

# A CAUTIONARY TALE: FIDUCIARY BREACH AS LEGAL MALPRACTICE

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## I. INTRODUCTION

Lawyers, judges, and legal scholars commonly refer to lawyers as fiduciaries, generally meaning agents who bear special and onerous duties toward clients. What is often missing from the incantation is a settled notion of the legal content of the concept and the part that such content should play in a client's lawsuit against a lawyer. The topic of fiduciary breach as a theory of recovery in a client's lawsuit is surely not new,<sup>1</sup> and its asserted advantages and justifications have received some attention from legal scholars.<sup>2</sup> Nonetheless, restiveness about the fiduciary breach concept continues to surface in some court opinions,<sup>3</sup> suggesting that present understanding and application of the concept might be unsound. A different, and narrower, formulation of lawyer-fiduciary-liability doctrine might in fact be overdue, and that is attempted here.

This exercise was inspired in part by earlier efforts to come to grips with a similar set of issues in the course of drafting the Restatement of the Law Governing Lawyers.<sup>4</sup> We reporters at an early point had concluded that the fiduciary breach concept generally lacked independent content as a liability rule and that it should be mentioned

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1. See, e.g., Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235 (1994). For the extensive scholarly writing on fiduciary breach generally, see sources cited *infra* notes 2, 62, and 64.

2. See, e.g., Anderson & Steele, *supra* note 1; John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 112-17 (1995) (noting the indeterminate nature of fiduciary breach liability as distinguished from negligence liability). *But see* Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137 (1999) (criticizing the perceived extravagant uses of fiduciary breach theory and recommending sharp restrictions on the doctrine).

3. On restiveness reflected in the case law, see *infra* notes 119-34 and accompanying text.

4. RESTATEMENT OF THE LAW GOVERNING LAWYERS (2000) [hereinafter RESTATEMENT]. I served as chief reporter for the Restatement. The Restatement as finally approved was preceded by many early drafts, culminating in a set of proposed final drafts. The Restatement was finally approved by the American Law Institute in May 1998. The Restatement appeared in a two-volume set in 2000. Citations to earlier drafts will note the relevant draft number and date.

only as another way of conceptualizing the “duty” element of professional negligence, the broad notion that a lawyer must conduct representation of a client as would a lawyer of ordinary care and prudence,<sup>5</sup> with a limited, and beyond-negligence, application in instances of *intentional* breaches of fiduciary duty.<sup>6</sup> That proposal was stoutly resisted by many in the Restatement’s advisory groups. Chastened, we returned with a suitably bifurcated treatment, setting out in its own section—section 49 in the published version,<sup>7</sup> the notion of liability of a lawyer to client for “breach of fiduciary duty” in addition to the now-traditional and general basis of liability for professional negligence—section 48.<sup>8</sup> That approach also had the effect, always soothing to an audience of ALI members, many of whom are anxious about forging into new territory, of conforming the Restatement to the majority position<sup>9</sup> under contemporary common law.

Thus, as with the mine run of court decisions, the final version of section 49 contemplates two general paths by which a client injured by a lawyer’s non-intentional act could recover against the lawyer, the claim for negligent legal malpractice (“negligence”) and the separate claim for breach of fiduciary duty (“fiduciary breach”). Aside from the specific element that might define the fiduciary duty and its breach, the other elements that the client would have to prove in a fiduciary breach claim would be the same as those involved in a claim of negligence: causation and damages. The implications, obviously, were that the fiduciary breach claim stood on equal and firm merits as a basis for recovery, and that a legal-malpractice plaintiff perhaps should enjoy the option of pursuing either theory as the plaintiff chose, or both theories simultaneously. On further reflection, I am now convinced that neither the final version of section 49 nor the reporters’ original position reflects the best approach, although the latter was much closer to the mark.

Existing scholarly analysis of the fiduciary breach ground for recovery in legal malpractice is, to my mind, either too accepting or too broadly critical of the existing state of affairs. Representative of the overly accepting scholarship is a 1994 article by Professors Roy Anderson and Walter Steele.<sup>10</sup> The article concludes that the fiduciary

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5. RESTATEMENT, *supra* note 4, § 72 cmt. f (Tentative Draft No. 8, 1997). For one version of the Restatement debates on fiduciary breach doctrine, see Lawrence J. Latto, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 718-42 (1998).

6. RESTATEMENT, *supra* note 4, § 76A (Tentative Draft No. 8, 1997).

7. RESTATEMENT, *supra* note 4, § 49 (2000).

8. *Id.* § 48 (2000).

9. *See infra* Part VI.A.1.

10. Anderson & Steele, *supra* note 1.

breach theory as applied to lawyers is commendably fluid and vague;<sup>11</sup> that, while negligence is based on a claim of breach of a standard of care, fiduciary breach is properly based on a claim of breach of a standard of conduct; that a fiduciary breach standard exists that provides a readily distinct and workable description of actionable and non-actionable lawyer activities;<sup>12</sup> and that a lawyer can violate both the standard of care (negligence) as well as the standard of conduct (fiduciary breach) under many imaginable circumstances.<sup>13</sup> Nonetheless, in the last sentence of the article the authors urge that existing law be changed to unify “legal malpractice as a hybrid of tort and contract and to establish a consistent set of rules, perhaps by statute, for actions involving attorney wrongdoing.”<sup>14</sup>

A more recent article by Professor Meredith Duncan<sup>15</sup> would severely limit the availability of fiduciary breach claims, for example, generally eliminating its availability in fiduciary breach as well as in fee-disgorgement and constructive-trust settings.<sup>16</sup> The only surviving fiduciary breach claims would involve instances of highly egregious lawyer wrongdoing, in which the plaintiff-client can also make a “but for” showing of causation of financial harm. Professor Duncan finds fault with what she describes as courts’ unwarranted extension of the fiduciary breach basis for lawyer liability. Duncan’s description of fiduciary breach law (as applied to lawyers) is overstated at several points,<sup>17</sup> and her recommended substantive limitations seem far too

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11. *Id.* at 239-40.

12. *Id.* at 249-50. The authors do not argue, however, that the limited application of the fiduciary breach concept to lawyers fills a void left by the insufficient coverage of negligence law. They simply describe it as narrower than negligence. Compare discussion *infra* Part IV.B.4. (arguing that the fiduciary breach concept has a limited range of application), with discussion *infra* Part IV.B.2. (noting the attempted dichotomy between care and conduct).

13. Anderson & Steele, *supra* note 1, at 250-51. The breadth of this reading may be unintended. The authors demonstrate the dual application of negligence and fiduciary breach by analyzing *Homes v. Drucker*, 411 S.E.2d 728, 730 (Ga. Ct. App. 1991), where the plaintiff was relying on two independent sets of facts, with one attached to a negligence claim and the other to a fiduciary breach claim.

14. Anderson & Steele, *supra* note 1, at 268-69.

15. See Duncan, *supra* note 2.

16. Compare *infra* Part III.A-B.

17. For a prominent example, the Duncan article claims that courts routinely hold that fiduciary breach claims against lawyers, unlike negligence claims, do not require proof of causation or actual damages. Duncan, *supra* note 2, at 1155. However, while scattered and aberrant decisions (including, arguably, a decision of the Second Circuit analyzed below, see *infra* text and accompanying note 108) might suggest a lesser requirement of such a showing, the decisions very dominantly agree that a fiduciary breach plaintiff must make the same showings of duty, breach, causation, and damages as would be true if the same claim were brought as a negligence claim. See *infra* notes 31-36 and accompanying text. Professor Duncan might have had in mind certain equitable remedies such as fee-disgorgement, which have a history and substantive rules readily

restrictive. Nonetheless, our differences, while substantial, are largely irrelevant for present purposes. Whether or not courts have distorted legal-malpractice law by formulating novel and extravagant rules for fiduciary breach claims that are unheard of in negligence actions (which I do not believe has occurred outside of isolated instances), my complaint is that courts have allowed fiduciary breach claims to proliferate needlessly on the same ground already adequately occupied by negligence. I argue, not for limiting the liability of lawyers, but for pruning back fiduciary breach claims when they merely duplicate negligence-based claims. While fiduciary breach law is flawed, it is not because of its exotic and rank departures from negligence law. To the contrary, most fiduciary breach claims are problematic precisely because of their almost complete and useless overlap with available claims of negligence.

This Article attempts to push the inquiry further. The Article commences with a survey of a client's action based on a theory of negligence. Through developments during the past four decades, American courts now universally accept negligence as the customary and broad foundation justifying a client's recovery for a lawyer's non-intentional harm. The Article then canvasses the conventional view of the Restatement, other commentary, and contemporary case law embracing the concept that an alternative or additional pathway to such legal-malpractice relief exists by way of a fiduciary breach claim. It turns out that the decisions reflect three different fiduciary breach themes, only one of which is the central focus of my critique.

One view of fiduciary breach doctrine (and the one now arguably ensconced in the Restatement) is that it stands as a companion theory to negligence, to the extent that a fiduciary breach claim is equally applicable to a single set of facts giving rise to a claim for negligence (or at least in some of them), a view I will call the "equal-claims" application of fiduciary breach theory. It is that use of the general fiduciary breach concept that I critique here. Other uses of the concept should be sharply distinguished. Most prominently, fiduciary theory is also deployed in decisions to justify and describe use of particular remedies (for the most part what formerly would be identified as equitable remedies) such as fee disgorgement and imposition of a constructive trust. I refer to this as the "equitable remedies" application of fiduciary breach theory.

The Article then moves to a general critique of the fiduciary breach

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distinguishable from the use of the fiduciary breach theory to recover compensatory damages. *See infra* Part III.A.

theory, recommending that it be eliminated in those instances, apparently the great majority of its use in legal-malpractice litigation, in which it simply restates in other words what could also be described as professional negligence. If that view were to become the law in a jurisdiction, the fiduciary breach claim would no longer provide a generally available basis for liability, functioning as just another way to say “negligence.” At the same time, fiduciary theory would continue its traditional role in the form of equitable remedies.

In addition, nothing in the proposed reworking of fiduciary breach doctrine would detract in any way from the heuristic value of the term “fiduciary” as a general, but powerful, statement of the commitment of courts to protect clients through the maintenance of effective remedies against lawyers who impose upon their clients or otherwise cause clients harm by serious wrongdoing against them. Thus, I also urge that the theory of lawyer-as-fiduciary be generally recognized as a key way of describing the entire lawyer-client relationship and the duties that flow from it, even if it would not be relied upon regularly as the standard by which to measure lawyers’ liability. In the course of that discussion, I urge that courts continue (as they often do now) to use the “fiduciary” concept to describe all of a lawyer’s duties to a client, and not only those few that are currently recognized as viable fiduciary breach settings.

Apart from clients’ claims of fiduciary breach, I leave aside in the discussion that follows several possible bases of lawyer liability to clients. Thus excluded from consideration are theories of breach of contract, violation of statutory duty, and intentional wrongdoing, such as fraud. Also excluded from consideration, of course, are such uses of the fiduciary breach concept as the cause of action by a *non-client* against a lawyer based on the lawyer’s alleged wrongful aiding and abetting of a client’s breach of fiduciary duties to the third party.<sup>18</sup> The breach of contract theory is based on the lawyer’s asserted breach of an express or implied promise to the client to perform in a certain way or breach of a warranty concerning the outcome, claims that should rarely succeed (because lawyers only rarely make such promises or warranties).<sup>19</sup> A

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18. See, e.g., *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406 (3d Cir. 2003); *Granewich v. Harding*, 985 P.2d 788 (Or. 1999); *Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756, 774-77 (S.D. 2002) (citing extensive authority). See generally RESTATEMENT, *supra* note 4, § 51(4). On the possibility of a finding that a lawyer owes fiduciary (or fiduciary-like) duties to a non-client, see, for example *Russell v. Lundberg*, 120 P.3d 541, 547 (Utah Ct. App. 2005) (holding that, while a law firm acting as mortgage trustee in a foreclosure action did not owe a fiduciary duty to homeowners, the law firm did owe obligations of reasonableness and good faith in avoiding unlawful inflation of foreclosure costs).

19. See generally RESTATEMENT, *supra* note 4, § 48 cmt. c. Distinct from that limited use of the breach of contract theory, some decisions more broadly permit a legal-malpractice plaintiff to

claim of lawyer liability to a client based on a statutory violation is more commonly encountered, but, quite unlike the fiduciary breach claim, is based on a court's perception either that a statute provides an independent basis for relief or that awarding relief to the client in a civil action furthers the specific legislative policy that generated the statutory duty in question.<sup>20</sup> Lawyer liability for intentional wrongs applies the general duty of tort law to compensate a client for a lawyer's intentional and wrongful infliction of harm. That is an instance of application of the general law to lawyers and has generated little controversy.<sup>21</sup> As I will note in conclusion, the contract-based theory of recovery (but not the other indicated bases of recovery) may well be subject to much the same analysis as that applied here to what I term the equal-claim version of the fiduciary breach theory in instances where there is no evidence of a specific promise by the lawyer that implies anything more than what the general duty of care already imposes.

## II. MEASURING A LAWYER'S CHALLENGED CONDUCT: A CLIENT'S NEGLIGENCE ACTION

Three or four decades ago, lawyers were among the last of American professionals that needed to confront the realistic threat of a professional malpractice action by a disgruntled client, an attempt to recover damages or other relief for harm alleged to have been caused by the lawyer's wrongful action or inaction during the course of a representation.<sup>22</sup> The expansion of legal-malpractice exposure of lawyers

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plead that the lawyer's failure to exercise due care breached an implied contractual undertaking of the lawyer. *See generally* 1 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 8.7 (2005 ed.) (discussing decisions in several jurisdictions allowing multiplicity of theories through recognizing implied-contract claim). Even more expansively, one court has intimated that it views the entire legal-malpractice claim (including such a claim based on a pleaded theory of negligence) as essentially contractual, and thus not subject to a contributory-negligence defense. *See Jackson State Bank v. King*, 844 P.2d 1093, 1095-96 (Wyo. 1993). The last is, however, a distinctly minority view, both on its theory and on its specific holding. *See* 2 MALLIN & SMITH, *supra*, § 21.2 (discussing availability of contributory negligence as defense to claim of breach of fiduciary duty). All states, except Wyoming, recognize contributory and comparative negligence defenses in legal-malpractice litigation. *Id.*

20. *See generally* RESTATEMENT, *supra* note 4, § 52 cmt. f.

21. *See generally id.* § 56.

22. Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 *GEO. J. LEGAL ETHICS* 205, 214-16 (2002) (noting a surge of legal malpractice actions against lawyers, beginning in the 1960s, following decades of significantly (and consistently) lower levels of reported decisions); *see also, e.g.*, John M. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 *TEMP. L. REV.* 1127, 1128 (1988) (noting a great increase in medical-malpractice litigation, followed, in some years, by a corresponding increase in legal malpractice lawsuits).

that began at that point soon reached historically high levels that have continued until the present day.<sup>23</sup> The reason for the long earlier period of relatively infrequent legal-malpractice claims has not been elaborately explored. The absence of claims was probably not a product of a judiciary that was more markedly hostile to legal-malpractice claims than other types of professional claims; the evolving law of legal malpractice had generally kept pace with the law of professional negligence as applied to other professionals, even while the legal-malpractice filings lagged far behind other professions, such as the medical profession.<sup>24</sup>

The customary explanation for the traditional lack of legal-malpractice filings was the much-mooted “conspiracy of silence,” by force of which lawyers would refuse to assist a client in the client’s potential legal-malpractice claim.<sup>25</sup> Any notion that lawyers consciously conspired in this way seems far-fetched. More likely, lawyers’ refusing to sue each other was a result of indirect, but nonetheless powerful, assumptions and understandings embedded in the common culture of lawyers of that day. In any event and for whatever reason, most lawyers refused to serve as plaintiff’s counsel in a client’s lawsuit against another lawyer or as the second lawyer giving expert testimony for the plaintiff.<sup>26</sup>

Clearly, that epoch is now long since over, and today it seems unlikely to return. Aggrieved clients no longer lack lawyer champions. A lawyer’s filing suit against another lawyer on behalf of a legal-malpractice claimant is hardly stigmatized today or even significantly noticed, at least in most larger legal communities. A few lawyers have made a handsome living as specialists in this law-practice niche.

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23. On the continuing level of such claims, see, for example, ABA STANDING COMM. ON PROF’L LIABILITY, PROFILE OF LEGAL MALPRACTICE CLAIMS 2000-2003 (2005), reported in *Malpractice: ABA Committee Malpractice Report Reveals Slight Rise in Severe Claims*, 21 *Laws. Man. on Prof’l Conduct* (ABA/BNA) 459 (Sept. 7, 2005) (reporting release of ABA study indicating that frequency and rate of legal-malpractice claims have been generally constant over last eighteen years); I MALLEEN & SMITH, *supra* note 19, § 1.6 (noting that a climb in the relative number of malpractice decisions “began in the 1960’s with a dramatic and steady increase in the frequency of legal malpractice litigation. Today, in the new millennium, the absolute number of appellate decisions is still increasing, as is the relative frequency”).

24. See, e.g., CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 5.6.1 (1986) (stating that the basic doctrinal content of legal malpractice law has remained intact for decades prior to the mid-1980s).

25. See, e.g., *id.* § 5.6.

26. On the general obligation that a legal-malpractice plaintiff supports the claim with expert testimony, see *infra* notes 98-101 and accompanying text. Then, as now, the same lawyer could not serve as both advocate and expert witness because of the so-called “advocate-witness” rule, which prohibited (and continues to prohibit) such a dual role. See generally *RESTATEMENT*, *supra* note 4, § 108(1)(a).

Lawyers are also readily available to serve as an expert witness for plaintiffs in such suits.

