LEGAL MALPRACTICE BY ANY OTHER NAME: WHY A BREACH OF FIDUCIARY DUTY CLAIM DOES NOT SMELL AS SWEET

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In a recent trend, courts have been permitting disgruntled clients to bring breach of fiduciary duty claims against their attorneys. In doing so, clients have been permitted to recover damages even in the absence of suffering any actual injury. In response to this trend, this Article argues that a client should be able to sue her attorney for breach of fiduciary duty only when the attorney has (1) committed a criminal offense victimizing the client, (2) perpetrated a scheme to defraud the client, or (3) caused actual harm to the client by virtue of the breach of fiduciary responsibilities.

INTRODUCTION

Consider the following: an experienced personal injury attorney agrees to represent a plaintiff in a personal injury case. As part of their agreement, the attorney will represent the client on a contingency fee basis. After several settlement conversations, the defendants present the attorney with a very good figure in settlement of the plaintiff's claim—a figure that would be more than acceptable to the attorney's client and one that all personal injury practitioners would agree is an above-average settlement figure for the injury sustained by the plaintiff. For various reasons, including the lawyer's typically busy schedule, the lawyer is unable to contact his client about the settlement offer. Recognizing the suitability of the settlement figure, the attorney accepts the defendant's offer and settles the plaintiff's case for the agreed upon figure without consulting his client.

When later informed of the settlement agreement, the client is genuinely pleased. Pursuant to the contingency fee arrangement, the attorney collects one-third of the settlement figure, and the re-

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mainder is timely distributed to the client. The client remains pleased until it is brought to her attention that it is the general practice of attorneys to leave decisions regarding acceptance or rejection of settlement offers completely to the client.[1] In contrast to what other similarly situated lawyers may have done, her attorney had accepted the settlement offer without consulting her. Although still pleased with the amount of the settlement, the client believes that, because of her attorney's violation of a professional norm, the attorney is not entitled to the entire fee that she received. Another lawyer agrees to take the case and proceeds to sue the client's former attorney to recover part or all of the fee.

Will the client be able to prevail in this action against her former attorney? The rote answer is "no." Because a legal malpractice action has historically been an action for professional negligence, any person familiar with tort law—even a first-year law student—knows that, in order for a plaintiff to sue in negligence, the plaintiff must prove, as part of her case, that she suffered an actual harm or injury. Here, the client has suffered no harm or injury. To the contrary, she has received a very favorable result that was both subjectively pleasing to her and objectively reasonable.

However, in a recent trend, many lawsuits—not unlike the above-described facts—have been brought by disgruntled clients against their attorneys. Now more than ever, attorneys are being held liable in the absence of actual harm or injury to the client.[2] Traditionally, a client suing for legal malpractice would pursue a negligence theory. However, in the emerging trend, clients have been successfully employing a variety of legal theories outside of the traditional tort action for professional negligence.

Dissatisfied clients (and their creative lawyers) have pursued actions against the clients' former attorneys grounded in novel theories of recovery, including, but not limited to, actions for breach of fiduciary duty.[3] For example, it would not be uncommon today for

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1. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1996) (requiring that a lawyer abide by a client's decision regarding settlement); *see, e.g.*, Whiteaker v. Iowa, 382 N.W.2d 112, 115-16 (Iowa 1986) (discussing that the client, not the attorney, should make the decision regarding whether to accept a settlement offer); Rizzo v. Haines, 555 A.2d 58, 66 (Pa. 1989) (stating that decisions regarding settlement belong to the client).

2. *See, e.g.*, Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999); *see also* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 114 (1995) (noting the frequency and success of fiduciary duty suits against lawyers as compared to corporate directors); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1661, 1679 (1994) (discussing the recent increase in legal malpractice lawsuits).

3. Although other theories of recovery are available to, and employed by, clients suing their former lawyers, this Article will focus primarily on actions based on breach of fiduciary duties. For discussions regarding other theories of recovery in legal malpractice, see generally Ray Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malprac-*

the plaintiff in the above-described situation to be able to assert a successful claim for breach of fiduciary duty against her former attorney. She could establish that she was a party to a fiduciary relationship—which an attorney-client relationship undoubtedly is.[4] She would then need to establish that her attorney, as fiduciary, breached a fiduciary obligation by not adequately informing her and by not seeking her approval of the settlement figure. Once that breach has been established, the lawyer may be subject to forfeiture of part or all of the fee that he received for handling this client's case.[5]

Permitting clients[6] to pursue breach of fiduciary duty claims against their former attorneys is a critical development in the law of lawyering for several reasons.[7] Although an important development in the law, courts have nonetheless, at times, done an inadequate job of creating and applying fiduciary law to the attorney-client relationship. To make matters worse, courts have, at times, failed even to distinguish breach of fiduciary duty claims from traditional professional negligence claims.[8] The failure of the courts to discuss and emphasize the distinctions between the two have led to a sloppy body of law that fails to consider, in any meaningful manner, the

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tice Puzzle, 47 SMU L. REV. 235 (1994) (discussing breach of fiduciary duty, breach of contract, and the tort of malpractice as the three distinct causes of action potentially available to clients suing their lawyers) and Susan Taylor Wall & Joseph R. Weston, *An Analysis of Current Theories of Liability*, 45 S.C. L. REV. 851, 854 (1994) (discussing the recent trend of plaintiffs in legal malpractice actions who assert claims for breach of fiduciary duty "almost as a matter of course, regardless of the nature of the attorneys' alleged error or omission").

4. *See* discussion *infra* Part II.B.2 (discussing the fiduciary nature of an attorney-client relationship).

5. *See* discussion *infra* Part II.B.6 (describing remedies for breach of fiduciary duty claims).

6. Although beyond the scope of this Article, it is worth noting that breach of fiduciary duty claims may be brought against attorneys by individuals other than their actual clients. *See* John Freeman, *Ethics and Fiduciary Duty*, S.C. LAW, Oct. 1998, at 11, 11 (1998) ("A fiduciary duty claim against a lawyer may be more potent for the malpractice plaintiff and more dangerous to the defendant lawyer because it can be used even where the plaintiff was not the lawyer's client."). *See generally* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.2 (4th ed. 1995 & Supp. 1998) (discussing an attorney's fiduciary responsibilities to non-clients).

7. *See* Anderson & Steele, *supra* note 3, at 249 (comparing the negligence standard, which allows an attorney to take her own interests into consideration while still acting as a reasonably prudent lawyer, with the fiduciary standard, which demands that an attorney act with undivided loyalty in the best interests of her client).

8. *See, e.g.*, Woodburn v. Turley, 625 F.2d 589, 592 (5th Cir. 1980); Chicago Title Ins. Co. v. Holt, 244 S.E.2d 177, 180, 36 N.C. App. 284, 287 (1978). *See generally* Anderson & Steele, *supra* note 3, at 235 (discussing courts' failure to recognize distinctions between actions brought by clients against attorneys under theories of breach of fiduciary duty, breach of contract, and professional malpractice).

impact of these novel theories of recovery on the ever-expanding law of lawyering.[9] Because the ramifications of each of these actions are unique, clearly distinguishing between the two is critical.[10]

This Article argues in favor of a position not previously espoused in the literature—a client should be able to sue her attorney for breach of fiduciary duty only when the attorney has either (1) committed a criminal offense victimizing the client, (2) perpetrated a scheme to defraud the client, or (3) caused actual harm to the client by virtue of the breach of fiduciary duty. This Article will first discuss the evolution and current status of legal malpractice actions based on traditional professional negligence law. It will then discuss the evolution and current status of legal malpractice actions based on breach of fiduciary duty. This Article will then discuss why clients suing their lawyers find breach of fiduciary duty claims attractive. Next, it will consider the recent trend of the courts in permitting breach of fiduciary duty claims against lawyers. Finally, this Article will outline the appropriate application of breach of fiduciary duty claims against lawyers.

I. EVOLUTION AND CURRENT STATUS OF LEGAL MALPRACTICE ACTIONS BASED ON TRADITIONAL PROFESSIONAL NEGLIGENCE LAW

Negligence is a tort action that has deeply imbedded historical roots.[11] It originated in the long-antiquated remedy of trespass, which existed in early English common law to provide a remedy for a direct and immediate injury.[12] To provide a remedy for wrongful conduct that did not result in a direct or immediate injury, trespass was later supplemented with trespass on the case, or action on the case.[13] At early English common law, an injured or aggrieved person was not permitted to bring an action for any alleged injuries without the King's writ.[14] At that time, the number of available writs was extremely limited, and the forms of procedures governing an action at law were strictly prescribed.[15] The practical effect of this system was that unless a cause of action fit into the form of some existing

9. *See* Leubsdorf, *supra* note 2, at 114-17 (explaining that the inability to distinguish a lawyer's fiduciary duties from a lawyer's duty of care is problematic).

10. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1, at 229 (explaining that the tort of breach of fiduciary responsibilities, although still legal malpractice, is "distinct and independent from professional negligence").

11. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 6, at 28-31 (5th ed. 1984) (discussing the history of negligence law).

12. *See id.* at 29 (discussing the transition from the writ system to negligence law).

13. *See id.* (discussing the distinction between trespass and trespass on the case).

14. *See id.* at 29 (explaining early English common law).

15. *See id.* (discussing the effects of the common law writ system).

and recognized writ, the plaintiff was left without a remedy at law.[16] This rigid history of tort law still affects modern negligence law.[17] Today, the law requires plaintiffs to satisfy specific requirements—many of which are vestiges of the King's writ system—in order to bring a negligence action.

Negligence law provides a remedy for plaintiffs who have sustained a compensable injury caused by a defendant's failure to use due care. It demands that members of society conduct themselves with the same care with which the reasonably prudent member of society would conduct himself in the same or similar circumstances. Therefore, to establish a cause of action for negligence, a plaintiff must establish (1) duty, (2) breach, (3) causation, and (4) harm.[18] Generally, the same rules apply even when the defendant who has allegedly injured the plaintiff is a professional. For example, a lawyer or doctor may be sued in negligence for failing to act as the reasonably prudent lawyer or doctor would act under the same or similar circumstances.[19]

Plaintiffs seeking to sue their lawyer or doctor for careless conduct may pursue an action for professional negligence. A cause of action for professional negligence differs from the typical negligence action in that a professional is held to a higher standard of care than is an ordinary member of society.[20] In the attorney-client setting, the plaintiff-client must prove, by a preponderance of the evidence, that the defendant-attorney breached the professional duty of care and that the breach of due care caused actual harm to the plaintiff.[21]

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16. *See id.* (discussing the rigidity of the writ system). The equity system was created to fill the gaps left by this rigid common law writ system. Often, courts would allow recovery in equity for injuries that were not recoverable at law. *See* discussion *infra* Part II (discussing the equitable action of breach of fiduciary duty).

17. *See* KEETON ET AL., *supra* note 11, § 6, at 28-31 & 31 n.18 (explaining that courts continue to apply the distinctions of the antiquated actions of trespass and trespass on the case, such as in determining whether actual damage is essential to the existence of a cause of action for a particular tort).

18. *See id.* § 30, at 164-65 (explaining that the traditional elements of a cause of action in negligence are (1) a duty recognized by law requiring the person to conform to a certain standard of conduct, (2) a breach of that duty, (3) a reasonably close causal connection between the conduct and the resulting injury, and (4) actual loss or damage to the interests of another).

19. *See id.* § 32, at 185 (stating that professional persons must act not only with the reasonable care of a lay person, but with the reasonable care of a person with the special knowledge and ability commensurate with the profession); *see also* Anderson & Steele, *supra* note 3, at 249 (explaining that an action in malpractice sanctions negligent performance, also referred to as violating the standard of care).

20. *See* KEETON ET AL., *supra* note 11, § 32, at 185 (explaining that negligence law demands that a person with knowledge, skill, or intelligence superior to that of the ordinary person must employ those special skills in conducting himself with due care).

21. *See* Anderson & Steele, *supra* note 3, at 253 (stating that plaintiff must allege and prove "(1) an attorney-client relationship; (2) breach of a duty arising

A. *Duty*

In a professional negligence action against an attorney, the first element of the plaintiff's case—duty—demands that a lawyer fulfill his responsibility to act as other reasonably prudent lawyers would under the same or similar circumstances.[22] Negligence law governs a professional's conduct in his relationship with his client without regard to any contractual agreement between the parties.[23] Regardless of the contractual agreement between the attorney and the client, the attorney may be held liable in negligence for failing to possess and "use the knowledge, skill and care ordinarily possessed and employed by [lawyers] in good standing."[24] Attorneys cannot contract away their responsibility to represent their clients in a non-negligent fashion.[25]

At trial, the standard of care usually must be established by expert testimony.[26] An expert is required to testify concerning the conduct in which the reasonably prudent lawyer would have engaged under similar circumstances.[27] The failure to provide expert

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from the scope of that attorney-client relationship; (3) that the conduct of the attorney was not that of a reasonable and prudent lawyer; and (4) that but for the attorney's misconduct the client would not have suffered damage").

22. *See* KEETON ET AL., *supra* note 11, § 32, at 185-86 (describing the standard of care for lawyers and other professionals required by negligence law).

23. *See id.* at 185-87 (suggesting that a client may not contract away the right to expect that a professional have the requisite skill and knowledge).

24. *Id.* at 187 (citations omitted) (discussing the tort standard of care for professionals).

25. *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.2(c) & cmt. 5 (1999) (preventing a lawyer from performing negligently).

26. *See* KEETON ET AL., *supra* note 11, § 32, at 188 & n.49 (explaining that, because juries are composed of laypersons, they "are normally incompetent to pass judgment on questions of [professional judgment and] the great majority of [professional negligence cases hold] that there can be no finding of negligence in the absence of expert testimony"); 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 32.15, at 197 (4th ed. 1996 & Supp. 1998) (stating that expert testimony in professional negligence claims against attorneys is usually essential); *see, e.g.,* Wright v. Williams, 121 Cal. Rptr. 194, 199-200 (Ct. App. 1975).

