>40</sup> The liability of a defendant for a single, indivisible injury is joint and several, so the defendant may be responsible for the entire loss although the defendant's fault may be relatively small compared to the other tortfeasors.<sup>41</sup> However, the defendant may have a claim for contribution or comparative indemnity against other tortfeasors.<sup>42</sup>

### *B. The Attorney Litigation Malpractice Paradigm*

Attorney malpractice cases involving attorney representation in connection with litigation use a different method of determining causation and damages. Courts consider expert testimony too speculative to prove causation or damages in an attorney litigation malpractice suit.<sup>43</sup>

required to prove the case beyond a reasonable doubt. *See id.*; *see also* 4 MALLEN & SMITH, *supra* note 19, § 32.10, at 181.

40. *See* PROSSER & KEETON, *supra* note 25, § 41, at 269.

41. *See* GOLDWASSER & ARNOLD, 25, § 4.4, at 4-80; RESTATEMENT (SECOND) OF TORTS § 875 (1979).

42. *See* American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 903-07 (Cal. 1978) (creating the doctrine of comparative indemnity among joint tortfeasors in California); RESTATEMENT (SECOND) OF TORTS § 886A (1979); GOLDWASSER & ARNOLD, *supra* note 25, § 4.5, at 4-82 to 4-83; UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1 (1955).

This Article does not consider the plight of an expert who has committed an intentional tort. Such tortfeasors are neither entitled to indemnity from negligent tortfeasors nor permitted to use the defense of comparative negligence against the plaintiff. *See* Allen v. Sundean, 186 Cal. Rptr. 863 (Cal. Ct. App. 1982); Godfrey v. Steinpress, 180 Cal. Rptr. 95 (Cal. Ct. App. 1982).

43. *See* Travelers Ins. Co. v. Leshner, 231 Cal. Rptr. 791, 805 (Cal. Ct. App. 1986), *overruled on other grounds by* Buss v. Superior Court, 939 P.2d 766 (Cal. 1997) ("We are aware of no California cases which hold that in an attorney malpractice action, expert testimony alone would suffice to prove the outcome of the underlying case."); Campbell v. Magana, 8 Cal. Rptr. 32 (Cal. Ct. App. 1960) (stating that a simple valuation approach "advances speculative values as a measure of recovery."); 4 MALLEN & SMITH, *supra* note 19, § 32.17, at 222 (noting that courts have refused or been reluctant to admit expert testimony about what the result of the underlying proceeding would have been); *see also* Mattco Forge, Inc. v. Arthur Young & Co., 60 Cal. Rptr. 2d 781, 794 (Cal. Ct. App. 1997) (Mattco Forge II) ("[T]o enable a plaintiff merely to value a case, renders professionals liable as guarantors, as almost all cases have some value." (citation omitted)); *cf.* Gautam v. DeLuca, 521 A.2d 1342, 1348 (N.J. Super Ct. App. Div. 1987) ("[The New Jersey] Supreme Court has eschewed rigid application of the [SWAS] principle in favor of a more flexible rule . . . [saying that] 'it should be within the discretion of the trial judge as to the manner in which the plaintiff may proceed to prove his claim for damages . . .'" (quoting Lieberman v.

Instead, the courts apply the SWAS doctrine.<sup>44</sup> Under this doctrine, the client has a second chance to try the underlying lawsuit during which the alleged malpractice occurred.<sup>45</sup>

Courts and commentators generally agree that the greatest obstacle a plaintiff must overcome in a legal malpractice action is the SWAS requirement.<sup>46</sup> The client must win two suits to recover in one. To win the malpractice suit against an attorney, the client must win a re-creation of the underlying action (the SWAS) and, thus, must prove that a more favorable outcome was possible in the underlying suit. If the client achieves a more favorable outcome in the SWAS, the client has proven that the professional's negligence caused harm to the client. The SWAS is also used to prove the amount of damages resulting from such harm. If the client does not win the SWAS, the professional is not liable; if the client wins the SWAS, the professional is liable for, among other things, the economic difference between the outcome of the original suit and the outcome of the SWAS.<sup>47</sup>

The approach of the SWAS doctrine is equivalent to the but for test. Courts generally accept the but for approach to attorney litigation malpractice.<sup>48</sup> An attorney is responsible for the entire harm if the

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Employers Ins., 419 A.2d 417, 427 (N.J. 1980)); *Vahila v. Hall*, 674 N.E.2d 1164, 1170 (Ohio 1997) (rejecting a rule requiring a plaintiff "to prove, in every instance, that he or she would have been successful in the underlying matter. Such a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim."); John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1149 (1988) ("Use of settlement value to establish the measure of damages for litigation malpractice is an option that courts should make available . . .").

44. The SWAS doctrine is based on early English and American cases in which the real issue was damages. See Kenneth G. Lupo, Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 694-95 (1977). Most of the early American cases are either unrelated to legal malpractice or are solely limited to legal malpractice cases in which the alleged negligence involved breach of the attorney's duty to collect on a debt. See *id.*

45. See *id.*

46. See *id.* at 693 ("It is virtually undisputed that the burden of proving two actions in a single proceeding is extremely heavy."); Neil T. Shayne & Norman H. Dachs, *Legal Malpractice—The Rising Cost of the Error of Our Ways*, 25 DEF. L.J. 425, 435 (1976) (stating that the SWAS is "the greatest hurdle the client must overcome"); Erik M. Jensen, Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 671 (1978) ("The cost and complexity of such a proceeding may well discourage the few plaintiffs otherwise willing to pursue the slim chance of success.").

47. However, if the client was the plaintiff in the underlying suit, recovery is limited to the extent the attorney can prove the judgment in the SWAS would have been uncollectible from the original defendant. See MALLEN & SMITH, *supra* note 19, § 29.13, at 672-75.

48. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 301:103 (1997)

plaintiff-client proves by a preponderance of the evidence that the client can obtain a more favorable result in the SWAS, and, thus, should have obtained a more favorable result in the underlying suit but for the malpractice of the attorney.<sup>49</sup>

The SWAS is an objective test designed to determine what "should have been," rather than what "would have been."<sup>50</sup> Therefore, factors such as the personality or inclinations of the judge or jury in the original suit are irrelevant. However, the judge, the jury, the attorneys, the opposing party, the venue, the available evidence, and other factors may be different in the SWAS. The applicable law and the party allegedly aggrieved by the malpractice may be the only common factors between the original suit and the SWAS.

### III. THE *MATTCO FORGE* CASES

#### A. *The Underlying Case*

The *Mattco Forge* cases resulted from the dismissal with prejudice of a lawsuit in the United States District Court for the Central District of California in 1989.<sup>51</sup> *Mattco Forge, Inc.* (*Mattco*), a parts manufacturer owned by a native Argentinian who is a naturalized United States citizen, filed a federal civil rights action in 1985 against General Electric (GE) after GE removed *Mattco* from GE's list of approved subcontractors.<sup>52</sup> *Mattco* alleged that GE's removal was racially motivated.<sup>53</sup>

("Proof of a 'proximate cause' relationship . . . requires a showing that 'but for' the attorney's misconduct the injury would not have been suffered.") [hereinafter *LAWYERS' MANUAL*]; CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 5.6.3, at 218 ("In general, the plaintiff must show that but for the lawyer's negligence, the representation would have resulted in a materially different, and more advantageous, outcome."); cf. Jensen, *supra* note 46, at 672 ("Because of its harshness the "but for" test has not served the judicial system well in legal malpractice cases.").

49. See *Arciniaga v. Bank of San Bernardino*, 60 Cal. Rptr. 2d 495 (Cal. Ct. App. 1997) (justifying the application of the SWAS doctrine to determine damages where an attorney failed to pursue a claim). The California Court of Appeal stated, "It is axiomatic that the damages for such failure are those which would have been recovered but for the failure to exercise care." *Id.* at 506.

50. See 4 MALLEN & SMITH, *supra* note 19, § 32.8, at 169-70; *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 780, 792-93 (Cal. Ct. App. 1997) (*Mattco Forge II*) ("[T]he jury's task is to determine what a reasonable judge or fact finder would have done.") (quoting *Brust v. Newton*, 852 P.2d 1092, 1095 (Wash. Ct. App. 1993)). "Could have been" and "might have been" are not the standard because they are speculative. See 4 MALLEN & SMITH, *supra* note 19, § 32.8, at 170.