The lawyer-objects of legal-malpractice claims are as diverse as the legal profession itself. The slowly dying legend among lawyers (particularly large-firm lawyers and lawyer-academics) is that the bumbling lawyers who typically become entailed in legal-malpractice actions are over-taxed or poorly organized solo practitioners and lawyers in small firms.<sup>27</sup> But large law firms today are hardly immune from exposure to legal-malpractice claims, including some of breath-taking magnitude. As a result, it is typical to find large firms carrying multiple layers of legal-malpractice insurance coverage, with the upper layers approaching or exceeding \$100 million in total coverage for the most heavily insured firms.<sup>28</sup>

The doctrinal glue that holds that litigational enterprise together and tests a client's right to recover is the branch of the law of non-intentional economic injury commonly referred to as legal malpractice. Legal malpractice basically, and in many details, embodies the now traditional professional negligence claim in this instance, liability for failure to conduct oneself as would a lawyer of ordinary care and prudence in the same or similar circumstances.<sup>29</sup> While there was considerable doubt about the matter until recent decades,<sup>30</sup> it has now become quite well settled—apparently in every jurisdiction—that, except in rare cases where breach of duty is either admitted by the defending lawyer or clearly established on the record,<sup>31</sup> the client is required to prove the

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27. See, e.g., Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client is Safe*, 47 FLA. L. REV. 1, 40-43 (1995) (providing statistics and refuting assumptions that solo and small-firm lawyers are at greater risk for liability).

28. For largely anecdotal accounts of the extent of large-firm coverage, see Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 642-45 (1995). Inevitably, the subject of "insurance" for legal malpractice raises the hackles of many insurers, as well as lawyers and law firms, for fear that knowledge about its terms and extent of coverage—even publicizing the possible existence of such insurance—will only encourage unwarranted filing of "nuisance" suits against lawyers. *Id.* at 652-54.

29. See generally RESTATEMENT, *supra* note 4, § 52(1) ("a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances"). That legal malpractice is founded on negligence is rarely questioned, although arguably contrary (and aberrant) decisions can be found. See, e.g., *O'Connell v. Bean*, 556 S.E.2d 741, 743 (Va. 2002) (holding that, because legal malpractice is essentially a contract claim, punitive damages are not recoverable under tort concepts).

30. See generally Martin T. Fletcher, Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771, 779 (1968) (noting that the majority of the (relatively few) legal-malpractice decisions on the books in 1968 took the position that expert testimony was not required).

31. See RESTATEMENT, *supra* note 4, § 52 cmt. g (stating that "expert testimony is unnecessary when it would be plain to a nonlawyer or is established as a matter of law that the lawyer's acts constitute negligence . . ."). See, e.g., *Vandermay v. Clayton*, 984 P.2d 272 (Or. 1999);

element of breach of duty through the testimony of one or more expert witnesses.<sup>32</sup> Beyond proving duty and its breach, the client must also successfully carry the burden of proving causation and resulting damages.<sup>33</sup> The required showing of causation is described quite differently in many jurisdictions. Several states impose a strict test. In New York, California, and other jurisdictions the client must prove “but for” causation, that, but for the professional negligence of the defending lawyer, the client would have been measurably better off.<sup>34</sup> Other jurisdictions, apparently a majority, test causation by a markedly more lenient standard, requiring the client to prove (only) that the professional negligence of the defending lawyer was a substantial factor in causing the plaintiff-client’s loss, even if not a necessary cause.<sup>35</sup>

The scope of the grounds that a client might invoke to prove breach

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House v. Maddox, 360 N.E.2d 580 (Ill. App. Ct. 1977) (expert testimony was not required where evidence clearly established that lawyer had not filed a claim within the time allowed by the statute of limitations).

32. See RESTATEMENT, *supra* note 4, § 52 cmt. g (stating the general rule that “a plaintiff alleging professional negligence or breach of fiduciary duty ordinarily must introduce expert testimony concerning the care reasonably required in the circumstances of the case and the lawyer’s failure to exercise such care”); Michael A. DiSabatino, Annotation, *Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney*, 14 A.L.R. 4th 170 (1982) (illustrating the extent to which contemporary decisions broadly agree that expert testimony is normally required).

33. See generally RESTATEMENT, *supra* note 4, § 53 (stating that a lawyer is liable for negligence or breach of fiduciary duty “only if the lawyer’s breach of a duty of care or breach of fiduciary duty was a legal cause of injury, as determined under generally applicable principles of causation and damages”). Unlike the issue of breach of duty, see *infra* note 101, jurisdictions generally do not require that proof of proximate cause be supported by expert testimony. See, e.g., First Union Nat’l Bank v. Benham, 423 F.3d 855, 864 (8th Cir. 2005) (holding so under Arkansas law).

34. See, e.g., Viner v. Sweet, 70 P.3d 1046, 1051-52 (Cal. 2003) (reversing the intermediate appellate court and holding that “but for” causation is mandatory in transactional-malpractice as well as litigation-malpractice settings); Estate of Re v. Kornstein Veisz & Wexler, 958 F.Supp. 907, 920 (S.D.N.Y. 1997) (citing New York authority); see also FDIC v. Ferguson, 982 F.2d 404, 406 (10th Cir. 1991) (holding that “but for” causation was required in negligence under Oklahoma law). But see, e.g., Vahila v. Hall, 674 N.E.2d 1164, 1168-69 (Ohio 1997) (refusing to insist that in every case the client must prove a “case-within-a-case” to make out causation in a so-called “lost opportunity” setting). See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 41 (5th ed. 1984) (discussing the extent to which “but for” causation standard prevails). Litigators differ among themselves over the extent to which, assuming that a claim is sufficiently supported with evidence to take the case to the jury on duty, breach, and damages issues, the element of proximate causation is nonetheless likely to prove to be a significant stumbling block if a good defensive case can be made out. For many defense lawyers, the common wisdom is that, if proximate cause in a legal-malpractice case is the only significant defense issue, the case should be settled, not tried.

35. See, e.g., 2175 Lemoine Ave. Corp. v. Finco, Inc., 640 A.2d 346, 351 (N.J. Super. Ct. App. Div. 1994) (holding that the test of proximate cause in a lawyer-negligence case “is satisfied where the negligent conduct is a substantial contributing factor in causing the [client’s] loss”). See generally DAN B. DOBBS, THE LAW OF TORTS (2000); KEETON ET AL., *supra* note 34.

of duty in a negligence claim is vast, encompassing most of the duties of lawyers spelled out in the lawyer codes and as generally understood and practiced by those mythical lawyers of ordinary care and prudence whose activities supposedly set the standard for negligence.<sup>36</sup> The theory obviously includes all such carelessness as failing to file a client's claim within the applicable statute of limitations,<sup>37</sup> failing to conduct appropriate legal research<sup>38</sup> or factual investigation,<sup>39</sup> and failing to secure a client's objectives through shoddy document-preparation or similarly defective transactional work.<sup>40</sup>

Most importantly for present purposes, the negligence theory is routinely employed to permit plaintiff clients to recover on claims that lawyers caused harm because of a wrongful conflict of interest.<sup>41</sup> Such claims are noteworthy here because they are the same claims that courts in many jurisdictions permit a client to assert on an equal-claims basis as a breach of fiduciary duty.<sup>42</sup> In most jurisdictions, the opinions suggest that the fiduciary breach theory is limited to those relatively few claims, and that it is not to serve as an alternative to negligence in all instances.<sup>43</sup> In short, the areas of allowable client recovery through the negligence

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36. Some idea of the scope of negligence claims can be gleaned quickly from scanning the volumes of the most well-known of the legal-malpractice treatises. *See generally* MALLEN & SMITH, *supra* note 19.

37. *Id.* § 30.17. (discussing "missed statute of limitations" as a ground for malpractice recovery); James L. Rigelhaupt, Jr., Annotation, *Legal Malpractice by Permitting Statutory Time Limitation to Run Against Client's Claim*, 90 A.L.R. 3d 293 (1979).

38. *See, e.g.*, *Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975) (holding that the trial court properly instructed the jury that "an attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques."); *c.f.*, *e.g.*, *Procanik v. Cillo*, 502 A.2d 94, 95-96 (N.J. Super. Ct. Law Div. 1985) (noting that on these facts, it was an issue for the jury whether a medical-malpractice specialist breached the duty of care by failing to notify the client of changes in the law created by a decision of the state's supreme court that became public only a short time prior to the expiration of the applicable limitations period).

39. A frequently-cited decision is *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693-94 (Minn. 1980) (discussing a lawyer's liability for failure to research the question whether a potential medical-malpractice physician used due care). *See generally* 4 MALLEN & SMITH, *supra* note 19, § 30.27 (discussing liability for errors in "investigation and evaluation").

40. *See, e.g.*, *Sierra Fria Corp. v. Donald J. Evans, P.C.*, 127 F.3d 175, 179-80 (1st Cir. 1997) (applying Massachusetts law, and stating the duty of care of a lawyer in a real-estate transaction); *Viner v. Sweet*, 70 P.3d 1046, 1052 (Cal. 2003) (discussing the application of the causation standard to a client's action for transactional malpractice).

41. *See generally* 2 MALLEN & SMITH, *supra* note 19, § 16.18. (surveying many decisions invoking negligence as a basis for recovery against a lawyer for a conflicted representation).

42. *See* discussion *infra* Part IV and accompanying text.

43. *See, e.g.*, *Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin*, 717 A.2d 724, 730 (Conn. 1998) (stating that "[p]rofessional negligence alone . . . does not give rise automatically to a claim for breach of fiduciary duty").

action encompass almost all (but not quite all<sup>44</sup>) claims that courts also allow clients to assert under the fiduciary breach theory. However, there are many claims that are routinely asserted as negligence claims that cannot be asserted as breaches of fiduciary duty, a matter explored further below.<sup>45</sup>

It would vastly overstate the resulting state of affairs to leave an impression that the negligence action for legal malpractice is widely celebrated for the clarity of its doctrine, the ease and certainty of its application, and its ability to lead to just and fair outcomes that are readily predictable. As with most areas of litigation, controversy and imperfections afflict the negligence claim. Nonetheless, as one arguably important measure of its success as doctrine, the negligence action seems to have become relatively well-accepted by lawyers (most of whom are at least potentially subject to its exactions) as both a necessary concomitant of professional practice and a relatively workable and fair method of allocating the risks and consequences of lawyers' failures to act competently in representing their clients. The success of the negligence remedy might be less enthusiastically described from the perspective of injured clients. Yet, at a minimum, clients may be assured that most jurisdictions will treat as actionable negligence any claim that a lawyer caused harm to a client through a breach of almost all of the provisions of the applicable lawyer code governing the lawyer's conduct.<sup>46</sup>

### III. "EQUITABLE-REMEDIES" APPLICATIONS OF FIDUCIARY BREACH LAW

Before turning to the much more problematic area of the "equal-claims" version of fiduciary breach, it is beneficial to explore briefly the other principal way in which fiduciary theory has been applied to lawyers. That area, which I have classified as "equitable-remedies" applications of fiduciary breach law, is not subject to the same criticisms that I will offer for equal-claims theory. At the very least, the two equitable remedies that have most frequently been applied to lawyers—fee forfeiture (or fee disgorgement, as the remedy is often called) and the

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44. See *infra* notes 76-82, 97 and accompanying text.

45. See *id.*

46. See generally RESTATEMENT, *supra* note 4, § 52 cmt. f. On the broad agreement among jurisdictions that expert testimony in negligence cases may permissibly rely on provisions of the applicable lawyer code (and often disclose such reliance to the jury), see *id.* cmt. g. But see, e.g., *Hizey v. Carpenter*, 830 P.2d 646 (Wash. 1992) (holding that an expert could rely on lawyer codes in giving testimony, but he or she should not mention such reliance in the presence of the jury).

imposition of a constructive trust—have long histories and relatively well worked-out doctrinal elements. While at least the fee-disgorgement remedy has been subjected to some criticism (largely concerning the test by which it is to be applied), and is itself in an apparent state of transformation, there is broad agreement that some substantive body of law should continue to recognize the remedy. There is also broad agreement that each remedy, given its objectives and history, legitimately calls for discrete substantive rules, which mark off those remedies from attempted recovery under either the negligence theory or the theory of fiduciary breach more generally.

### A. *The Remedy of Fee Forfeiture*

Reflecting the origins of the fiduciary breach theory in the flexible and discretionary hands of traditional equity, perhaps the most defensible difference between fiduciary breach claims and negligence claims is the availability of additional kinds of remedies for a fiduciary breach. In general, a negligence claim provides only compensation for economic harm caused to the plaintiff-client. In contrast, remedies for fiduciary breach claims are more numerous. As a prominent example, the remedy of disgorgement of profits has long been recognized as a beneficiary's available remedy against a fiduciary, requiring the fiduciary to disgorge to the beneficiary any profit that the fiduciary wrongfully gained through the fiduciary's office.<sup>47</sup> Generalizing that view, the Restatement of Agency states flatly that a disloyal agent may be required to disgorge payments made by the principal to the agent that were tainted by the disloyalty.<sup>48</sup> While disgorgement often involves conscious wrongdoing, use of this remedy even when the fiduciary's wrongdoing was non-deliberate might support the interest of deterring breaches of fiduciary duty. For such reasons, the Restatement of the Law Governing Lawyers<sup>49</sup> as well as the Restatement of Restitution<sup>50</sup> both

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47. See generally 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 4.5(3) (2d ed. 1993) [hereinafter DOBBS, REMEDIES] (describing generally the remedy of disgorgement against trustee or other fiduciary). In the specific context of impermissible lawyer business transactions with a client, a result similar to disgorgement can sometimes be obtained through the remedy of rescission of the underlying agreement between lawyer and client. See generally RESTATEMENT, *supra* note 4, § 6 cmt. e.

48. RESTATEMENT (SECOND) OF AGENCY § 469 (1958) (stating that agent is entitled to no compensation for conduct that is disobedient or breaches agent's duty of loyalty to principal).

49. RESTATEMENT, *supra* note 4, § 49 cmt. d ("Breaches of some fiduciary duties . . . typically involve intentional conduct, in that the lawyer chooses to act knowing facts that make the act improper. However, a lawyer who violates fiduciary duties to a client is subject to liability even if the violation or the resulting harm was not intended.").

50. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 cmt. c.

approve of the use of the disgorgement remedy for unintentional breach of fiduciary duty. The Restatement of the Law Governing Lawyers, however, imposes additional requirements before the remedy of total disgorgement of a lawyer's fee may be imposed.<sup>51</sup>

Decisions have largely agreed with the Restatement views.<sup>52</sup> Importantly, in doing so, courts have not required a client seeking fee forfeiture to show that the lawyer's wrongful conduct caused the client harm, although the extent of any harm shown to have been caused is relevant in determining the extent of forfeiture.<sup>53</sup> Fee forfeiture, in the absence of harm to the client, obviously provides a remedy with a substantive element quite different from what would otherwise be available by means of an action for either negligence or fiduciary breach.<sup>54</sup> However, a central purpose of the remedy of fee forfeiture is to provide deterrence by depriving the lawyer of any gain related to the wrongdoing and to protect the relationship of trust and confidence between clients and lawyers,<sup>55</sup> purposes whose salience does not depend on whether the client was harmed. Accordingly, altering the substantive element by relaxing the normally required showing of client harm is eminently sound.

### B. *Imposition of a Constructive Trust*

A similar alteration of some substantive requirements that are normally found in negligence and fiduciary breach theories of recovery can also be seen with the constructive-trust remedy. The remedy treats the lawyer as the trustee of any funds or property obtained by the lawyer in, for example, a business transaction with the client and requires the

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(Discussion Draft 2000).

51. See RESTATEMENT, *supra* note 4, § 37 cmts. d, e (scaling the extent of fee forfeiture to the seriousness and obviousness of the lawyer's wrongful conduct as well as the extent that conduct harms important client interests). For a decision generally following the approach of the Restatement on fee forfeiture, see, for example, *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). For a criticism of the fee-disgorgement line of decisions, see generally *Duncan*, *supra* note 2.

52. Among leading decisions are *Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996) (applying District of Columbia law, on the facts here, a lawyer's breach of fiduciary duty warranted fee forfeiture despite an absence of a showing of actual financial harm); *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller*, 629 So. 2d 947, 953 (Fla. Dist. Ct. App. 1993) (following Restatement); *Burrow*, 997 S.W.2d at 237-45 (applying a multi-factor standard of the Restatement to determine the extent of forfeiture of lawyer's fee and holding that the client need not show actual harm, but only the extent of any harm relevant to extent of forfeiture). See also, e.g., *Thomas D. Morgan, Sanctions and Remedies for Attorney Misconduct*, 19 S. ILL. U. L.J. 343, 351 (1995) ("[T]he fee forfeiture sanction is available even where a client has suffered no loss as a result of an attorney's alleged misconduct.").

53. *Id.*

54. See *supra* note 47 and accompanying text.

55. RESTATEMENT, *supra* note 4, § 37 cmt. b; see also *Burrow*, 997 S.W.2d at 240-41.

lawyer to hold in trust and promptly return any property or funds obtained from the client in the absence of a showing that the transaction complied with exacting standards meant to assess whether the transaction was fair and reasonable.<sup>56</sup> The remedy is well-established in traditional equity.<sup>57</sup> The large majority of decisions arising out of client-lawyer business transactions holds that the normal requirement imposed on the plaintiff-client of showing that the business transaction was wrongful is substantially altered because of the fiduciary obligations of the lawyer. The lawyer, not the client, has the burden here of demonstrating that the business transaction was fair and reasonable.<sup>58</sup> As some courts put it, such a business transaction is presumed fraudulent or at least presumed to be voidable, unless the lawyer seeking to benefit from it can prove the contrary.<sup>59</sup>

As with fee forfeiture, the constructive-trust remedy follows faithfully from a very focused rationale that is best served by altering the normal burden of proving whether the transaction was fair and reasonable. Unlike business contracts in general, such as between business people or between business people and consumers, there is no public policy served by encouraging client-lawyer business transactions even if they might otherwise be lawful under general contract law. To the contrary, the substantive law regulating such transactions between fiduciary and principal clearly reflects suspicion, if not hostility, toward such transactions.<sup>60</sup> The law in most states demands that, to be enforceable, a client-lawyer business transaction must be fair and reasonable and that the lawyer make an adequate disclosure to the client that the lawyer's personal financial interest is in conflict with the possible interest of the client in obtaining disinterested legal advice

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56. See generally RESTATEMENT, *supra* note 4, § 126(2) (stating the requirement that “the terms and circumstances of the [business transaction between lawyer and client] are fair and reasonable to the client”); *id.* cmt. e. (discussing the fairness requirement).