27. *See, e.g.,* Geiserman v. MacDonald, 893 F.2d 787, 793-94 (5th Cir. 1990); Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400, 406 (Tenn. 1991); *cf.* KEETON ET AL., *supra* note 11, § 32, at 188-89 (discussing the effect of expert testimony in medical malpractice cases). Rules of professional conduct do not establish the standard of care in legal malpractice actions. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble cmt. 18 (1996) (explaining that a violation of a Model Rule of Professional Conduct "should not give rise to a cause of action"); *see also* CAL. RULES OF PROFESSIONAL CONDUCT 1-100(A) (1999) ("These rules are not intended to create new civil causes of action."); *see, e.g.,* Ruden v. Jenk, 543 N.W.2d 605, 611 (Iowa 1996); OMI Holdings, Inc. v. Howell, 918 P.2d 1274, 1288 (Kan. 1996). *But see, e.g.,* Schlesinger v. Herzog, 672 So. 2d 701, 707 (La. Ct. App. 1996) (ruling that "the ethical issue was transformed into a legal duty"). *Cf.* Fishman v. Brooks, 487 N.E.2d 1377, 1381 (Mass. 1986) (ruling that the ethical code is analogous to statutes that provide civil remedies, but it only provides some evidence of attorney negligence).

testimony to establish the applicable duty required is usually fatal to a professional negligence action.[28]

B. Breach

As to the breach element, whether a lawyer has breached the standard of care is determined by simply considering whether his professional performance rises to the standard of care as set forth by the expert.[29] If the lawyer's professional performance does not rise to the level at which the reasonable lawyer would have performed under the same or similar circumstances, then the lawyer is said to have breached his duty of care.

C. Causation

After proving duty and breach, a plaintiff must prove that the defendant's breach of the duty of care actually caused harm to her.[30] In the attorney-client setting, this means that, if the client cannot prove that the harm was caused by the lawyer's breach of the standard of care, the negligence claim will fail.[31]

It is this causation requirement that is notoriously difficult for plaintiffs to satisfy in a professional negligence action against a lawyer.[32] The causation element essentially requires the client to prove that she would have been successful in the underlying case

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28. *See, e.g.,* Fitzgerald v. Walker, 747 P.2d 752, 752, 756 (Idaho 1987) (ruling that a client's testimony is insufficient); Kubik v. Burk, 540 N.W.2d 60, 62 (Iowa Ct. App. 1995) (same); Sanders v. Smith, 496 P.2d 1102, 1105 (N.M. 1972) (same); *see also* KEETON ET AL., *supra* note 11, § 32, at 188 & n.49 (explaining that, in an action based on professional negligence, there can be no finding of negligence in the absence of expert testimony); 4 MALLEN & SMITH, *supra* note 26, § 32.15, at 197 (stating that, except in a very few instances, the testimony of a lawyer as an expert is absolutely necessary to prove a plaintiff's professional negligence action against another attorney). *But see, e.g.,* Briggs v. King, 714 S.W.2d 694, 698 (Mo. Ct. App. 1986) (ruling that expert testimony is not necessary where the defendant-attorney admits fault and causation in the underlying case); Sommers v. McKinney, 670 A.2d 99, 104 (N.J. 1996) (ruling that expert testimony is not required for those claims that are matters of common knowledge). *Cf.* 4 MALLEN & SMITH, *supra* note 26, § 32.15, at 197 & n.3 (noting a few narrow exceptions where expert testimony is not required).

29. *See* KEETON ET AL., *supra* note 11, § 30, at 164 (describing the breach element of an action based in negligence as being a failure on the person's part to conform to the required standard of care).

30. *See id.* at 164-65 (setting forth the elements for establishing a cause of action grounded in negligence).

31. *See id.* at 165 (explaining that there must be a reasonably close causal connection between the tortfeasor's conduct and the resulting injury).

32. *See* 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, 72-75 (1989) (discussing the problems created by the unique nature of establishing a trial-within-a-trial in a professional legal negligence action); Leubsdorf, *supra* note 2, at 148 (explaining how much of the expense of traditional legal malpractice litigation stems from the plaintiff having to prove the case-within-a-case).

but for the attorney's lack of care.[33] In other words, the client must prove that, in the absence of her lawyer's breach of the standard of care, she would have succeeded in the underlying lawsuit.[34] Success in the underlying suit requires not only proof that the client would have won on the merits, but also that the appropriate judgment would have been successfully collected. This burden of proof is what is referred to as proving the case-within-the-case.[35] The client is basically forced to prevail in two separate lawsuits: (1) the current legal malpractice negligence action and (2) the underlying case for which she claims the attorney did not exercise the appropriate standard of care.[36] The law is skewed in favor of the lawyer and against the client; the practical effect is that the client is at an enormous disadvantage.[37]

D. Harm

As to the final requirement of the plaintiff's case—that of actual harm—if the client has suffered no actual harm or compensable injury as a result of the lawyer's breach of the standard of care, then no recovery in negligence is permitted.[38] The plaintiff must prove by a preponderance of the evidence that the defendant's breach of the duty of care resulted in the plaintiff sustaining actual harm.[39] The plaintiff must prove both the fact that she incurred an injury and the extent of that injury.[40] Unlike the law of intentional torts or

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33. *See* Koffler, *supra* note 32, at 41 (discussing the problems generated by the unique nature of having to prove a case-within-a-case); *see, e.g.,* Williams v. Bashman, 457 F. Supp. 322, 327 (E.D. Pa. 1978); Duke & Co. v. Anderson, 418 A.2d 613, 616 (Pa. Super. Ct. 1980).

34. *See* Leubsdorf, *supra* note 2, at 148 (describing the case-within-a-case doctrine as requiring the client to relitigate the underlying action in which she originally was represented by the attorney in order to prove in the malpractice action that she would have won her original case but for the attorney's negligence).

35. *See* Koffler, *supra* note 32, at 41 (discussing the problems created by the unique nature of establishing a trial-within-a-trial in a professional legal negligence action); Leubsdorf, *supra* note 2, at 148-50 (noting that proving the case-within-a-case makes a traditional legal malpractice action very expensive); *see also* 4 MALLEN & SMITH, *supra* note 26, § 32.9, at 174-75 (reiterating the difficulty in proving causation in a legal malpractice action).

36. *See* 4 MALLEN & SMITH, *supra* note 26, § 32.9, at 174-75 (explaining that clients must prove two lawsuits when having to prove the case within a case). *But cf.* Ramos, *supra* note 2, at 1691-92 (explaining that once a claim reaches a jury, juries turn a weak underlying case into a windfall of damages for the plaintiff).

37. *See* Koffler, *supra* note 32, at 71 (discussing the current system of having to prove the case-within-a-case as being unconscionable).

38. *See* KEETON ET AL., *supra* note 11, § 30, at 165 (explaining that there can be no recovery in negligence where no actual loss has occurred).

39. *See, e.g.*, Fiorentino v. Rapoport, 693 A.2d 203, 212 (Pa. Super. Ct. 1997).

40. *See, e.g.,* Coon v. Ginsberg, 509 P.2d 1293, 1296 (Colo. Ct. App. 1973); *Fiorentino*, 693 A.2d at 215.

other theories of recovery, negligence law does not provide a remedy for the violation of a technical right without supporting damages. Proof of damages cannot be speculative or uncertain.[41] The plaintiff may only recover compensation for actual loss suffered.[42] A lack of injury is fatal to any negligence action.

E. Defenses

There are many defenses available to a defendant in a negligence action,[43] the most effective of which are (1) a statute of limitations defense and (2) a comparative or contributory fault defense.[44] A complete defense to a negligence action—and the most successful defense to a professional negligence suit brought against a lawyer—is a statute of limitations defense.[45] Varying by jurisdiction, the statute of limitations for a professional negligence action ranges anywhere from one to six years, after which the plaintiff's negligence action is completely and forever barred.[46]

Another effective defense in a negligence action is that of contributory or comparative fault. If a plaintiff has been negligent in her own right and that negligence has contributed to the complained of injury, then the lawyer may raise the defense of contributory or

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41. *See, e.g.,* Harline v. Barker, 912 P.2d 433, 439 (Utah 1996); Gregory v. Hawkins, 468 S.E.2d 891, 894 (Va. 1996); *see also* 4 MALLEN & SMITH, *supra* note 26, § 32.9, at 178-79 (noting that the plaintiff must show the presence of and extent of her damages).

42. *See* Anderson & Steele, *supra* note 3, at 255 (describing the remedy in tort as returning the injured party to the monetary position she held immediately before the tort occurred).

43. *See* 2 MALLEN & SMITH, *supra* note 6, § 20.1, at 637 & nn.1-15 (listing the multitude of defenses available to a professional negligence action brought against an attorney).

44. *See id.* § 20.1, at 637.

45. *See id.*

46. *See, e.g.,* ALA. CODE § 6-5-574 (1993) (two to four years); CAL. CIV. PROC. CODE § 340.6 (Deering 1991) (one to four years); FLA. STAT. ANN. § 95.11(4)(b) (West 1982 & Supp. 1999) (two years); IDAHO CODE § 5-219(4) (1998) (two years); 735 ILL. COMP. STAT. 5/13-214.3 (West 1993 & Supp. 1999) (two year discovery and six year occurrence limitation); IND. CODE ANN. § 34-11-2-3 (West 1998) (two years); KY. REV. STAT. ANN. § 413.245 (Michie 1992) (one year); LA. REV. STAT. ANN. § 9:5605 (West Supp. 1999) (one year discovery, three year occurrence); ME. REV. STAT. ANN. tit. 14, §§ 752, 753-A (West 1996 & Supp. 1998) (six years); MASS. ANN. LAWS ch. 260, § 4 (Law. Co-op. 1992) (three years); MICH. STAT. ANN. § 27A.5805(4) (LEXIS Supp. 1999) (two years); MONT. CODE ANN. § 27-2-206 (1998) (three years); NEB. REV. STAT. § 25-222 (1995) (one to two years); NEV. REV. STAT. ANN. § 11.207 (Michie 1998) (four years); N.H. REV. STAT. ANN. § 508:4 (1997) (six years); N.D. CENT. CODE § 28-01-18(3) (1991) (two years); R.I. GEN. LAWS § 9-1-14.3 (1997) (three years); S.D. CODIFIED LAWS § 15-2-14.2 (Michie Supp. 1999) (three years); TENN. CODE ANN. § 28-3-104 (Supp. 1998) (one year); WYO. STAT. ANN. § 1-3-107 (Michie 1999) (two years). Whether the statute of limitations begins to run when the alleged breach of duty occurs or when the plaintiff discovers the alleged breach may also vary by jurisdiction. *See* 2 MALLEN & SMITH, *supra* note 6, §§ 21.10-21.11.

comparative fault to bar or reduce his liability.[47] Whether and to what extent the defense of comparative or contributory fault may serve to bar or reduce a defendant's liability varies by jurisdiction according to the type of fault system in place.[48] The majority of jurisdictions have adopted a comparative fault system, which generally provides for the defendant's liability to be reduced by the amount of the plaintiff's negligence or fault as long as the plaintiff's negligence does not exceed a specified percentage—typically, if the plaintiff's fault does not equal or exceed that of the defendant.[49] If the plaintiff's negligence is determined to exceed the specified percentage, then the plaintiff's claim is completely barred.[50] In almost every jurisdiction that has addressed this issue in the context of a legal malpractice claim, a lawyer may have his liability reduced or eliminated if the lawyer establishes that the plaintiff has contributed to the complained of injury in some way.[51]

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47. *See* KEETON ET AL., *supra* note 11, § 65, at 461 (discussing the operation of a defense of contributory negligence). Typically, the defense of contributory negligence occurs within one of five factual patterns: (1) when the client fails to supervise, review, or inquire concerning the subject of the representation; (2) when the client fails to follow the attorney's legal advice or instruction; (3) when the client fails to provide essential information to the attorney; (4) when the client actively interferes with the attorney's representation or fails to complete certain responsibilities regarding the subject matter of the representation; and (5) when the client fails to pursue remedies to mitigate or avoid the effect of the attorney's negligence. *See* 2 MALLEN & SMITH, *supra* note 6, § 20.2, at 641.

48. *See* 2 MALLEN & SMITH, *supra* note 6, § 20.2, at 640 (comparing the various types of comparative/contributory fault schemes). In jurisdictions that allow contributory negligence as a defense, the plaintiff's claim is completely barred. In contributory fault jurisdictions, if the plaintiff has been negligent in any manner whatsoever—even if his fault does not exceed that of the defendant—then the plaintiff's claim is completely barred. Contributory liability is a defense in only a small minority of jurisdictions. *See* KEETON ET AL., *supra* note 11, § 65, at 451-62 (discussing contributory negligence).

49. For cases holding that defendant's liability is reduced by the amount of plaintiff's fault as long as plaintiff's fault does not equal or exceed that of the defendant, see, e.g., Levin v. Weissman, 594 F. Supp. 322, 330 (E.D. Pa. 1984); Kirsch v. Duryea, 578 P.2d 935, 938 (Cal. 1978) (en banc); Somma v. Gracey, 544 A.2d 668, 669 (Conn. App. Ct. 1988); Michael Kovach, P.A. v. Pearce, 427 So. 2d 1128, 1129 (Fla. Dist. Ct. App. 1983); Pizel v. Whalen, 845 P.2d 37, 43 (Kan. 1993); Ignotov v. Reiter, 343 N.W.2d 574, 576 (Mich. Ct. App. 1983); Bowen v. Arnold, 380 N.W.2d 531, 536 (Minn. Ct. App. 1986); and Cicorelli v. Capobianco, 453 N.Y.S.2d 21, 21 (App. Div. 1982).

50. *See, e.g., Levin*, 594 F. Supp. at 330; *Somma*, 544 A.2d at 672; *Michael Kovach, P.A.*, 427 So. 2d at 1130; *Cicorelli*, 453 N.Y.S.2d at 22; *see also* 2 MALLEN & SMITH, *supra* note 6, § 20.2, at 640 (discussing the operation of comparative fault systems).