51. See generally *Mattco Forge II*, 60 Cal. Rptr. 2d at 783.

52. See *id.* at 783.

In a motion for dismissal, GE argued that Mattco had fabricated the documents it produced in discovery, with the assistance of Arthur Young & Company (Arthur Young),<sup>54</sup> an accounting firm that Mattco had retained as its litigation consultant and expert witness in the case.<sup>55</sup> Mattco hired Arthur Young to assist in Mattco's calculation of lost profits due to GE's removal of Mattco from its list of subcontractors.<sup>56</sup> Prior to Mattco retaining Arthur Young, a partner from Arthur Young met with the owner of Mattco and gave him a "glossy promotional brochure" which represented that Arthur Young's litigation services professionals were specially trained in legal procedures.<sup>57</sup> However, a different Arthur Young CPA, who subsequently performed the work for Mattco on behalf of Arthur Young, had no training or experience in litigation services.<sup>58</sup>

When the CPA assigned to the job discovered as missing almost half of the worksheets used by Mattco to prepare bids to GE, he asked Mattco's owner to prepare new worksheets to reflect how the owner would have estimated the costs associated with the bids.<sup>59</sup> These newly-created worksheets were intermingled with original business documents and were not identified as not being original business records.<sup>60</sup> The newly-created worksheets were included in documents produced by Mattco's attorneys during discovery in response to a document request by GE.<sup>61</sup> No one from Mattco or Arthur Young told GE about the newly-created worksheets.<sup>62</sup>

After reviewing the documents produced in discovery, GE filed a counterclaim against Mattco, alleging that Mattco and its owner had committed procurement fraud by bid rigging.<sup>63</sup> During discovery, GE

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53. *See id.*

54. Arthur Young was one of the group of the largest international accounting firms then known as the "Big Eight." *See* Jeffrey R. Laderman, *When One Plus One Equals No. 1*, BUS. WK., June 5, 1989, at 92. Arthur Young subsequently merged with Ernst & Whinney (another "Big Eight" firm) to become what is now Ernst & Young, LLP, one of the group of the largest international accounting firms now called the "Big Six." *See id.* Ernst & Young has entered into another agreement to merge with yet another Big Six firm that would be effective in early 1998. *See* Tracey L. Miller, *For Ernst/KPMG: Business as Usual, But on a Global Scale*, ACCT. TODAY, Nov. 10-23, 1997, at 1.

55. *See Mattco Forge II*, 60 Cal. Rptr. 2d at 783.

56. *See id.* at 784.

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.* at 784-85.

61. *See id.*

62. *See id.*

63. *See id.*

uncovered information which it believed proved that Mattco had destroyed other documents, that Mattco had hidden witnesses, and that one of Mattco's officers had committed perjury during discovery.<sup>64</sup> Meanwhile, the Arthur Young partner testified in a deposition that, when he calculated the damages, he had not relied on the newly-created worksheets.<sup>65</sup>

GE filed a motion to dismiss based on the alleged misconduct of Mattco and Arthur Young.<sup>66</sup> In considering GE's motion, the district court found that Mattco and its owner fraudulently created and knowingly produced the newly-created worksheets, and that the Arthur Young partner had relied on the fabricated worksheets in calculating damages.<sup>67</sup> The district court ruled that (1) evidence of damages previously produced or prepared for the action would be inadmissible; (2) Arthur Young would be precluded from assisting with the production of evidence concerning damages; (3) no materials previously used by Arthur Young to calculate damages could be used to produce any evidence on damages; and (4) GE would be reimbursed for attorneys' fees, costs, and expenses relating to production of evidence concerning damages.<sup>68</sup> The district court subsequently ordered that Mattco's failure to pay \$1.4 million in sanctions to GE within forty-five days would result in dismissal. The district court also stated that it would consider an additional penalty for destruction of evidence against Mattco and its owner once the sanctions had been paid.<sup>69</sup> Notwithstanding the court's order, Mattco paid no sanctions because the parties settled and dismissed their respective actions.<sup>70</sup>

### *B. The Litigation Services Malpractice Trial*

Six months later, Mattco sued Arthur Young in Los Angeles Superior Court, stating the following causes of action: professional negligence, fraudulent misrepresentation, and fraudulent concealment.<sup>71</sup> Arthur Young filed a cross-complaint against Mattco's former attorneys alleging fraud and claiming complete and partial indemnity.<sup>72</sup> In support of its

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64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.* at 784-86.

68. *See id.* at 785-86.

69. *See id.*

70. *See id.*

71. *See id.* at 783.

72. *Mattco Forge, Inc. v. Arthur Young & Co.*, 45 Cal. Rptr. 2d 581, 584-85 (Cal.

cross-complaint, Arthur Young introduced the expert declaration of an attorney who opined as follows:

[Mattco's former attorneys] failed to comply with the professional standards of an attorney at law by, inter alia, failing to recognize and respect the distinction between Young's role as a consultant and as a testifying expert . . . , failing to direct and supervise Young's work . . . , [and] improperly representing to the court the nature of the work undertaken by Young and the testimony Young would provide on the issue of damages.<sup>73</sup>

Before trial, Arthur Young obtained a summary judgment based on Mattco's unclean hands and a statutory absolute litigation privilege for publications or broadcasts made in judicial proceedings.<sup>74</sup> However, in *Mattco Forge I*, the court of appeal unanimously reversed, holding in part that the litigation privilege did not apply.<sup>75</sup>

Subsequently, the trial against Arthur Young proceeded, lasting more than four months and involving approximately forty witnesses, 880 marked exhibits, 10,000 combined pages of clerk's and reporter's transcripts, and almost 200 pages of appellate briefs for motions filed during trial.<sup>76</sup> In 1994, the jury awarded Mattco \$41.9 million.<sup>77</sup>

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Ct. App. 1995). Arthur Young voluntarily dismissed its cross-complaint without prejudice, but subsequently refiled it. *See id.* at 585. Prior to adjudication, Mattco and its former attorneys entered into a sliding-scale settlement agreement, by virtue of which the former attorneys promised to pay \$150,000 to Mattco up front and up to an additional \$600,000, thereby guaranteeing Mattco "a recovery of at least \$750,000 on its claims against Young." *See id.* If, however, Mattco recovered more than \$750,000 from Young, or if Mattco settled or entered into a stipulated judgment with Young, the former attorneys would pay nothing to Mattco. *See id.* The trial court found that the settlement was made in good faith and granted the former attorneys' motion to dismiss Young's cross-complaint. *See id.* at 586. The appellate court reversed. *See id.* at 593.

73. *See id.* at 585-86.

74. *See Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 781, 783 (Cal. Ct. App. 1997) (*Mattco Forge II*). The litigation privilege is codified in California Civil Code section 47(b), which states in relevant part:

A privileged publication or broadcast is one made: . . . (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title I of Part 3 of the Code of Civil Procedure . . . .

CAL. CIV. CODE § 47(b) (West Supp. 1997). "[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 786 P.2d 365, 369 (Cal. 1990) (citations omitted).

75. *See Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 781 (Cal. Ct. App. 1992) (*Mattco Forge II*).

76. *See id.* at 784.

77. *See id.* The jury award included \$13.2 million in compensatory damages,

The trial court did not apply the SWAS doctrine.<sup>78</sup> The trial court failed to instruct the jury on the causation element which required a connection between Arthur Young's negligence and the harm to Mattco.<sup>79</sup> The only evidentiary burden placed on Mattco with respect to liability "was to show Arthur Young had caused Mattco to suffer 'harm.'"<sup>80</sup> In the damages phase, the trial court required only that Mattco prove "the extent of the harm," primarily the "value" of Mattco's case against GE.<sup>81</sup> The trial court instructed the jury that in determining that value, "you shall exercise reasonable judgment and the damages you shall fix shall be just and reasonable in light of the evidence."<sup>82</sup>

### C. Consideration of the SWAS Doctrine on Appeal

In *Mattco Forge II*, Arthur Young, appealing the multimillion-dollar award, contended that (1) the trial court should have required Mattco to prove that it would have prevailed in the underlying federal case against GE, and (2) the trial court should have applied the SWAS doctrine to determine the impact of Arthur Young's negligence on the outcome of the underlying federal case.<sup>83</sup> In response, Mattco argued that the SWAS doctrine was limited to attorney malpractice cases and that a "valuation method" employing expert witness testimony as to the outcome of the underlying case was appropriate for the malpractice action against Arthur Young.<sup>84</sup> The court of appeal unanimously agreed with Arthur Young and held that Mattco's burden of proof required a SWAS to prove damages.<sup>85</sup>

The *Mattco Forge II* opinion specifically addressed the causation issue by reviewing the jury instructions given below.<sup>86</sup> The court of appeal concluded that proper instruction of the jury would require Mattco to establish that Arthur Young's negligence was a substantial factor in

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\$995,717.38 in out-of-pocket expenses and interest, and \$27.68 million in punitive damages. *See id.* at 783 n.1.