57. See generally DOBBS, REMEDIES, *supra* note 47 (discussing older decisions on the business-transaction rule).

58. RESTATEMENT, *supra* note 4, § 126 cmt. a (“In any civil proceeding between a lawyer and a client or their successors, the lawyer has the burden of persuading the tribunal that requirements stated in this Section have been satisfied.”); *id.*, reporter’s note to cmt. a.

59. See generally 2 MALLEN & SMITH, *supra* note 19, § 15.4 (discussing business-transaction decisions); *Tyson v. Moore*, 613 So. 2d 817, 823 (Miss. 1992) (stating that a lawyer business transaction with a client is “presumptively fraudulent”); *Hughes v. McDaniel*, 98 A.2d 1, 4 (Md. 1953) (ruling that a lawyer’s business transaction with a client is “*prima facie* fraudulent and void”); *In re Estate of Mapes*, 738 S.W.2d 853, 854 (Mo. 1987) (holding, in a lawsuit challenging a lawyer’s receipt of a gift from a client, that the gift transaction was rebuttably presumed to be the result of fraud and undue influence).

60. This is reflected in the approaches of some courts that characterize such contracts as “presumptively fraudulent.” See sources cited *supra* note 59.

about the transaction.<sup>61</sup> Moreover, the lawyer is typically in a superior position to realize the conflict and to deal effectively with it. Given the opportunity obviously provided by the lawyer's own general legal experience and specific role in the transaction, little additional cost is imposed on the parties, especially on the lawyer, by, in effect, requiring the lawyer to document satisfaction of those requirements in the course of otherwise documenting the transaction. If such adequate transaction documents are prepared and signed, and if the facts support the situation portrayed in the documents, in most instances, the lawyer can readily carry the burden of showing fairness and reasonableness. If that documentation is not generated, the burden is rightly imposed on the person, the lawyer, who was in the best position to have anticipated and obviated the need for such proof in a later evidentiary showing. That in fact is what the law achieves by shifting the burden of proof to the lawyer in order to avoid the remedy of constructive trust.

As with the fee-forfeiture remedy, the extent to which the law of the constructive-trust remedy alters the usual rules of negligence is both focused and limited. It is also fully warranted by the specific rationale for the remedy. The contrast with the other principal use of fiduciary theory, that underlying the "equal-claims" version of fiduciary breach law, is sharp.

#### IV. THE "EQUAL-CLAIMS" VERSION OF THE FIDUCIARY BREACH CONCEPT

In contrast to the reach of the negligence theory of legal malpractice and the law defining the substantive elements of the equitable-remedies claims, the "equal-claims" version of fiduciary breach theory has always had about it the aura of an exception, a departure from the norm of legal malpractice as negligence. Although the number of filings of fiduciary breach claims against lawyers has apparently increased in recent years, fiduciary breach law itself still seems to be finding its way. In one sense, the lesser status of fiduciary breach claims in the decided cases and the ascendancy of negligence-based recovery in most economic-harm litigation against lawyers might seem anomalous as a matter of professional ideology, with its frequent embrace of the ideal of lawyer-as-fiduciary. The reason for the apparently confined and second-class status of fiduciary breach claims must reflect rather strong judicial misgivings. As will be seen, there is

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61. See generally RESTATEMENT, *supra* note 4, § 126.

significant evidence of judicial reluctance to unleash fiduciary breach doctrine farther because of its broad rhetorical sweep, its indeterminate application as doctrine, its forensic volatility, and its overall potential to extend lawyer liability far beyond what otherwise well-settled legal-malpractice theory and practice would support.

#### A. Breach of Fiduciary Duty in General

Anglo-American law for centuries has recognized an equitable claim for breach of duty on the part of a variety of persons whom the law denominates “fiduciaries.”<sup>62</sup> The forerunners of such claims were recognized long before the development in the last century and a half of the modern concept of professional negligence.<sup>63</sup> The fiduciary breach claim entitled, and still entitles, a protected person (such as a beneficiary of an express trust or a client), commonly referred to as the principal, to recover against a person (such as a trustee or a lawyer), commonly called the agent, for a violation of the duties of the fiduciary. Agents, such as lawyers, who are subject to fiduciary duties are at least generally identifiable as those persons who have undertaken to protect important interests of the principal when the circumstances of the relationship indicate that the principal is vulnerable to abuse by the agent because the undertaking confers significant discretion on the agent and, hence, power over the principal’s property or other valuable interests.<sup>64</sup> That

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62. The general fiduciary breach theory, for example, as applied to trustees and similar custodians of property that is to be managed by the fiduciary for the benefit of others (beneficiaries), has roots running back centuries in decisions of courts of equity. *See generally* Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285 (1989); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975); L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69. Legal scholars seem to agree that it is otherwise unclear where and why the concept of fiduciary breach arose as a matter of legal history and theory. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879; Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 796 (1983) (writing about the history of the general theory of liability for breach of fiduciary duty, and asserting: “Little has been written about the origin of fiduciary law, the rationales behind the creation of fiduciary duties, the remedies for violations of these duties, and the methods by which courts fashion such remedies.”).

63. On the development of the concept of professional negligence in the nineteenth century, see generally *supra* notes 34, 47 and accompanying text; LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 350-51 (3d ed. 2005) (giving history of development of American law of torts (negligence) beginning in latter half of nineteenth century); 1 MALLEN & SMITH, *supra* note 19, § 1.2 (tracing history of American legal malpractice law as an off-shoot of negligence law which did not develop until the nineteenth century).

64. On the general theory of fiduciary obligation, see *infra* notes 76-82, 97 and accompanying text. *See also* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 435 (1993); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991). Although some scholarship touches on the client-lawyer fiduciary duty as an example of the fiduciary breach genre,

concept has a long history in decisions finding a lawyer liable to a client for fiduciary breach, and it remains the base of all such claims.

*B. The Substantive Content of Fiduciary Breach Claims Against Lawyers*<sup>65</sup>

How does a client's attempted recovery for a lawyer's fiduciary breach differ substantively from a claim for negligence? As will be seen, it is clear that fiduciary breach doctrine lacks coherence and is far from settled. Considered below are several important problematic aspects of the doctrine.

1. Judicial and Professional Rhetoric Concerning the Lawyer-as-Fiduciary

The dominant, almost invariant, language that courts and bar organizations employ in discussing the fiduciary breach claim is at the same time compelling but very amorphous. It is also one of the most popular, for tactical reasons, among others, for plaintiff-clients.<sup>66</sup> At an intuitive and general level (where, unfortunately, the matter is often left), the concept of lawyer liability for fiduciary breach has powerful appeal.<sup>67</sup> Who would quarrel, for example, with the broad and essential proposition that a lawyer has the duty of acting with the highest "degree of honesty, forthrightness, loyalty, and fidelity"?<sup>68</sup> In what is arguably a

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most of the prior scholarly work focuses on fiduciary liability either generally or as applied to either property holders (such as trustees and personal representatives of decedents' estates) or corporate officers and directors.

65. Among potentially significant differences between fiduciary breach claims and negligence claims are those involving claims by non-clients against lawyers who represent others. Some fiduciary breach claims can be asserted against lawyers by a non-client. *Compare* 2 MALLEN & SMITH, *supra* note 19, § 14.3 (considering the extent of a lawyer's fiduciary duties to non-clients), with 1 MALLEN & SMITH, *supra* note 19, §§ 7.1-7.15 (general prohibition against negligence-based claims against lawyers by non-clients, with limited exceptions). Claims by a non-client might also invoke the theory that the lawyer's actions constituted impermissible aiding and abetting of a client fiduciary's breach of duty. *See, e.g.,* Joel v. Weber, 197 A.D.2d 396, 396-97 (N.Y. App. Div. 1993) (holding that plaintiff had sufficiently pleaded aiding and abetting in stating that the law firm knowingly and recklessly assisted a fiduciary in diversion of the plaintiff's partnership distribution); *see also* Stanley Pietrusiak, Jr., Comment, *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S L.J. 213 (1996). Both areas lie outside the focus of this Article.

66. On the tactical use of general descriptions of a lawyer's fiduciary duties in jury-tried fiduciary breach cases, see *infra* notes 140-47 and accompanying text.

67. *See generally* RESTATEMENT, *supra* note 4, § 16 & cmt. b (in section describing general scope of "[A] Lawyer's Duties to a Client" stating, as rationale: "[a] lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary."); WOLFRAM, *supra* note 24, § 4.1 (discussing concept of lawyer as client fiduciary).

68. Singleton v. Foreman, 435 F.2d 962, 970 (5th Cir. 1970) (citing Smyrna Dev., Inc. v.

sufficient sign by itself of amorphous rhetoric, several courts continue to insist on describing the fiduciary duty of lawyers in Latin—*uberrima fides*.<sup>69</sup>

The rhetoric of lawyer-as-fiduciary flows naturally, indeed, ineluctably, from the rhetoric of “fiduciary” in general. The mandatory citation or quotation in judicial opinions discussing the general fiduciary concept is Cardozo’s stirring and much-quoted words in *Meinhard v. Salmon*, which dealt with joint venturers *inter se*, not lawyers and their clients.<sup>70</sup>

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.<sup>71</sup>

Clear echoes of Justice Cardozo’s paean to the fiduciary concept can be found in many opinions repeating the fiduciary breach standard as applied to lawyers.<sup>72</sup> Perhaps attracted by Cardozo’s overblown rhetoric, some of those courts have attempted to equal his poetic language (if not his strained syntax). Among the more artful is the following, from an intermediate appellate court opinion in Texas, which

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Bornstein, 177 So. 2d 16, 18 (Fla. Dist. Ct. App. 1965)).

69. David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 341 (Cal. Ct. App. 1988) (stating that “[t]he relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity—*uberrima fides*”) (quotations omitted). In a footnote, the court quoted with apparent approval the following definition of *uberrima fides* from Black’s Law Dictionary: “[t]he most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment [or] deception, however slight.” *Id.* at 341 (quoting BLACK’S LAW DICTIONARY 1690 (4th ed. 1968)).

70. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

71. *Id.* (citation omitted).

72. *Matza v. Matza*, 627 A.2d 414, 423 (Conn. 1993) (stating that “[t]he relationship between an attorney and his client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity and good faith”) (quotations omitted); *Tante v. Herring*, 439 S.E.2d 5, 10 (Ga. Ct. App. 1993) (stating, among other things, that the fiduciary duties of a lawyer entailed “applying his best skill, zeal, and diligence . . . [and] exercis[ing] the utmost good faith and loyalty . . . and [acting] solely for [the client’s] benefit”).

(for readily understandable reasons) Texas malpractice plaintiffs' lawyers strenuously attempt to have incorporated into jury instructions.

[T]he relationship between attorney and client has been described as one of *uberrima fides*, which means "most abundant good faith," requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.<sup>73</sup>

As a general concept, the high-sounding expressions of the fiduciary concept perhaps provide courts with emotive phrases to describe a kind of low-resolution photo of desired lawyer conduct as well as a somewhat blurry vision of client vulnerability and trust. That much, most lawyers would readily grant: clients are properly regarded as the objects of the care of lawyer-fiduciaries. In particular cases, the general language might also signal a court's outrage at peculiarly egregious or unprofessional lawyer behavior, perhaps as a warning to other lawyers who might encounter the court's opinion.

Much more positively, and importantly, there can be little doubt that courts intend the lawyer-fiduciary rhetoric to serve a hopefully powerful heuristic function. Courts clearly wish to impress upon lawyers the urgency and importance of their duties to clients as well as warning them that courts intend to assess sympathetically a client's claim of fiduciary breach. That symbolic positioning of courts on the "side" of clients is, however, curiously narrow if limited to the traditional equitable grounds for claims of fiduciary breach. As has been seen,<sup>74</sup> much of the realm of negligence liability lies beyond the reach of fiduciary breach law, yet it would be strange to imagine that courts are less concerned about the types of lawyer wrongdoing that are subject only to a claim of negligence than they are about fiduciary breach claims that (for largely historical reasons) parallel the reach of negligence. Certainly from the perspective of clients, it would be difficult to maintain that their interests, which are protected by the equal-claims theory of fiduciary breach, are more important to them than, for example, the competent handling of their entrusted matter, a claim that can be asserted only through a negligence action.

For similar reasons, and perhaps for others, the lawyer-as-fiduciary rhetoric has proved popular with official bar organs. Such rhetoric has an obvious attraction because its highly moralistic resonance can be rallied in support of the bar's position on issues that might threaten public denunciation of lawyers and the bar. An example is a 1992 ABA formal

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73. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App. 1991).

74. See *infra* notes 77-79 and accompanying text.

opinion stating that “[a] lawyer is bound to conduct himself as a fiduciary or trustee occupying the highest position of trust and confidence . . . . It is his duty to exercise and maintain the utmost good faith, honesty, integrity, fairness and fidelity.”<sup>75</sup> The linkage between rhetoric and occasion is suggestive. The opinion held that a lawyer was subject to professional discipline under the ABA’s Model Rules of Professional Conduct for taking advantage of a client’s vulnerability through sexual relations with the client. Although the opinion did not mention anything about lawyer liability for monetary damages, it can, of course, be cited, for example by an expert witness for a plaintiff-client in damages litigation as an expression of the bar’s position on fiduciary duties in the circumstances.

While it may be relatively harmless, indeed, quite beneficial for important purposes, to express the fiduciary breach theory in general language, it is another matter altogether to employ nothing more than emotive, general language to describe a standard of liability. Beyond the warm glow of generalities, there are difficult doctrinal and other practical decisions to be made. Guidance in understanding and applying the standards flowing from those generalities is needed by lower courts in instructing juries, ruling on the relevance of evidence, and making findings. Litigants need similar guidance to make sound decisions on such critical matters as whether to file suit, to invest more or less resources in prosecuting or defending the suit, and to settle a claim and, if so, at what level. Those choices cannot be resolved by rhetoric alone, unless one were to entertain the silly assumption that the rhetoric uniformly compels a client-favoring outcome, regardless of the question. Justice Frankfurter put it well in a decision attempting to ascertain the appropriate “fiduciary” standard to be applied by the Securities and Exchange Commission to officers and directors managing a holding company that was in the process of reorganization.

We reject a lax view of fiduciary obligations and insist upon their scrupulous observance. But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?<sup>76</sup>

Regrettably, however, few authorities have attempted such an elaboration for fiduciary breach claims in legal-malpractice litigation,

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75. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992) (quoting *Haft v. Farkas*, 498 F.2d 587, 589 (2d Cir. 1974)).

76. *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943) (citations omitted).

even on the unambitious comparison to the degree to which the negligence formulation of a lawyer's duties has been articulated. Consequently, there is no general agreement about which lawyer activities are included within the scope of fiduciary breach and which are not, or about why included activities are not adequately addressed by the theory of negligence. The authorities are redolent with the notion that the fiduciary breach theory is more limited than the action for negligence, but offer little meaningful guidance beyond that. Those authorities that do attempt to elaborate on the reach of the equal-claims theory offer different—and, frankly, overly simplified—formulations from one part of a law review article to another,<sup>77</sup> or one part or edition of a treatise to another.<sup>78</sup> The articulations of limited application of the equal-claims concept are rarely defended, other than by an invocation of precedent purporting to illustrate or simply to restate that application.<sup>79</sup>

## 2. “Conduct” versus “Care”

One of the commonly stated “standards” of equal-claims fiduciary

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77. Compare Duncan, *supra* note 2, at 1153 (stating that “[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”), with *id.* at 1154 (stating that lawyer’s fiduciary obligations also include “safeguarding client property”). A different sort of problem infects other analyses. For example, in Anderson & Steele, *supra* note 1, at 249, the authors offer the following (unsupported) differentiation between negligence and fiduciary breach: “legal malpractice [that is, negligence] contemplates a balancing of interests between attorney and client, a concept which the law of fiduciary obligation definitely rejects.” Yet, fiduciary breach cases reflect a similar “balancing.” For example, a lawyer who carries the burden of proving that a business transaction with a client was fair and reasonable and followed a due disclosure is entitled to the benefit of the bargain. See *supra* notes 56-59 and accompanying text. At another point, the authors state that “fiduciary obligations are sui generis and absolute, while the malpractice obligation of reasonable care is only relative and fact specific.” Anderson & Steele, *supra* note 1, at 268. Yet, it is commonplace in fiduciary breach cases dealing with alleged conflicts of interest for the courts to admit expert testimony on whether a lawyer of ordinary care and prudence would have recognized the asserted conflict. In fact, most experts will testify as to both negligence and fiduciary breach in such cases without differentiation.

78. See *infra* note 79 and accompanying text.

79. 2 MALLEN & SMITH, *supra* note 19, § 14.2 (“The fiduciary obligations are twofold [only]: (1) confidentiality; and (2) undivided loyalty.”). The sole authority offered in support is a citation to Richter v. Van Amberg, 97 F. Supp. 2d 1255, 1261 (D. N.M. 2000), which is accurately described in the treatise as “citing text.” 2 MALLEN & SMITH § 14.2 & n.6. The only support mentioned in the Richter opinion is a citation to an earlier edition of MALLEN & SMITH (2 MALLEN & SMITH § 14.1.5 (4th ed. 1998 Supp.)). The circularity of citation lends little support to the proposition.