51. *See, e.g.*, FDIC v. Gantenbein, 811 F. Supp. 593, 596 (D. Kan. 1992); Aames v. Commissioner, 94 T.C. 189, 190 (1990) (applying Massachusetts law); Cummings v. Sea Lion Corp., 924 P.2d 1011, 1023 (Alaska 1996); *Kirsch*, 578 P.2d at 938; McLister v. Epstein & Lawrence, P.C., 934 P.2d 844, 846 (Colo. Ct. App. 1996); *Somma*, 544 A.2d at 672; *Michael Kovach, P.A.*, 427 So. 2d at 1130; Hill Aircraft & Leasing Corp. v. Tyler, 291 S.E.2d 6, 9 (Ga. Ct. App. 1982); Nika v. Danz, 556 N.E.2d 873, 884 (Ill. App. Ct. 1990); Hacker v. Holland, 570 N.E.2d

F. Remedies

A plaintiff who prevails in her negligence action is entitled to recover compensatory damages from the defendant and, in some cases, punitive damages as well.[52] As the name suggests, compensatory damages serve to compensate the plaintiff for any injuries sustained. In negligence causes of action, compensatory damages seek to put the plaintiff into her pre-tort monetary position—the position in which she would have been had the defendant not acted carelessly.[53]

Punitive damages serve to punish the defendant for his conduct and deter the defendant (and others) from engaging in similar conduct in the future.[54] To support an award of punitive damages, most jurisdictions require some form of intentional[55] or reckless conduct.[56] To act intentionally means that the actor has intended the conduct or acted with substantial certainty that the conduct would produce the result.[57] To act recklessly means to act with conscious disregard

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951, 958 (Ind. Ct. App. 1991); *Pizel*, 845 P.2d at 42; Wimsatt v. Haydon Oil Co., 414 S.W.2d 908, 912 (Ky. Ct. App. 1967); Richards v. Cousins, 550 So. 2d 1273, 1276 (La. Ct. App. 1989); Pontiac Sch. Dist. v. Miller, Canfield, Paddock & Stone, 563 N.W.2d 693, 704 (Mich. Ct. App. 1997); Bowen v. Arnold, 380 N.W.2d 531, 536 (Minn. Ct. App. 1986); London v. Weitzman, 884 S.W.2d 674, 678 (Mo. Ct. App. 1994); Resolution Trust Corp. v. Barnhart, 862 P.2d 1243, 1245 (N.M. Ct. App. 1993); Caiati v. Kimel Funding Corp., 546 N.Y.S.2d 877, 878 (App. Div. 1989); United Leasing Corp. v. Miller, 298 S.E.2d 409, 412, 60 N.C. App. 40, 44 (1982); Bjorgen v. Kinsey, 466 N.W.2d 553, 559 (N.D. 1991); Harrell v. Crystal, 611 N.E.2d 908, 916 (Ohio Ct. App. 1992); Becker v. Port Dock Four, Inc., 752 P.2d 1235, 1239 (Or. Ct. App. 1988); Roberts v. Burkett, 802 S.W.2d 42, 43 (Tex. App. 1990); Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 457 S.E.2d 28, 32 (Va. 1995); Stiley v. Block, 925 P.2d 194, 203 (Wash. 1996) (en banc); Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118, 132 (Wis. 1985). *But see* Jackson State Bank v. King, 844 P.2d 1093, 1097 (Wyo. 1993) (holding that comparative negligence is not a defense in an action for legal malpractice based on claims for breach of contract and breach of fiduciary duty).

52. Other forms of damages—including injunctive relief—are available as well. *See generally* 2 MALLEN & SMITH, *supra* note 6, §§ 19.1-19.21 (discussing the full range of damages available to plaintiffs).

53. *See* Anderson & Steele, *supra* note 3, at 255. This is contrasted to recovery in a contract action where recoverable damages put the plaintiff where she would have been if the defendant had fulfilled his end of the promise. *See id.*

54. *See* KEETON ET AL., *supra* note 11, § 2, at 9-15 (discussing the purpose of punitive damages).

55. *See, e.g.,* Cummings v. Pinder, 574 A.2d 843, 845 (Del. 1990) (allowing punitive damage award against an attorney who unilaterally increased the contingency fee to which the parties had agreed).

56. *See, e.g.,* Ratcliff v. Boydell, 674 So. 2d 272, 280 (La. Ct. App. 1996) (awarding punitive damages where the attorney misrepresented the value of settlement to increase legal fees); Cantu v. Butron, 921 S.W.2d 344, 350-51 (Tex. App. 1996) (awarding punitive damages where fee was increased from 40% to 45%).

57. *See, e.g.,* National Bank of Monticello v. Doss, 491 N.E.2d 106, 111 (Ill. App. Ct. 1986) (awarding punitive damages of $2,000,000 where the lawyer

of the consequences.[58] This heightened requirement of intentional or reckless conduct in order to be eligible for punitive damages means that, for a negligence action, it must be proven that the defendant engaged in conduct exceeding mere carelessness.[59]

II. EVOLUTION AND CURRENT STATUS OF LEGAL MALPRACTICE ACTIONS BASED ON BREACH OF FIDUCIARY DUTY

Although also an action in tort,[60] a claim for breach of fiduciary duty differs significantly from a professional negligence action.[61] The distinctions and contrasts between these actions begin at their inception in the law. Unlike a negligence action, which originated as a remedy at law, fiduciary law originated in equity.[62] Historically, equitable remedies were created to provide one with a remedy for a wrong committed against that person in the absence of a remedy at law.[63] In other words, equitable remedies filled in the gaps left by the common law. Accordingly, the law of fiduciaries has historically been created and developed for the protection of those who have suffered a wrong with no available legal remedy.[64]

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misappropriated the client's property); Belford v. McHale, Cook, & Welch, 648 N.E.2d 1241, 1246 (Ind. App. Ct. 1995) (ruling that mere negligence or gross negligence is not sufficient to support an award of punitive damages).

58. *See, e.g.*, Miller v. Byrne, 916 P.2d 566, 580 (Colo. Ct. App. 1995); McKinnon v. Tibbetts, 440 A.2d 1028, 1031 (Me. 1982).

59. *See Belford*, 648 N.E.2d at 1246 (ruling that "malice, fraud, gross negligence or oppressiveness inconsistent with mistake of law or fact, honest error in judgment, overzealousness, mere negligence, or other noniniquitous human failing" must be proved to support an award of punitive damages).

60. A tort may be fairly defined as a civil wrong not arising out of contract for which the law provides a remedy. *See* KEETON ET AL., *supra* note 11, § 1, at 1-7 (exploring a precise definition of a tort).

61. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1, at 229 (defining breach of fiduciary duty as an action in tort, not contract); Anderson & Steele, *supra* note 3, at 255 (noting that breach of a fiduciary obligation is a tort). *But see* Kling v. Landry, 686 N.E.2d 33, 39 (Ill. App. Ct. 1997) (defining breach of fiduciary duty as an action arising in contract); Doe v. Roe, 681 N.E.2d 640, 649 (Ill. App. Ct. 1997) (stating that contract law controls a breach of fiduciary duty).

62. *See* Anderson & Steele, *supra* note 3, at 239 (discussing that the fiduciary duty has remained "fluid over time" as a result of its origination in equity).

63. *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligations*, 1988 DUKE L.J. 879, 880-82 (1988) (discussing the history of fiduciary law).

64. Not originating in the rigidity of the King's writ system, fiduciary law developed slowly and varies by relationship and the applicable circumstances. The term "fiduciary law" is a bit of a misnomer inasmuch as it suggests that there is one body of consistent law that applies to all fiduciary relationships. Courts have often—sometimes inappropriately so—applied "fiduciary law" to various relationships as if it were one distinct body of law. However, courts, commentators, and legal scholars throughout the years have grappled with the intricacies and have had difficulty defining with specificity the expanse of fiduciary law. *See* Anderson & Steele, *supra* note 3, at 242-43 (discussing the fact that many scholars have examined the various and competing theories driving fiduciary law including the "property theory, the reliance theory, the unequal

"Fiduciary law" is a term that, at best, describes many equitable remedies created to address certain common problems that arise across various relationships. All of these relationships share at least one common characteristic—the relationship poses the potential problem of an abuse of a delegated power.[65] In response, unique rules have been created to address and rectify the potential problems that arise in these relationships where this transfer of power has taken place. This area of law is ever-expanding and increasingly relied upon by the courts.[66]

A. *How and When One Becomes a Fiduciary*

Fiduciary obligations arise in diverse types of relationships[67] that have classically included, but are not limited to, agent-principal, trustee-beneficiary, director-corporation, guardian-ward, and, of course, attorney-client.[68] A fiduciary is one who has undertaken a responsibility to act primarily on behalf of another, the entrustor,[69] for a distinct purpose, whether that purpose be narrow or broad.[70] Commonly, a fiduciary has been entrusted with an impor-

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relationship theory, the contractual theory, the unjust enrichment theory, the commercial utility theory, and the power and discretion theory"); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences,* 66 N.Y.U. L. REV. 1045, 1045-46 (1991) (discussing the failure of legal theorists and practitioners to define exactly when a fiduciary relationship exists, a breach of the fiduciary relationship, and the legal consequences generated by such a violation).

65. *See* DeMott, *supra* note 63, at 908-10 (explaining that, from a theoretical perspective, courts generally impose fiduciary constraints to control one person's discretion because of the character of that person's relationship with another); Tamar Frankel, *Fiduciary Law,* 71 CAL. L. REV. 795, 809 (1983) (discussing that all fiduciary relationships pose the problem of abuse of delegated power).

66. *See* Frankel, *supra* note 65, at 802-04 (discussing the emerging trend of society as one which often prefers fiduciary relationships).

67. *See* DeMott, *supra* note 63, at 879, 909 (explaining that fiduciary law is situation-specific and eludes theoretical capture because it arises in diverse types of relationships); Frankel, *supra* note 65, at 798 (discussing that the law of fiduciary relations can affect and be affected by the societal trend toward the establishment of fiduciary relationships).

68. *See* DeMott, *supra* note 63, at 908 (discussing the variety of forms in which fiduciaries exist); Frankel, *supra* note 65, at 817-18 (same).

69. Although treated by many as one body of law, there is no general term presently used across the various fiduciary relationships to describe the person who delegates the power to a fiduciary. Of course, within the individual types of relationships, various names are given to this person, e.g., "beneficiary" in trust law and "principal" in agency law. The term "entrustor" is the most appropriate in describing this person across all fiduciary relationships and will be used throughout this Article. *See* Frankel, *supra* note 65, at 800 & n.17 (coining the term "entrustor").

70. *See id.* at 800, 808 (stating that, in a fiduciary relationship, the entrustor becomes dependent upon the fiduciary and that central to fiduciary relations is that the fiduciary serves as a substitute for the entrustor); *see also* BLACK'S LAW DICTIONARY 625 (6th ed. 1990) (defining fiduciary); DeMott, *supra* note 63,

tant responsibility to act for another's benefit. In order to be able to act for another's benefit, the fiduciary must be empowered with the ability to act for that particular undertaking.[71] It is this transfer of power from the entrustor to the fiduciary that gives rise to the need for the creation of a body of law designed to protect the entrustor—and society—from the fiduciary over-reaching or abusing the power with which he has been entrusted.[72] Accordingly, a fiduciary is necessarily obligated by law to exercise the utmost loyalty to the interests of the entrustor—*uberrima fides*, the most abundant good faith.[73] The fiduciary must at all times put the entrustor's needs before his own.[74]

B. *Suing for Breach of Fiduciary Obligations*

The various laws governing fiduciary obligations have been created to solve the unique problems that arise in every fiduciary relationship—the potential of the fiduciary's abuse of his entrusted power.[75] Fiduciary law serves to deter the fiduciary from abusing his power by prohibiting, supervising, and limiting self-dealing.[76]

As is the case for a negligence action, the law allows a plaintiff to pursue a cause of action for breach of fiduciary duty without regard to any contractual agreement between the parties.[77] Most importantly, in contrast to a professional negligence action where the plaintiff must establish duty, breach, causation, and harm to prevail, in a lawsuit for breach of fiduciary duty, courts have allowed

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at 910 (discussing various commentators' definitions of a fiduciary).

71. *See* Frankel, *supra* note 65, at 809 (describing, as a central feature of a fiduciary relationship, the transfer of power from the entrustor to the fiduciary).

72. *See id.* (explaining that the inherent tension existing in a fiduciary relationship is that the fiduciary cannot effectively benefit the entrustor without a delegation of power but, at the same time, it is impossible to eliminate the fiduciary's ability to abuse that power).

73. *See* Anderson & Steele, *supra* note 3, at 240; *see also* BLACK'S LAW DICTIONARY 626 (6th ed. 1990) (describing the fiduciary relationship); DeMott, *supra* note 63, at 882, 892-93 (discussing the general principles of fiduciary law and contrasting the good faith requirements of contract law with the good faith requirements of fiduciary law).

74. *See* DeMott, *supra* note 63, at 882.

75. *See* Frankel, *supra* note 65, at 816 (stating that fiduciary law intervenes to protect the entrustor from possible abuse of the fiduciary's power by creating rules that are sensitive to the dangers that the relationship poses for the entrustor).

76. *See id.* at 824 (discussing that much of fiduciary law is designed to prevent the fiduciary from using her delegated power to further any interests other than those of the entrustor).

77. *See* DeMott, *supra* note 63, at 901-02 (explaining that the parties' relationship is defined by express agreement and the parties' conduct, but the obligations inherent in the parties' relationship are defined by the law); Frankel, *supra* note 65, at 825 (discussing that courts impose obligations for the benefit of the entrustor that would have been agreed upon by the parties had they not been prohibited by the cost of contracting or the nature of the parties' relationship).

plaintiffs simply to prove the existence of a fiduciary relationship and that the defendant breached his fiduciary obligations.[78] The burden then shifts to the fiduciary to prove that he dealt fairly and candidly with the entrustor.[79]

The suit for breach of fiduciary duty is a powerful tool in the hands of a plaintiff.[80] Fiduciary law is a fiercely protective body of law that exists for the benefit of the entrustor.[81] As such, it empowers an entrustor with rights that, in the absence of fiduciary law, she would not otherwise have. For example, in the absence of fiduciary law, a fiduciary would have outright ownership of any power or property delegated to him by the entrustor.[82] Any legal remedies sought for the benefit of the entrustor against the fiduciary would be without much force because in law, and in fact, the fiduciary would own the property rights to the power delegated.[83]

However, fiduciary law essentially shifts the property rights to the power delegated back to the entrustor.[84] In other words, fiduciary law ensures that the fiduciary merely owns *legal* title to the power which has been entrusted to him; the beneficial ownership—or the entitlement to the benefits of that power—remains with the entrustor.[85] As a result, the entrustor, as an owner of property, may enforce any prohibition against the fiduciary's use of power directly against the fiduciary.[86]

1. Duty

The specific duties of a fiduciary may vary from relationship to

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78. *See* DeMott, *supra* note 63, at 900 (contrasting the differences in proof allocation in fiduciary duty claims with contract claims).