78. *See id.* at 793-94.

79. *See id.*

80. *See id.* at 786 (footnote omitted).

81. *See id.* at 786.

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.* at 799.

86. *See id.* at 783-99.



Mattco's loss of the prior lawsuit.<sup>87</sup> The opinion stated that, although Arthur Young was found negligent, "Arthur Young cannot be held liable for Mattco's own defalcations which may have contributed to the loss of its legal claim against GE."<sup>88</sup>

#### IV. MISAPPLICATION OF THE ATTORNEY LITIGATION MALPRACTICE PARADIGM TO LITIGATION SERVICES MALPRACTICE

##### A. *Use of the SWAS Doctrine is Improper for Proving Causation*

If witness immunity is not available for party experts, a trial court should not use a SWAS by itself to prove causation in a litigation services malpractice lawsuit. Use of the SWAS doctrine to prove causation in such cases is improper, because the SWAS doctrine is a variant of the but for test and should not be used to prove causation when factors other than the expert's negligence may have affected the outcome of the underlying suit. If other factors may have significantly affected the outcome of the underlying suit, a court should apply the substantial factor test. If a court could apply the substantial factor test in a litigation services malpractice case, the expert would have no liability if the expert's negligence is insignificant. Even if the client won the SWAS, the expert would not be liable had a similar outcome in the underlying suit resulted without the expert's negligence, or if the expert's negligence contributed relatively insignificantly to the outcome of the underlying suit.

California law requires that courts apply the substantial factor test in all negligence cases.<sup>89</sup> Accordingly, in *Mattco Forge II*, the court of appeal jerrybuilt an approach to handle litigation services malpractice not only by applying the SWAS doctrine, but also by mandating a jury instruction covering the substantial factor test.<sup>90</sup> The court of appeal recognized the need for the jury to consider other persons who could have influenced the outcome of the underlying suit.<sup>91</sup> The opinion declared

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87. *See id.* at 795.

88. *See id.* at 793.

89. *See Mitchell v. Gonzales*, 819 P.2d 872, 878-79 (Cal. 1991) (rejecting the but for test of causation in negligence and requiring the application of the substantial factor test); *Conklin v. Hannoeh Weisman*, 678 A.2d 1060, 1072 (N.J. 1996) (applying the substantial factor test to an attorney transactional malpractice lawsuit).

90. *See Mattco Forge II*, 60 Cal. Rptr. 2d at 783-99.

91. The court of appeal concluded as follows:

The conduct of Arthur Young in the calculation of Mattco's lost profits was shown to be negligent. But the triers of fact also must find that Arthur Young's negligence caused the loss of Mattco's claim against GE in order to reach a verdict in favor of Mattco. Arthur Young cannot be held liable for Mattco's own defalcations which may have contributed to the loss of its legal claim against GE . . . . The lack of a proper *causation* instruction permitted

that even if the trial court had applied the SWAS doctrine, the trial court's failure to instruct the jury on the substantial factor test "left the jurors in a sea of speculation and conjecture."<sup>92</sup> The court stated that the applicable standard in a professional malpractice suit is the SWAS, "accompanied by proper instructions."<sup>93</sup> As an example, the opinion suggested instructions that require the plaintiff to establish that "the professional's negligence was a substantial factor in the plaintiff's loss of the prior lawsuit."<sup>94</sup>

Some jurisdictions, such as New York, which have not yet addressed expert witness liability, articulate the element of causation in attorney litigation malpractice actions primarily in terms of the but for test.<sup>95</sup> If such jurisdictions apply the SWAS doctrine as the only means to prove causation in a litigation services malpractice suit, the result will be the

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Mattco to escape its burden of proving Arthur Young's negligence caused Mattco to lose its lawsuit against GE. . . . Such an instruction also would have put in issue Mattco's misconduct in the underlying lawsuit against GE.

*Id.* at 793-94.

92. *See id.* at 793.

93. *See id.* at 794.

94. *See id.* at 795.

95. *See, e.g.,* Charles Reinhart Co. v. Winiemko, 513 N.W.2d 773, 775-76 (Mich. 1994) ("[A] plaintiff 'must show that *but for* the attorney's malpractice, he would have been successful in the underlying suit.") (quoting *Coleman v. Gurman*, 503 N.W.2d 435, 437 (Mich. 1993)); *Carmel v. Lunney*, 511 N.E.2d 1126, 1128 (N.Y. 1987) ("New York has traditionally applied a 'but for' approach to causation when evaluating legal malpractice claims.") (citations omitted); 76 N.Y. JUR. 2D § 39 (1996) ("But so long as counsel's negligence was one of the proximate or efficient causes of the injury, causation is established, even though mistakes made by others may have also contributed."); Wolfram, *supra* note 48, § 5.6.3, at 218; LAWYERS' MANUAL, *supra* note 48, § 310:103 (proof of proximate cause "requires a showing that 'but for' the attorney's misconduct the injury would not have been suffered").

In applying the but for test, courts have also stated that the attorney's negligence must be a substantial factor in the unfavorable outcome of the underlying suit.

An attorney can be held liable to a client for malpractice only if the attorney's breach of duty is a substantial cause of the injury suffered by the aggrieved client[;] [t]his has been said to require the client to prove that 'but for' the improper act or omission by the attorney, the client would not have been harmed in the manner alleged.

LAWYERS' MANUAL, *supra* note 48, § 301:132; *see* Wolfram, *supra* note 48, § 5.6.3, at 218 ("There is no requirement that the plaintiff demonstrate that the malpractice was the only cause, so long as there is competent proof that it was a cause that contributed significantly to the plaintiff's loss.").

misapplication of the but for test in situations in which the expert may be an insignificant factor in the outcome of the SWAS.

If a court applies the SWAS doctrine in a litigation services malpractice suit without considering the influence of other persons (such as the attorney or other experts) who may be substantial factors in the outcome of the underlying suit, the trier of fact will not have the opportunity to determine whether a similar result would have followed without the expert's act, or whether the expert's contribution to the result was insignificant. For instance, as noted above, Arthur Young alleged in one of the *Mattco Forge* appeals that, among other things, Mattco's original attorneys failed to comply with attorney professional standards, failed to recognize and respect the distinction between the accounting firm's role as consultant and as testifying expert in the underlying action, failed to direct and supervise the CPA's work in that action, and improperly represented to the court the nature of the work undertaken and the testimony to be provided by the accounting firm.<sup>96</sup>

In addition, the SWAS doctrine does not consider the comparative fault of the client. For example, in the United States District Court case underlying the *Mattco Forge* cases, the court found that Mattco and its owner were guilty of GE's allegations of fraud, including fabrication and knowing production of the newly-created worksheets.<sup>97</sup>

If a court only applies the SWAS doctrine, the expert may be held unjustly responsible for the entire loss. The expert's liability will be joint and several, although the expert's fault may be insignificant in comparison to the fault of others. Although an expert may have a claim for contribution or comparative indemnity against others, the expert will still have some liability, or have disproportionate liability if the others have settled for disproportionately small amounts. For example, the trial court in *Mattco Forge* approved a settlement agreement between Mattco and its former attorneys, who Mattco had not sued.<sup>98</sup> The agreement provided that if Mattco recovered more than \$750,000, settled the case, or stipulated a judgment with Arthur Young, the attorneys would owe nothing.<sup>99</sup> However, the California Court of Appeal rejected the settlement because there was "no substantial evidence to support a critical assumption" concerning Arthur Young's liability.<sup>100</sup> One can easily imagine, due to the factual and legal uncertainties of the malpractice case, that Mattco and its original attorneys could have reached and substantiated a settle-

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96. See *Mattco Forge, Inc. v. Arthur Young & Co.*, 45 Cal. Rptr. 2d 581, 584-86 (Cal. Ct. App. 1995).

97. See *Mattco Forge II*, 60 Cal. Rptr. 2d at 784-86.

98. See *Mattco Forge*, 45 Cal. Rptr. 2d at 585.

99. See *id.*

100. See *id.* at 588.

ment which would have been reasonable at the time of the settlement, but which would have amounted to much less than a proportionate part of the actual jury verdict.

*B. Proof of Significance Will be Too Speculative*

Even if the substantial factor test is somehow incorporated into a litigation services malpractice suit, jurors will still be left "in a sea of speculation and conjecture."<sup>101</sup> Application of the substantial factor test would further complicate an already complex trial by requiring more evidence about the significance of various factors in the outcome of the underlying suit; such evidence can only be speculative because of the complex nature of the litigation. The *Mattco Forge II* opinion did not disclose the method to be used by the plaintiff to prove that Arthur Young's negligence was a substantial factor in the outcome of the underlying United States District Court case.