In a closely related portion of the text, the Richter opinion cites Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1290 (Utah App. 1996). Kilpatrick, in turn, cites a yet earlier edition of MALLEN & SMITH (1 MALLEN & SMITH, § 11.1 (3d ed. 1989)), but that earlier version of the treatise included the following, much more expansive definition of fiduciary duty, which includes a duty of disclosure: lawyers have a legal duty “to represent the client with undivided loyalty, to preserve the client’s confidences, and to disclose any material matters bearing upon the representation [of the client].” Kilpatrick, 909 P.2d at 1290 (quoting 1 MALLEN & SMITH § 11.1 (3rd ed. 1989)).

law is a statement—almost invariably without any elaboration—found in a surprising number of decisions and commentary. The statement is that, while negligence involves the breach of a standard of “care,” fiduciary breach claims involve breach of a standard of “conduct.”<sup>80</sup> Most of the decisions claiming to adopt that differentiation in the last decade rely on either a law review article<sup>81</sup> or a standard legal-malpractice treatise,<sup>82</sup> which the law review article cited as its principal authority. How the care-versus-conduct differentiation might be justified or how it might operate helpfully is left entirely unexplained. The asserted differentiation is hardly intuitive. Indeed, the usage stands ordinary, intelligent use of English on its head. “Conduct,” the term used to describe the narrower realm of fiduciary breach, is a term that is certainly broader in ordinary meaning than, and could readily encompass, the concept of “care,” the negligence standard that governs a much vaster realm of lawyer activity. Nor could it be that the care-conduct distinction is a veiled allusion to a well worked-out dichotomy in arguably analogous areas of the law, such as those concerning the fiduciary duties of partners or corporate managers. In those areas as well, controversy rages about the existence and extent of fiduciary duties of care.<sup>83</sup>

Beyond indeterminacy, one might also be concerned (particularly when the reference to conduct-based standards is accompanied by moralistic rhetoric about breach of fiduciary duty) that courts emphasizing “conduct” might be entertaining the notion that the

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80. A frequently-cited source of the distinction is Anderson & Steele, *supra* note 1, at 249 (“[t]he essence of an action for malpractice is violation of a standard of care. A breach of fiduciary duty, however, involves violation of a standard of conduct, not a standard of care”). On apparently approving citations to the Anderson-Steele dichotomy, see, for example Duncan, *supra* note 2, at 1152; Latto, *supra* note 5, at 729-31. Fiduciary breach decisions have also recited the conduct-care dichotomy approvingly, although also without noting how it aids resolution of the point being decided. See, e.g., *Richter*, 97 F. Supp. 2d at 1261 (stating that “[l]egal malpractice based on negligence concerns violations of the standard of care; whereas legal malpractice based upon breach of [fiduciary] duty concerns violations of a standard of conduct”); *Kilpatrick*, 909 P.2d at 1290. Cf., e.g., *Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin*, 717 A.2d 724, 730 (Conn. 1998) (“Professional negligence implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty and honesty.”).

81. See generally Anderson & Steele, *supra* note 1.

82. The Anderson-Steele article cited to an earlier edition of Mallen & Smith’s treatise. For the current mention in MALLEN & SMITH of the care-conduct dichotomy, see 2 MALLEN & SMITH, *supra* note 19 § 14.2 (stating that “[t]he fiduciary obligations set a standard of ‘conduct,’ analogous to the standard of ‘care,’ which pertains to the requisite skill, knowledge and diligence. Thus the standard of care concerns negligence and the standard of conduct concerns a breach of loyalty or confidentiality.”) (footnotes omitted).

83. William A. Gregory, *The Fiduciary Duty of Care: A Perversion of Words*, 38 AKRON L. REV. 181 (2005) (including a somewhat polemical and critical discussion by a legal scholar of the extensively-used description in corporate and partnership law, including statutory law, of a “fiduciary duty of care”).

fiduciary breach standard purposefully amounts to little more articulate than an individual judge's conclusory expression of moral outrage, a literal, latter-day realization of the old adage that equity was to be measured by the chancellor's foot. That is not to say that breach of fiduciary duty, as a general legal concept, should be thought to have nothing to do with morality, contrary to the apparent claim of some analysts attempting to forge a judicial legal agenda founded mainly, or perhaps entirely, on contractarian concepts. For example, in their seminal article on fiduciary duty in general,<sup>84</sup> Frank Easterbrook and Daniel Fischel have argued that fiduciary duties are an instance of courts resolving Ronald Coase's problem of social costs.<sup>85</sup> They argue persuasively in justifying the concept of fiduciary duties that "legal rules can promote the benefits of contractual endeavors in a world of scarce information and high transactions costs by prescribing the outcomes the parties themselves would have reached had information been plentiful and negotiations costless."<sup>86</sup> From this, however, they deduce that "[f]iduciary duties are not special duties; *they have no moral footing*; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings."<sup>87</sup> While the social-cost argument in support of fiduciary duty claims is surely compelling as far as it goes, why does it preclude the thought that moral considerations might support the same doctrine, and perhaps extend it in morally compelling instances?<sup>88</sup> Courts surely do not understand fiduciary concepts in such a limiting way, most assuredly not in decisions finding that a lawyer has violated a fiduciary duty to a client.

It remains, however, to descend from the lofty plane of moral and other general considerations to the pedestrian, but vital, realm of attempting to construct sensible doctrine. Two approaches that are often advanced in many areas of the law in attempts to articulate doctrine are an analysis of policy and teasing-out coherent doctrine from the decisions of individual cases. Unfortunately, pursuit of those approaches

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84. See generally Easterbrook & Fischel, *supra* note 64.

85. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

86. Easterbrook & Fischel, *supra* note 64, at 426.

87. *Id.* at 427 (emphasis added). An argument has been advanced by Gregory Alexander that would arguably lead to a quite different understanding of fiduciary duties than that favored by social-cost theorists. His proposed thesis is that "[c]ognitive factors lead courts to analyze fiduciary relationships, at least those that are property-based, differently than they evaluate contractual relationships." Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 768 (2000) (footnote omitted).

88. I reject, of course, the possibility that practitioners of the Chicago School of economics feel bound in their theorizing to follow the "duplicious pleading" rule of the Illinois intermediate appellate courts, which will shortly be considered. See *infra* notes 126 and accompanying text.

in the case of equal-claims fiduciary theory does not lead very far in any certain direction.

### 3. The Policy Implications of Fiduciary Breach Rhetoric

As a matter of policy, in fact, the clearly more limited reach of the equal-claims fiduciary breach standard is peculiar. Clearly, the notion behind equal-claims (as well as other) uses of fiduciary breach theory in the case of lawyers is that certain duties of a lawyer to a client are particularly important in terms of the client's own interests and wishes, and are thus denominated "fiduciary" in nature. In that view of policy, it would be perverse not to count as of at least equal importance the nature of the lawyer's actual performance of functions in carrying out the representation. Put another way, all of the realms of both "care" as well as "conduct" would be swept into fiduciary breach doctrine. That has indeed been done in some instances. For such reasons, in describing in very general terms the duties of a lawyer to a client, the Restatement takes an appropriately broad view and emphasizes the concept of lawyer-as-fiduciary as the underpinning of a lawyer's duties to act with reasonable competence and diligence.<sup>89</sup>

Yet, a conflation of all of a lawyer's duties to a client as fiduciary makes the resulting policy a useless concept to wield in attempting to determine which legal malpractice claims are subject to the equal-claims use of fiduciary breach and which are not. Under a policy that broad, all of a lawyer's duties are essentially fiduciary. Yet that is not how the equal-claims concept is understood. That concept is much narrower.

### 4. The Decisions: The Fiduciary Breach Theory as

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89. See RESTATEMENT, *supra* note 4, § 16(2) (stating that lawyer must "act with reasonable competence and diligence"); see also *id.* § 16(3) (stating lawyer's duties to "comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client"). In explaining the rationale of the section, the comments emphasize the fiduciary nature of the client-lawyer relationship. *Id.* § 16 cmt. b (stating, as "[r]ationale" for the duties listed in the section: "A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary."); see also, e.g., *Hansen v. Wightman*, 538 P.2d 1238, 1248 (Wash. Ct. App. 1975) (holding that the trial court acted properly in giving instruction on the negligence standard of care and refusing to give plaintiff's requested additional instruction on the fiduciary duty of a lawyer to exercise skill, stating that "[e]xisting within the [negligence] standard, and comprising a component thereof, is the fiduciary duty of the lawyer to the client. That duty does not create a special standard, but sets the standard of performance on a level where conscientious endeavor is expected of ordinary men. The exercise of trust responsibility by the attorney is a part of his work which makes diligence and constancy in the handling of a client's concerns an element to be reasonably expected of ordinary lawyers as a matter of course.").

### Workaday Doctrine

If one were to start afresh to construct the elements of an equal-claims fiduciary breach theory of recovery, one possibility would be to infer a standard from the underlying factual settings in which fiduciary breach claims have been upheld. Reading the decisions, it is quite apparent that some factual settings are considered eligible for equal-claims fiduciary-treatment while others are not. However, from those settings it is impossible to formulate a consistent and limited standard by which to apply fiduciary breach doctrine, nor is it possible to derive any conception of why it is that fiduciary breach claims are allowed to operate in factual settings in which the better-understood and better-articulated theory of negligence is also readily available.

The broadest area of agreement among decisions and writers is that fiduciary breach theory includes claims that a lawyer represented clients in violation of prohibitions against conflicts of interest.<sup>90</sup> And, to be sure, the great majority of fiduciary breach claims upheld by courts bring changes on a lawyer's conflicted representation of the client.<sup>91</sup> Inclusion of conflicts violations among allowable fiduciary breaches is often explained on the basis that the lawyer has violated a duty of "loyalty" to a client.<sup>92</sup> However, although courts occasionally suggest that *only* loyalty offenses are included within the concept of fiduciary breach,<sup>93</sup> it is clear that many authorities have additional categories in mind in which a plaintiff-client might also assert fiduciary breach claims, categories transcending what can meaningfully be described as a problem of loyalty.

A second area of fiduciary breach that courts frequently recognize is a lawyer's misuse of the "confidences" of a client. Such decisions concern two types of inappropriate lawyer conduct, which are connected only by their coincidental use of two fundamentally different meanings of the term. First is a lawyer's misuse of a client's secret information, such as in preempting an investment or other economic opportunity

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90. See *supra* notes 65-69 and accompanying text.

91. *E.g.*, *Avianca, Inc. v. Corriea*, 705 F. Supp. 666 (D.D.C. 1989); *Dessel v. Dessel*, 431 N.W.2d 359 (Iowa 1988).

92. *E.g.*, *Tyson v. Moore*, 613 So. 2d 817, 823 (Miss. 1992) (stating that a lawyer's fiduciary duty of loyalty "may take one of two forms. The first involves situations in which the attorney obtains an unfair personal advantage, such as acquiring property from a client; the second involves situations in which the attorney or other clients have interests adverse to the client in question.").

93. *E.g.*, *Owen v. Pringle*, 621 So. 2d 668, 671 (Miss. 1993) (quoting *Hickox v. Holleman*, 502 So. 2d 626, 633 (Miss. 1987) (stating that "[t]oday a lawyer owes his client duties falling into three broad categories: (a) the duty of care, (b) a duty of loyalty, and (c) duties provided by contract")).

about which the client had consulted the lawyer,<sup>94</sup> or misusing one client's information to advance the interests of another of the lawyer's clients at the expense of the first.<sup>95</sup> That area is concerned with protecting a client's confidences in the sense of confidential information as broadly defined in the client-lawyer relationship. An entirely different notion, using an entirely different meaning of "confidence" of a client, condemns a lawyer's abuse of the trust that a client has bestowed on a lawyer, such as by overreaching the client in a business transaction,<sup>96</sup> or inducing the client to have sex with the lawyer.<sup>97</sup> That concerns the concept of the "trust and confidence" that a client confides in a lawyer.

That the foregoing "loyalty" and "confidences" offenses rightly give rise to liability is clear. What is murky is why the theory of fiduciary breach is necessary or even appropriate to reach that conclusion and, if so, why the theory is exhausted by considering only those grounds. As noted earlier, ample authority exists for the proposition that the negligence theory reaches most of the area of lawyer misconduct traditionally included within the fiduciary breach ambit, and certainly includes conflicts.<sup>98</sup>

##### 5. Fiduciary Breach and Negligence Doctrine Compared

Beyond the indeterminate nature of fiduciary breach liability of lawyers, there is also uncertainty about the extent to which, if any, the

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94. See RESTATEMENT, *supra* note 4, § 60(2) & cmt. j (stating the prohibition against a lawyer's unconsented use of confidential information of a client for the lawyer's personal enrichment); e.g., *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg*, 265 Cal. Rptr. 330 (Cal. Ct. App. 1989) (holding that a claim that a law firm used confidential client information to acquire property that the client was negotiating to purchase stated a triable claim of a breach of fiduciary duty); *David Welch Co. v. Erskine & Tulley*, 250 Cal. Rptr. 339 (Cal. Ct. App. 1988) (affirming imposition of a constructive trust and ordering that a law firm disgorge profits where the law firm employed confidential information gained in representing the client collection agency to set up a competing entity and take business from the former client).

95. E.g., *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1018-19 (8th Cir. 1999); *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991).

96. E.g., *Phillips v. Carson*, 731 P.2d 820 (Kan. 1987); *Goldman v. Kane*, 329 N.E.2d 770 (Mass. App. Ct. 1975).

97. See generally Linda Mabus Jorgenson & Pamela K. Sutherland, *Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact*, 45 ARK. L. REV. 459 (1992); e.g., *McDaniel v. Gile*, 281 Cal. Rptr. 242 (Cal. Ct. App. 1991). See *infra* notes 166-72 and accompanying text.

98. E.g., *Hoagland v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 744 (7th Cir. 2004) (citations omitted) (in course of holding that a plaintiff-client's fiduciary breach claim must be supported by expert testimony in the same way as a negligence claim, stating that "[a]n attorney's throwing one client to the wolves to save the other is malpractice . . . whatever the plaintiff chooses to call it."). *Hendry v. Pelland*, 73 F.3d 397, 401 (D.C. Cir. 1996); see generally 2 MALLEN & SMITH, *supra* note 19, § 16.18 ("Today, allegations of conflicts of interests almost routinely appear in actions for legal malpractice[,] indiscriminately citing both fiduciary breach and negligence cases).

fiduciary breach tort might differ from the negligence tort. Some of those possible differences are catalogued below. As will be seen, most of the perceivable differences are not recognized in more than isolated jurisdictions in which they have originated. At the end of the day, it clearly appears that there are vast areas of congruence of the coverage of negligence doctrine and that of the equal-claims version of fiduciary breach. In fact, it well might be that the indeterminate nature of fiduciary breach claims and the law underlying them lend themselves easily to misunderstanding. As an initial instinct, even very smart lawyers can be excused for thinking that there must be something different about negligence claims and fiduciary breach claims when courts permit both theories to be pleaded and proved in legal-malpractice cases.

a. Proof of Duty and Breach: Expert Testimony

As a general proposition, a client seeking recovery under the negligence theory must offer expert testimony tending to prove that the defending lawyer's activities failed to comply with the standard of care.<sup>99</sup> A few decisions have held that the peculiar properties of the fiduciary breach theory allow the plaintiff asserting such a claim to dispense with the expense and possible forensic drawbacks of supporting the claim with expert opinion testimony. In fact, according to some of those decisions, the question of the standard of conduct in a lawyer-fiduciary case is a legal and not a factual question.<sup>100</sup>

On the other hand, the great majority of fiduciary breach decisions state or strongly intimate that fiduciary breach claims and negligence claims differ only in their different way of stating a duty, using loyalty (or whatever different, if limited, standard is recognized) in fiduciary breach cases and the general duty of care in negligence.<sup>101</sup> As a result, and specifically with respect to the requirements of proof, the vast majority of fiduciary breach decisions require the plaintiff-client to offer expert testimony to the same extent and in much the same way that the client would be required to do if the claim were based on a negligence theory.<sup>102</sup>

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99. *E.g.*, RESTATEMENT, *supra* note 4, § 52 cmt. g; 5 MALLEEN & SMITH, *supra* note 19, § 33.16.

100. *See* Stanley v. Richmond, 41 Cal. Rptr. 2d 768, 776 (Cal. App. 1995); David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 341-43 (Cal. Ct. App. 1988) (reflecting distinctly minority position).

101. *E.g.*, 2 MALLEEN & SMITH, *supra* note 19, § 14.2 (stating that "a cause of action for fiduciary breach corresponds to a cause of action for negligence, substituting the fiduciary duty for the standard of care").

102. *See* 4 MALLEEN & SMITH, *supra* note 19, § 33.16 (collecting extensive authorities requiring

### b. Causation and Fiduciary Breach

Aside from readily understandable alterations of negligence-based causation rules in applying the remedies of fee disgorgement<sup>103</sup> and constructive trust,<sup>104</sup> most fiduciary breach decisions have refused to relax the so-called proximate cause<sup>105</sup> requirement for damage claims based on fiduciary breach theories.<sup>106</sup> Indeed, the fiduciary breach case law is sufficiently well-settled to warrant its description—in this and other respects—as merely substituting for “due care” in the negligence formulation the concept of “fiduciary duty.” All else remains the same, including the requirements that the plaintiff-client show breach of the fiduciary duty, causation, and damages.<sup>107</sup>

There are, however, some few decisions suggesting notable differences between claims of fiduciary breach and negligence. Those decisions suggest that the fiduciary breach theory can be successfully employed in situations in which the same facts would not support a claim for negligence recovery because of the plaintiff’s inability to demonstrate causation, at least with the degree of rigor required of a negligence claimant. The tantalizing precedent case—into which many lawyers for plaintiff-clients have subsequently attempted to shoe-horn their own (often weaker) facts—is the 1994 decision of the Second Circuit in *Milbank, Tweed, Hadley & McCloy v. Boon*.<sup>108</sup> The court

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a plaintiff-client to offer expert testimony in support of a fiduciary breach claim). As is also true of negligence claims, a plaintiff-client in a fiduciary breach case need not offer expert testimony on the question of duty and breach when the violation of duty would be easily recognizable by a lay person. *E.g.*, *Homa v. Friendly Mobile Manor, Inc.*, 612 A.2d 322, 328-29 (Md. Ct. Spec. App. 1992).

