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Roy Ryden Anderson
Southern Methodist University, Dedman School of Law

Walter W. Steele Jr.

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FIDUCIARY DUTY, TORT AND CONTRACT: A PRIMER ON THE LEGAL MALPRACTICE PUZZLE

*Roy Ryden Anderson**
*Walter W. Steele, Jr.***

I. INTRODUCTION

HOW to deal with problematic lawyer behavior has become a vogue subject.[1] The ever increasing number of lawsuits against lawyers over the past decade has resulted in increased thinking about the law of attorney malpractice and has resulted in dramatic changes and developments in the practice of law and in attitudes about law practice.[2]

Three distinct causes of action are potentially available to clients for misbehavior by their lawyers: (1) breach of fiduciary duty; (2) breach of contract; and (3) the tort of malpractice. The courts, however, are not in agreement on the exact nature of and parameters for these causes of action. Many refuse to recognize the distinctions and dichotomies between and among the actions, and conclude that regardless of how the cause is characterized it is essentially a tort action for malpractice.[3] Such a conclusion, however, is much too pat. In both pleading and proof, precisely framing the

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* Professor of Law, Southern Methodist University. B.A., Texas Christian University, 1966; J.D., Southern Methodist University, 1969; LL.M., Yale University, 1975.

** Professor of Law, Southern Methodist University. LL.B., Southern Methodist University, 1957; LL.M., University of Texas, 1969.

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1. *See generally* DENNIS J. HORAN & GEORGE W. SPELLMIRE, ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE (1989); DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE (1980); WILLIAM H. GATES & SHEREE L. SWETIN, ABA STANDING COMMITTEE ON LAWYERS PROFESSIONAL LIABILITY, CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER (1979); ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW, PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION (1977).

2. DUKE NORDLINGER STERN & JOANN FELIX-RETZKE, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE (1983); JEFFREY M. SMITH, PREVENTING LEGAL MALPRACTICE (1981).

3. *See* Chicago Title Ins. Co. v. Holt, 244 S.E.2d 177, 180 (N.C. Ct. App. 1978); *see also* Woodburn v. Turley, 625 F.2d 589, 592 (5th Cir. 1980); Pham v. Nguyen, 763 S.W.2d 467, 469 (Tex. App.—Houston [14th Dist.] 1988, writ denied); Black v. Wills, 758 S.W.2d 809, 814 (Tex. App.—Dallas 1988, no writ); Gabel v. Sandoval, 648 S.W.2d 398, 399 (Tex. App.—San Antonio 1983, no writ); Citizens State Bank v. Shapiro, 575 S.W.2d 375, 386 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (finding whatever label is placed on a cause of action for legal malpractice, the action is in the nature of tort).

nature of the wrong can have a substantial impact on the outcome of the case, depending upon which cause of action is being alleged.

Although the action for negligence is the most common and well-developed form for a malpractice claim, the emerging action for breach of fiduciary duty, albeit often misunderstood, may offer the greatest potential for recovery for a client injured by her attorney's wrongdoing.[4] Despite this great potential, the recent explosion in malpractice litigation has in the main centered on the common law tort of negligence, and the doctrine surrounding breach of fiduciary duty has been slow to develop.

Commentators have long noted that "[f]iduciary obligation is one of the most elusive concepts in Anglo-American law."[5] In general, the fiduciary relationship between attorney and client imposes upon the attorney a "duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client's interest."[6] However, how this standard of care plays out in the attorney-client relationship has been little explored by the courts.