One alternative is to allow the parties to present the jury with factual evidence regarding insignificance and allow the jury to form its own opinion.<sup>102</sup> Can juries be expected to analyze competently whether the expert's negligence was a substantial factor in the outcome of the underlying suit? Without expert witness testimony, jury determination of whether expert malpractice was a substantial factor would be a fiasco, because a lay juror does not have a working knowledge of the rules and procedures of litigation and the rules of law that could affect the outcome of the underlying suit. To leave such a complex analysis to a jury without professional guidance from expert witnesses would turn the trial into a crashout.

The only other alternative is for legal experts familiar with the litigation process to provide opinion testimony that would be considered by the jury. Legal experts would assess the proportionate contribution of the defendant-expert's negligence to the outcome of the underlying suit by analyzing the various factors that affect the outcome of a lawsuit. In non-litigation attorney malpractice cases, expert witness testimony is usually essential.<sup>103</sup> In litigation attorney malpractice cases, however, courts have refused, or have been reluctant, to admit expert testimony

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101. See *Mattco Forge II*, 60 Cal. Rptr. 2d at 793.

102. See *Skinner v. Stone, Raskin & Israel*, 724 F.2d 264, 266 (2d Cir. 1983) (suggesting that "[a] jury, with all the facts before it" might be able to determine whether an attorney's negligence was a proximate cause of the plaintiff's harm).

103. See 4 MALLEN & SMITH, *supra* note 19, § 32.16, at 205-07.

pertaining to the outcome of the underlying suit because the courts have deemed such testimony too speculative.<sup>104</sup> Courts often cite a so-called “battle of the experts” and the high probability of confusing the jury as problems inherent with using experts to opine about the outcome of litigation.<sup>106</sup> There is no reason to believe that testimony on the significance of causation in a litigation services malpractice suit would be any less speculative.

### C. *The SWAS Doctrine is Inappropriate for Proving Damages*

Courts should not use the SWAS doctrine to prove damages in litigation services malpractice cases because the differences between experts and attorneys amplifies the level of speculation and conjecture that may be tolerable in an attorney litigation malpractice suit. Because the parties cannot duplicate the original situation, a SWAS intrinsically has a degree of speculation and conjecture. That degree of speculation and conjecture is further increased when an expert must litigate the underlying case in a SWAS due to the fact that an expert is at a greater disadvantage than the attorney originally in charge of the underlying suit.

The analysis of this issue in the *Mattco Forge II* opinion is flawed. In that case, the California Court of Appeal held that the client in the underlying lawsuit must establish through a SWAS that the client would have prevailed had the accounting firm properly handled its duties in the underlying suit.<sup>106</sup> In discussing the SWAS doctrine, the court of appeal appeared to be more concerned with the SWAS as a measure of damages than as a means of finding causation.<sup>107</sup> The court stated that the SWAS burden persists “probably because it is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever ex-

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104. *See id.* § 32.17, at 222-23; *cf. Lieberman v. Employers Ins.*, 419 A.2d 417, 427 (N.J. 1980) (stating that the method of proving damages “should be within the discretion of the trial judge”).

105. *See* 4 MALLEEN & SMITH, *supra* note 19, § 32.17, at 222-23 (“The fact that litigation virtually is an American pastime emphatically shows that few attorneys ever agree on the likely outcome of a lawsuit or on the amount of probable recovery.”).

106. *See Mattco Forge II*, 60 Cal. Rptr. 2d at 783-99.

107. *See id.* In declaring the SWAS standard for attorney malpractice alive and well in California, the court of appeal noted that *Campbell v. Magana*, 8 Cal. Rptr. 32 (Cal. Ct. App. 1960), a significant case in attorney malpractice jurisprudence, provided “the rationale in support of an admittedly burdensome and complicated [SWAS] approach: it avoids ‘speculative values as a measure of recovery.’” *See Mattco Forge II*, 60 Cal. Rptr. 2d at 787 (quoting *Campbell*, 8 Cal. Rptr. 2d at 33). The court also referred to subsequent attorney malpractice and insurance malpractice cases that adopted the SWAS approach. *See id.* at 787-88. In the insurer bad faith cases, the SWAS doctrine was not used to prove causation, but merely to prove damages. *See id.*

panding litigation. It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance."<sup>108</sup> Thus, the court of appeal adopted the SWAS doctrine by process of elimination and was reluctant to consider a new approach for litigation services.<sup>109</sup> The majority stated that "[c]ertainly, to date, no other approach has been accepted by the courts."<sup>110</sup>

*Mattco Forge II* failed to address either the ways in which an expert's participation in a lawsuit differs from the participation of an attorney or the limited impact an expert has on the outcome of the underlying lawsuit.<sup>111</sup> The court of appeal incorrectly found that the different relationships between a client and its attorney and a client and its experts performing litigation services did not make a difference for purposes of applying the SWAS doctrine. The majority stated, "[W]e would not be the first court to hold the same evidentiary approach is applicable in analogous situations where the claim is that professional negligence caused the loss of a lawsuit."<sup>112</sup> In support of its conclusion, the majority cited the Supreme Court of Missouri for the following proposition: "Often [professionals] play as great a role in the organization and shaping and evaluation of their client's case, as do the lawyers. Those who provide these services are selected for their skill and ability and are compensated accordingly just as any other professional."<sup>113</sup>

Other cases cited in the *Mattco Forge II* opinion as support for treating experts as attorneys were not appropriate. As an illustration of another professional treated like an attorney in order to determine damages, the court cited an insurer negligence case in which the insurer completely controlled the underlying suit and improperly conducted the defense.<sup>114</sup>

108. *Mattco Forge II*, 60 Cal. Rptr. 2d at 788.

109. *See id.*

110. *See id.* Conceding that the arguments of some critics of SWAS are meritorious, the court cited law review articles for the general proposition that the SWAS doctrine placed an unreasonable burden on the plaintiff and, therefore, allowed attorneys who had not met professional standards to evade liability. *See id.* at 788-89.

111. *See id.* at 783-99.

112. *Id.* at 789.

113. *See id.* (citing *Murphy v. A.A. Mathews*, 841 S.W.2d 671, 682 (Mo. 1992) (involving witness immunity as opposed to application of the SWAS doctrine).

114. *See id.* (citing *Travelers Ins. Co. v. Leshner*, 231 Cal. Rptr. 791 (Cal. Ct. App. 1986), *overruled on other grounds by Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997)) (discussing plaintiff's allegation that insurer improperly conducted defense of lawsuit). The court also cited *Williams v. Wrazall*, 39 Cal. Rptr. 2d 658 (Cal. Ct. App. 1995), an expert serologist negligence suit in which the court declined to apply the SWAS doctrine. *See Mattco Forge II*, 60 Cal. Rptr. 2d at 789.

The other cases cited from non-California jurisdictions either (1) did not involve a SWAS, (2) ultimately resulted in the plaintiff relitigating the suit against the original opponent instead of the negligent professional, or (3) ultimately resulted in the plaintiff litigating against a party who was not a litigation professional and had previously admitted that it was the correct opponent.<sup>115</sup>