103. See discussion *supra* Part III.A.

104. See discussion *supra* Part III.B.

105. Many negligence and fiduciary breach cases tend to use the loose term “proximate cause” when referring to the two-fold requirement of cause-in-fact and reasonable foreseeability of risk of harm, and thereby miss the fact that two issues (and not one) are involved. See KEETON ET AL., *supra* note 34, § 41.

106. See, *e.g.*, *Kirkland & Ellis v. CMI Corp.*, No. 95 C 7457, 1996 WL 559951, at \*9-10 (N.D. Ill. Sept. 30, 1996) (applying Illinois law, holding that “but-for” proximate cause must be shown to recover consequential damages on a fiduciary breach theory); *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1291 (Utah Ct. App. 1996) (holding that same kind of showing of causation and damages is required under both negligence and fiduciary breach theories). See *generally* 2 MALLEN & SMITH, *supra* note 19, § 14.2 (reporting that fiduciary breach actions are governed by same rules of causation and damages as are negligence claims); *Anderson & Steele*, *supra* note 1, at 253.

107. See *generally* 2 MALLEN & SMITH, *supra* note 19 § 14.2 (listing elements of a client’s action for fiduciary breach as including existence of fiduciary relationship between client and lawyer, breach of fiduciary duty, and harm to the client, which was proximately caused by the breach).

108. 13 F.3d 537, 538 (2d Cir. 1994). *Boon* is cited, without endorsement, by the reporters of the Restatement. See RESTATEMENT, *supra* note 4 § 49, reporter’s note to cmt. e.

there, in effect, relaxed the normal substantive requirement of causation, apparently because (and only because) the plaintiff's claim was pleaded as one for fiduciary breach and not only for negligence.

The facts stated by the court in *Boon* make it a particularly sympathetic case in which to allow recovery. Family members (who I will refer to here as the Leo interests) hired the Milbank law firm to assist them in buying a controlling interest in a Swiss bank. That involved a complex arrangement designed to acquire the bank's stock, which was tied up in bankruptcy. The Leo interests dealt with Milbank primarily through an agent, Mr. Chan; however, it was clear to Milbank from an early point and throughout that their clients were the Leo interests. After much work, and substantial fee payments to Milbank by the Leo interests, the intended transaction reached an impasse, although that point was reached only after the Leo interests and the seller signed an agreement that seemed to confer substantial rights on the Leo interests. Milbank was aware that the Leo interests intended to work around the impasse and complete the transaction. In fact, a Milbank lawyer wrote to the Leo interests assuring them that the firm would do nothing to prejudice their position under their agreement.

Nonetheless, when Mr. Chan reemerged at Milbank's offices and informed them that he now proposed to proceed to complete the transaction in his own name and for his own interest, Milbank resumed the representation, this time of Mr. Chan, and he ended up in control of the bank stock. That was done over the protest of the Leo interests and despite Milbank's earlier assurance to the contrary. The Leo interests eventually sued Milbank to recover the loss of the profit they would have turned by purchasing the bank stock themselves.<sup>109</sup> Milbank defended, among other things, on the apparently impressive ground that the Leo interests could not show that any conflicted representation on the firm's part was the "but for" cause of harm to them, as required under what the parties agreed was applicable New York law. Milbank noted in this connection that New York law required a showing of the strict "but for" version of causation.<sup>110</sup>

The Second Circuit rejected Milbank's reading of New York causation law, but solely because of the fiduciary breach theory on

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109. The court's opinion indicates that the Leo interests had reached a settlement with Mr. Chan in order to assure the return to them of an \$8.5 million down payment on the transaction that was supposed to have been escrowed, but which Mr. Chan had managed to get into his own hands. *See Boon*, 13 F.3d at 542. The Second Circuit's decision ultimately affirmed the jury's award of \$2 million to the Leo interests.

110. On the New York "but for" test in negligence legal-malpractice actions, see sources cited *supra* note 34.

which the Leo interests' claim was based.<sup>111</sup> For that more generous theory, the court stated in its key ruling, the client need show only that the firm's fiduciary breach was a "substantial factor" in causing harm; they were not required to make the more exacting showing of "but for" causation required in a negligence action.<sup>112</sup>

*Boon* has led a fairly robust life in decisions controlled by New York law,<sup>113</sup> but has made no headway elsewhere.<sup>114</sup> The *Boon* decision involved diversity-of-citizenship jurisdiction, and thus plainly the court's decision was an attempt to extract its relaxed causation rule from extant New York authority,<sup>115</sup> which by itself discourages its export beyond New York. More importantly, it is not clear that *Boon* reaches a defensible result—other than providing the satisfaction that a law firm shown by the plaintiff's evidence to have engaged in a blatantly conflicted and wrongful representation was sanctioned. In the first place, the court's opinion does not mention the remedy of fee-disgorgement, which would seem to be the preferable remedy, and which does not require causation between the lawyer's misconduct and the client's recoverable damages.<sup>116</sup> Second, the outcome seems to hold open the possibility of multiple recoveries for some *Boon* benefited plaintiffs. On its own facts, the Leo interests might have ended up with more than compensatory damages, given that they had already reached a favorable settlement with Mr. Chan in addition to their judgment against Milbank.<sup>117</sup> Moreover, even under the court's lesser causation standard, *Boon*-type cases seem to generate inherently difficult questions of

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111. *Boon*, 13 F.3d at 543-44.

112. *See id.*

113. *See, e.g.*, *Fisher v. Reich*, No. 92 Civ. 4158, 1995 WL 23966, at \*14 (S.D.N.Y. Jan. 10, 1995) (using the less-demanding "substantial factor" standard in a fiduciary breach action against a law firm in conflict-ridden representation); *Estate of Re v. Kornstein, Veisz & Wexler*, 958 F. Supp. 907, 924 (S.D.N.Y. 1997) (holding that a client could employ the less-exacting "substantial factor" test to prove causation of harm from a firm's undisclosed amassing of a total of \$500,000 in referrals from the Paul Weiss law firm, which also represented the client's adversary in an unsuccessful brokerage arbitration).

114. The only reported decision outside of the Second Circuit that has yet considered *Boon* refused to follow it on the ground that it did not reflect the applicable law. *Garrett v. Bryan Cave LLP*, 211 F.3d 1278 (10th Cir. 2000), an unpublished decision whose text is available on Westlaw. The court's discussion of *Boon* is at \*4-5.

115. Quite unusually, the Second Circuit's opinion in *Boon* does not mention that it was applying New York law, or even that the case involved the federal courts' diversity jurisdiction, although that was plainly the basis of jurisdiction and, hence, New York law should have been applied.

116. *See* discussion *supra* Part III.A.

117. Neither question, fee forfeiture nor multiple recovery, can be assessed on the basis of what is reported in the court's opinion. It is possible, of course, that further facts would indicate that neither was raised by Milbank as an issue in the case or that the issues were raised and rejected for sound reasons.

causation and damages. Judges in other jurisdictions well might conclude that adding such problematic complexity to what are already complex cases for lay jurors is unwarranted. Finally, subsequent decisions of New York and federal courts are irreconcilable with *Boon*. The Second Circuit has itself limited *Boon* to claims for non-compensatory (restitutionary) relief.<sup>118</sup> A recent decision of New York's intermediate appellate court seems flatly to apply a rule requiring the same showing of causation in fiduciary breach and negligence cases.<sup>119</sup> And, a developing line of New York state court decisions holds that a fiduciary breach claim is simply another way of claiming negligence,<sup>120</sup> a position that similarly seems irreconcilable with *Boon* and its federal progeny.

#### 6. Fiduciary Breach Standards in the Final Analysis

At the end of a perplexing search for the specific and limiting rationale and standard for imposing fiduciary breach liability on lawyers, one is tempted to conclude that the fiduciary breach doctrine and its limited application are best understood as accidents of legal history. Much of the law involving fiduciary duties was developed in the context of persons, such as trustees of express trusts, who undertook to act for another with respect to important property rights. The liability of trustees and similar fiduciaries developed relatively early and in courts of equity—lending a fluid and flexible character to the bounds of the liability. Much of the case law of fiduciary liability developed out of pre-modern settings, where defalcations of a fiduciary were likely to consist of nothing more than what would now be called theft, usually accomplished through a devious and self-interested scheme concocted by the fiduciary. Liability of trustees and others, such as lawyers, for negligence (including negligence in investing entrusted assets) developed relatively much later, not until well into the nineteenth century in England and the United States. Negligence-based liability for harm caused by a professional has now become well-accepted as the central concept behind lawyer liability to clients. It has not to this point been thought to be so inconsistent with negligence-based liability to continue borrowing from that older (and more limited) area of fiduciary

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118. See *LNC Investments, Inc. v. First Fid. Bank, N.A.*, New Jersey, 173 F.3d 454, 465-66 (2d Cir. 1999).

119. *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 780 N.Y.S.2d 593, 596 (N.Y. App. Div. 2004) (“We have never differentiated between the standard of causation requested [required?] for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability. The claims are co-extensive.”).

120. See *infra* notes 136-39 and accompanying text.

law.

The resulting *mélange* is today spread upon the pages of contemporary decisions about the liability of lawyers. If this *mélange* is indeed mainly explicable as a product of accidents of legal history, it does not bode well for its capacity to generate an intelligible state of legal doctrine.

*C. Restiveness in Judicial Ranks in Dealing with Fiduciary Breach Doctrine*

While many decisions, typified by those already discussed, have shown willingness to accept the fiduciary breach claim as an apparently full equal with the negligence claim, giving it a life of its own, a few courts, admittedly a small minority at this point, have indicated various degrees of restiveness about resort to fiduciary breach concepts, at least on a wholesale and willy-nilly basis as is suggested by the equal-claims use of fiduciary breach theory.

Among them is the recent decision of the Missouri Supreme Court in *Klemme v. Best*.<sup>121</sup> Plaintiff Klemme was a police officer named in a federal civil rights action seeking damages against him along with several other officers and the city that employed them all. All were represented by lawyer Best. Klemme later claimed, in his fiduciary breach claim against Best, that Best had met with the lawyer for the civil rights plaintiffs to discuss a draft complaint prior to its filing. Klemme alleged that, although Best had information showing that neither Klemme nor another officer were involved in the incident, Best told the plaintiff's lawyer only that the other officer, who thereafter was dropped as a defendant, was uninvolved. Klemme alleged that Best acted to keep Klemme in the case in order to advance the interests of the city and its self-insured association that had actually retained Best.<sup>122</sup> Based on those facts, Klemme sought recovery against Best for "violat[ing] the fiduciary duties of fidelity, loyalty, devotion, and good faith."<sup>123</sup> The trial court dismissed Klemme's case, finding that his pleading failed to state a claim under state law and that, in any event, it was barred by the statute of limitations. The Missouri Supreme Court affirmed, but only on the limitations point.

The court first defined the elements of a negligence action in the

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121. 941 S.W.2d 493 (Mo. 1997).

122. *Id.* at 495. The court's recitation of the facts is obscure, but perhaps the claim was that Best kept Klemme (who might have been separately insured) in the case in the interests of enlarging the pool of defendants who might respond to a settlement or judgment.

123. *Id.*

traditional four-fold way: (1) a client-lawyer relationship; (2) negligent breach by the lawyer; (3) proximate causation of the client's harm; and (4) damages. In contrast, according to the court, there were five elements that had to be established to make out a claim of fiduciary breach: (1) a client-lawyer relationship; (2) the lawyer's breach of a fiduciary obligation; (3) proximate causation; and (4) damages, but, as well, another requirement: (5) demonstration that "no other recognized tort encompasses the facts alleged."<sup>124</sup> Relying in part on an earlier decision,<sup>125</sup> *Klemme* elaborated as follows on the fifth element: "[i]f the alleged breach can be characterized as both a breach of the standard of care (legal malpractice based on negligence) and a breach of a fiduciary obligation (constructive fraud), then the sole claim is legal malpractice."<sup>126</sup> The court offered no reason for that restrictive definition of the fiduciary breach claim or for its rule barring overlapping theories of recovery here.

Reaching much the same result, but through a curiously proceduralist approach, are several decisions, most of them decisions of intermediate appellate courts in Illinois. The Illinois decisions have developed a "same operative facts" test to limit the pleading of a fiduciary breach claim along with a negligence claim.<sup>127</sup> An example is *Majumdar v. Lurie*,<sup>128</sup> where the client pleaded a claim for negligence based on an assertion that the law firm had proximately caused harm through its conflicted representation of a competitor while representing the plaintiff. The client, in a separate count, also pleaded a fiduciary breach claim, asserting much the same facts in support of that different theory. The court held that the fiduciary breach claim was not viable.<sup>129</sup>

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124. *Id.* at 496.

125. *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995). The *Klemme* court's reading of *Donahue* is difficult to extract from the earlier decision.

126. *See Klemme*, 941 S.W.2d at 496. The court went on to find that *Klemme* had sufficiently alleged a fiduciary breach claim, and that it was not necessary for him to plead or prove that Best had fraudulent intent. In the process, the court was obviously implying that the same facts would not warrant a finding of negligence. *But see supra* note 43 (discussing a decision which held that conflict-of-interest allegations can be asserted as claims for negligence). In any event, the *Klemme* court held that the plaintiff's fiduciary breach claim was time-barred *See Klemme*, 941 S.W.2d at 497-98.

127. *See, e.g., Kirkland & Ellis v. CMI Corp.*, No. 95 C 7457, 1996 WL 559951, at \*9-10 (N.D. Ill. Sept. 30, 1996) (applying Illinois law, dismissing a fiduciary breach counterclaim as duplicative of a negligence claim); *Majumdar v. Lurie*, 653 N.E.2d 915, 920-21 (Ill. App. Ct. 1995); *Calhoun v. Rane*, 599 N.E.2d 1318, 1321 (Ill. Ct. App. 1992). In *Neade v. Portes*, 739 N.E.2d 496, 500 (Ill. 2000), the Illinois Supreme Court expressed approval of this line of intermediate appellate-court decisions.

128. 653 N.E.2d 915.

129. *See id.* at 920-21. For a decision holding that a complaint pleading facts showing a lawyer's conflict of interest suffices to show a fiduciary breach, *see supra* note 43 and

The court first described the two claims as “duplicative”<sup>130</sup> and then asserted the following rule:

[A]lthough an action for legal malpractice<sup>131</sup> is conceptually distinct from an action for breach of fiduciary duty because not all legal malpractice rises to the level of a breach of fiduciary [duty] . . . when, as in this case, the same operative facts support actions for legal malpractice and breach of fiduciary [duty] resulting in the same injury to the client, the actions are identical and the later [sic] should be dismissed as duplicative.<sup>132</sup>

Note that the court’s result and reasoning are not simply an application of the election-of-remedies concept, here, requiring a pleader to elect a remedy when two theories are available on the same facts. Instead, when the same operative facts support both the theory of negligence and that of fiduciary breach, the court makes the election not to permit the plaintiff-client to pursue the fiduciary breach claim. An articulation of the reason for the court’s hostility to the fiduciary breach claim is, however, entirely absent from any of the Illinois decisions.

Decisions in a few other jurisdictions have followed a similar path. If sometimes with slightly different phraseology, those other decisions are similarly reticent in their reasoning. A Colorado decision relied directly on the Illinois appellate court authority in rejecting a similar attempt to pursue a fiduciary breach claim that relied on the same facts as a negligence claim.<sup>133</sup> Somewhat differently, in *Dresser Industries, Inc. v. Digges*,<sup>134</sup> a federal court (applying Maryland law) refused to permit a former client (under very sympathetic facts, involving false billing by a former law firm partner) to recover vicariously against a law firm on a theory of fiduciary breach. The court so held on the ground that the claim was merely “duplicitous” of the client’s claims for fraud

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accompanying text.

130. *Marjundar*, 653 N.E.2d at 920.

131. In context, it is clear that “legal malpractice” is meant to refer to the negligence-based theory of recovery.

132. *See id.* at 920-21.

133. *See Moguls of Aspen, Inc. v. Faegre & Benson*, 956 P.2d 618, 620-21 (Colo. Ct. App. 1997) (holding that a client’s requested jury instructions on fiduciary breach were correctly rejected by the trial court where the facts alleged (involving a lawyer’s carelessness and lack of diligence) constituted negligence and the latter theory was the subject of adequate instruction).