Whether the cause of action is for negligence, breach of contract, or violation of the fiduciary standard, a central purpose of the particular cause of action is to guard against and remedy exploitation of the power lawyers have to control clients' lives and property. Of course, the degree of protection afforded and the ultimate remedy available to the client may vary significantly depending upon the particular cause of action at issue. In this article we seek to demonstrate that this critical choice of law is too often ad hoc and accidental, and that, even when the choice is correctly made, the differences

4. Commentators suggest that the tort of breach of fiduciary duty, while involving a wrong distinct and independent from professional negligence, still constitutes legal malpractice. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 11.1, at 633 (3d ed. 1989). What this generalization overlooks is that legal malpractice is professional negligence. Like all negligence, professional negligence is failure to perform. Breach of fiduciary duty is *not* failure to perform. Breach of fiduciary duty is failure to adhere to the authority granted by the client. An attorney-client relationship imposes a fiduciary duty on the lawyer to represent the client with undivided loyalty. Failing to give undivided loyalty does not necessarily mean that the attorney *performed legal services* negligently. Instead, failure to give undivided loyalty to the client means that the attorney performed the legal service *outside the scope of the authority* (fiduciary duty) granted by the client. The importance in understanding the particular nature and elements of breach of fiduciary duty is that "[c]ourts throughout the United States have not hesitated to impose civil sanctions upon attorneys who breach their fiduciary duties to their clients, which sanctions have been imposed separately and apart from professional discipline." Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1286 (Pa. 1992). Thus, the sanctions for breach of fiduciary duty exist separate and apart from not only professional malpractice, but also professional disciplinary proceedings conducted by the state bar associations in conjunction with the Code or Rules of Professional Responsibility.

5. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879. "Little has been written about the origin of fiduciary law, the rationales behind the creation of fiduciary duties, the remedies for violation of these duties, and the methods by which courts fashion such remedies." Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 796 (1983). Additionally, it is clear that the fiduciary duties and obligations and the breach of those obligations are separate concepts from the jurisprudence of legal ethics. Fiduciary obligation brings its own set of enforcement mechanisms and rules which are totally independent from the various state rules of ethics and enforcement procedures.

6. Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978).

and distinctions among the available causes of actions are often ignored by the courts.

In deciding whether or not to grant the particular cause of action and in deciding the available remedy, the courts must make policy decisions. Should the remedy available to the client be measured against the amount of harm caused by the attorney's misbehavior? Should legal presumptions, rebuttable or irrebuttable, be applied so as to afford greater protection to clients from attorneys than they would have from other vendors of goods and services in the market place? Against what standard should the attorney's conduct be measured: reasonableness, *uberrima fides*, or some other? Should the standard vary depending upon the nature of the cause of action? These and other issues comprise our agenda.

II. THE RATIONALE OF CAUSES OF ACTION

Legal remedies usually do not develop prospectively. Absent legislative intervention, a dispute between parties must occur before a legal remedy develops. If a particular type of dispute reappears with sufficient frequency, and if the courts determine that an interest in dispute is worthy of legal protection, the courts may develop a remedy to resolve that dispute that acquires the status of a cause of action.[7] Once a type of dispute achieves this status, an ordering of relationships between parties may occur as they attempt to conform their conduct to reflect their respective legal rights announced by that cause of action. Thus, a cause of action may serve not only as an outline to be used by a court to settle disputes between parties, but it may also channel the conduct of parties within the legal boundaries established by the cause of action.

Every distinct cause of action allocates the rights of the respective parties through its particular elements unique to that cause of action. Some of these allocations are procedural in nature and some are substantive. In either case, the purpose of the allocation is to balance the respective rights of the disputants. Thus, the cause of action establishes a public policy to which society demands that its citizens conform. Nothing requires that the rights of the parties to a particular cause of action be balanced. One party may be awarded a particular advantage over the other based on a policy decision arising from the nature of the relationship between the parties.

Willis v. Maverick[8] is a good example of a court's balancing procedural rights between the parties in a legal malpractice case. The issue before the court was whether the statute of limitations in a legal malpractice case

7. For example, in many states statutory causes of action now exist for consumers to seek redress for wrongdoings of providers of goods and services. *See* Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987 & Supp. 1993) ("DTPA"). Before the enactment of the DTPA consumers were forced to seek remedies through common-law types of actions such as breach of warranty, breach of contact, fraud, or others. *See* John R. Harrison, Jr., Comment, *The Deceptive Trade Practices-Consumer Protection Act: The Shield Becomes a Sword*, 17 ST. MARY'S L.J. 879, 883-84 (1986).