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115. See *Mattco Forge II*, 60 Cal. Rptr. 2d at 788-89. The citation of the four cases from other jurisdictions as support for the court's conclusion is extremely dubious. According to one case, a plaintiff must prove damages as a result of expert malpractice by first proving that plaintiff would have prevailed in the underlying lawsuit. See *id.* at 789-90 (citing *Schaffer v. Donegan*, 585 N.E.2d 854, 860 (Ohio Ct. App. 1990)). However, based on the quoted charge to the jury in the malpractice case, there was no SWAS at trial. See *Schaffer*, 585 N.E.2d at 858. The *Schaffer* court did not mention a SWAS, and did not state that a SWAS was required or that a SWAS had been conducted. See *id.* at 856-59. *Schaffer* is better characterized as an example of a vindictive client who decided to sue a friendly expert because the expert, hired to testify in the underlying suit, changed his opinion so he could testify truthfully. See *id.* at 856-57. *Schaffer* may also be characterized as an example of a case in which the actions of the attorneys allegedly contributed to the unfavorable outcome. See *id.* at 858. The *Mattco II* majority cited another case for essentially the same proposition; however, in that case, the plaintiff sued a hospital for losing evidence which was allegedly necessary to prevail in the underlying lawsuit. See *Mattco Forge II*, 60 Cal. Rptr. 2d 788-89 (citing *Rodgers v. St. Mary's Hosp.*, 556 N.E.2d 913, 919 (Ill. App. Ct. 1990)). No professional malpractice (attorney, expert, or otherwise) was involved that case. See *Rodgers*, 556 N.E. 2d at 914-19. The *Rodgers* court required the plaintiff to prove that the loss of evidence caused its defeat in the underlying suit, in order to prevail in the negligence claim against the hospital. See *id.* at 915-16. The *Rodgers* court did not mention a SWAS and did not state that a SWAS was required. See *id.* at 914-19. The *Mattco Forge II* opinion also cited a case in which a plaintiff sued a manufacturer for misrepresentation because the manufacturer admitted that it had manufactured the product during discovery in the underlying suit, but, after the statute of limitations had run, it was discovered that the defendant manufacturer was not the true manufacturer. See *Mattco Forge II*, 60 Cal. Rptr. 2d at 788-89 (citing *Beeck v. Kapalis*, 302 N.W.2d 90, 92-93 (Iowa 1981)). The Supreme Court of Iowa stated that the case was analogous to attorney malpractice in that the plaintiff would have to prove that it could have prevailed against the true manufacturer. See *Beeck*, 302 N.W.2d at 93-94. Obviously, no professional malpractice (attorney, expert, or otherwise) was involved in *Beeck*. See *id.* at 90-98. Apparently, it would be easier for a manufacturer to defend a suit involving a product it originally thought it had made than it would be for an expert to defend a reconstruction of a suit in which it had nothing in common with the defendant therein. Next, the *Mattco Forge II* court cited a case that involved a negligence lawsuit against the county for an error committed by the county clerk, allegedly causing the denial of an appeal of the underlying case. *Mattco Forge II*, 60 Cal. Rptr. 2d at 789 (citing *Universal Ideas Corp. v. Linn County*, 669 P.2d 1165, 1165-66 (Or. Ct. App. 1983)). The Oregon court held that if the trial court determined on remand that the appeal would have been successful, then, before holding the county liable, the trial court must retry the original lawsuit to determine whether the appellant would have prevailed therein. See *Universal Ideas Corp.*, 669 P.2d at 1166. The court of appeal held in the subsequent retrial that the appellant could relitigate the underlying suit against the original opponent. See *id.* Generally, a

A SWAS is inherently suspect because it is impossible to accurately reconstruct the circumstances surrounding the underlying suit.<sup>116</sup> The SWAS approach "wholly ignores the possibility of settlement."<sup>117</sup> Furthermore, the passage of time may affect the quality of evidence for both parties.<sup>118</sup> In addition, memories of witnesses may fade or evidence may be lost or destroyed.<sup>119</sup> There may be a jury trial for the SWAS, whereas the client may not have been entitled to one for the underlying suit.<sup>120</sup> Perhaps the client may prevail in the SWAS merely as a result of more effective advocacy or better preparedness through hindsight, rather than elimination of professional malpractice.<sup>121</sup>

It is unfair to impose the SWAS doctrine on an expert. The expert is forced to try a suit that possibly no one ever intended to try. The expert is forced to pursue a cause which the expert previously opposed. The process of litigating a SWAS is obviously much more difficult for an expert's attorney than for an attorney representing another attorney accused of litigation malpractice. Because the expert did not control the litigation of the underlying suit, the expert does not have the benefit of hindsight and experience to prevail in a SWAS. An expert, unlike an attorney or an insurer, does not have ultimate control of the litigation. The expert merely reports to the attorney and possibly testifies at trial. An expert performs tasks only under the supervision of the attorney. The attorney is the advocate, whereas the expert is employed by the attorney to objectively deliver information or an opinion.

Unlike an attorney-defendant's counsel, an expert's counsel does not have the experience of preparing for, and possibly trying, the underlying case. Unlike an expert, an attorney-defendant ordinarily will have con-

SWAS is not opposed by the original opponent.

116. See *Gautam v. DeLuca*, 521 A.2d 1343, 1348 (discussing weaknesses of the SWAS approach); Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial—A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40, 47 (1989) (reviewing weaknesses of the SWAS doctrine).

117. *Gautam*, 521 A.2d at 1348.

118. See *id.*

119. See *LAWYERS' MANUAL*, *supra* note 48, § 301:104.

120. See, e.g., *Ceriale v. Superior Court*, 56 Cal. Rptr. 2d 353 (Cal. Ct. App. 1996) (rejecting defendant's contention that equitable and legal issues should be severed and allowing the plaintiff to try the legal malpractice suit to a jury even though she may not have been entitled to a jury in the underlying suit).

121. See Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, *LITIGATION*, Winter 1989, at 16 ("Often the first attorney neglected the case (inexcusably of course) because it wasn't much of a case.").



sulted extensively with the former client, will have determined not only the strengths of the client's claim, but also its weaknesses, and may be in a better position to defend the client's claim than the original opponent.<sup>122</sup> More importantly, an attorney who is sued for malpractice has access to privileged information and work product, which can be used or disclosed.<sup>123</sup> An expert cannot use or disclose such information.<sup>124</sup>

An attorney's performance is a significant factor in the outcome of the underlying suit even if the attorney does not commit malpractice. The attorney sets the strategy, chooses the witnesses and the experts, writes the briefs and motions, conducts and defends discovery, objects to or defends the introduction of evidence, decides whether to settle, decides whether to appeal, and makes many other decisions and performs many other tasks that affect the outcome of a case. For example, the attorney may decide to apply less effort in what the attorney perceives to be a losing case.

Furthermore, an expert's role is not analogous to that of an insurer. An insurer has ultimate control of a lawsuit because the insurer decides whether to try or settle the lawsuit, and chooses or approves the attorney. An expert does not perform such tasks.

The *Mattco Forge II* majority also stated, as a justification for applying the SWAS doctrine, that professionals who provide litigation support services are subject to liability if they perform negligently in their other areas of practice and concluded that "in situations where alleged negligent conduct *is analogous to* an attorney's mishandling litigation, a plaintiff should be held to the same burden."<sup>125</sup>

Expert liability for negligence in performing litigation services, however, is not analogous to expert liability for negligence in performing other services. Not all experts are subject to professional standards for litigation services.<sup>126</sup> The rationale for the absence of professional standards

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122. See David O. Haughey, *Lawyers' Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888, 893 (1973).

123. See 4 MALLEN & SMITH, *supra* note 19, § 32.29, at 257-60, § 32.31, at 272-74 (noting that the self-defense exception to the attorney-client privilege is available in an action by a client against his attorney). In fact, the work product may not be available to the client. See *id.* § 32.31, at 272-73; *cf.* CAL. CIV. PROC. CODE § 2018(f) (West Supp. 1977) (establishing no work-product privilege in action between attorney and client concerning breach of duty by attorney).

124. See 4 MALLEN & SMITH, *supra* note 19, § 32.28, at 250-54, § 32.31, at 272-74 (explaining that an attorney is usually required to assert attorney-client privilege for the following communications: attorney's impressions, conclusions, opinions, legal research, and theories absolutely protected from client's adversaries).

125. See *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 780, 789 (Cal. Ct. App. 1997) (*Mattco Forge II*).

126. For example, because the American Institute of Certified Public Accountants

is that an expert customizes each engagement according to the needs of the client and the attorney, and that the expert's work product is subject to scrutiny by the client, the attorney, and the other party (through discovery and cross-examination).<sup>127</sup> In effect, the client and the attorney determine the objectives and the standards for the expert's work.

The method mandated by the court of appeal in the *Mattco Forge II* decision for proving causation and damages does not sufficiently eliminate speculation and conjecture. When this deficiency is considered in light of the court opinions discussing witness immunity, the case for witness immunity for party experts becomes compelling.

## V. REVISITING WITNESS IMMUNITY

### A. History

As the *Mattco Forge* cases illustrate, if witness immunity is not available for an expert, the result can be extremely harsh. The few courts that have considered whether witness immunity applies to party experts have not reached a consensus. As discussed above, the California Court of Appeal, in *Mattco Forge I*, refused to extend the California statutory litigation immunity for witnesses to a friendly CPA expert for liability to a client arising from litigation services performed during discovery.<sup>128</sup> Several months later, the Supreme Court of Missouri, in *Murphy*, held that common law witness immunity did not bar an action by a client against a friendly engineering expert for negligence in pretrial litigation services.<sup>129</sup>

Other than the *Mattco Forge I* and *Murphy* decisions, only courts in Washington<sup>130</sup> and Pennsylvania<sup>131</sup> have considered the issue of immu-

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(AICPA) classifies litigation services as consulting services, litigation services are generally not subject to the stringent reporting standards that apply to audits and attestation services, but are subject to the comparatively general and meager standards for consulting services. See *Application of AICPA Standards in the Performance of Litigation Services*, CONSULTING SERVS. SPECIAL REP. 93-1, § 71/120 (American Inst. of Certified Pub. Accountants 1993) [hereinafter SPECIAL REP.]; *Attestation Standards: Attestation Engagements Interpretation of Section 100*, 1 AICPA PROFESSIONAL STANDARDS, § 9100.47-.55 (American Inst. of Certified Pub. Accts. 1990) [hereinafter PROFESSIONAL STANDARDS].