79. *Cf.* Anderson & Steele, *supra* note 3, at 253.

> Although the client retains the ordinary burdens of pleading and proof regarding causation and damages, the attorney has the full burden of proving that [he] has not violated [his] fiduciary obligation—that [he] has dealt fairly with [his] client and that [his] actions were not only acceptable but were above reproach.

Id. (citations omitted).

80. *See* Anderson & Steele, *supra* note 3, at 243-44 (deciding to sue for breach of fiduciary duty may increase the remedies available to the plaintiff).

81. *See* DeMott, *supra* note 63, at 905 (opining that, when a fiduciary obligation exists, it offers more protection than contract law's capacity rules).

82. *See* Frankel, *supra* note 65, at 827-29 (discussing the transfer of property as a strong remedy in fiduciary law).

83. *See id.* at 827-28 (discussing that, in the absence of fiduciary law, the fiduciary would be the owner of the power or property designated to him by the entrustor).

84. *See id.* at 828 (stating that "[b]y declaring that a person is a fiduciary, the law shifts the beneficial ownership . . . to the entrustor and leaves the fiduciary with mere legal title").

85. *See id.* (discussing the effects of fiduciary law shifting the beneficial ownership of the delegated power back to the entrustor).

86. *See id.* (discussing the power of the entrustor to enforce the law against a fiduciary who abuses his delegated power).

relationship. For instance, a trustee may have different responsibilities in his capacity as a fiduciary than those of a director of a corporation or an attorney representing a client. However, the general obligations of a fiduciary to an entrustor are very much the same.

Whereas negligence law requires the actor to exercise the appropriate standard of care, fiduciary law requires the fiduciary to exercise the appropriate standard of conduct.[87] The fiduciary has a duty to exercise undivided loyalty to the interests of the entrustor.[88] The fiduciary also is required in all matters to further the best interests of and to exhibit and to practice fairness and honesty toward the entrustor.[89] As a result of this serious undertaking, the law imposes the role of the ultimate moral person upon the fiduciary,[90] and the fiduciary is required to act in a completely selfless manner, thinking and acting only for the person or entity for whom he serves as fiduciary.[91] He must, at all times, avoid acts that would conflict with the best interest of the entrustor.[92] He must act with undivided loyalty and exercise absolute and perfect candor at all times.[93]

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87. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1, at 229, § 16.23, at 486 (explaining that the best approach is to define the tort of professional negligence as a violation of an attorney's duty of care and the tort of breach of fiduciary obligations as the violation of the duty of conduct); Anderson & Steele, *supra* note 3, at 243-44, 249 (explaining that malpractice actions discipline a violation of the standard of care whereas breach of fiduciary duty claims discipline a violation of the standard of conduct); Lawrence J. Latto, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 729 (1998) (agreeing with Anderson and Steele that a breach of a fiduciary duty claim provides a remedy for the violation of the standard of conduct and that a professional negligence claim provides redress for a breach of the standard of care).

88. *See* Anderson & Steele, *supra* note 3, at 240-41; *see also* BLACK'S LAW DICTIONARY 625 (6th ed. 1990); DeMott, *supra* note 63, at 882, 892-93 (discussing the general principles of fiduciary law and contrasting the good faith requirements of contract law with the good faith requirements of fiduciary law).

89. *See* DeMott, *supra* note 63, at 900, 907-08 (emphasizing that a fiduciary's obligations constrain the fiduciary from acting self-interestedly and that the fiduciary obligation encompasses a duty to account to the principal for any value received in connection with the fiduciary relationship, unless the principal consents); Frankel, *supra* note 65, at 819, 830-31 (describing fiduciary law's underlying theme as moral or altruistic, requiring the fiduciary to act to further the interests of the beneficiary in preference to his own).

90. *See* DeMott, *supra* note 63, at 891-92 (discussing the use of the language of moral obligation by courts in fiduciary cases to justify the outcome).

91. *See id.* at 882 (stating that a fiduciary must avoid acts that put his interests in conflict with those of the beneficiary); Frankel, *supra* note 65, at 830-31 (discussing how the law places a fiduciary in the role of a moral person and pressures the fiduciary to behave selflessly).

92. *See* Frankel, *supra* note 65, at 807-08 (discussing that the problem posed by fiduciary relations is the fiduciary's abuse of power).

93. *See* BLACK'S LAW DICTIONARY 625 (6th ed. 1990); Anderson & Steele, *supra* note 3, at 240.

2. A Lawyer's Basic Fiduciary Obligations

It is without question that lawyers are fiduciaries to their clients.[94] In almost any capacity in which a lawyer serves,[95] his primary responsibility is to act on behalf of another person.[96] Although most often the relationship between an attorney and his client is established by a contract assumed to have been entered into by means of an arms-length bargain, such a contract does not affect his responsibilities arising from the fiduciary law.[97] Fiduciary law may impose a much stricter standard than that bargained for by the attorney and the client.[98]

A successful cause of action for breach of fiduciary duty arising from an attorney-client relationship requires proof that the lawyer breached his duty of confidentiality or loyalty.[99] As fiduciary, a lawyer has a duty to exercise the most scrupulous honor, good faith, and fidelity to his client's interests.[100] Even if a client's interests may differ from or be in direct conflict with those of the lawyer, the lawyer still has the duty to exercise the utmost good faith in protection of his client's interests and not his own.[101] A lawyer is to act with undivided loyalty.[102] These duties include, *inter alia*, disclosing any

94. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1, at 227 (explaining that the basic fiduciary duties are acknowledged by every American jurisdiction); Freeman, *supra* note 6, at 11 (discussing that the agency relationship between a lawyer and his client is a fiduciary relationship); Leubsdorf, *supra* note 2, at 112-13 (stating that, without question, lawyers are fiduciaries).

95. One noted exception, of course, is when a lawyer represents himself in a legal matter.

96. *Cf.* RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (providing that agency is the fiduciary relationship resulting from the manifestation of consent by a principal to the agent and that the agent shall act on behalf of and subject to the principal's control).

97. *See* Anderson & Steele, *supra* note 3, at 246 (discussing the gloss added to the contractual attorney-client relationship by fiduciary tort law's imposition of tort obligations of due care and fiduciary obligations of *uberrima fides* on the attorney).

98. *See id.* at 242 (discussing that, although fiduciary law disposes of the general presumptions and standards of contract law, the express terms of fiduciary agreements are still relevant in ascertaining the fiduciary's obligations; however, the intent of the parties is not controlling in the same manner as under contract law); Leubsdorf, *supra* note 2, at 115 (questioning to what extent a lawyer may contract out of his fiduciary responsibilities considering the fact that lawyers are forbidden to contract out of malpractice liability).

99. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1, at 229 (discussing the components of a cause of action against a lawyer based on breach of fiduciary duty).

100. *See* Anderson & Steele, *supra* note 3, at 240 (describing the relationship between attorney and client as one of *uberrima fides*).

101. *See id.* (discussing fiduciary obligations in the attorney-client relationship).

102. *See, e.g.*, Financial Gen. Bankshares, Inc. v. Metzger, 523 F. Supp. 744, 762 (D.D.C. 1981) (ruling that a lawyer's common law duty of undivided loyalty is the essence of the attorney-client fiduciary relationship).

material matters that may infringe upon the lawyer's fiduciary obligations,[103] avoiding conflicts of interest,[104] protecting client confidences,[105] and safeguarding client property.[106] These duties impact many of a lawyer's responsibilities.

3. Breach

Violating one's fiduciary obligations constitutes breaching one's fiduciary duties. In determining whether a breach of fiduciary duty has occurred, the fact that the fiduciary has acted in good faith is largely irrelevant. The fiduciary's subjective motivations are not important to a court's consideration of whether he breached his fiduciary obligations.[107] Breaching one's fiduciary duties is often characterized as constructive fraud.[108] A constructive fraud is committed where "conduct, though not actually fraudulent, has all [the] actual consequences and all [the] legal effects of actual fraud."[109] Breach of one's fiduciary duties, irrespective of moral culpability, is declared by law to be fraudulent because of its tendency to deceive others or violate confidence in the fiduciary relationship.[110]

4. Causation and Harm

For the classic breach of fiduciary duty claim, there is often no actual harm requirement and, therefore, no causation require-

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103. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1, at 227, § 14.17, at 286 (explaining that an attorney's fiduciary responsibilities include a duty to represent the client with undivided loyalty, to preserve client confidences, and to disclose any material matters infringing upon these obligations).

104. *See* Leubsdorf, *supra* note 2, at 112-13 (discussing common fiduciary duties, the breach of which would subject an attorney to civil liability); *see, e.g.*, Dessel v. Dessel, 431 N.W.2d 359, 361 (Iowa 1988) (finding lawyer civilly liable for conflict of interest).

105. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1, at 230 (discussing the basic fiduciary obligations of lawyers); Anderson & Steele, *supra* note 3, at 240-41 (same); Freeman, *supra* note 6, at 11 (same); *see, e.g.*, Tri-Growth Ctr. City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 265 Cal. Rptr. 330, 335 (Ct. App. 1989) (ruling that a lawyer who misuses client confidences may be held liable for breach of fiduciary duty).

106. *See* Leubsdorf, *supra* note 2, at 113 (discussing common fiduciary duties owed by lawyers to their clients); *see, e.g.*, Blackmon v. Hale, 463 P.2d 418, 425 (Cal. 1970) (holding attorney liable for converting client funds).

107. *See* DeMott, *supra* note 63, at 900 (stating that while courts may consider a fiduciary's subjective motivations relevant to questions of good faith, courts may consider the motivations to be irrelevant to fiduciary obligations).

108. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1, at 229 (explaining that an action for breach of fiduciary duty is sometimes defined as an action for constructive fraud); Anderson & Steele, *supra* note 3, at 240 (stating that a "violation of the fiduciary standard is often given the sobriquet 'constructive fraud'"); Wall & Weston, *supra* note 3, at 854 (discussing that breach of fiduciary duty in South Carolina has been regarded as constructive fraud).

109. BLACK'S LAW DICTIONARY 314 (6th ed. 1990).

110. *See id.*

ment.[111] Unlike negligence, there is no requirement of proof of causation or actual damages.[112] Establishing duty and breach are usually sufficient to support an award of damages for a plaintiff pursuing an action for violation of fiduciary responsibilities.[113]

5. Defenses

In contrast to a professional negligence claim against a lawyer,[114] defenses to an action based on breach of fiduciary obligations brought against a lawyer are limited. Because a breach of fiduciary duty claim is not grounded in negligence, the traditional defenses available in a negligence action, such as comparative or contributory negligence, are not available.[115] The most successful defense to a breach of fiduciary duty claim is a statute of limitations defense. However, statutes of limitations are typically longer for fiduciary claims than for negligence claims.[116] When available, a client's failure to bring the breach of fiduciary duty claim prior to the expiration of the statute of limitations operates as a complete bar to the action.

The other possible defense to a breach of fiduciary duty claim is for the defendant to prove that he did not in fact breach his fiduciary obligations.[117] In a lawsuit brought for breach of fiduciary responsibilities, once the plaintiff has established the existence of a fiduciary relationship and has alleged the breach of fiduciary obligations, the burden of proof often shifts to the defendant to establish that he did not in fact breach his fiduciary responsibilities, but rather that he dealt fairly and candidly with the client.[118] The onus is on the law-

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111. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.5:108 (2d ed. Supp. 1997) (explaining that, in a breach of fiduciary duty claim, the breach of loyalty is the harm and the client is not required to prove causation or specific injury).

112. *See id.*

113. *See, e.g.,* Hendry v. Pelland, 73 F.3d 397, 401 (D.C. Cir. 1996); Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999) (ruling that clients suing their attorney for breach of fiduciary duty need prove only that their attorney breached the duty, not that the breach caused them any injury).

114. *See* discussion *supra* Part I.E (discussing defenses to a professional negligence action).

115. *See* Anderson & Steele, *supra* note 3, at 254 (discussing that traditional negligence defenses are not available in an action based on breach of fiduciary duty).

116. *See id.* at 259-61 (discussing the variance in the time periods for statutes of limitation for professional negligence, breach of fiduciary duty, and breach of contract actions); *see, e.g.,* Gerdes v. Estate of Cush, 953 F.2d 201, 205 (5th Cir. 1992).

117. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.18, at 288 (stating that full disclosure and explanation of matter is the primary defense to a claim of fiduciary breach).

118. *Cf.* Anderson & Steele, *supra* note 3, at 253.

Although the client retains the ordinary burdens of pleading and proof

yer to prove that he did not breach the standard of conduct toward his client. Proving that he did not breach his fiduciary obligations will operate as a defense to the client's breach of fiduciary duty claim.

6. Remedies

The remedy for breach of fiduciary duty can be quite ample. Not only is the plaintiff entitled to recover actual damages suffered, if any, but the plaintiff may also recover any profit realized by the fiduciary through acts inconsistent with the fiduciary's obligation of fidelity.[119] This policy provides the plaintiff with the potential to recover part or all of any fee that the fiduciary received for his fiduciary services,[120] as well as any benefits realized by virtue of his breach.[121]

This potential for recovery is a critical aspect of fiduciary law. The plaintiff may be entitled to have returned to her part or all of any compensation that she may have given the fiduciary for the fiduciary's services. Additionally, the plaintiff is entitled to have the fiduciary give to her any benefit that the fiduciary obtained by breaching his duty.[122] These remedies are available without regard to whether the entrustor has been injured by the fiduciary's actions. Stated differently, the plaintiff may recover even if the plaintiff has

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> regarding causation and damages, the attorney has the full burden of proving that [he] has not violated [his] fiduciary obligation—that [he] has dealt fairly with [his] client and that [his] actions were not only acceptable but were above reproach.