8. 760 S.W.2d 642 (Tex. 1988).

should begin to run from the time the alleged malpractice occurred, or instead, from the time the aggrieved client discovered, or should have discovered, the alleged malpractice. Obviously, applying the customary *occurrence* rule would favor attorneys, and applying the *discovery* rule would favor clients.

The Supreme Court of Texas noted that, although the lower courts in Texas had reached divergent results on the question, the issue was one of first impression for it.[9] The court further noted that the occurrence rule was the general rule followed in Texas for medical malpractice, the cause of action accruing when the facts came into existence that authorized a claimant to seek a judicial remedy regardless of whether the claimant might reasonably have discovered the wrong.[10] The case at bar required the court to decide whether to deviate from the general rule in adjusting the rights of the parties.

For various policy reasons and because of the special nature of the attorney-client relationship, the court chose to favor clients by adopting the discovery rule in legal malpractice cases.[11] The court found that the policy justifications long relied upon by Texas courts for adopting the discovery rule in other kinds of causes of action were no less compelling in legal malpractice actions.[12] The court emphasized that attorneys are expected, as professionals, to function at a high level of expertise.[13] Although the client may, in the sense of the *occurrence* rule, be well aware of all the facts relating to his attorney's performance, the client often will not have sufficient legal acumen to perceive initially that the attorney's performance did not measure up.[14] The court reasoned that the special relationship between attorney and client further justified imposition of the *discovery* rule.[15] That relationship requires, *inter alia*, that the attorney make full and fair disclosure to the client of all facts material to the client's representation.[16] The court concluded that application of the discovery rule would vindicate the full disclosure requirement by preventing the fiduciary from becoming immune from liability because of the client's inability to perceive the attorney's nondisclosure.[17]

Just as with procedural rights, courts may balance substantive rights of parties to level the playing field for the weaker party. A good case in point is

9. *Id.* at 645.

10. *Id.* at 644.

11. *Id.* at 645-46; *see also* Jampole v. Matthews, 857 S.W.2d 57 (Tex. App.—Houston [14th Dist.] 1993, writ requested).

12. *Willis*, 760 S.W.2d at 645.

13. *Id.*

14. *Id.* (citing Stan K. Ward, *Legal Malpractice in Texas*, 19 S. TEX. L.J. 587, 613 (1978)).

15. *Id.*

16. *Id.*

17. *Id.* at 645-46. The court relied heavily in its reasoning on the watershed decision of the California Supreme Court in Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421 (Cal. 1971).

Rice v. Perl,[18] wherein Rice retained Perl to represent her in a personal injury action. Perl subsequently settled the case with the insurance adjuster. The insurance adjuster was also on Perl's payroll, a fact that Perl did not disclose to Rice. Later, upon discovering that the adjuster was simultaneously in the employ of both her lawyer and the insurance company, Rice sued her attorney. Rice did not allege any dissatisfaction with the amount of the settlement Perl had obtained for her, but maintained that Perl had breached the fiduciary obligation of full disclosure by not informing her of the adjuster's dual employment.

In the context of the present discussion, it is important to note that application of customary legal rules would tilt the outcome of the case heavily in favor of the attorney. Although the attorney had violated the duty of full disclosure by a fiduciary, the attorney's wrong had caused no injury to any interest of the aggrieved client normally protected by law. The client had not suffered damages in either tort or contract, since she was no worse off financially than had full disclosure been made. Further, the client had apparently not relied to her detriment on the attorney's nondisclosure, nor had the attorney been unjustly enriched by his failure to disclose his relationship with the insurance adjuster. In short, the client had not suffered an injury normally compensable in a tort action (being no worse off than had the wrong not occurred), nor had the client suffered injury to either her expectation, reliance, or restitution interests, the interests normally protected by the law of contract.[19]

Nevertheless, the court balanced the interests of the parties in favor of the client by fashioning a unique legal remedy outside the normal course. Under this remedy, the attorney was held to forfeit his right to compensation and was required to refund all legal fees earned to the client.[20] The court justified adjusting the rights of the parties in this fashion because of basic policy considerations requiring strict fidelity of the attorney to the interests of both his clients and the courts.[21] Notwithstanding the lack of any cognizable injury to his client, the attorney was required to forfeit all legal fees earned under the tainted relationship.[22]