127. See SPECIAL REP., *supra* note 126, § 71/110.

128. See *Mattco Forge, Inc. v. Arthur Young & Co.*, 6 Cal. Rptr. 2d 780, 790 (Cal. Ct. App. 1992) (*Mattco Forge I*).

129. See *Murphy v. A.A. Mathews*, 841 S.W.2d 671 (Mo. 1992).

130. See *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 776 P.2d 666 (Wash. 1989)

nity for party experts. The 1989 Washington case of *Bruce v. Byrne-Stevens & Associates Engineers, Inc.*, was the first litigation services immunity case decided.<sup>132</sup> The holding in *Bruce* was rejected in the *Mattco Forge I* and *Murphy* cases but was followed by a Pennsylvania court in *Panitz v. Behrend*.<sup>133</sup> In *Bruce*, the Supreme Court of Washington provided a comprehensive analysis of the issues that to-date have been considered in determining the scope of witness immunity.<sup>134</sup> In *Panitz*, a Pennsylvania Superior Court rejected the California court's holding in *Mattco Forge I* and concluded that the Supreme Court of Washington, in *Bruce*, had the better view, that is, that absolute immunity exists for friendly experts and covers in-court testimony, including acts and communications in connection with preparing such testimony.<sup>135</sup>

As noted above, although recent commentators have overwhelmingly argued that an expert should be liable when the expert receives compensation and fails to act as a reasonably prudent professional in rendering litigation services, none of these commentators has seriously considered the problems of proving causation and damages discussed herein.<sup>136</sup>

Early English and American courts granted absolute immunity to witnesses in order to shield them from subsequent defamation suits based upon their testimony. Modern courts however, have struggled to decide whether to expand or contract the traditional scope of witness immunity.<sup>137</sup> Some American courts limit witness immunity to statements made in response to questions asked by counsel or the court and exclude from immunity irrelevant statements volunteered by a witness.<sup>138</sup> In particular, Missouri courts limit the scope of immunity to adverse witnesses and

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(finding that witness immunity extends to actions forming the basis of compensated friendly engineer's testimony).

131. See *Panitz v. Behrend*, 632 A.2d 562 (Pa. Super. Ct. 1993) (holding that a friendly expert medical witness was immune from civil liability for her testimony).

132. See *Bruce*, 776 P.2d at 666.

133. See *supra* notes 128-31 and accompanying text.

134. For detailed reviews of the *Bruce* decision, see Pahl, *supra* note 12 (commenting on the application of the rules of witness immunity to expert witnesses) and Jensen, *supra* note 14 (favoring the denial of witness immunity to experts receiving compensation from individual litigants).

135. See *Panitz*, 632 A.2d at 565-66. A federal district court in Pennsylvania, however, recently interpreted Pennsylvania law to provide immunity for adverse expert witnesses and, in a footnote, expressed doubt that the Pennsylvania Supreme Court would reject *Mattco Forge I* and *Murphy* and affirm its own lower court's ruling in *Panitz*, which extended immunity to friendly witnesses. See *Serchia v. MacMillan*, No. CIV. A.96-2910, 1997 WL 127984, at \*1 & n.7 (E.D. Pa. Mar. 20, 1997).

136. See *supra* text accompanying note 14.

137. See *Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1983); *Murphy v. A.A. Mathews*, 841 S.W.2d 671, 674-75 (Mo. 1992).

138. See *Murphy*, 841 S.W.2d at 675-76.

to statements made directly in the judicial proceeding or in an affidavit or pleading.<sup>139</sup> On the other hand, many jurisdictions now hold that a common law absolute quasi-judicial immunity protects court-appointed experts, but most of those jurisdictions have not yet addressed issues involving compensated friendly experts.<sup>140</sup>

The rationale for witness immunity is avoidance of two forms of witness self-censorship.<sup>141</sup> First, a witness may be reluctant to testify if the witness is apprehensive of subsequent liability.<sup>142</sup> Secondly, a witness may be inclined to shade the witness's testimony in favor of the potential plaintiff to magnify uncertainties, and thus deprive the finder of fact of candid, objective, and undistorted evidence if the witness knows that the witness might be forced to defend a subsequent lawsuit, and perhaps to pay damages.<sup>143</sup>

### *B. Compensation and Friendliness do not Make a Difference*

The primary, if not exclusive, difference between an expert witness and a lay witness is that an expert witness can give opinions about sub-

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139. *See id.* at 676-77 (citing Missouri precedent in support of the denial of immunity where an expert was not sued for defamation, the expert was not an adverse witness, and the claim was limited to litigation support services, not testimony).

140. Court-appointed medical experts are the primary beneficiaries of absolute, quasi-judicial immunity. *See Lythgoe v. Guinn*, 884 P.2d 1085, 1087 & n.1 (Alaska 1994) (holding that a court-appointed psychologist was entitled to absolute quasi-judicial immunity and citing numerous parallel holdings from other jurisdictions); *Gallion v. Woytassek*, 504 N.W.2d 76, 83-84 (Neb. 1993) (holding that a court-appointed psychiatrist was entitled to absolute quasi-judicial immunity for act done within scope of authority "without willfulness, malice, or corruption"). In Pennsylvania, absolute immunity from medical malpractice liability was granted to court-appointed, medical expert witnesses, but not necessarily on a quasi-judicial basis. *See Clodgo by Clodgo v. Bowman*, 601 A.2d 342 (Pa. Super. Ct. 1992). *But see James v. Brown*, 637 S.W.2d 914, 916-18 (Tex. 1982) (recognizing common law absolute immunity for defamation, but interpreting a statute to limit liability for psychiatrists, who render diagnoses as part of an involuntary hospitalization proceeding, from "negligent misdiagnosis-medical malpractice merely because their diagnoses were later communicated to a court in due course of judicial proceedings"). In New Jersey, court-appointed accountants are not entitled to the same immunities enjoyed by medical professionals in many states. *See Levine v. Wiss & Co.*, 478 A.2d 397, 398-403 (N.J. 1984) (holding that an accountant jointly selected by the parties and appointed by the court as an "impartial witness" was not immune from a negligence claim brought by one of the parties).

141. *See Briscoe*, 460 U.S. at 333.

142. *See id.*

143. *Id.*

jects lay witnesses cannot and that experts need not rely on first-hand knowledge to formulate such opinions.<sup>144</sup> Whether they are compensated or uncompensated, friendly or adverse, experts are under the same sworn obligation as other witnesses: "To tell the truth, *the whole truth* and nothing but the truth, so help you God."<sup>145</sup>

Attorneys are distinguishable from experts in that they are advocates. As such, attorneys, unlike expert witnesses, do not have to tell "the whole truth."<sup>146</sup> They present only evidence that advances a desired outcome. The objective of an advocate is not to determine truth, but rather to communicate a position statement about the evidence presented to the trier of fact.<sup>147</sup>

As a matter of law, experts are distinguishable from attorneys in that they serve the court by offering impartial testimony and serve their clients by giving impartial advice.<sup>148</sup> Following the *Bruce* court's granting of immunity to friendly experts, the majority in *Panitz* stated that "[t]he primary purpose of expert testimony is not to assist one party or another in winning the case but to assist the trier of the facts in understanding complicated matters."<sup>149</sup> In *Murphy*, the Supreme Court of Missouri erroneously stated that experts "function as paid advisors and as paid advocates" rather than as "unbiased court servant[s]," and concluded that the "policy of ensuring frank and objective testimony" was not advanced by extending immunity to them.<sup>150</sup>

Some experts are subject to standards that preclude them from functioning as advocates. A CPA expert who provides litigation services cannot be an advocate because of the requirement that a CPA be impartial in rendering such services. Accountants are subject to a standard that re-

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144. See HAROLD A. LIEBENSON, *YOU, THE EXPERT WITNESS* 42-44 (1962); FRANK J. MACHOVEC, *THE EXPERT WITNESS SURVIVAL MANUAL* 6 (1987). Generally, opinion testimony by a lay witness is limited to certain matters. Compare FED. R. EVID. 701 (lay witness testimony primarily limited to first-hand knowledge or observation), with FED. R. EVID. 702 & 703 (expert witness testimony is related to specialized knowledge and opinions are not dependant upon first-hand knowledge).