Id. (citations omitted).

119. *See id.* at 255-56 (discussing that recovery for a breach of fiduciary duty includes amounts well in excess of any losses actually suffered by the client and is allowable even where no loss has been suffered at all).

120. *See* RESTATEMENT (SECOND) OF AGENCY § 469 (1958) (providing that an agent who breaches his duty of loyalty is entitled to no compensation even for properly performed services); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996) (allowing partial to full forfeiture of fees); RESTATEMENT (SECOND) OF TRUSTS § 243 (1959) (providing that "[i]f the trustee commits a breach of trust, the court may . . . deny him all compensation or allow him a reduced compensation or allow him full compensation"); Freeman, *supra* note 6, at 11 (discussing fee disgorgement as a remedy for breach of fiduciary duty in the legal malpractice area); *see, e.g.*, Rice v. Perl, 320 N.W.2d 407, 411 (Minn. 1982); Burrow v. Arce, 997 S.W.2d 229, 223, 246 (Tex. 1999).

121. *See* Anderson & Steele, *supra* note 3, at 255-56 (discussing the underlying theory driving this policy as being that, if the rule were otherwise, no one would be able to maintain an action against the fiduciary in the absence of harm to the entrustor); DeMott, *supra* note 63, at 882 (discussing one of the general principles of fiduciary law as being that, if the fiduciary benefits from acting without regard to his obligation of fidelity, the beneficiary may recover any benefit realized by the fiduciary).

122. *See* DeMott, *supra* note 63, at 888 (comparing the appropriate measure of damages for a breach of fiduciary duty claim with a contract claim).

benefited in some manner from the fiduciary's breach of loyalty.[123] Unlike a negligence claim, not only is the plaintiff not required to prove an injury as part of her case, but additionally, there is no requirement that the plaintiff prove that she suffered an injury in order for her to recover damages.[124]

The reason for awarding damages in the absence of injury is grounded in the primary purpose of fiduciary law: fiduciary law seeks to prevent any divergence of the parties' interests, even in the absence of the entrustor suffering a measurable injury.[125] Obligations that the law imposes on the fiduciary exist for the protection of the entrustor, not the fiduciary.[126] Providing a remedy in the absence of harm seeks to protect fiduciary relationships by discouraging fiduciary disloyalty.[127]

The fiduciary has agreed to perform compensable services in a position of trust. If he breaches that agreement, it is logical in the eyes of the law that he is not entitled to part or all of her compensation.[128] The fiduciary has taken advantage of his position without regard to whether the entrustor has been injured. The harshness of a remedy of fee forfeiture seeks to remove any incentive for the fiduciary to breach his duty of loyalty.[129] Contrasted with negligence law, in this instance, fiduciary law is about deterrence, not redress.

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123. *See id.* (discussing the unique remedies available for breach of fiduciary duty claims).

124. *See* Anderson & Steele, *supra* note 3, at 254 (noting the inquiry in actions for breach of fiduciary duty is determining whether complainant's counsel violated a conduct standard); Thomas D. Morgan, *Sanctions and Remedies for Attorney Misconduct,* 19 S. ILL. U. L.J. 343, 351 (1995) (explaining that a plaintiff may recover damages even where the attorney's misconduct caused no actual loss); *see, e.g.,* Hendry v. Pelland, 73 F.3d 397, 402 (D.C. Cir. 1996) (stating that a client must show only that the attorney breach his duty); Rice v. Perl, 320 N.W.2d 407, 411 (Minn. 1982) (holding that the client need not prove actual harm to obtain fee forfeiture).

125. *See* DeMott, *supra* note 63, at 905-06 (noting that fiduciary duties are sensitive to discrepancies between the fiduciary's and entrustor's interests, even in the absence of a measurable injury).

126. *See* Anderson & Steele, *supra* note 3, at 236, 243 (explaining the primary consideration in an action for breach of fiduciary duty involving the attorney-client relationship is to guard against misuse of clients' lives and property); Frankel, *supra* note 65, at 801 (stating that a fiduciary relationship protects only the entrustor's needs, not the fiduciary's needs).

127. *See Hendry*, 73 F.3d at 402; Burrow v. Arce, 997 S.W.2d 229, 238 (Tex. 1999).

128. *See Hendry*, 73 F.3d at 403; RESTATEMENT (SECOND) OF TRUSTS § 243 cmt. a (1959) (explaining that the denial of compensation is based on the premise that the trustee failed to render services for compensation given).

129. *See Hendry*, 73 F.3d at 402-03; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. a, b (Proposed Final Draft No. 1, 1996) (explaining that the remedy of fee forfeiture serves as a deterrent).

III. WHY CLIENTS SUING THEIR LAWYERS FIND BREACH OF FIDUCIARY DUTY CLAIMS ATTRACTIVE

The recent trend of pursuing breach of fiduciary duty claims against lawyers can be attributed to several factors. As it exists today, the law provides clients with several incentives to frame their claims against their attorneys as breach of fiduciary duty claims as opposed to professional negligence actions. First, it is easier for a client to prove a breach of fiduciary duty claim than it is for a client to prove a professional negligence claim against a lawyer.[130] It is also difficult to defend against a breach of fiduciary duty claim.[131] Finally, the greatest potential for a client to recover damages lies with a breach of fiduciary duty claim.[132]

A. Proving a Breach of Fiduciary Duty Claim Is Easier Than Proving a Professional Negligence Claim

First, an action for breach of fiduciary duty is easier for a plaintiff to prove than an action based in negligence. As discussed *supra*, an action for professional negligence almost always requires expert testimony to establish the appropriate professional standard of care.[133] In the vast majority of professional negligence actions, expert testimony is required to establish each element of the plaintiff's cause of action: the requisite standard of care, whether that standard of care was breached, whether the breach proximately caused injury to the plaintiff, and the extent of the damages.[134] In comparison, although a breach of fiduciary duty claim often requires expert testimony as well, such expert testimony may not always be required.[135] Further, even when required, having only to prove duty and breach through expert testimony is a significantly less burdensome undertaking for the client than the requirement in a professional negligence action where the client must provide expert testimony as to establish essentially every element of his claim.

Second, in a breach of fiduciary duty claim, the plaintiff's case is easier to prove because of the allocation of the burdens of proof.[136] In a suit challenging a fiduciary's conduct, after the plaintiff has met her burden of production by establishing a fiduciary relation-

130. *See infra* notes 133-42 and accompanying text.
131. *See infra* notes 143-46 and accompanying text.
132. *See infra* notes 147-52 and accompanying text.
133. *See* 4 MALLEN & SMITH, *supra* note 26, § 32.16, at 201.
134. *See id.* (discussing the need for experts in most professional negligence actions brought against an attorney).
135. *See, e.g.*, Johnson v. DeLay, 809 S.W.2d 552, 555 (Tex. App. 1991); Anderson & Steele, *supra* note 3, at 249 (explaining that actions for breach of fiduciary duty do not require showing a violation of the standard of care; consequently, expert testimony is not always needed).
136. *See* DeMott, *supra* note 63, at 900-01 (discussing the significant effect on the course of litigation the pursuit of a breach of fiduciary duty claim entails).

ship and an alleged breach, the burden shifts to the lawyer to prove that he dealt fairly and candidly with his client.[137] By virtue of the fact that the client has accused the fiduciary of acting improperly within the attorney-client relationship, the lawyer is required to prove that his actions were indeed appropriate. This entails not just raising a challenge to the plaintiff's proof, but it also requires the defendant-lawyer to prove by a preponderance of the evidence that he acted with the utmost loyalty. The burden of proof rests with the defendant, not with the plaintiff.[138] This allocation of proof is significantly different than in a professional negligence action where the burden essentially remains with the plaintiff-client at all times.

However, the most significant reason a breach of fiduciary duty claim is easier to prove than a professional negligence action is that the causation requirement for the professional negligence claim against a lawyer—proving the case-within-the-case—is an exceedingly difficult undertaking.[139] The requirement of having to prove two lawsuits at once—the current malpractice action and the underlying lawsuit—is a major obstacle for a plaintiff to overcome.[140] Recall that, in a breach of fiduciary duty claim, there is no such causation requirement.[141]

This combination of limited expert testimony, the allocation of burdens of proof, and the difference in the causation requirements eases the plaintiff's evidentiary responsibilities so much as to make a breach of fiduciary duty claim much more attractive to plaintiffs. In contrast to the professional negligence claim against an attorney, a breach of fiduciary duty claim is the obvious choice.[142]

B. Defending Against a Breach of Fiduciary Duty Claim Is More Difficult Than Defending Against a Professional Negligence Claim

Related to the fact that a breach of fiduciary duty claim is easier to prove than a professional negligence action is the fact that a breach of fiduciary duty claim is more difficult for a lawyer to defend. There are few defenses available to an attorney accused of

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137. *See id.* at 900 (contrasting the allocation of proof in a breach of fiduciary duty claim with a claim based in contract where the party alleging the breach of contract has the burden of proof).

138. *See id.*

139. *See* Koffler, *supra* note 32, at 41 (discussing the difficulties created by the requirement that the plaintiff prove a trial-within-a-trial in a professional legal negligence action).

140. *See* Leubsdorf, *supra* note 2, at 148-50 (explaining how much of the expense of traditional legal malpractice litigation stems from the plaintiff having to prove the case-within-a-case).

141. *See* discussion *supra* Part II.B.4 (discussing causation requirements in a breach of fiduciary duty lawsuit).

142. *See* Hendry v. Pelland, 73 F.3d 397, 402 (D.C. Cir. 1996) (ruling that clients pursuing a claim for breach of fiduciary duty only must prove their attorney breached that duty, not that the attorney caused actual injury).

breaching his fiduciary obligations to his client.[143] As discussed *supra,* statutes of limitations for breach of fiduciary duty claims may provide for much longer time periods than corresponding professional negligence actions.[144] Moreover, the traditional tort defenses of contributory or comparative negligence are not available in a breach of fiduciary duty claim.[145] The limited defenses provide additional incentive for clients to frame their claims against their attorneys as breach of fiduciary duty claims as opposed to professional negligence claims.[146]

C. Greatest Potential for Damages Lies with a Breach of Fiduciary Duty Claim

A very plausible explanation for the recent trend of clients suing lawyers for breach of fiduciary duty is the differing remedies available.[147] In a professional negligence claim, in the absence of intentional or reckless conduct—where punitive damages may be available—the plaintiff is entitled to recover only for her actual injuries.[148] That recovery stands in marked contrast to the remedies available for a breach of fiduciary duty claim where the client has the potential to recover any benefit realized by the attorney through the breach of fiduciary obligations, even in the absence of actual injury suffered by the client.[149] Being permitted to recover any benefit

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143. *See* discussion *supra* Part II.B.5 (discussing defenses to a breach of fiduciary duty claim).

144. *See* Anderson & Steele, *supra* note 3, at 259 (discussing that a claimant may successfully pursue a breach of fiduciary duty claim long after the statute of limitations has run on the corresponding malpractice or contract action).

145. *See, e.g.,* Jackson State Bank v. King, 844 P.2d 1093, 1096-97 (Wyo. 1993) (stating that comparative negligence is not available as a defense for breach of fiduciary obligations).

146. *See* Anderson & Steele, *supra* note 3, at 260.

147. *See id.* at 255-56.

148. *See* Hendry v. Pelland, 73 F.3d 397, 400 (D.C. Cir. 1996).

149. *See Hendry*, 73 F.3d at 402 (stating that, in a claim against an attorney for breach of fiduciary duty where the client seeks only disgorgement of fees as a remedy, the client only must prove that the attorney breached his fiduciary duty, not that the breach caused actual injury); Frank v. Bloom, 634 F.2d 1245, 1258 (10th Cir. 1980) (recognizing that attorney's fees may be withheld in cases involving actual conflicts of interest even where no damages are shown); *In re* Estate of Corriea, 719 A.2d 1234, 1241 (D.C. 1998) (holding that plaintiff's inability to prove the precise amount of the damages suffered did not prevent fee disgorgement); Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So. 2d 947, 952-53 (Fla. Dist. Ct. App. 1993) (holding that fee forfeiture should only be considered when an ordinary remedy would be plainly inadequate); Rice v. Perl, 320 N.W.2d 407, 411 (Minn. 1982) (holding that the client is not required to prove actual harm to obtain fee forfeiture); Eriks v. Denver, 824 P.2d 1207, 1213 (Wash. 1992) (rejecting the argument that a finding of damages and causation is required in order to permit fee forfeiture); *see also* DeMott, *supra* note 63, at 900-01 (discussing how the beneficiary in litigation against a fiduciary may seek unique types of remedies). *But see* 2 MALLEN & SMITH, *supra* note 6, § 14.1.5, at 37 (opining that, to determine the elements for

realized by the attorney by the breach permits the client to disgorge part or all of any fees earned by the attorney, even where the client has suffered no actual harm as a result of her attorney's conduct. Since actual harm is not required, this recovery may even include some circumstances where the attorney's performance resulted in a favorable result for the client.[150] In addition, the client may recover for any actual losses suffered.[151]

It is easy to understand why plaintiffs who seek to sue their lawyers may choose to pursue a theory of breach of fiduciary duty instead of or in addition to professional negligence actions. Breach of fiduciary duty claims are easier to prove—from an evidentiary perspective – than professional negligence actions. Furthermore, as long as the causation requirement in a professional negligence suit against a lawyer is so exacting, displeased clients will continue to seek alternative methods of recovery.[152] These factors, coupled with the fact that the potential for recovery may be great in a breach of fiduciary duty action, easily explain the recent trend of plaintiffs dissatisfied with their lawyers pursuing breach of fiduciary duty claims.

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a case of breach of fiduciary duty, courts should begin with the traditional negligence cause of action, replacing the relevant fiduciary obligation for the duty of care, then requiring the same rules as to causation, damages, and burdens of proof); Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc., 665 A.2d 1038, 1046 (Md. 1995) (requiring as one of the components of a cause of action for breach of fiduciary duty proof of harm resulting from the fiduciary breach); Crawford v. Logan, 656 S.W.2d 360, 365 (Tenn. 1983) (requiring client to show prejudice to obtain fee forfeiture); Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1291 (Utah Ct. App. 1996) (requiring that plaintiff prove that but for the attorney's fiduciary breach the client would have benefited).

150. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. d (Proposed Final Draft No. 1, 1996) (stating that fee forfeiture is warranted when the attorney's violation is flagrant even absent actual harm); HAZARD & HODES, *supra* note 111, § 1.5:108 (discussing that fee forfeiture is a remedy for a claim based on breach of the duty of loyalty even in the absence of specific injury to the client; Morgan, *supra* note 124, at 351 (discussing the availability of fee forfeiture despite the fact a client suffered no loss due to an attorney's misconduct).

151. *See* DeMott, *supra* note 63, at 900-01 (setting forth the available remedies for an action based on breach of fiduciary duty).

152. Although beyond the scope of this Article, perhaps a more appropriate causation test—for example, something similar to the lost chance doctrine for proving causation in medical malpractice actions—should be formulated to address this problem of proof of causation in professional negligence actions against lawyers. *See* Leubsdorf, *supra* note 2, at 150 (suggesting an alternative to the case-within-a-case may be adoption of the loss of chance doctrine as used in medical malpractice actions); *see also* Koffler, *supra* note 32, at 74 (suggesting that one solution to the problems associated with requiring the plaintiff to prove the case-within-a-case is to place the burden of proof on the lawyer instead of on the client); Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice,* 61 WASH. L. REV. 1479, 1486-91 (1986) (discussing application of the loss of chance doctrine in various medical malpractice cases).

IV. RECENT TREND OF THE COURTS IN PERMITTING BREACH OF FIDUCIARY DUTY CLAIMS AGAINST LAWYERS

It has now become more popular than ever for a client to bring an action against her lawyer for conduct occurring in an attorney-client relationship.[153] In doing so, plaintiffs pursue many theories of recovery,[154] including claims for breach of fiduciary duty. In what is considered by many to be an alarming trend, lawyers, in several jurisdictions, may be forced to forfeit some or all of their fees in actions brought by clients for breach of fiduciary obligations, even when the clients have suffered no harm.[155]

The forthcoming Restatement (Third) of the Law Governing Lawyers endorses fee forfeiture as a remedy for breach of fiduciary duty. It provides that a lawyer may be required to forfeit some or all of his compensation in the event of a "clear and serious violation of duty to a client."[156] To subject the attorney to fee forfeiture, the lawyer's conduct must be both a "clear" and a "serious" violation of a duty. The Restatement describes a clear violation as conduct that "a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known [to be] wrongful."[157] It

153. *See* Ramos, *supra* note 2, at 1661 (discussing the recent popularity of lawsuits brought against lawyers).

154. *See generally* 2 MALLEN & SMITH, *supra* note 6 (discussing the various theories of recovery for legal malpractice actions, including professional negligence, breach of fiduciary duty, and breach of contract); Anderson & Steele, *supra* note 3 (same).

155. *See* Hendry v. Pelland, 73 F.3d 397, 402 (D.C. Cir. 1996) (concluding that "clients suing their attorney for breach of fiduciary duty . . . and seeking disgorgement of legal fees as their sole remedy need prove only that their attorney breached that duty, not that the breach caused them injury"); Frank v. Bloom, 634 F.2d 1245, 1258 (10th Cir. 1980) (recognizing that fees may be withheld desptie a lack of actual damages when the attorney elects to represent clients having conflicts of interests); *In re* Estate of Corriea, 719 A.2d 1234, 1241 (D.C. 1998) (holding that the plaintiff's inability to enumerate damages suffered did not prevent the fee disgorgement); Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So. 2d 947, 953 (Fla. Dist. Ct. App. 1993) (holding that fee forfeiture should be considered only when other remedies are inadequate); Rice v. Perl, 320 N.W.2d 407, 411 (Minn. 1982) (holding that the client need not prove actual harm to obtain fee forfeiture); Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999) (holding that actual injury is not a prerequisite to employing a fee forfeiture remedy for a breach of fiduciary duty claim against a lawyer); Eriks v. Denver, 824 P.2d 1207, 1213 (Wash. 1992) (rejecting the argument that a finding of damages and causation is required to order fee forfeiture); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996) (providing that "[a] lawyer engaging in a clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter"); HAZARD & HODES, *supra* note 111, § 1.5:108 (explaining that, in a breach of fiduciary duty action, the client is not required to prove causation or specific injury in order to recover damages).

156. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996).

157. *Id.* § 49 cmt. d.

describes a serious violation as one that is not minor.[158] Then,

> [i]n determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and timing of the violation, its wilfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.[159]

Several courts presented with the issue of fee forfeiture for breach of fiduciary duty in the attorney-client setting have adopted tests similar to the one set forth in the Restatement.[160] Courts presented with this issue have permitted both full and partial fee forfeiture.[161]

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158. *See id.*

159. *Id.* § 49.

160. *See, e.g., In re* New York, New Haven & Hartford R.R. Co., 567 F.2d 166, 180-81 (2d Cir. 1977) (holding that the court should base the amount of fee forfeiture on the type of fiduciary breach, as well as evidence that the attorney had, prior to the breach, performed valuable services for the estate); *In re* Life Ins. Trust Agreement of Julius F. Seeman, 841 P.2d 403, 405 (Colo. Ct. App. 1992) ("[A] conflict of interest is only one of many factors to be considered in determining the award of fees; it does not mandate a denial of all compensation."); Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So. 2d 947, 951-53 (Fla. Dist. Ct. App. 1993) (rejecting a mechanical application of fee forfeiture and approving the multi-factor approach to fee forfeiture as stated in the tentative draft of the Restatement (Third) of the Law Governing Lawyers); *In re* Marriage of Pagano, 607 N.E.2d 1242, 1249-50 (Ill. 1992) ("[W]hen one breaches a fiduciary duty to a principal the appropriate remedy is within the equitable discretion of the court. While the breach may be so egregious as to require the forfeiture of compensation by the fiduciary as a matter of public policy, such will not always be the case." (citations omitted)); Gilchrist v. Perl, 387 N.W.2d 412, 417 (Minn. 1986) (holding that the amount of fee forfeiture should be conditioned by application of the relevant factors in the state's punitive damage statute); International Materials Corp. v. Sun Corp., 824 S.W.2d 890, 895 (Mo. 1992) (en banc) (holding that complete forfeiture is not warranted unless the fiduciary breach destroys the client-lawyer relationship, thereby removing the right for the lawyer's compensation, and that otherwise recovery could be in *quantum meruit* for benefits conferred); Kidney Ass'n, Inc. v. Ferguson, 843 P.2d 442, 446-47 (Or. 1992) (favoring consideration of factors in determining whether attorney's fee should be reduced or denied when attorney breaches duty of loyalty); Crawford v. Logan, 656 S.W.2d 360, 365 (Tenn. 1983) (holding that any misconduct of an attorney does not automatically result in fee forfeiture but rather "[e]ach case . . . must be viewed in the light of the particular facts and circumstances of the case"); Lindseth v. Burkhart, 871 S.W.2d 693, 695 (Tenn. Ct. App. 1993) (holding that fee forfeiture for a breach of fiduciary duty is not automatic but depends on the facts and circumstances of each case); Burrow v. Arce, 997 S.W.2d 229, 245 (Tex. 1999) (holding that a lawyer's fee forfeiture, because of a breach of fiduciary duty owed, should be determined by applying the Restatement (Third) of the Law Governing Lawyers); *see also In re* Estate of Brandon, 902 P.2d 1299, 1317 (Alaska 1995) (noting that existing Alaska law appeared to require full fee forfeiture, but directing the trial court on remand to make alternative findings under the multi-factor approach).

161. *See, e.g.,* Hendry v. Pelland, 73 F.3d 397, 403 (D.C. Cir. 1996) (leaving

In a recent opinion illustrative of the current nationwide trend, a court held that attorneys breaching their fiduciary duty to their clients may be required to forfeit all or part of their fees, irrespective of whether the clients suffered actual damages as a result of the breach.[162] In *Burrow v. Arce,* forty-nine plaintiffs were represented by the defendants-attorneys in the underlying action, which involved wrongful death and personal injury lawsuits arising from a large chemical plant explosion.[163] During their representation, the defendants-attorneys settled on behalf of all plaintiffs for approximately $190 million, of which the lawyers received a contingency fee of one-third of the settlement—or more than $60 million.[164] Although the settlement for each client may have been reasonable, the plaintiffs subsequently sued their attorneys, asserting causes of action for, *inter alia,* professional negligence and breach of fiduciary duty.[165] Having suffered no actual damages, the plaintiffs sought disgorgement of their attorneys' fees.[166]

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open the extent of forfeiture to which the plaintiffs might be entitled if they succeed in proving that the attorney breached his duty of loyalty); Sweeney v. Athens Reg'l Med. Ctr., 917 F.2d 1560, 1573-74 (11th Cir. 1990) (holding that, under Georgia law, if an attorney has engaged in unethical conduct, the court may be obligated to order forfeiture of part of the fees); Musico v. Champion Credit Corp., 764 F.2d 102, 112-113 (2d Cir. 1985) (describing a trend in New York law away from automatic full fee forfeiture); Cal Pak Delivery, Inc. v. United Parcel Serv., Inc., 60 Cal. Rptr. 2d 207, 216 (Ct. App. 1997) (recognizing that California courts allowed partial fee recovery by the attorney for services rendered before the ethical breach or on an unjust enrichment theory where the attorney's services resulted in the client's recovery); Lurz v. Panek, 527 N.E.2d 663, 671 (Ill. App. Ct. 1988) ("[W]e do not believe defendant should have to forfeit the entire fee. . . . Rather, we agree with the trial court that the jury was capable of apportioning the contingent fee."); Fairfax Sav., F.S.B. v. Weinberg & Green, 685 A.2d 1189, 1209 (Md. Ct. Spec. App. 1996) (holding that law firm was not obligated to disgorge entire fee because firm rendered valuable legal services to clients, and because other remedies of actual and punitive damages and sanctions would be adequate); *In re* Estate of McCool, 553 A.2d 761, 769 (N.H. 1988) (holding that "an attorney who violates our rules of professional conduct by engaging in clear conflicts of interest, of whose existence he either knew or should have known, may receive neither executor's nor legal fees for services he renders an estate"); Pessoni v. Rabkin, 633 N.Y.S.2d 338, 338 (App. Div. 1995) (holding that an attorney who violates the disciplinary rules is not entitled to fees for any services rendered).

162. *See* Burrow v. Arce, 997 S.W.2d 229, 240, 245 (Tex. 1999).

163. *Id.*

164. *See id.* at 232.

165. *See id.* Additional claims were brought for fraud, violations of Texas's Deceptive Trade Practices-Consumer Protection Act, and breach of contract. *See id.*

166. *See id.* The plaintiffs alleged that, during the representation, their attorneys violated several rules governing their professional conduct, including soliciting business through a lay intermediary, failing to investigate fully and assess their individual claims, failing to communicate offers received and demands made, entering into an aggregate settlement without authority or approval, and intimidating and coercing the plaintiffs into accepting the settle-

The trial court denied the plaintiffs' claims and granted the defendants-attorneys' motion for summary judgment.[167] Regarding the professional negligence and the breach of fiduciary duty claims, the court ruled that because the settlement was fair and reasonable, the plaintiffs had suffered no actual damages and, in the absence of damages, the defendants were entitled to judgment as a matter of law.[168]

The court of appeals agreed with the trial court's decision regarding the negligence claims, but reversed on the fiduciary duty claims, holding instead that actual damages are not a prerequisite for a successful breach of fiduciary duty action.[169] Relying on fiduciary law as applied and developed in areas other than attorney-client relationships, the intermediate appellate court explained that proof of damages was not required for typical breach of fiduciary duty claims.[170] The court stated that there was "no reason to carve out an exception for breaches of fiduciary duty in the attorney-client relationship."[171]

The state supreme court agreed, holding that it was the lawyers' disloyalty, not any resulting harm, that violated the fiduciary relationship and that a plaintiff may be entitled to recover damages for breach of fiduciary obligations without a showing of actual harm.[172] The court held that the amount of damages to be awarded is a determination of law conducted by the court.[173] It went on to hold that a complete forfeiture of fees may not necessarily be appropriate: "Some [fiduciary duty] violations are inadvertent or do not significantly harm the client. Some can be adequately dealt with by [resort to other] remedies . . . or by a partial forfeiture [of fees]."[174] The court then adopted a test similar to the one set forth in the Restatement (Third) of the Law Governing Lawyers, adding to the Restatement's test the consideration of the public's interest in maintaining the integrity of the attorney-client relationship.[175] The court then explained the procedure that lower courts are to follow in determining whether a client may force a forfeiture of fees in cases involving a lawyer's alleged breach of fiduciary duty:

> [A] trial court must determine from the parties whether fac-

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ment offer. *See id.* at 232-33.

167. *See id.* at 233.

168. *See id.*

169. *See* Arce v. Burrow, 958 S.W.2d 239, 258 (Tex. App. 1998) (granting writ).

170. *See id.* at 246-49.

171. *Id.* at 246.

172. *See Burrow,* 997 S.W.2d at 238, 240.

173. *See id.* at 245-46.

174. *Id.* at 241 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. b (Proposed Final Draft No. 1, 1996)).

175. *See id.* at 244.