134. CIV. No. JH-89-485, 1989 WL 139234, \*1, \*7 (D. Md. Aug. 30, 1989); *see also, e.g.*, *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 400 (S.D.N.Y. 2000); *Peterson v. Scorsine*, 898 P.2d 382, 383 (Wyo. 1995) (stating, in the course of a decision holding that the plaintiff client had failed to meet the lawyer’s expert testimony that challenged practices met local standard of care, that plaintiff’s theories of malpractice, breach of contract, and breach of fiduciary duty involved “alternative theories . . . subsumed by the malpractice claim”).

and malpractice.<sup>135</sup>

Finally, a similar movement is afoot in New York, although, as in Illinois, the decisions are perfunctory, providing no supporting reasoning. In fact, two potentially confusing lines of relevant decisions have emerged in recent years, both based on the view that negligence and fiduciary breach claims in legal-malpractice litigation are redundant, requiring dismissal of the latter. One of the lines of cases, the one most obviously relevant here, is based on a refusal by New York courts to permit a plaintiff to pile on claims such as fiduciary breach when the plaintiff has already asserted a viable claim for negligence.<sup>136</sup> Representative of that line is the 1999 decision in *Mecca v. Shang*.<sup>137</sup> The court first held that the plaintiff-client had pleaded a triable negligence claim that required further proceedings in the trial court. However, the court ordered dismissal of the plaintiff's additional claims of breach of fiduciary duty and fraud because "they arise from the same facts as his legal malpractice claim and do not allege distinct damages."<sup>138</sup> Other similar decisions have explicitly followed *Mecca* or reached the same result.<sup>139</sup> Not one provides any rationale, citing only

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135. See *Dresser Indus., Inc.*, 1989 WL 139234 at \*7. The court also noted that, while malpractice involves the breach of a standard of care, a "breach of fiduciary duty does not involve standard [sic] set by the marketplace; but rather, a standard of moral conduct." *Id.* On the conduct-care dichotomy, see *supra* notes 80-88 and accompanying text. The description of the fiduciary breach claim as "moral" is ambiguous, but presumably reflected the court's conclusion that, at least in the instance before it, the claim of fiduciary breach was a non-legal claim not compensable in a legal proceeding. On possibly broader, and more menacing, invocations of morality considerations in fiduciary breach claims, see *infra* notes 141-43 and accompanying text.

136. This line of decisions seems to leave many issues unresolved, such as whether the rejected fiduciary breach claim can be incorporated into the same count as the negligence claim (it would seem that it cannot), or whether the plaintiff could drop the negligence claim and proceed on only the fiduciary breach claim (which would be highly risky and thus has not yet been attempted).

137. 685 N.Y.S.2d 458 (N.Y. App. Div. 1999).

138. *Id.* at 460.

139. See, e.g., *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 780 N.Y.S.2d 593, 596 (N.Y. App. Div. 2004) (ordering the reinstatement of a negligence counterclaim, and "[a]s to the claim for breach of fiduciary duty, we have consistently held that such a claim, premised on the same facts and seeking the identical relief sought in the legal malpractice cause of action, is redundant and should be dismissed"); *InKline Pharm. Co. v. Coleman*, 759 N.Y.S.2d 62, 63 (N.Y. App. Div. 2003) (dismissing fiduciary breach and contract-breach claims, while remanding the negligence claim for further proceedings); *Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 736 N.Y.S.2d 668, 670 (N.Y. App. Div. 2002) (after reversing the trial court's dismissal of a negligence claim, and ordering the dismissal of fiduciary breach and contract-breach claims against a law firm "which are predicated on the same allegations and seek relief identical to that sought in the malpractice cause of action"); *Best v. Law Firm of Queller and Fisher*, 718 N.Y.S.2d 397, 397 (N.Y. App. Div. 2000). A very similar line of decisions (already reflected in the *InKline* and *Nevelson* decisions, above) holds that a "redundant" claim of a lawyer's breach of contract based on the same facts as a claim of negligence is also to be dismissed. See, e.g., *Pellegrino v. File*, 738 N.Y.S.2d 320, 324 (N.Y. App. Div. 2002) (noting that where a negligence claim was too speculative to survive a pleading motion, the additional "cause of action sounding in breach of contract is

other decisions in the same line. The second line of decisions involve a quite different set of issues although, confusingly enough, employing very similar language. These cases stand for the unremarkable point that, when a plaintiff pleads multiple claims arising out of the same operative facts—for example, negligence and fiduciary breach in a legal malpractice case, and the negligence claim is properly dismissed on a ground that infects the fiduciary breach claim as well—the fiduciary breach claim must also be dismissed because both are based on the “same operative facts.”<sup>140</sup> Unfortunately, sometimes a decision presenting an issue relevant only to one of those lines of cases will dismiss with citation to a case from the other line,<sup>141</sup> as if it were relevant and controlling, which it plainly is not. On the other hand, some, at least of the first line of decisions, are not subject to this suspicious error and seem to stand alongside the Illinois line of cases.

The Illinois and New York decisions are problematic, if based solely on pleading rules. Modern pleading rules permit a plaintiff to assert as many theories as are available and do not require election of a single theory or give priority to one theory over another, and certainly not at the outset of litigation. For that reason, the expected response, as a matter of procedure to a pleading motion such as those indicated in the

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redundant to the malpractice claim” and was ordered dismissed as well); *Sage Realty Corp. v. Proskauer Rose, LLP*, 675 N.Y.S.2d 14, 17 (N.Y. App. Div. 1998) (“[A] breach of contract claim premised on the attorney’s failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim.”); *cf. Harleysville Worcester Ins. Co. v. Hurwitz*, No. 02 civ. 7612, 2005 WL 774166, at \*5-6 (S.D.N.Y. Apr. 6, 2005) (dismissing a plaintiff-client’s claim for subrogation on the grounds that it was redundant, given the plaintiff’s claim for negligent representation). The concept of defectively redundant claims appears to have originated in New York medical-malpractice litigation. *See, e.g., Winegrad v. Jacobs*, 567 N.Y.S.2d 249 (N.Y. App. Div. 1991) (ordering the dismissal of a breach of contract claim in medical-malpractice litigation as “redundant” of a negligence claim).

140. *See, e.g., Sonnenschine v. Giacomo*, 744 N.Y.S.2d 396, 398 (N.Y. App. Div. 2002); *Tyborowski v. Cuddeback & Onofry*, 718 N.Y.S.2d 489, 491 (N.Y. App. Div. 2001). Presumably these decisions are also based on the court’s further finding, which these opinions customarily assume rather than announce, that the same basis for dismissal, such as the absence of a sufficient pleading of harm, applies to both theories. Beyond the cases cited here, there are other New York decisions that are too cryptically described in the reports to allow one to determine to which line of decisions they properly belong. *See, e.g., Daniels v. Lebit*, 749 N.Y.S.2d 149, 150 (N.Y. App. Div. 2002) (affirming dismissal of negligence count on statute of limitations grounds, affirming dismissal of fiduciary breach claim as well on “same facts” ground, but without indicating whether the defect was the same limitations ground or the broader “same facts” ground).

141. *See, e.g., Coveal v. Consumer Home Mortg., Inc.*, No. 04-CV-4755(ILG), 2005 WL 704835, at \*10 (E.D.N.Y. Mar. 29, 2005) (finding that negligence claim was time-barred, dismissing fiduciary breach claims, citing *Mecca’s* prohibition against redundant claims); *Sonnenschine*, 744 N.Y.S.2d at 398 (finding that negligence claim could not be sustained absent proper pleading of proximately caused damages, dismissing fiduciary breach under “same operative facts” test of *Mecca*); *InKline Pharm. Co. v. Coleman*, 759 N.Y.S.2d 62, 63 (N.Y. App. Div. 2003) (dismissing fiduciary breach claim on basis of *Sonnenschine* in *Mecca* type case).

foregoing decisions, is to reject any required narrowing of the plaintiff's ability to plead both negligence and fiduciary breach theories, even if based on the same set of facts.<sup>142</sup>

On the other hand, those procedural rules would not stand in the way of dismissal if the courts were resting decision on the ground that the dismissed fiduciary breach claim was simply not an available theory on the same facts. The rationale that the Illinois, New York, and other courts might be relying on to restrict the fiduciary breach claim, while assuming that the negligence claim has a significantly broader and more generously welcomed ambit, is left unstated.<sup>143</sup> There is much, however, that might be said for a somewhat similar imposition of confining limits on the fiduciary breach theory. I turn next to a critique supporting such a limitation on fiduciary breach claims.

#### V. CRITIQUE OF THE "EQUAL-CLAIMS" VERSION OF FIDUCIARY BREACH THEORY IN LEGAL-MALPRACTICE CASES

Against the background of the treatment of negligence and fiduciary breach claims, the point has been reached where the appropriate reach of each claim can be assessed. Among the questions to be answered are those discussed below. Given the general availability of the negligence theory as a vehicle for recovery of damages in most (but not all) instances of lawyer wrongdoing, and given the special availability of the fiduciary breach theory to provide equitable recovery in several instances of perceived special need, should there be any further function available to be filled by the fiduciary breach theory? Specifically, should the theory be available, as it is in many, but not all, states, as an amiable companion theory to negligence in the mine run of actions to recover compensation for injuries caused by a lawyer's careless lawyering? As the terminology is employed here, should the equal-claims concept of fiduciary breach continue to offer malpractice plaintiffs the option of proceeding under the umbrellas of both

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142. The argument has rarely been asserted in most jurisdictions, doubtless because of the clarity of the procedural rules permitting alternative pleading of theories. When the issue has been raised, it has been promptly rejected. *See, e.g.,* Resolution Trust Corp. v. Holland & Knight, 832 F. Supp. 1528, 1531-32 (S.D. Fla. 1993) (holding that, due to liberality of pleading rules, a defending law firm must defend against both negligence and fiduciary breach claims, even if founded on the same set of facts).

143. There are indications in Illinois cases that the "same operative facts" test reflects a general view that fiduciary breach claims are simply a variant subsumed within negligence. *See, e.g.,* Wilson v. Coronent Ins. Co., 689 N.E.2d 1157, 1159 (Ill. Ct. App. 1997) (stating that because a claim of fiduciary breach is "[i]ncluded within the rubric of legal malpractice," the rule barring assignment of negligence claims also bars assignment of fiduciary breach claims) (alteration in original) (quoting Doe v. Roe, 681 N.E.2d 640, 649 (Ill. Ct. App. 1997)).

negligence and, simultaneously, fiduciary breach? I offer here what I consider to be compelling reasons why courts should refuse to extend the fiduciary breach theory any further than its special-function role as a remedial concept (as in fee-forfeiture and constructive-trust cases), as a possible basis for handling emerging and novel claims of lawyer misconduct that seem worthy of treatment as tortious but that fit uncomfortably within the confines of negligence, and in all instances, as a powerful heuristic assertion about the nature of the client-lawyer relationship in all its manifestations.

*A. The Infelicity of the Equal-Claims Version of Fiduciary Breach*

To start, what should be the reach, if any, of the equal-claims version of substantive fiduciary breach law? Among other considerations, the opinions embracing the equal-claims version of fiduciary breach doctrine are inarticulate about an obvious, first-order question: why should the concept of a claim based on breach of fiduciary duty not extend to all of the defaults of a lawyer? To be sure, that would make the fiduciary breach concept coterminous with negligence, but what is objectionable about that? Once a court has accepted the prospect of a significant area of overlap between the two, on what principled basis can a court say that enough overlap—short of total congruence—is enough?

Surely the concept of lawyer-as-fiduciary is an expansive one. It underpins the entire client-lawyer relationship. In fact, opinions can be found describing the scope of fiduciary duty so expansively as to encompass a lawyer's duty to operate competently.<sup>144</sup> It unquestionably underpins many of the provisions of modern lawyer codes dealing with a lawyer's duties to a client,<sup>145</sup> and most courts permit proof of a lawyer's violation of a lawyer code provision to be introduced as evidence of a lawyer's failure to conform to the applicable standard of care.<sup>146</sup> Given that the fiduciary underpinnings reach so extensively into clients' damages litigation, it might seem odd to some that courts have seen fit

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144. See, e.g., *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 401 (S.D.N.Y. 2000) (stating, in assessing a fiduciary breach claim against a lawyer, "[t]he duty to deal fairly, honestly, and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interest over the attorney's.") (quoting *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994)).

145. See generally WOLFRAM, *supra* note 24, § 4.1 (discussing the centrality of fiduciary concepts to the law of the client-lawyer relationship).

146. See RESTATEMENT, *supra* note 4, § 52 reporter's note to cmt. f; see also *supra* notes 36-40, 46 and accompanying text.

(as many have) to arrest the fiduciary breach theory of liability short of what is arguably its ultimate logic.

Would it then be wise to expand the theory of fiduciary breach as a liability rule so that it was coterminous with negligence, so that, in other words, any claim of negligence could be coupled with a companion claim of fiduciary breach? That, in its most dramatic form, is the question posed by the existence of the fiduciary breach theory as a liability rule. It is the question to which I now turn.

*B. Occam's Razor: Equal-Claims Fiduciary Breach as a Needless Proliferation of Theories of Recovery*

A central objection to the general availability of the “equal-claims” version of the fiduciary breach concept is that it produces a needless proliferation of theories of recovery. Aside from one-sided and unfair forensic advantage to a skillful plaintiff’s advocate, next considered,<sup>147</sup> why have the many courts that have done so tolerated the undisciplined spread of the fiduciary breach theory into much of the realm already occupied and, for all that is said, adequately served by the negligence theory? For example, what consideration of public policy suggests that it is preferable to provide a plaintiff with multiple theories of recovery on the same facts? (I, obviously, can think of none.) On the other hand, there are non-trivial reasons for a judge to wish to rein in such a proliferation of theories; among them is the increased risk of jury confusion and the sheer addition of more procedural and substantive rulings that the judge must make as the number of permitted claims increases.

One possible response to a needless proliferation argument is that theory-proliferation is not unique to legal-malpractice litigation. To be sure, it is not uncommon in negligence cases to see a number of additional theories of recovery advanced, such as claims for breach of contract.<sup>148</sup> Beyond legal-malpractice litigation, many other areas of litigation commonly see multiple theories of recovery advanced and accepted by courts.<sup>149</sup> Theory proliferation can thus arguably be regarded as a litigational norm. In response, I would reply in a two-fold way. First, it is not clear that the other areas of proliferated claims involve the same degree of unfair prejudice to the defending party (to be discussed next) as does the use of the equal-claims version of fiduciary breach doctrine. Second, to the extent that theory-proliferation does

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147. See *infra* Part V.C.

148. See *supra* note 139 and accompanying text.

149. See, e.g., FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 227-28 (5th ed. 2001).

cause similar problems, proliferation should be resisted in each such area as well.

*C. Rhetorical Overkill: The Potential for Distortion in Employing Fiduciary Breach Rhetoric in Legal-Malpractice Cases*

For a plaintiff-client's lawyer assessing potentially available routes to recovery, the appeal of the fiduciary breach theory is, obviously, that it can readily be used to set an apparently more exacting standard of lawyer conduct, perhaps far more exacting, than what a jury might gather from a judge's instruction based on the more pedestrian and straightforward negligence standard. There must be great emotional impact when an apparently disinterested judge reading a jury instruction employs such charged language as that quoted above.<sup>150</sup> Added to a highly favorable jury instruction is the consideration that the plaintiff's advocate can adopt the rhetoric of high duty without sounding suspiciously overblown. Perhaps of equal advantage, the plaintiff's expert witnesses can repeat from the witness stand the lofty demands and apparently inflexible and all-sweeping reach of fiduciary orthodoxy, employing language far more colorful and apparently demanding of the lawyer-defendant than the negligence standard alone would warrant. The combined impact on a common-law jury must be so decidedly one-sided that it is remarkable that the matter has not received more careful judicial scrutiny.

*D. The "Stacking" Problem: Equal-Claims Pleading of Fiduciary Breach Theory as Inequitable Scale-Tipping*

A further, and rather dramatic, problem is that recognizing a broad overlap between fiduciary breach claims and run-of-the-mill negligence claims plainly stacks the deck unfairly in favor of plaintiffs. That is a problem that has nothing to do with forensic advantage, just discussed. The present problem can be illustrated in simple mathematical terms. Suppose that a plaintiff has a negligence case that—on the relevant facts and law—stands a 60% chance of success. Suppose further that the jurisdiction permits the plaintiff to also assert, on the same facts, a fiduciary breach claim, and assume that the chance of success on that theory is also 60%.<sup>151</sup> Suppose that the plaintiff seeks \$100,000 in

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150. See *supra* Part IV.B.1.

151. The percentages given here for the probability of recovery on each theory are arbitrary. In real-life situations, however, lawyers typically compute such probabilities within relatively narrow ranges, at least once discovery is closed and all substantive issues have been resolved through *in limine* motions. The illustration uses the same figure (60%) as the likelihood of recovery for both

damages, again based on the same factual theory of damage recovery.

The ability to assert the second, parallel theory of fiduciary breach creates inherent unfairness; it is as if the plaintiff were permitted to roll the dice twice. If only the legal-malpractice claim (or only the fiduciary breach claim) could be pursued at trial, the plaintiff would value her claim at \$60,000. But, because the plaintiff also has a 60% chance of prevailing on the separate fiduciary breach theory,<sup>152</sup> the value of the plaintiff's claim increases to an overall 84% chance of recovering \$100,000,<sup>153</sup> which, of course, increases the settlement value of the plaintiff's case to \$84,000.<sup>154</sup> Obviously, as different percentage values are attached to the two theories, the overall value will rise or fall. But the stacking effect will remain, rising by a product of multiplication that will reflect an increase in the component values of each claim, solely because of the ability to pursue both theories. To be sure, in real life there might be downside risks to the plaintiff from asserting both theories, such as the risk of jury confusion or impatience. But it seems improbable that such drawbacks would ordinarily offset the effects of theory-stacking.

In sum, there are substantial and substantive reasons for a court to refuse to permit a plaintiff in a legal-malpractice case based on negligence to proceed as well with an alternative claim of fiduciary breach. The decisions refusing to permit the pursuit of a companion fiduciary breach claim in a negligence case<sup>155</sup> correctly refuse to ratchet up a malpractice plaintiff's chance of recovery, although their language of duplicitous pleading might mask those reasons as if they amounted to nothing more than pleading niceties. Much more is at stake.

A final question, the answer to which is by this point obvious, is whether the plaintiff-client should be afforded an election of which theory—negligence or fiduciary breach—to proceed with in attempting to recover from the lawyer. The ways in which the general negligence theory and the exceptional fiduciary breach theory have developed in the American law of lawyering strongly indicates that the former should be

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claims. However, it would often be more realistic to place a higher probability of recovery on the fiduciary breach theory to reflect such advantages as more favorable jury instructions and other forensic advantages of that theory. *See supra* Part V.C.