145. See MACHOVEC, *supra* note 144, at 6 (emphasis added).

146. See *supra* text accompanying note 145.

147. See BARTON L. INGRAHAM, *The Ethics of Testimony: Conflicting Views on the Role of the Criminologist as Expert Witness*, in *EXPERT WITNESSES: CRIMINOLOGISTS IN THE COURTROOM* 178-79 (Patrick R. Anderson & L. Thomas Winfree, Jr. eds., State Univ. of N.Y. Press 1987).

148. See *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164 (3d Cir. 1995) ("In theory, despite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise."); *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 776 P.2d 666, 669 (Wash. 1989) (finding that the expert "serves the court" as a matter of law).

149. See *Panitz v. Behrend*, 632 A.2d 662, 665 (Pa. Super. Ct. App. Div. 1993).

150. See *Murphy v. A.A. Mathews*, 841 S.W.2d 671, 681 (Mo. 1992).

quires them to exercise "integrity and objectivity."<sup>151</sup> The integrity standard requires a CPA to be honest and candid within the constraints of client confidentiality, and the objectivity standard requires a CPA to be impartial, intellectually honest, and free from conflicts of interest.<sup>152</sup>

Witness immunity preserves the integrity of the judicial process by encouraging objectivity in expert testimony.<sup>153</sup> It removes the apprehension of subsequent liability that might induce self-censorship, thereby depriving the trier of fact of candid, objective, and undistorted evidence.<sup>154</sup> If some courts think party experts are actually paid advocates, how can they believe that such experts will not shade the truth or worse to avoid being sued by their client? The *Mattco Forge I* majority stated that granting immunity to friendly experts has the effect of encouraging untruthfulness.<sup>155</sup> The *Murphy* court agreed.<sup>156</sup> However, an expert's fear of being sued by its client, if the client deems the outcome to be unfavorable, may have the same effect. Lack of immunity may cause experts to "assert the most extreme position favorable to the party for whom they testify" in order to avoid the "threat of civil liability based on an inadequate final result in litigation."<sup>157</sup>

A potential party expert may be reluctant to testify or provide litigation services if the client is allowed to subsequently sue the expert and impose thereupon the entire responsibility for an unfavorable outcome. In today's world of cutthroat, no-holds-barred litigation, there is no reason for an expert not to believe that a vindictive client, just like a vindictive opponent, will sue merely if the client does not like the outcome. Immunity allows friendly experts to testify truthfully and perform litigation services with integrity and objectivity, and without fear of retribution from an unhappy client.

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151. See *Statement on Standards for Consulting Services*, 2 AICPA PROFESSIONAL STANDARDS, § 100.07, at 15,013 (American Inst. of Certified Pub. Accts. 1991). Consulting services have been defined to include litigation services. See *id.* § 100.05(d), at 15,012.

152. See *id.* § 100.07 n.2, at 15,013 (citing *Code of Professional Conduct*, 2 AICPA PROFESSIONAL STANDARDS, Art. III & IV, §§ 54.04 & 55.04, at 4311-12 (American Inst. of Certified Pub. Accts. 1992)).

153. See *id.*

154. See *id.*

155. See *Mattco Forge v. Arthur Young & Co.*, 6 Cal. Rptr. 2d 780, 788 (Cal. Ct. App. 1992).

156. See *Murphy V. A.A. Matthews*, 841 S.W.2d 671, 681 (Mo. 1992).

157. See *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 776 P.2d 666, 670 (Wash. 1989).

For example, in *Schaffer v. Donegan*, a vindictive client sued a medical doctor who had been hired by the client's attorney to testify as an expert.<sup>158</sup> In that case, the client sued the doctor for malpractice because the doctor, after being deposed in preparation for the underlying suit, changed his opinion before testifying at trial, but after the trial had already started.<sup>159</sup> The court of appeals refused to overturn the jury verdict in favor of the doctor, stating as follows:

A witness has a duty to appear and testify truthfully concerning his knowledge or belief . . . . Fundamentally, no witness can be required to testify, and no witness should be expected to testify, to anything other than the truth as [the witness] sees it and according to what [the witness] believes it to be. The same is expected of expert witnesses.<sup>160</sup>

The wide scale unavailability of quality litigation services will likely upset the balance of justice. In *Murphy*, the majority stated that "[t]here is no reason to believe that professionals will abandon the area of litigation support." Furthermore, the court noted that professionals have continued to provide other services despite potential liability.<sup>161</sup> Both of the court's propositions are unfounded.

In fact, an increasing number of large accounting firms are dropping audit clients due to the risk of costly litigation.<sup>162</sup> During the first four months of 1997, the largest accounting firms "dropped [thirty] publicly traded companies as audit clients."<sup>163</sup> By comparison, in 1996, large accounting firms dropped ninety-two clients, up from eighty-five in 1994.<sup>164</sup> A vast majority of the rejected clients are small, lesser-known companies.<sup>165</sup>

The threat of liability may drive all but full-time experts out of litigation services, primarily due to the fact that only full-time professional witnesses are able to carry liability insurance.<sup>166</sup> For example, the university professor or other knowledgeable person who occasionally testifies on a highly technical or esoteric issue will probably not opt to purchase expensive malpractice insurance for protection; as a result, such witnesses may refuse to testify.<sup>167</sup> This potential loss of witnesses

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158. See *Schaffer v. Donegan*, 585 N.E.2d 854, 856-57 (Ohio Ct. App. 1990).

159. See *id.* at 856-57.

160. *Id.* at 860.

161. See *Murphy*, 841 S.W.2d at 681; *Bruce*, 776 P.2d at 675 (Pearson, J., dissenting) ("[E]ven if malpractice liability intimidates some experts, others will rise to fill the need.")

162. See Elizabeth MacDonald, *More Accounting Firms Are Dumping Risky Clients*, WALL ST. J., Apr. 25, 1997, at A2.

163. *Id.*

164. See *id.*

165. See *id.*

166. See *Bruce*, 776 P.2d at 670.

167. See *id.*

would be unfortunate because such occasional experts generally can be relied upon to approach their duty to the court "with great objectivity and professionalism."<sup>168</sup> If courts do not extend immunity to party experts, what type of professional will risk the exposure to liability?

As the court noted in *Bruce*, all extensions of immunity are protected by the "safeguards against false or inaccurate testimony" already inherent in the judicial process.<sup>169</sup> For example, the witness oath, cross-examination, and the threat of prosecution for perjury are in place to ensure witness reliability.<sup>170</sup> The *Bruce* court dismissed arguments that experts will offer more reliable testimony when subject to a recognized threat of prosecution, reasoning that "[c]ivil liability is too blunt an instrument to achieve much of a gain in reliability in the arcane and complex calculations and judgments which expert witnesses are called upon to make."<sup>171</sup>

### C. *Specific Professional Standards are not Feasible*

Because specific standards for litigation services are nonexistent due to their infeasibility, immunity is warranted. The *Murphy* court stated that imposing liability on friendly experts would encourage them to be careful and accurate, just as it does in their respective areas of practice.<sup>172</sup> However, litigation services are not analogous to other areas of practice. This is due to the fact that experts, when rendering litigation services, rely on their clients to specify tasks and expectations. As a result, the nature of litigation services requires that experts perform ad hoc procedures in response to the particular needs of the attorney and the client, thereby rendering infeasible the development of detailed standards.

168. *See id.*

169. *See id.* at 667.

170. *See id.*; *see also* *Briscoe v. LaHue*, 460 U.S. 325, 333-34 (1983). In *Bruce*, however, Justice Pearson stated in his dissent that "the threat of perjury and the rigors of cross examination only protect against intentional misstatements and those negligent statements the *opponent* wishes to expose." *Bruce*, 776 P.2d at 675 (Pearson, J., dissenting) (emphasis added).

171. *See Bruce*, 776 P.2d at 670.

172. *See* *Murphy v. A.A. Mathews*, 841 S.W.2d 671, 681 (Mo. 1992); *Levine v. Wiss & Co.*, 478 A.2d 397 (N.J. 1984) (holding that immunity for professionals acting in a quasi-judicial capacity was not extended to a court-appointed accountant hired to appraise a business); *cf.* *James v. Brown*, 637 S.W.2d 914 (Tex. 1982) (finding that the Texas Mental Health Code provided only immunity for actions by professionals who performed without negligence).