> tual disputes exist that must be decided by a jury before the court can determine whether a clear and serious violation of duty has occurred, whether forfeiture is appropriate, and if so, whether all or only part of the attorney's fee should be forfeited. Such factual disputes may include, without limitation, whether or when the misconduct complained of occurred, the attorney's mental state at the time, and the existence or extent of any harm to the client. If the relevant facts are undisputed, these issues may, of course, be determined by the court as a matter of law. Once any necessary factual disputes have been resolved, the court must determine, based on the factors we have set out, whether the attorney's conduct was a clear and serious breach of duty to his client and whether any of the attorney's compensation should be forfeited, and if so, what amount. Most importantly, in making these determinations the court must consider whether forfeiture is necessary to satisfy the public's interest in protecting the attorney-client relationship.[176]

Burrow is illustrative of the current nationwide trend to permit breach of fiduciary duty claims against lawyers in the absence of harm. Although the *Burrow* court goes to great lengths to justify and limit the scope of its decision, the ruling has the potential to create a host of problems that can and should be avoided. For example, the court rejects the defendants' argument that permitting forfeiture of an attorney's fees without a showing of actual damages will encourage an increase in the filing of breach of fiduciary duty claims by clients to extort their legal fees after the representation has concluded, thereby allowing clients to receive a windfall.[177] Contrary to the court's ruling, it is true that facilitating a client's ability to bring a breach of fiduciary duty claim necessarily will result in an increase in the filing of breach of fiduciary duty claims— particularly considering the current trend of plaintiffs to pursue each and every theory of recovery available to them when filing lawsuits. At a minimum, decisions such as this are likely to lead to increased filing of lawsuits and windfall judgments to uninjured plaintiffs.

A second problem created by *Burrow* is that the possibility of exacting too harsh of a penalty against a lawyer in a breach of fiduciary duty lawsuit may serve to over-deter lawyers' conduct and make attorneys reluctant to take on cases that they otherwise would be willing to handle. The court rejects the argument that, without a determination of actual damages against which to calculate a damage award, a jury's award may be excessive.[178] However, if not unwilling to take on some cases, attorneys may be forced to raise already high legal fees in order to compensate either for the fees that they will lose as a result of these lawsuits or the money that will be

176. *Id.* at 246.
177. *See id.* at 240.
178. *See id.*

expended in defending them.[179]

A third problem with cases like *Burrow* is that the "clear and serious" breach standard does not provide lawyers with adequate protection against breach of fiduciary duty "strike suits." Although full or partial fee forfeiture may be an appropriate remedy in limited circumstances, it certainly should not be available in any and all circumstances where a lawyer has breached a fiduciary obligation. Perhaps more importantly, in order to prevent the filing of these claims, the law should not provide a disgruntled client with even the *appearance* that such an action is potentially available. Ruling—as the *Burrow* court did and as the Restatement proposes—that fee forfeiture is appropriate for "clear and serious" violations of fiduciary duties does not provide sufficient guidance to courts that will routinely have to determine whether a plaintiff should be permitted to proceed with a breach of fiduciary duty claim against her attorney. It is too much to ask trial courts presented with these cases to make a case-by-case determination of whether an attorney's breach of fiduciary duty was "clear and serious." Asking trial courts to determine on an ad hoc basis (1) whether fee forfeiture is justified and (2) if so, whether it should be full or partial—as the *Burrow* court does—may, at a minimum, unnecessarily expend precious court resources.

With the myriad of remedies available to clients dissatisfied with their attorneys' conduct, limitations need to be placed on when plaintiffs should be permitted to bring a breach of fiduciary duty claim against their lawyers. In the interest of judicial economy and in fairness to lawyers practicing today, a more clear-cut and well-suited test that may be more easily applied by the trial courts is necessary.

V. THE APPROPRIATE APPLICATION OF BREACH OF FIDUCIARY DUTY CLAIMS AGAINST LAWYERS

An action for breach of fiduciary duty arising in the attorney-client relationship should not lie for each and every breach of an attorney's fiduciary responsibilities. Rather, a client should have a breach of fiduciary duty claim against her lawyer only when her lawyer has committed a criminal offense directed against the client, has engaged in a scheme to defraud the client, or has caused actual harm to the client by virtue of the breach. In those circumstances—and only in those circumstances—should an aggrieved client have available to her a viable action for breach of fiduciary duty. However, in those limited circumstances, recovery should be required.[180]

179. *Cf.* Frankel, *supra* note 65, at 834 (concluding that fiduciary law should not burden the fiduciary alone with the costs of deterrence).

180. *See* discussion *infra* Part V.C.4 (discussing the fact that recovery of damages should be mandatory when a breach of fiduciary claim is brought).

A. *Focusing on the Purpose of Fiduciary Law*

Fiduciary law is equitable in nature. It was created for two purposes. The first was to fill gaps in the law left where there existed no remedy at law.[181] The second was to deter fiduciaries from exploiting their position of power against the people who entrusted them with that power.[182]

The need to fill gaps and deter a fiduciary's behavior differs from relationship to relationship—and, at times, even within a particular type of relationship, from situation to situation. For example, the need to protect a corporation's shareholders from a director of the corporation engaging in breaches of fiduciary obligations may differ significantly from the need to deter a trustee from engaging in breaches of fiduciary obligations toward the beneficiary of a trust. Accordingly, the law governing directors in the corporate setting *should* be different than the law of trustees because the function and purpose of the fiduciaries are different. Similarly, a client using an attorney for the first time may need protections that would not be necessary for a sophisticated client who has had various and multiple dealings with attorneys. Hence, within the same type of relationship of trust—here the attorney/client relationship—a fiduciary's function may vary in order to protect the entrustor-client and the fiduciary-lawyer.

B. *The Need for Fiduciary Law in the Attorney-Client Relationship*

Fiduciary law is currently applied in the attorney-client relationship in too broad and too unfocused a fashion. It has been formulated without much foresight and without giving due consideration to the necessary features of a legal practice. As a result, as currently applied, fiduciary law has the potential to over-deter attorneys from engaging in behavior in which attorneys commonly (and often must) engage, as well as to punish more severely questionable behavior which is already adequately regulated in other ways.[183] I do not suggest a system of *laissez faire* under which questionable or inappropriate conduct would be accepted as a professional norm because most lawyers engage in it. Rather, I propose that, in applying fiduciary law to attorney conduct, consideration should be given to both the demands and realities of a modern legal practice[184] and the availability and desirability of using other means

181. *See* discussion *supra* Part II.

182. *See* discussion *supra* Part II.B.

183. *See generally* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 804-09, 863-72 (1992) (examining the agencies and systems responsible for enforcing the rules of professional responsibility among lawyers).

184. *See* Frankel, *supra* note 65, at 797, 804-08 (claiming that the current method of developing fiduciary law by analogy is unsatisfactory as it results in the application of inappropriate rules).

to regulate that conduct.[185]

The fact that lawyers are in positions of trust does not alone justify haphazardly applying "fiduciary law" to the attorney-client relationship.[186] Rather, principles of fiduciary law should be applied to the attorney-client relationship only after taking into consideration the unique characteristics of the relationship. Prime consideration should be given to the function that the legal profession demands that the lawyer as fiduciary should serve. Fiduciary law should be developed with the goal of regulating the attorney so as to minimize and reduce the potential risks to the client.[187] Without this goal as a focus, the practice of making a blanket application of fiduciary rules to the attorney-client relationship runs the risk of creating bad law.

Fiduciary law should fill gaps left by other applicable laws and deter only the most egregious behavior that may occur in an attorney-client relationship. Many different procedures and laws require attorneys to perform their job in a manner which is becoming of the legal profession.[188] For example, it is universally held in the legal profession that a lawyer should have the client's best interest as the primary consideration. Every jurisdiction has adopted rules of professional conduct that require lawyers to keep the client's best interest as a priority.[189] At the core of these rules is the mandate that an attorney perform with loyalty and good faith toward his client.[190] These ethical rules also serve to address certain fiduciary issues that may arise in an attorney-client setting. Violation of these rules subjects an attorney to disciplinary proceedings.[191] Sanctions for

185. *See* Wilkins, *supra* note 183, at 804-10 (discussing the various enforcement systems in place to regulate attorney conduct).

186. *See* Leubsdorf, *supra* note 2, at 114 (observing that there are many other agency relationships involving duties that are far less extensive than the fiduciary duties and responsibilities of lawyers).

187. *Cf.* Frankel, *supra* note 65, at 833 (stating that "the law should regulate the fiduciary to ascertain and reduce the potential risks to the entrustor").

188. *See, e.g.,* Fairfax Sav., F.S.B. v. Weinberg & Green, 685 A.2d 1189, 1209 (Md. Ct. Spec. App. 1996) (holding that a law firm was not obligated to disgorge entire fee because the firm rendered valuable service to the client and because other remedies of actual and punitive damages and sanctions would be adequate).

189. *See generally, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-1.9 (1983) (prohibiting conflicts of interests); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101, 5-105, 5-107 (1980) (same). Every jurisdiction has adopted, in some form, a version of the Model Rules of Professional Conduct or the Model Code of Professional Responsibility.

190. *See* Johns v. Smyth, 176 F. Supp. 949, 952 (E.D. Va. 1959) ("One of the cardinal principles confronting every attorney in the representation of a client is the requirement of complete loyalty and service in good faith to the best of his ability.").

191. *See* MODEL RULES OF PROFESSIONAL CONDUCT Scope of Rules (1983) ("Failure to comply with an obligation . . . imposed by a Rule is a basis for invoking the disciplinary process.").

violating the applicable ethical rules can be quite severe, ranging anywhere from censure to disbarment.[192] However, violation of the ethical rules does not provide a basis for a professional negligence action against an attorney.[193] Similarly, the violation of ethical rules should not provide a basis for a breach of fiduciary duty claim.[194]

Allowing a breach of fiduciary duty claim against a lawyer for the violation of every ethical rule would potentially subject a lawyer to liability that is disproportionate to the lawyer's conduct or to the harm, if any, inflicted on the client. For example, the failure to keep one's client adequately informed is definitely conduct in which a lawyer should not engage, and the ethical rules so provide.[195] But the mere fact that a client is not kept adequately informed does not, without more, mean that the client should be able to sue the lawyer for a portion or all of the attorney's fee. If, in this example, the failure to keep the client adequately informed caused no actual harm, the client should not be permitted to pursue a breach of fiduciary duty claim unless the lawyer's failure to keep her informed is due to the commission of a criminal offense victimizing the client or the perpetration of a scheme to defraud the client. If not, the client should not even be able to proceed with the breach of fiduciary duty claim in the absence of damages. Such a claim should never be filed or, at a minimum, should be defeated at the summary judgment stage. In the absence of harm and where the lawyer has neither committed a criminal offense nor perpetrated a scheme to defraud the client, action by the appropriate disciplinary board is better suited to address the offense of failing to keep a client adequately informed. The severe remedies available for an action for breach of fi-

192. *See* Frances Patricia Solari, *Malpractice and Ethical Considerations*, 19 N.C. CENT. L.J. 165, 167 (1991).

193. *See, e.g.,* Ruden v. Jenk, 543 N.W.2d 605, 611 (Iowa 1996); OMI Holdings, Inc. v. Howell, 918 P.2d 1274, 1288 (Kan. 1996); MODEL RULES OF PROFESSIONAL CONDUCT Scope of Rules (1983) (explaining that the violation of a Model Rule of Professional Conduct should not give rise to a cause of action); CAL. RULES OF PROFESSIONAL CONDUCT 1-100(A) (1995) ("These rules are not intended to create new civil causes of action."); *cf.* Fishman v. Brooks, 487 N.E.2d 1377, 1381 (Mass. 1986) (ruling that the ethical code is analogous to statutes that provide civil remedies, but it only provides an inference of attorney negligence). *But see, e.g.,* Schlesinger v. Herzog, 672 So. 2d 701, 707 (La. Ct. App. 1996) (ruling that the ethical issue became a legal duty).

194. *See* MODEL RULES OF PROFESSIONAL CONDUCT Scope of Rules (1983). *But see, e.g., In re* Estate of McCool, 553 A.2d 761, 769 (N.H. 1988) (holding that a lawyer who violates the state's rules of professional conduct by engaging in clear conflicts may receive neither executor's nor legal fees for services she renders an estate); Pessoni v. Rabkin, 633 N.Y.S.2d 338, 339 (App. Div. 1995) (holding that an attorney who violates the disciplinary rules is not entitled to fees for any services rendered).

195. *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983) (mandating that a lawyer keep her client reasonably informed); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-2 (1981) (insisting that a lawyer inform her client of material developments regarding the matter of representation).

duciary duty, in this instance, would be disproportionate to the misconduct of the attorney.

In this day and age of clients suing under every conceivable theory, it is important for courts to distinguish between the various theories of recovery. Courts must remain clear on this point—a lawyer has at least two responsibilities to his client: (1) the duty to provide competent representation and (2) the duty to comply with fiduciary obligations.[196] The former responsibility is protected by negligence law and frequently by other tort-based or statutory causes of action. Fiduciary law protects the latter. Competent representation—negligent-free representation—is *not* one of a lawyer's fiduciary obligations.[197] Professional negligence law exists to provide a remedy for breach of the standard of *care* that a lawyer is required to exercise. Remedies for breach of a lawyer's fiduciary responsibilities provides a remedy for violation of a standard of *conduct*.[198] Although, under negligence law, an attorney has a duty to act as the ordinary, prudent lawyer,[199] the fiduciary standard is much higher.[200]

The fact that a lawyer has acted negligently does not by itself mean that he has breached his fiduciary obligations.[201] For example, if a lawyer carelessly fails to file a plaintiff's claim prior to the expiration of the applicable statute of limitations, the client loses the opportunity to bring her cause of action. This is negligence.[202] The lawyer has failed to exercise the appropriate standard of care, resulting in harm to his client. However, even though performing negligently, the lawyer may very well have fulfilled his fiduciary obligations by acting at all times with undivided loyalty and by pre-

196. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1.5, at 35 (emphasizing that it is best to think of an attorney's obligations toward her clients as concerning competent representation and compliance with fiduciary obligations).

197. *See id.* (explaining that the avoidance of negligence is not one of a lawyer's fiduciary responsibilities).

198. *See id.* §§ 14.1, 16.23 (explaining that the best approach is to define the tort of professional negligence as a violation of an attorney's duty of care and the tort of breach of fiduciary obligations as the violation of the duty of conduct); Anderson & Steele, *supra* note 3, at 249 (explaining that, in a malpractice action, the attorney violates the standard of care whereas, in a breach of fiduciary duty claim, the attorney violates the standard of conduct); Latto, *supra* note 87, at 729 (agreeing with Anderson and Steele that a breach of fiduciary duty provides a remedy for a violation of the standard of conduct and that professional negligence provides a remedy for a violation of the standard of care).

199. *See* discussion *supra* Part I.A (discussing the standard of care for a professional negligence action brought against a lawyer).