152. The theories are "separate" in the sense that I assume the trial court would uphold a verdict for the plaintiff-client on either theory, even if the jury were to return a defense verdict on the other.

153. The increase to 84% occurs because of the compounding effect produced by the (assumed to be independently operating) probabilities of 60% chance of recovery on each of the two theories, much as would occur with multiple discount rates off a gross price. *See generally* MORRIS H. DEGROOT, *PROBABILITY AND STATISTICS* 43-44 (2d ed. 1989).

154. Similar "stacking" problems occur when a prevailing party at trial is granted a new trial after appellate reversal of the original outcome.

155. *See supra* notes 121-41 and accompanying text.

the normal theory, with the latter reserved for special instances in which both substantive law and remedial law recognize a special basis for liability, a much more limited role considered below.<sup>156</sup>

## VI. FIDUCIARY BREACH IN THE FINAL ANALYSIS

The analysis to this point would strip away many, but not all, applications of the fiduciary breach theory in what are otherwise negligent-lawyer lawsuits. What would be left is a fully broad and robust doctrine of professional negligence, coupled as it already is with extending rules of punitive damages or intentional-tort recovery for rare instances of particularly outrageous lawyer breaches. Yet, here as always, bath water and babies must be disposed of selectively: there also remain legitimate and useful roles for fiduciary breach concepts. They will next be examined and include both substantive and remedial aspects.

### *A. The Substantive Reach of Fiduciary Breach Law as Applied to Lawyers*

There are two ways in which substantive fiduciary breach theory has been, and should continue to be, available to plaintiff-clients in actions against their lawyers, areas in which the fiduciary breach theory has become well-accepted by traditional and now routine application and non-routine instances in which emerging theories of recovery lend themselves particularly well to fiduciary concepts.

#### 1. Traditional Substantive Areas

Several areas of plaintiff-client recovery are now well-established in which the primary substantive theory of recovery has traditionally been recognized to be that of fiduciary breach. As with many other areas of traditional equity (such as the injunction and the law of trusts), those areas have now become so well recognized that they are routinely available to plaintiff-clients whose claims fit within their accepted contours. Already considered are actions by a client to recover against a lawyer for disgorgement of profits gained by the lawyer either in an impermissible business transaction with the client<sup>157</sup> or in the misuse of the client's confidential information to make an advantageous acquisition from a third person.<sup>158</sup> Also included without question are

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156. See *infra* Parts VI.

157. See RESTATEMENT, *supra* note 4, § 126.

158. See *id.* at § 60, cmt. c; RESTATEMENT (SECOND) OF AGENCY § 388 cmt. c (1958).

traditional applications of fiduciary breach law to wrongful lawyer infliction of harm on a client that is intentional.<sup>159</sup>

Those areas seem entirely appropriate for coverage by fiduciary breach theory. The factual settings out of which they arise fit into traditional negligence doctrine either uncomfortably or not at all. None of the excepted settings involve a lawyer's non-intentional, negligent act—except in the somewhat attenuated and circular sense that the lawyer has negligently ignored a legal duty. They are areas that have always been understood to fit within the concept of fiduciary duty,<sup>160</sup> whatever else that concept might encompass.<sup>161</sup> And, because of their routine, well-settled character, they impose no significant additional burden on courts in fleshing out their limits and applying them to individual cases.<sup>162</sup>

## 2. Emerging Applications of Substantive Fiduciary Breach Law

Quite different are newly emerging instances in which plaintiff-clients have attempted to extend the law of legal malpractice to encompass violations of lawyer duties that have not traditionally been recognized as a basis for recovery. Those instances should be tested by the traditional, and stringently applied, willingness of courts of equity to relax the normally applicable common law rules limiting relief only on an exceptional basis and for particularly compelling reasons. I offer two candidates that, to my mind, are legitimate candidates for applying fiduciary breach theory so as to routinize what has thus far been either treated as extraordinary or, in the other instance, occasionally denied as

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159. That is obviously implicit in the many decisions holding that fraud or other intentional act is not necessary to be shown in order for a client to establish that a lawyer breached a fiduciary duty owed to the client. *See, e.g.*, *Stockton v. Ford*, 50 U.S. (11 How.) 232, 247 (1850) (stating, in the course of affirming an order imposing a constructive trust on a client's property purchased by the client's lawyer at execution sale, that "[n]either fraud nor imposition need be shown"); *Baker v. Humphrey*, 101 U.S. 494, 502 (1879) (stating "[a]ctual fraud in such cases is not necessary to give the client a right to redress," in imposing a constructive trust on client's property purchased by a lawyer). *See generally* 2 MALLEN & SMITH, *supra* note 19, § 14.4 (collecting authorities for the proposition that a client need not show wrongful intent or motive of the lawyer to establish breach of fiduciary duty by the lawyer). As indicated above, the one specific instance of fiduciary breach that an early draft of the Restatement would have retained was intentional lawyer conduct. *See supra* note 6 and accompanying text.

160. *See supra* Part IV.A-B.

161. Recall that many decisions, for example, have regarded business-transaction violation settings as appropriate negligence cases.

162. For similar reasons, radical doctrinal surgery to prune much of the reach from already-recognized applications of fiduciary breach law seems entirely unnecessary. Thus, the proposal of Professor Meredith Duncan to limit fiduciary breach claims, among other things, to those in which the plaintiff can show causally inflicted actual harm through criminal or fraudulent lawyer action seems unwarranted. *See Duncan, supra* note 2, at 1167.

a basis for liability: (1) a former-client conflict claim; and (2) a claim by a client against a lawyer who entered into a sexual relationship with the client in the course of the representation.

a. Former-Client-Conflict Claims

One of the most frequently-encountered bases for legal-malpractice liability is the lawyer's involvement in a conflicted representation that causes injury to the plaintiff-client.<sup>163</sup> One familiar type of conflict has, however, not produced very many decisions or a settled body of law permitting recovery thus far. That unsettled area involves what those of us in the legal-ethics trade call "former-client conflicts," an impermissible later representation by a client's former lawyer in which the lawyer represents a person with interests adverse to those of the original client in the same matter or one that is substantially related to the earlier representation.<sup>164</sup> The theoretical difficulty in readily concluding that such facts support a negligence claim is the absence of a client-lawyer relationship at the time of the lawyer's wrongful conduct.<sup>165</sup> Of course, not all decisions suggest that such a problem bars a negligence action for a former-client conflict.<sup>166</sup> My present point is the modest one that, if the state of law in a jurisdiction precludes a court from finding that the requisite client-lawyer relationship existed at the time of the wrongful conduct, thus barring resort to a claim of negligence, the court should feel entirely free to provide a cause of

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163. See generally 2 MALLEN & SMITH, *supra* note 19, §§ 16.1-16.20.

164. See generally RESTATEMENT, *supra* note 4, § 132; WOLFRAM, *supra* note 24 § 7.4. See also MODEL RULES OF PROF'L CONDUCT R. 1.9 (2004).

165. On the general prerequisite of a client-lawyer relationship to support a negligence claim, see RESTATEMENT, *supra* note 4, §§ 50-51 (stating the duties of care owed to clients and enumerating the limited duties of a lawyer to a restricted list of non-clients, respectively). The Restatement, however, assumes, perhaps rather blithely, that a negligence remedy is available to a former client for the former lawyer's violation of the prohibition against former-client conflicts. *Id.* at § 50 cmt. c. (citations omitted) (stating that "a lawyer still owes certain duties to a former client, for example, to . . . avoid certain conflicts of interest. Breach of such duties, . . . may be remedied through a malpractice action in circumstances coming within this Section."); *id.* at § 132 cmt. a (stating that if a lawyer breaches her duties to a former client, such as those implied by the former-client conflict rule, "the remedy of professional malpractice might be available . . ."). Several decisions have done the same. See, e.g., *Griffith v. Taylor*, 937 P.2d 297, 303 (Alaska 1997) (finding a duty of lawyers to former clients and stating that a claim for malpractice for breach of that duty can be maintained).

166. For example, in *Damron v. Herzog*, 67 F.3d 211, 213-14 (9th Cir. 1995), the court, applying Idaho law, held that a former client could maintain a malpractice action on the theory that, with respect to the lawyer's obligation not to take any action that would materially impair the work done for the former client, the lawyer would be deemed to have a "reattach[ed]" client-lawyer relationship with the former client. While the outcome might be commendable, the court's approach seems less than elegant.

action to the client through the fiduciary breach theory.<sup>167</sup>

b. Sexual-Relations Claims

The second area in which I would suggest the use of fiduciary breach concepts to enable a plaintiff-client to recover involves a client with whom the lawyer had entered into a sexual relationship during the representation. A case usefully setting a testing factual situation is the recent New York trial-court decision in *Guiles v. Simser*.<sup>168</sup> Joining the still-rare instances<sup>169</sup> in which a client has attempted to recover damages from the lawyer in such a setting, the *Simser* court granted summary judgment to the lawyer, although on grounds that, if followed in subsequent New York decisions, would permit other such plaintiffs to reach a jury. At one level, the *Simser* facts suggest a strong case: the sexual relationship was amply proved, there was proof that it had been initiated by the defendant lawyer, and it occurred during a divorce representation—an area in which New York’s unique and specific lawyer code prohibition against entering into sexual relations with a

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167. In *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537 (2d Cir. 1994), see *supra* Part IV.B.5.b, the court apparently assumed that the fiduciary breach theory would allow recovery by a former client. At a point, the court, in explaining why a lesser standard of causation should apply, described the case as follows: “There is an even more compelling reason to apply a prophylactic rule to remove the incentive to breach when the fiduciary relationship is that of an attorney and former client because of the attorney’s unique position of trust and confidence.” *Id.* at 543.

168. 804 N.Y.S.2d 904, 907 (N.Y. Sup. Ct. 2005).

169. Much as with the modern treatment of the now-discredited actions for seduction or breach of promise to marry, damages actions by clients against a lawyer for inappropriate sexual relations have thus far received a cautious welcome from courts. See, e.g., *Tante v. Herring*, 453 S.E.2d 686 (Ga. 1994) (holding that a client could proceed on a fiduciary breach, but not malpractice, theory); *Doe v. Roe*, 681 N.E.2d 640 (Ill. Ct. App. 1997) (holding that a pleading sufficiently alleged that a lawyer breached fiduciary duty in gaining sexual favors from his client and then failed to pursue claim for reimbursement of attorney fees for fear that the client’s husband would raise the issue of the sexual relationship); *Doe v. Roe*, 756 F. Supp. 353 (N.D. Ill. 1991) (holding that a lawyer’s engaging in sexual conduct with the plaintiff and other clients did not support a RICO claim); *Suppressed v. Suppressed*, 565 N.E.2d 101, 105-06 (Ill. Ct. App. 1990) (holding that a plaintiff could not recover on a fiduciary breach theory in the absence of a claim that the plaintiff suffered a loss or compromise of legal position in the underlying legal action); cf. *McDaniel v. Gile*, 281 Cal. Rptr. 242 (Cal. Ct. App. 1991) (holding that a lawyer’s conduct in withholding legal services to coerce a client into a sexual relationship and the sexual harassment of the client constituted grounds for a claim of intentional infliction of mental distress, and a lawyer’s abandonment of a client on her refusal of sex stated grounds for a claim of negligence); *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Cal. Ct. App. 1983) (holding that a client could proceed to trial to attempt to support a claim that she suffered personal injuries due to an ectopic pregnancy after she engaged in sexual relations with her lawyer after he gave verbal assurance that he could not get anyone pregnant). See Margit Livingston, *When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations*, 62 *FORDHAM L. REV.* 5, 25-34 (1993) (reviewing comprehensively the availability to clients of civil remedies against a lawyer).

client<sup>170</sup> directly applies. In the view of the court, however, the plaintiff-client's downfall was her deposition testimony in which she portrayed the relationship as one into which she entered enthusiastically and without any independently inappropriate conduct on the part of the lawyer (such as coercion). Her testimony provided such details as the ways that she and her lawyer had attempted to hide their law-office sex play from the lawyer's then-employer.<sup>171</sup> While fully agreeing that Simser's conduct flatly violated the New York lawyer code prohibition, the court refused to base liability on the fact of that violation alone. Noting the absence of any aggravating fact, such as coercion, the bartering of sex for legal services, or misuse of the client's confidential information, the court refused to find that the plaintiff had sustained actionable harm.<sup>172</sup>

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170. N.Y. CODE OF PROF'L RESPONSIBILITY DR 5-111(B)(3) ("A lawyer shall not: . . . 3. [i]n domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.").

171. See *Simser*, 804 N.Y.S.2d at 907. ("She testified that she and Simser, on visits to his law office, would connive to prevent their fondlings from becoming known to Mr. Garuffi, his employer and supervising lawyer. 'It was almost a game. It was like we were little kids trying not to get caught doing something. We knew we were doing something we weren't supposed to be doing.'"). Because of the client's complicity in hiding the relationship, successfully, from the employing lawyer, the same court in an unreported decision had earlier dismissed the plaintiff's claims against the employer based on theories of secondary liability. *Guiles v. Simser*, unreported, No. 2003-0775 (N.Y. Sup. Ct., Apr. 25, 2005).

172. *Id.* at \*3-4 (citations omitted); see *Simser*, 804 N.Y.S.2d at 908:

Unlike the typical case contemplated by the Manual, there is no evidence here that defendant misused information disclosed by the client in any manner resulting in a detriment to her legal position or that he bartered his services for sex. Nor is there any proof of damages to the client by reason of erroneous, inadequate or laggardly legal advice or dilatory tactics by the lawyer in dealing with the matter entrusted to him. . . . In short, plaintiff has shown no injury to her position in relation to her case.

Where no such detriment can be shown, and where the only apparent injury to the client is emotional, we are left with a complaint which occupies the same ground as the former action for seduction. That cause of action has been repealed as exploitive and often extortionate . . . .

Under these circumstances, and even assuming a breach of duty by Simser in the form of a violation of DR 5-111(B)(3), it is not clear what remedy, at law or in equity, could be rendered to plaintiff by the court in the event of trial except such emotional distress damages (or heart balm, in the parlance of that bygone era) as would have been available, before repeal, in the much reviled cause of action for seduction. Meantime, Simser lost his position at Mr. Garuffi's law office and was subjected to such disciplinary measures as the Committee on Professional Standards deemed necessary and appropriate.

The court shares the plaintiff's reprehension that a member of the bar has broken the rules and caused her personal embarrassment and chagrin. But the offender has been punished and plaintiff has failed to demonstrate an injury, in the nature of verifiable and

The rather clear implication of the opinion is that the presence of one or more of the listed aggravating facts would suffice to support a claim for fiduciary breach.<sup>173</sup> With that I fully agree. Any one or more of those facts would sufficiently indicate the kind of injury that is readily susceptible of judicial remedy, and without any significant risk that the claim constitutes a bald attempt at litigational extortion.

It is also arguable that the factual setting presented to the Second Circuit in the *Boon* case was an apt occasion for developing a new substantive rule of proximate cause, although for reasons that would not extend to all situations that have traditionally fallen under the fiduciary breach umbrella.<sup>174</sup> Perhaps *Boon* should be understood as an isolated instance in which the court permitted relaxation of the burden of proving causation because the wrongful act of the defendant-lawyers made it particularly difficult for the plaintiff-client to prove causation. The firm's assistance to the successor client in making the acquisition being attempted by the plaintiff-clients made it difficult, perhaps impossible, for the latter to demonstrate that, but for the lawyers' wrongful act, they would have completed the transaction themselves. While there are problems with such a theory (redolent of the difficulties posed by any "loss of a chance" theory of recovery), at the least, fiduciary theory could be of assistance in properly aligning the relevant considerations.

### B. *The Remedial Reach of Fiduciary Breach Law*

Much like certain claims of fiduciary breach that have worked their way into well-settled categories of legal-malpractice recovery, several equitable remedies have emerged from the history of fiduciary law and are now being commonly applied to lawyers in a fashion that is close to routine. Already discussed have been the equitable remedies of fee-disgorgement<sup>175</sup> and imposition of a constructive trust.<sup>176</sup> Another is the

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compensable emotional distress, or any legal detriment caused by Simser's behavior. Thus, she has not stated a cognizable claim.

The defendant's motion to dismiss the complaint is granted.

*Id.* For an extended discussion, see *Vallinoto v. DiSandro*, 688 A.2d 830 (R.I. 1997).

173. On facts similar to those in *Simser*, the Rhode Island Supreme Court reached a similar result. See *Vallinoto*, 688 A.2d at 830. The plaintiff, however, had not pleaded a fiduciary breach theory and thus the court explicitly refused to pass on possible liability of the lawyer under that theory. *Id.* at 837-38.

174. See *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir. 1994) (discussing the general requirement that the plaintiff in a fiduciary breach claim demonstrate cause); Part IV.B.5.b.

175. See *supra* Part III.A.

176. See *supra* Part III.B.

remedy of injunction, which has occasionally been applied by courts to prevent a lawyer's threatened or continued fiduciary breach.<sup>177</sup> In all such instances, the court is not hampered by the problems of indeterminate theory that hampers articulation of fiduciary breach theory in equal-claims settings. In each area, the relevant substantive and remedial law is relatively well-settled. In none of those areas is it likely that the court will be confronted with a needless proliferation of theories of liability. And, to the extent that any such instance should arise similarly to that considered here—of entire overlap between a negligence claim and a fiduciary breach claim arising out of the same set of facts—the court should engage in a similar pruning of liability theories of the kind urged here.