III. THE NATURE OF FIDUCIARY DUTY

With its roots in equity, the jurisprudence of fiduciary duty has remained fluid over time. For purposes of the present discussion, it is important to explore the nature of fiduciary duty, and why it exists, in order to distinguish an action for breach fiduciary duty from actions by clients against attorneys for breach of contract or legal malpractice. All attorneys realize that a fiduciary relationship exists with their clients, but the precise nature and mean-

18. 320 N.W.2d 407 (Minn. 1982).

19. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 (1979) (establishing the expectation, reliance and restitution interests as those protected by the law of contract remedies).

20. *Rice*, 320 N.W.2d at 411.

21. *Id.*

22. *Id.*

ing of that relationship is quite vague.[23] Analyzing the nature and extent of a lawyer's fiduciary duty to a client is not easy. The courts have purposely left its parameters vague so as to encompass new situations as they arise.[24] Indeed, violation of the fiduciary standard is often given the sobriquet "constructive fraud," and one court has suggested the following trenchant rationale for leaving indefinite the boundaries of fraud-related causes of action:

> Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean form at will, were courts to cramp themselves by defining it with a hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition. Messieurs, the fraud-feasors, would like nothing half so well as for courts to say they would go thus far and no further in its pursuit. Accordingly definitions of fraud are of set purpose left general and flexible, and thereto courts match their astuteness against the versatile inventions of fraud-doers.[25]

Thus, although definitions of an attorney's fiduciary duty to her client abound, they are framed in quite general terms. The following is typical: "[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."[26] Fiduciary obligation is shaped by the discretionary control that an attorney usually has over a significant aspect of the client's life or assets, and by the fact that very often the interests of the lawyer are not always the same as, and may be in conflict with, those of the client.[27] In *Garrett v. BankWest*[28] the court explained the special nature of a relationship that gives rise to fiduciary obligation in this way:

> There is no invariable rule which determines the existence of a fiduciary relationship, but it is manifest in all the decisions that there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions, *giving to one advantage over the other.*[29]

The leading commentary adds that "the basic fiduciary obligations are two-fold: undivided loyalty and confidentiality. Although the phrasing . . . is varied and often dependent upon the context of particular circumstances,

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23. DeMott, *supra* note 5, at 879-80; *see also* Frankel, *supra* note 5, at 797-808.

24. Equity jurisprudence is the parent of the law of fiduciary obligation, and since it was the function of equity to fill the gaps of the more rigid common law, one might expect that the law pertinent to fiduciaries would be somewhat fluid and amorphus. Because the concept of fiduciary and the rules pertaining thereto developed in the law of equity, it follows that the substantive law of fiduciary obligation is quite fact specific. *See* DeMott, *supra* note 5, at 881-82.

25. Stonemets v. Head, 154 S.W. 108, 114 (Mo. 1913) (citations omitted).

26. Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

27. *See generally* Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking — Some Theoretical Perspectives*, 80 NW. U. L. REV. 1, 4 (1985).

28. 459 N.W.2d 833 (S.D. 1990).

29. *Id.* at 838 (quoting Yuster v. Keefe, 90 N.E. 920 (Ind. App. 1910)).

this rule exists in every jurisdiction in the United States."[30] Fiduciary duties include acting with utmost fairness to clients,[31] making full disclosure,[32] avoiding representation which conflicts with that of the client,[33] and preserving confidences of the client.[34] The fiduciary obligation arises from the ascendancy of the attorney in relationship to his client because:

> [W]hen an agreement creates a relationship in which one party's decisions can severely limit the benefit that the other party will derive form the agreement or drastically increase the cost of performance, the obligation to act in good faith may constrain decisions that would otherwise be within the parties' independent discretion.[35]

Such statements emphasize the deprecation with which the fiduciary must often regard his own interests when they oppose those of a client.[36]

This core concept requiring self deprecation by the attorney because of his bargaining power and general ascendancy over his client contrasts markedly with the general presumptions of the law of contract regarding the parties' freedom to contract. Contract law generally assumes that parties bargain at arms length, whether or not the parties actually share equal bargaining leverage, and that the resulting bargain governs their relationship.[37] Fiduciary

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30. MALLEN & SMITH, *supra* note 4, § 11.1, at 631.