200. *See* discussion *supra* Part II.B.1 (discussing the standard of conduct for a lawyer as fiduciary).

201. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1, at 229 (discussing the distinctions between an attorney's breach of professional care and breach of professional conduct); *see, e.g.*, Bukoskey v. Walter W. Shuham, CPA, P.C., 666 F. Supp. 181, 184 (D. Alaska 1987); Majumdar v. Lurie, 653 N.E.2d 915, 920 (Ill. App. Ct. 1995).

202. *See* discussion *supra* Part I.

serving his client's confidences.[203]

Similarly, the fact that a lawyer has breached his fiduciary obligations does not necessarily mean that he has performed negligently.[204] For example, discussing client confidences is definitely a breach of fiduciary obligations, but it is not, without more, a violation of the standard of care. If he has, in all other ways, handled the client's matter competently, he has not performed negligently even in the face of breaching his fiduciary obligations.

Specialization in the legal profession has become the rule, and general practice has become the exception. Although a lawyer's fiduciary obligations can be traced from the origins of the profession, the importance of a lawyer's fiduciary obligations have increased as the complexity of the modern practice of law has developed.[205] As a result, clients have become more dependent on their attorneys than in the past.[206] Even so, courts designing the law of fiduciaries in the attorney-client context should separate the problem of abuse of power by the attorney from other problems raised in the context of the attorney-client relationship.[207]

The need for fiduciary law in the attorney-client relationship should depend on the extent to which the client or the law can prevent or deter the abuse of power through other means.[208] Fiduciary law may be appropriately applied in the attorney-client relationship, but it needs to be done so within carefully defined boundaries.

C. *The Best Application of a Fiduciary Claim Against an Attorney*

A lawyer who has breached a fiduciary obligation should be liable to the aggrieved client in the absence of harm only if such breach was a criminal offense or was the result of a scheme to defraud the client.

1. *Criminal Act*

A client should be permitted to pursue an action for breach of fiduciary duty against her attorney if the attorney has committed a

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203. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1.5, at 35, 38 (providing examples of when an attorney may act negligently, but without breaching his fiduciary duties).

204. *See id.* at 35-36 (providing examples of when an attorney may have acted negligently and at the same time breached his fiduciary duties).

205. *See* 2 MALLEN & SMITH, *supra* note 6, § 14.1, at 231 (discussing the evolution of fiduciary responsibilities).

206. *See id.* (discussing the increased fiduciary responsibilities of lawyers over the years).

207. *See* Frankel, *supra* note 65, at 818 (suggesting that "in designing the law regulating fiduciaries, the courts should separate the problem of abuse of fiduciary power from other problems raised by the legal contexts in which the power arises").

208. *See id.* at 811 (explaining that, when an entrustor can protect herself from the abuse of the fiduciary through other means, then fiduciary law need not intervene on the client's behalf).

criminal act that victimized the client. Fiduciary law should provide a remedy in these circumstances, not because of the equitable duty of fiduciary law to fill the gaps, but rather because of the deterrent quality of the law.

One of the major functions in developing fiduciary law is to create rules and consequences that, when considered by the fiduciary, will persuade the fiduciary not to breach his fiduciary responsibilities.[209] Certain types of conduct are always worth deterring; criminal acts against one's client are examples of such types of conduct. Allowing a breach of fiduciary duty claim when the lawyer has committed or attempted to commit a criminal act against his client will serve only to the benefit of the legal profession. Therefore, any criminal conduct, whether it be a felony or a misdemeanor, which victimized the lawyer's client should support an action for breach of fiduciary duty against the lawyer, without regard to whether the criminal act was completed. Although other legal remedies are available to the client in the event that a lawyer commits or attempts to commit a crime that victimizes the client, the client should still have at her disposal the harsh remedy of fee forfeiture available through fiduciary law. Public policy dictates this result.

2. Scheme to Defraud

A breach of fiduciary duty claim is also appropriate when the attorney has committed an actual fraud against the client.[210] In order to be found liable for committing an actual fraud, the attorney typically would have had to make a false representation of a present or past fact which was relied upon by the client causing damage to her. An actual fraud typically requires intentional or purposeful conduct. Actual fraud is to be contrasted with constructive fraud which is typically an act or omission that *operates* as a fraud, but may be unconnected with an evil desire or intent.[211] A constructive fraud is a vague term which generally encompasses conduct which, although not technically fraudulent, has all the actual consequences of an actual fraud. Having all the actual consequences of an actual fraud, the law operates to provide all the legal effects of an actual fraud as well. However, a client should be permitted to bring a breach of fiduciary duty claim when her attorney has perpetrated an *actual* fraud, not merely a *constructive* fraud.

A breach of fiduciary duty claim is justified when the attorney

209. *See supra* Part II.B. *See generally* Cooter & Freedman, *supra* note 64, at 1051-53 (discussing that fiduciary law should function so as to deter fiduciaries from desiring to engage in inappropriate behavior).

210. *See, e.g.*, Littell v. Morton, 369 F. Supp. 411, 425 (D. Md. 1974) (characterizing strict fee forfeiture as inequitable unless the attorney intentionally defrauded the client).

211. *See* discussion *supra* Part II.B.3 (discussing the breach element of an action for breach of fiduciary duty).

has committed an actual fraud against the client for reasons analogous to the reasons such a claim is appropriate when the attorney has committed or attempted to commit a criminal offense.[212] It is the element of intent, the lawyer's *mens rea*, which is the determinative feature. There is, quite simply, conduct which is so very egregious that the deterrent quality of fiduciary duty law should serve to prevent it. Although a client should be able to pursue a breach of fiduciary duty claim when the lawyer has committed an actual fraud against her, she should not have a similar claim when the lawyer engaged in conduct which may operate merely as a constructive fraud. It is the element of the attorney's intent that justifies fiduciary remedies for actual fraud but not for constructive fraud. Quite simply, as in the case of criminal acts, the law should seek to prevent a lawyer from intending to perpetrate a fraud against his client. A lawyer's conduct which operates as a fraud, in the absence of intent, should not sustain a breach of fiduciary duty claim in the absence of actual harm.

3. Actual Harm

A client who has suffered actual harm as a result of her attorney breaching a fiduciary obligation should also be permitted to pursue a theory of breach of fiduciary duty and recover for the harm. This harm requirement should be equivalent to the harm required to maintain a professional negligence action. In order to maintain the action, the client needs to have suffered an actual compensable injury or loss. Allowing a client to recover for breach of fiduciary duty in the event that the breach has caused actual harm to the client fulfills the purpose of fiduciary law as an equitable remedy. If the rule were otherwise, if there were no available action for breach of fiduciary duty in the event of an actual harm to a client, there would potentially be a gap in the law where an injured client would have no available remedy for a wrong suffered.[213]

A breach of fiduciary duty in the absence of a breach of the standard of care does not give rise to a cause of action for negligence. For example, consider an attorney who, in representing his client, performs non-negligently by exercising the appropriate standard of care. However, throughout the representation, he discloses a client confidence by discussing privileged information with the client's competitor not related to the matter of the representation. Assume further that the disclosed confidence is used by the competitor to the

212. *See* discussion *supra* Part V.C.1 (explaining that a client should have a claim for breach of fiduciary duty against her lawyer when her lawyer has committed a criminal offense targeting the client).

213. *But see* Burrow v. Arce, 997 S.W.2d 229, 237-38 (Tex. 1999) (ruling that limiting fee forfeiture when the client sustains actual damages goes against both purposes of fiduciary law: disallowing compensation for poor performance and deterring fiduciaries from breaching their duty of loyalty).

client's disadvantage, causing injury to the client. A negligence action would not lie because the attorney has exercised the appropriate standard of care in handling the client's matter. Although disciplinary proceedings may be brought against the lawyer for violating ethical rules, in the absence of a remedy provided by fiduciary law, the client would suffer an actual injury by the conduct of her attorney and have no tangible vehicle with which to hold the attorney accountable for such a fundamental breach of loyalty.

Allowing recovery for breach of fiduciary duty in these circumstances fulfills one of the fundamental functions of fiduciary law as an equitable remedy. It provides a remedy for a wrong where there would otherwise exist no adequate remedy. The harm required should be similar to the harm required to sustain a negligence action—actual compensable harm. At a minimum, the client should be permitted to recover the harm suffered. In the absence of harm, the client should not be able to pursue a breach of fiduciary duty claim.

Take as another example a situation where one member of a law firm represents a client. He is the only lawyer in the firm who handles this client's case. In all things, he puts this client's interests first and exhibits the utmost loyalty toward this client. However, at least one member of the firm to which he belongs does not care for this client. On several occasions, he bad-mouths this client and discusses a client confidence with someone outside of the firm. The disclosure of the confidence does not harm the client in any way. However, upon learning of this behavior, the client sues the firm for the disloyalty of the firm even though the only attorney who ever handled the client's case exhibited *uberrima fides*. Should such a lawsuit be permitted? The offending lawyer should certainly be subject to disciplinary proceedings, but should the client have a breach of fiduciary duty claim against the firm?[214] No. A client who has had her case handled non-negligently by a lawyer with undivided loyalty should not have a lawsuit against that lawyer's firm for breach of fiduciary duty in the absence of some type of injury.[215]

4. Remedies

If the client prevails in her action for breach of fiduciary duty, recovery is warranted and should be mandatory. Making the recovery discretionary, even the decision *whether* recovery is warranted, removes the deterrent value of the law. Similarly, in the event of

214. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983) (providing that an entire law firm is imputed the knowledge of its individual lawyers practicing within the firm for conflict of interest and intermediary purposes).

215. *Cf.* Leubsdorf, *supra* note 2, at 140-44 (discussing how malpractice law influences behavior in law firms because the firm itself may be vicariously liable and arguing that the threat of a malpractice action should instead influence members of the firm to police their colleagues).

actual harm, the client, at a minimum, is entitled to compensation for the harm suffered. In addition to any actual harm done, the plaintiff should be permitted to recover as the court deems fit after applying a test, such as the one set forth in the Restatement (Third) of the Law Governing Lawyers.[216]

5. Application

Permitting an uninjured client to pursue a breach of fiduciary duty claim only when the lawyer has committed or attempted to commit a criminal offense against the client or when the lawyer has perpetrated an actual fraud against the client leads to just results. For example, in the opening hypothetical, the client would not have a viable breach of fiduciary duty claim against her lawyer. The client has suffered no actual damage. In addition, the lawyer neither committed a criminal offense victimizing the client nor did he perpetrate an actual fraud against the client. Therefore, the client should not be permitted to bring a breach of fiduciary duty claim against her lawyer. Admittedly, the lawyer did not conduct himself as he should have. He violated an ethical rule by not leaving the ultimate settlement decision to his client. As a result, the client may, and should, pursue a disciplinary proceeding against her lawyer. But she should not be able to bring a breach of fiduciary duty claim against her lawyer.

CONCLUSION

Although seldom discussed, a reality of modern law practice is that it is impossible for a lawyer to handle every single matter of every single client every single day with the utmost fidelity and undivided loyalty. To do so would require every attorney to answer every client inquiry and respond to every client situation as if he had but one client, and, with very few exceptions, that is not the case. Simply being in trial for Client A may prevent a lawyer from promptly returning a telephone call from Client B promptly, thereby failing to keep Client B completely informed and breaching a fiduciary obligation.

I do not suggest that lawyers should be able to breach their fiduciary responsibilities without consequences. However, there are certain situations where the regulation of lawyers should be handled apart from the court system.[217] The vast majority of a lawyer's fiduciary obligations are prescribed by each jurisdiction's ethical rules.

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216. The factors that the court could consider "include the gravity and timing of the violation, its wilfulness [sic], its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996).

217. *See generally* Wilkins, *supra* note 183 (discussing the complex issues that arise in determining the appropriate means by which to regulate lawyers).

In the event that a lawyer violates those rules—like the plaintiffs alleged occurred in *Burrow*—the lawyer should be subject to discipline by the bodies charged with enforcing those rules. To permit a breach of fiduciary duty claim as a matter of course may produce a remedy that is disproportionate to the conduct of the attorney. In the interest of judicial economy and efficiency, only the most egregious conduct should be managed by the court system.

To have the rule of fiduciaries in the attorney-client relationship be otherwise would be detrimental to lawyering. First, if clients are permitted to sue their attorneys for every breach of fiduciary duty and—by applying classic fiduciary duty law—are able to recover the tremendous remedies available, attorneys will be reluctant to enter into attorney-client relationships into which they, in the absence of the harshness of fiduciary duty law, would otherwise be willing to enter.[218] If not unwilling to take on clients, attorneys may be compelled to raise already high legal fees in order to compensate either for the fees that they will lose as a result of these lawsuits or the money that will be expended in defending them.[219]

The scope of any fiduciary's obligation varies within the context of the relationship.[220] Accordingly, the liability of the fiduciary in the event of a breach of the fiduciary's responsibility should vary as well. In order for fiduciary law, as applicable in the attorney-client relationship, to make sense, the law needs to be developed, not by analogy to other fiduciary contexts, but by evaluating the attorney's power within that relationship and the potential for abuse.[221] In this day and age of lawyering, the courts should not ignore the reality that lawyers often may make minor breaches of fiduciary duties—sometimes necessarily so.[222] Accordingly, a lawyer's breach of fiduciary duty should be compensable only when the lawyer has committed a criminal offense which victimizes the client, when the lawyer has engaged in a scheme to defraud the client, or when the breach of fiduciary duty has resulted in actual injury to the client.

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218. *Cf.* Frankel, *supra* note 65, at 833 (discussing that the burden of the regulation of fiduciaries should be limited to that which they might agree to bear in order to avoid deterring fiduciaries from entering the relationships).

219. *Cf. id.* at 834 (concluding that fiduciaries should not bear the costs of prevention).

220. *See* DeMott, *supra* note 63, at 908.

221. *Cf.* Frankel, *supra* note 65, at 836 (concluding that, in order for fiduciary law to evolve rationally, it must be developed by evaluating the particular fiduciary's power and the potential for abuse).

222. *See* Ramos, *supra* note 2, at 1715-17 (discussing the demanding nature of modern law practice).