## VII. CONCLUSION

There is much appeal in the original suggestion of Professors Anderson and Steele<sup>178</sup> for creating, through judicial decision or legislation, a unitary cause of action against a lawyer for misconduct causing a client harm. While not separately analyzed here, in many jurisdictions there seems to be a comparable proliferation of additional and parallel theories in legal-malpractice litigation through recognition of such theories as breach of contract. In fact, in a strange reversal, Illinois—the jurisdiction that has been perhaps most prominent in not permitting a client to plead alternatively both fiduciary breach and negligence on the same facts<sup>179</sup>—has nonetheless permitted the plaintiff-client to plead and proceed to trial with alternative theories of both negligence and breach of contract for the same wrongful conduct by the lawyer.<sup>180</sup> It would seem that alternative maintenance of contract and tort theories is subject to many of the same criticisms as those that should prevent alternative maintenance of fiduciary breach and negligence. Notably, New York courts have treated both fiduciary breach claims and

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177. *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277 (Pa. 1992) (affirming the trial court's grant of injunctive relief against a law firm proceeding against a former client). *See also* *Cord v. Smith*, 338 F.2d 516, 519 (9th Cir. 1964), mandate clarified, 370 F.2d 418 (9th Cir. 1966); *Oxford Dev. Minn., Inc. v. County of Ramsey*, 428 N.W.2d 434 (Minn. Ct. App. 1988) (issuing a preliminary injunction against a county attorney who participated in tax litigation or otherwise assisted county agents); *Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 986 P.2d 35 (Or. Ct. App. 1999) (ordering an injunction against former members of a corporate client's general-counsel staff); *cf. In re Polur*, 579 N.Y.S.2d 3 (N.Y. App. Div. 1992) (disciplining a lawyer for violation of disqualification order and injunction enforcing disqualification).

178. *See* Anderson & Steele, *supra* note 1.

179. *See supra* notes 127-36.

180. *Collins v. Reynard*, 607 N.E.2d 1185 (Ill. 1992).

those based on contract as susceptible to the same restrictive rule when they are pleaded simply as another way of describing negligence.<sup>181</sup>

Much of the needless and messy proliferation of fiduciary breach theory is court-created; it seems susceptible to repair through the same common-law process. Courts should resist the appeals of lawyers for plaintiff-client to proliferate theories of recovery that merely overlap each other. Principally, that should result in elimination of the equal-claims version of the fiduciary breach theory. That does not entail that courts also cut back on legitimate uses of such theories for intentional lawyer wrongdoing, for traditional equitable remedies, and as an occasional basis for recognizing otherwise compelling client claims that fall outside hitherto, traditional standards for negligence-based recovery. As discussed here, all those are legitimate, if more limited, roles to play in righting the harms caused by lawyer wrongs.

#### QUESTION AND ANSWERS

PROFESSOR SIMON: Thank you very much, very provocative. And we invite questions. Now it's the audience's turn to do its job.

MR. NELSON: Cliff Nelson. The question is, it's my understanding that punitive damages are available in a breach of fiduciary duty where the cause of action is framed as breach of fiduciary duty, whereas in a more typical legal malpractice action you would be limited to compensatory damages.

PROFESSOR WOLFRAM: It turns out not really to be so. You can find authority for that, but I think those are today almost words. Most fiduciary duty cases say that fiduciary duty simply addresses the question of the standard; and every other component of legal malpractice including proximate causation, damages, et cetera, and limitation on damages applies, so that if you want punitives you have to prove intentional, malicious conduct, whatever the local standard is. So it turns out that's not a differentiation. I go through a long exercise in which I try to tease out things like punitive damages, different statutes of limitations, et cetera, as indicators of differences between them. That, it turns out, is not much of an indicator.

PROFESSOR ZIEGLER: Carol Ziegler. I look forward to reading the paper. I guess I have always thought about breach of fiduciary duty claims as having the aroma of a betrayal that was going on.

PROFESSOR WOLFRAM: And being careless of a client's cause of all action is not betrayal?

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181. See *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 780 N.Y.S.2d 593, 596 (N.Y. App. Div. 2004).

PROFESSOR ZIEGLER: Different kind of betrayal. This is my question. If we were to abolish this separate claim, what would happen to a causation and would what you now consider something suitable for breach of fiduciary duty claim, confidentiality breaches, conflict of interest problems, where but-for causation was relaxed? Would that persist or would we have but-for causation for the entire claim of legal malpractice?

PROFESSOR WOLFRAM: I couldn't begin to tell you based on every decision. But every category of decisions that is treated, for example, conflicts of interest or misuse of client confidential information, you can also find pleaded, proved and judgments affirmed on a theory of legal malpractice. In other words, it's not necessary to have fiduciary breach in order to reach that result. You get it with legal malpractice. I don't want to pretend to say that there is an exact equivalent or that there is no difference. Plainly, for example, the *Milbank Tweed v. Boon*<sup>182</sup> case thought, on grounds sufficient to the court, at least, that there was an important difference and that their proximate causation standard should be more generous because it was a fiduciary breach case. I have a different explanation, although it somewhat imperfectly covers the facts. And that is, where a lawyer's act has removed the possibility of the plaintiff demonstrating the presence of proximate causation, that's an appropriate occasion, at least to cast the burden on the lawyer, of demonstrating lack of causation. The court didn't quite go that far because it required the plaintiff to show some causation.

PROFESSOR ZIEGLER: But should there be a remedy for misuse of the client confidential information absent provable but-for damages?

PROFESSOR WOLFRAM: Absent what?

PROFESSOR ZIEGLER: What I'm asking is should there be a breach—should there be a remedy for conflicts or for breach of use of confidences, even if you cannot establish causation? Even if you can't establish specific damages related to the breach?

PROFESSOR WOLFRAM: Okay. Damages—if by damages you are including the plaintiff's legal fees that the plaintiff client was paying to the lawyer at the time the disclosure—presumably unknown to the client—was being made, there is a remedy for that. And that's the disgorgement remedy. The disloyal agent cannot keep the compensation. And lawyers, at least going forward, can't keep the fruits of work done while, for example, violating the rights of their client.

PROFESSOR ZIEGLER: One more word then I'll yield. What

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182. *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537 (2d Cir. 1994).

about punitive damages in that kind of circumstance?

PROFESSOR WOLFRAM: I think you and I can readily imagine many cases in which punitive damages would fit a jurisdiction's description. It would be outrageous; very likely it would be almost malicious misuse. I can also imagine hypotheticals, and maybe so can you, in which it would be maybe accidental that one has done this, where they wouldn't be available.

PROFESSOR FREEDMAN: Chuck, you're right, I have never adequately dealt with this issue and I have found this very interesting and important and provocative. My concern is that of the first speaker. A lawyer malpractice case is a negligence case. And with regard to punitive damages, I don't think you are going to get—you are less likely, certainly, to get punitive damages even for willful wrong or for reckless disregard. I think there is more authority historically that a willful or reckless breach of a fiduciary obligation will result in punitive damages. And I think I would rather be, from what I remember of the cases I have seen, I would feel myself representing a plaintiff, a former client, in a much stronger position arguing for punitive damages where the breach of the fiduciary obligation, say the conflict of interest, as in *Milbank Tweed* you mentioned, is a particularly egregious one, a willful one, a reckless one, however you want to characterize it, than trying to get punitive damages in what a court is more likely to look at as professional negligence, and you don't get punitive damages for negligence.

PROFESSOR WOLFRAM: Well, I think you're right. At least on the second point you are plainly right. As a plaintiff you would rather have every possible shaft to throw. But that doesn't necessarily mean that the system ought to accord that kind of election to the plaintiff. You are positively right that it would be easier to make out whatever the standard is for punitive damages if you start from the base of the typical rhetoric that is given to the jury in the judge's instruction. And certainly the experts can argue it based on fiduciary breach decisions. Which seems to create this very, very high road that lawyers must comport with, unlike legal malpractice where it looks like a much more middling road. I guess on your first point, I just read the cases somewhat differently. At least what the cases are saying, what they seem to be doing, is to apply the same standard that—the punitive damages standard that's applied in all of tort law or negligence cases to the particular field of professional negligence. Final point in all of this, obviously, is that most plaintiffs stay away from punitive damages because they don't want to run into a problem in collecting a judgment out of an insurance company. They might want to get leverage, but punitives are found very rarely in legal malpractice cases, the pleading of them.

MR. SHIRLEY: Evan Shirley. In lawyer malpractice cases, many jurisdictions allow evidence of violation of the lawyer disciplinary rules to be introduced. Is that true in breach of fiduciary duty as well?

PROFESSOR WOLFRAM: I don't know any differentiation. That's pretty standard across the country though, with a wrinkle in a jurisdiction or two. In Washington, for example, you can talk about the lawyer rules but you can't say "lawyer rules." You have to frame it somewhat differently.

MR. SHIRLEY: Doesn't matter between legal malpractice and fiduciary duty?

PROFESSOR WOLFRAM: No, the courts seem to be as willing in each area to let experts rely on them, to get instructions out of the lawyer code rules, etc., no differentiation.

PROFESSOR LUBET: That was my question.

PROFESSOR WOLFRAM: Some people just like to get up as often as they can to show off their long-standing loyalty to the White Sox. That hat that Steve has on, I want you to know, is an old White Sox hat. He's been a fan since—

PROFESSOR LUBET: 1952. The hat is from 1967.

PROFESSOR POWELL: My question or comment can't be put as succinctly. I'm Burnele Powell, University of South Carolina. They say that you remember the games that you lost, you know, over time. I was out in Missouri and asked to advise on an ethics matter involving a nationwide corporation that had an attorney working for them. The attorney had worked for them for ten or fifteen years, had written up all their franchise contracts. And then one day he retired and the next day wrote all the franchisees in the country and said, I have been representing the company for the last fifteen years, wrote all of their contracts for them, and I am now ready to extend my services to you. The company, of course, did not think that this was a wise move and they then went into District Court to try to stop this. Now that you have had a chance to look at malpractice and breach of fiduciary rules, how would you handle a case like that, in terms of the model that you are laying out for us?

PROFESSOR WOLFRAM: Burnele, it's not really hard. I mean, if this agent were a deliverer of milk, the exact same objection would be raised. The fact that they are in a confidential relationship—or had been until they left the employ—of an employer/client to whom they owe obligations in the lawyer code, makes it an easy case whatever the theory is. I think it can be handled as legal malpractice, it can be handled as breach of fiduciary duty. It's an enjoined offense. I would think it's a violation of the rights of the plaintiff.

PROFESSOR POWELL: Perhaps it was too easy. The court decided that there was no showing that damages had occurred in this circumstance and refused to issue an injunction on it.

PROFESSOR WOLFRAM: Was that reported?

PROFESSOR POWELL: You know, I don't know. I doubt that it was. I thought it was so egregious that I would not have reported it.

PROFESSOR WOLFRAM: Maybe that's why it is not reported.

PROFESSOR POWELL: But the view that was taken by the court was that no injuries could be shown at this point. Of course, what the parties were arguing was that merely by putting the company, the client, the former firm in the position where they have to wonder what is being disclosed was enough of a breach and should have been enjoined.

PROFESSOR WOLFRAM: That's a bizarre case. There are several other cases where courts have granted and affirmed injunctions in circumstances very similar to that.

PROFESSOR POWELL: One last point. I don't remember the name of the attorney that was involved, but the case involved Anheuser-Busch. So it was an interesting episode.

PROFESSOR WOLFRAM: Yes.

PROFESSOR SIMON: I have a question. Chuck, it seems that almost every plaintiff's lawyer, well, many plaintiffs' lawyers, allege a conflict of interest when they sue either for legal malpractice or breach of fiduciary duty, but one of the reasons they like to do that is that they can say that a conflict of interest is a breach of fiduciary duty. And yet there are no automatic damages for a conflict of interest. Why are plaintiffs' attorneys so interested in pleading conflicts of interest as part of legal malpractice and breach of fiduciary duty cases?

PROFESSOR WOLFRAM: Well, I think it's because of the forensic advantage. You can get your expert witness on the witness stand and without objection or at least without successful objection, the expert can use the talk of or maybe read right from and identify the source; *Meinhard v. Salmon*<sup>183</sup> seems to insist on a standard higher than what legal malpractice does. Legal malpractice is a somewhat ordinary standard of care exercised by the lawyer of ordinary, reasonable, et cetera. That's not as high of a road as *Meinhard* seems to be. I'm not sure it was intended to be, but maybe it was. It's that forensic advantage that I think plaintiffs' lawyers are seeking. And often, as I say, you will find judges instructing the jury using words like those in *Meinhard*. That's pretty powerful ammunition. If I was a plaintiff's lawyer in any case, I would plead fiduciary duty, fiduciary breach.

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183. 164 N.E. 545 (N.Y. 1928).

PROFESSOR GILLERS: Steve Gillers. To answer Roy's question and make a few comments about Charles' paper, I think another reason a law firm suing a law firm might assert conflicts is that there may have been multiple choices available to the defendant law firm, A, B or C. The defendant law firm chose A. That might have been reasonable absent the conflict. But plaintiff's law firm may want to argue that the defendant law firm was not in a position to make an independent objective judgment as among the three strategies, A, B or C, because B would impinge on the interests of another client. And so, it's not purely forensic in the sense of having a platform for argument or exciting the jury, but it may explain a choice harshly that, absent the conflict, would appear reasonable.

PROFESSOR WOLFRAM: Steve, I don't disagree with that, but what I'm saying about that though is that it is certainly well within the established bounds of legal malpractice law to make exactly that argument. You don't need fiduciary breach.

PROFESSOR GILLERS: I was just responding to Roy's forensic question. And I think it's valuable to do what you are doing because I have, as we all have, experienced rather casual use of both theories of recovery in the case law. As far as *Milbank Tweed* goes, it is true that the Second Circuit talked about a lesser burden of causation in a breach of fiduciary duty action. But in a later case in the circuit, it casts serious doubt on that position. And then in a recent case a state supreme court justice in a litigation against Weil Gotshal relied on the *Milbank* precedent for the lower burden of proof. And on appeal, this will give you some comfort, the First Department said no, there is not a lower burden of proof, and Federal suggestions that under New York law there is, are wrong.<sup>184</sup> It also said that in this jurisdiction we have always said that when there are fiduciary duty claims and malpractice claims, they merge and they become a malpractice claim. So, New York may be following the course you advocate. My last point is that I would urge you not to create a closed universe of fiduciary duty claims; that is, you identified three categories where you think they are legitimate as independent claims. And I agree with your categories. I think you might try to tease out an overarching principle and not suggest that those can be the only categories. Because there may be others where it fits, where it's appropriately in sync with those three categories that we cannot now foresee. I think that if you do that and provide guidance, I think that opportunity to get the courts to accept the divisions you are urging is

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184. See *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills Inc.*, 780 N.Y.S.2d 593 (N.Y. App. Div. 2004).

heightened.

PROFESSOR WOLFRAM: Well, possibly. I, of course, made the effort in thinking through these issues to come up with a concept of fiduciary breach that would make good sense and stand on its own feet, separate and apart from legal malpractice. But I despair of the effort because I believe that almost every obligation a lawyer has is rooted in fiduciary concepts. Again, in response to a comment made earlier, I simply fail to understand why what a lawyer is doing for a client, whether done carelessly or not, is irrelevant to fiduciary concepts. It seems to me that for most clients in terms of importance, it's the most important thing a lawyer can be doing. "Do my job carefully for heaven's sake. Also do it loyally, also do it with confidentiality. But for heaven's sake do it well, do it competently." In the Restatement, for example, when we list the duties of a lawyer to a client in the rationale section, that's the concept we rely on, the fiduciary nature of the relationship. The entrusting of the task from client to lawyer is the reason for requiring competence. I can't cabin it, at least I can't cabin it in a way that makes sense.

MR. TEMPLE: Ralph Temple. Your complaint that it gives the lawyer, the plaintiff's lawyer, a rhetorical advantage when you've got a category of intimacy between the lawyer and the client that is higher, that falls into this spectrum that they call fiduciary duty, and you are talking about an even higher standard of care and candor, that's no different than talking about negligence, gross negligence and reckless disregard. It's language, it's linguistics. And it sounds to me that the more we talk about it, when you stop looking at these advantages that the plaintiffs get out of a higher duty of care, out of an even more than usual intimacy in the relationship, that it sounds appropriate.

PROFESSOR WOLFRAM: Well, I don't argue with it at a level of generality. I don't even argue with it as a concept of morality. I don't argue with it in terms of policy. But my problem with it is using it as a standard. And I misled you if you see equivalence between legal malpractice and breach of fiduciary duty, if you see the equivalence there between negligence and gross negligence. It's actually negligence and less than negligence. The higher standard is one that the lawyer has to comply with which gives the plaintiff a lower burden.

MR. TEMPLE: I'm saying it's the language though, it's what you are calling a rhetorical advantage. You are calling it an unfair rhetorical advantage and I'm raising the question of whether it isn't a fair rhetorical advantage. Because it's language which is what gross versus ordinary negligence is. It's language that characterizes a sense of values that we have about it. And similarly here when you have these categories

where the relationship has been more intimate, where the client had even a greater degree of trust in the lawyer, for whatever the subject matter was, than is the normal degree of trust, the plaintiff should have that rhetorical advantage.

PROFESSOR WOLFRAM: That's not how the concept is used though. It's used in every conflict-of-interest case. There is no decision outside of Illinois and Maryland, and a couple of other states, that says that you can't plead a conflict-of-interest legal-malpractice case alternatively as a breach of fiduciary duty case. And most of those cases are saying that it's just another way of saying legal malpractice. In other words, it's not, at least in the court's contemplation, a higher standard of conduct exacted from the lawyer, a lower standard of proof exacted from the plaintiff. It's the same thing using different words. If that's the case, if we take courts at their word for that, it seem to me it is unfair to use *Meinhard v. Salmon* language to decide what is meant to be the same thing as legal malpractice.

PROFESSOR SIMON: Thank you very much. [Applause]