31. Sanguinetti v. Rossen, 107 P. 560, 563 (Cal. Ct. App. 1906); *In re* Anderson, 287 N.E.2d 682, 684 (Ill. 1972); *In re* Broverman, 239 N.E.2d 816, 819 (Ill. 1963); Greenbaum & Browne, Ltd. v. Braun, 410 N.E.2d 303, 306 (Ill. App. Ct. 1980); Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978).

32. Crean v. Chozick, 714 S.W.2d 61, 62 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

33. Hunter v. Troup, 146 N.E. 321, 324 (Ill. 1925); Easley v. Brookline Trust Co., 256 S.W.2d 983, 989 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.); Kurbitz v. Kurbitz, 468 P.2d 673, 674 (Wash. 1970); *see also* 7a C.J.S. *Attorney and Client* § 150 (1980).

34. Buntrock v. Buntrock, 419 So. 2d 402, 403 (Fla. Dist. Ct. App. 1982); *Hunter*, 146 N.E.2d at 324; *Kurbitz*, 468 P.2d at 674-75.

35. DeMott, *supra* note 5, at 896.

36. Authorities provide lofty explanations about the inherent duties and the justification for these responsibilities as well as for the extraordinary burdens placed on the attorneys:

> In all relations with his client, an attorney is bound to the highest degree of fidelity and good faith. Strict adherence to this rule of conduct is required by time-honored, deeply rooted concepts of public policy. Since the relationship puts the attorney in a position to avail himself of the necessities of his client and to gain knowledge that can be used to the client's disadvantage, any business transaction between attorney and client is presumptively invalid in law — a presumption that the attorney can overcome only by the clearest and most convincing evidence, showing full and complete disclosure of all facts known to the attorney and absolute independence of action on the part of the client. The burden of proof is always upon the attorney, as a fiduciary, to establish clearly the absence of any taint in the transaction; otherwise it is voidable.

Melson v. Michlin, 223 A.2d 338, 344 (Del. 1966).

37. We do not mean to suggest that parties' freedom to contract is unfettered or that the courts do not have broad based power to police contracts. However, the standards of review in contract such as unconscionability and illegality, or even the good faith/bad faith dichotomy, are far less strict than the fiduciary standard of *uberrima fides*. Even regarding standardized form contracts, which no doubt constitute the documentation of the vast majority of dickered deals, wherein one party clearly has the dominant bargaining position over the other, simple fairness is at best the strictest standard suggested by the law of contracts. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979) (suggesting that in standardized agreements, where one party has reason to believe that the other would not assent to a particular term in the writing were he made aware of it, the term does not become part of the agreement). *See*

relationships, particularly those involving attorney and client, usually begin with a contract. But in the eyes of the law, fiduciary relationships are never arms length. With respect to such agreements, the law jettisons the general presumptions and standards of the law of contract and applies instead the stricter fiduciary standard.[38] Of course, the express terms of fiduciary agreements are not irrelevant to ascertaining the fiduciary's obligations, but the intention of the parties manifested by the agreement does not control in the same way as it would under typical contract doctrine.[39]

The jurisprudential underpinnings of fiduciary obligation have never been mapped successfully. Scholars have examined several competing theories as justification for fiduciary law, including the so-called property theory,[40] the reliance theory,[41] the unequal relationship theory,[42] the contractual theory,[43] the unjust enrichment theory,[44] the commercial utility theory,[45] and

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generally John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982); W. David Slawson, *The New Meaning of Contract: The Transformation of Contract Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

38. DeMott, *supra* note 5, at 896.

39. *See generally* TEX. DISCIPLINARY R. PROF. CONDUCT 1.08(g) (1991), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1993). The rule states:

> A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

Id. Note that Texas Rule 1.08(g) is identical to the American Bar Association MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1992).