Since at least 1905, members of the accounting profession have been recognized as comprising a class of skilled professionals subject to the same rules of liability for malpractice as members of other professions, such as architects and engineers.<sup>173</sup> Until recently, accounting malpractice centered primarily in the area of audit and tax services.<sup>174</sup> The standards of practice for audit and tax services are well-developed and have been promulgated in detail by authoritative bodies.<sup>175</sup> In contrast, the professional standards for litigation services are not nearly as specific as those that govern audits.<sup>176</sup> Litigation services generally are not subject to the stringent reporting standards applicable to audits.<sup>177</sup> The American Institute of Certified Public Accountants (AICPA) classifies litigation services as consulting services because such services differ significantly from audits.<sup>178</sup> Since the *Mattco Forge* jury verdict, the AICPA has issued only one very general authoritative pronouncement concerning consulting services and several nonauthoritative publications discussing the general standards of consulting services as applied to litigation services.<sup>179</sup> Before the *Mattco Forge* jury verdict there were no such publications. Experts in other professions may not be subject to any established or authoritative standards.

#### *D. Pretrial Services Deserve Immunity*

Pretrial litigation services should be immunized notwithstanding the fact that they do not involve courtroom testimony. The self-censorship rationale for common law witness immunity is equally applicable to pretrial services of experts for two reasons. First, a party may not be able to obtain expert services in preparation for trials involving technical or esoteric issues because experts may be reluctant to offer their services due to apprehension of subsequent liability. Second, an expert may distort pretrial advice in favor of the client due to a fear of subsequent liability.

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173. See Carl S. Hawkins, *Professional Negligence Liability of Public Accountants*, 12 VAND. L. REV. 797, 797 (1959) (citing *Smith v. London Assur. Corp.*, 96 N.Y.S. 820 (N.Y. App. Div. 1905)).

174. See Susanne Sclafane, *New Risks May Impact Accountant Liability Market*, NATIONAL UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Nov. 11, 1996, at 11, available in 1996 WL 8651114.

175. See Henry H. Janssen, *The Expectation Gap When Accountants Testify as Expert Witnesses*, 40 TRIAL LAW. GUIDE 441 (1996).

176. See *id.*

177. See SPECIAL REP., *supra* note 126, § 71/120; PROFESSIONAL STANDARDS, *supra* note 126, §§ 9100.47-.55.

178. See SPECIAL REP., *supra* note 126, §§ 71/100-1, 71/100-2.

179. See CONSULTING SERVS. PRACTICE AID 96-3, §§ 74/115.03, .04 (listing relevant authoritative and nonauthoritative AICPA publications).

The proper course would be to ignore the belief expressed in *Mattco Forge I* that immunity for experts does not encourage future truthful testimony if the underlying suit does not reach the trial stage.<sup>180</sup> Ironically, the *Mattco Forge I* court noted that the statutory privilege otherwise applies even if the services are performed outside the courtroom and involve no function of the court.<sup>181</sup> If the California statutory privilege applies to other services outside the courtroom, it should also protect friendly experts who are merely trial consultants. Further support for such protection is the fact that witnesses in pretrial proceedings, such as grand juries (where there is no cross examination), are granted immunity although they may not later testify and be subject to scrutiny at trial.<sup>182</sup>

#### *E. Immunity is Needed Against Negligence as Well as Defamation*

The dissent in *Bruce* observed that an attorney remains liable to the client for malpractice in a judicial proceeding, but enjoys absolute immunity from liability for defamation in the same proceeding.<sup>183</sup> Based on the foregoing, the dissent argued that common law witness immunity should extend only to defamation.<sup>184</sup>

However, the dissent neglected to note that fear of subsequent litigation threatens an expert witness regardless of whether the cause of action is based upon defamation or some other theory of recovery.<sup>185</sup> A client should not be able to circumvent an expert's immunity by pursuing a claim in terms other than defamation.<sup>186</sup> The *Bruce* majority noted that there are a large number of cases in a wide range of jurisdictions

180. See *Mattco Forge, Inc. v. Arthur Young & Co.*, 6 Cal. Rptr. 2d 780, 787 (Cal. Ct. App. 1992) (*Mattco Forge I*).

181. See *id.* (citing *Silberg v. Anderson*, 786 P.2d 365, 369, 370-72 (Cal. 1990)).

182. See *Bruce v. Byrne-Stevens & Assocs. Eng'rs., Inc.*, 776 P.2d 666, 667-68 (Wash. 1989) (citation omitted).

183. See *id.* at 674 (Pearson, J., dissenting).

184. See *id.* at 675 (Pearson, J., dissenting) (“[A] distinction must be drawn between defamation and acts of professional malpractice subsequently published in the courtroom.”); see also *Murphy v. A.A. Mathews*, 841 S.W.2d 671, 677 (Mo. 1992) (“Every [Missouri] decision was limited to subsequent actions in defamation or defamation-type lawsuits.”).

185. See *Bruce*, 776 P.2d at 670.

186. See *id.* The court stated, “[W]e must not permit its circumvention by affording an almost equally unrestricted action under a different label.” *Id.* (citing *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 117 A.2d 889, 895 (N.J. 1955)).

granting witness immunity to bar causes of action other than defamation.<sup>187</sup>

Perhaps the *Bruce* dissent makes the unintended point that the scope of immunity for attorneys should be broadened. In England, from which the United States historically draws its common law immunity jurisprudence, advocates have enjoyed absolute immunity from negligence liability for more than two-hundred years.<sup>188</sup>

#### *F. Lack of a Sufficient Method of Proving Causation and Damages Justifies Immunity*

Until courts develop a sufficient method of proving causation and damages in litigation services malpractice cases, courts should extend immunity to party experts who perform litigation services. The appropriate standard of proof in any negligence case should require providing the trier of fact with sufficient evidence on which to base an award without speculation and conjecture as to causation and damages. As shown above, although a SWAS may be a safeguard against speculative damages in an attorney litigation malpractice suit or insurer negligence suit, it does not adequately protect against speculation as to causation and damages in a litigation services malpractice suit. In addition, the significance of an expert's negligence, whether determined solely by a jury or with the assistance of expert witness testimony, also will be based on speculation and conjecture. Under such circumstances, an expert should not be exposed to liability for the entire harm to a client who has experienced an unfavorable outcome in the underlying lawsuit.

#### IV. CONCLUSION

An expert who performs litigation services is more analogous to a lay witness than an attorney. Therefore, a party expert should be entitled to absolute common law witness immunity for both pretrial services and testimony regardless of whether the expert is compensated or friendly.

Negative attitudes toward expert witnesses date as far back as the dawn of this century.<sup>189</sup> However, experts should not become scape-

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187. See *id.* at 671 (citing *Brody v. Montalbano*, 151 Cal. Rptr. 206 (Cal. Ct. App. 1978) (barring claims of malicious prosecution, conspiracy to interfere with contract, and conspiracy to intentionally inflict emotional distress)). But see *James v. Brown*, 637 S.W.2d 914 (Tex. 1982) (concluding that although defamation action was barred by common law immunity, negligence action was available pursuant to state statute).

188. See Melissa Newman, Note, *The Case Against Advocates' Immunity: A Comparative Study*, 9 GEO. J. LEGAL ETHICS 267, 268-69 (1995). "Until at least the fifteenth century, [English] advocates were subject to the same liability for professional malpractice as other professional[s]." *Id.* at 269.

189. See Jensen, *supra* note 14, at 185, 192-93 (citing *Albers v. Church of the*

goats for our country's current overzealous litigiousness. The threat of expert liability seems more likely to result in expert opinions being motivated by the client's interests rather than by applicable professional standards.<sup>190</sup> Expert witnesses assist both attorneys and triers of fact in understanding complex issues and provide a basis for decisions that would otherwise be based on ignorance, speculation, or conjecture. Subjecting negligent experts to huge judgments based on speculation and conjecture would be painful irony. Meanwhile, courts and clients should depend upon perjury laws, the adversarial process, and the diligence of supervising counsel to ferret out substandard evidence from experts. A rule that makes an expert liable for acts and communications that occur prior to or during judicial proceedings "would be unrealistically narrow, would not reflect the realities of litigation and would undermine the gains in forthrightness on which the rule of witness immunity rests."<sup>191</sup>

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Nazarene, 698 F.2d 852, 858 (7th Cir. 1983)).

190. See *Bruce*, 776 P.2d at 670.

191. See *id.* at 673.