40. The property theory states that "a fiduciary relationship exists where one person has legal title and/or control over property or other advantage, and another person is the beneficial owner thereof." J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 LAW Q. REV. 51, 63 (1981). The property theory is rarely proposed by recent discussion. *Id.*

41. The reliance theory is perhaps the most basic and commonly cited theory of the nature of the fiduciary relationship. The theory postures that the relationship exists where one person places trust, confidence, or reliance in another. Scholars have criticized the theory because it is not analytic but descriptive only and because it is vague. *Id.* at 58-59.

42. The unequal relationship theory developed as a result of the position of the parties who deal with one another. This inequality may be *de jure* as a result of the mere dominion of one over another. Because one party has this inherent power by virtue of his position of dominance, he has certain duties to the dependent party. The vulnerability or inequality of bargaining power is the center piece of the doctrine and the rationale for the resulting duties. *Id.* at 61.

43. The contractual theory defines the fiduciary relationship as one where one party relies on or trusts another and such reliance is accepted. The relationship is not a contract per se, but is at least a contract in form. It is often described as an implied contact or an equitable right. Thus: "Who is a fiduciary? A fiduciary is a person who undertakes to act in the interest of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous." *Id.* at 64-65 (*quoting* Austin Scott, *The Fiduciary Principle*, 37 CAL. L.J. 521, 540 (1949)).

44. The fiduciary relationship exists under the unjust enrichment theory "where one person obtains property or other advantage which justice requires should belong to another." *Id.* at 53. Courts force such a defendant to disgorge any external profits received by a fiduciary as a result of the relationship. Often the remedy is in the form of a constructive trust. *Id.* at 53-54.

45. The commercial utility theory is based strictly on policy rather than morality. The

the power and discretion theory.[46] Although there is no consensus on the one dominant or most correct theory, the fundamental focus of all of these theories is the beneficiary's transfer of power to the principal encumbered by accompanying duties. For the legal profession, the notion of a fiduciary's placing himself on a plane subsidiary to that of the beneficiary is sociologically compatible with the concept of a professional. A professional is "someone who serves another with special knowledge and skill but also at times and in places or circumstances which may be quite inconvenient or unpleasant for the professional. More than by mere competence, the professional is distinguished by special dedication to a spirit of service."[47]

As discussed previously, balancing the rights between disputants is an inherent function of all causes of action. The cause of action for breach of fiduciary duty takes a very distinctive approach to that task. Only the fiduciary is regulated under the cause of action for breach of fiduciary duty, and the cause of action thus takes a myopic focus exclusively on the alleged abuses of the fiduciary "because only he is vested with power that can be abused."[48]

> In contrast to contract and status law, a salient feature of fiduciary law is that it regulates only one of the parties—the fiduciary. . . .
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> . . . In the world of contract, self-interest is the norm, and restraint must be imposed by others. In contrast, the altruistic posture of fiduciary law requires that once an individual undertakes to act as a fiduciary, he should act to further the interests of another in preference to his own.[49]

IV. BASIC JURISPRUDENTIAL DISTINCTIONS AMONG THE THREE CAUSES OF ACTION

We turn now to a brief discussion of the basic jurisprudential distinctions that separate the causes of action by clients against attorneys for breach of fiduciary duty, for tort, and for breach of contract. We will then present a more detailed analysis of the rationality of these three causes of action as resolution mechanisms for disputes between attorney and client. Making the choice between the three causes of action can have an impact upon the reme-

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doctrine finds a fiduciary relationship when the "court feels necessary to hold a person . . . to a higher than average standard of ethics or good faith in the interests of protecting the integrity of the commercial enterprise." Shepard, *supra* note 40, at 56-57. This theory is often manifest in the context of the so-called corporate opportunity doctrine. *Id.*

46. The power and discretion theory involves a two-step analysis of "(a) the power to change the legal position of another, and (b) a discretion in the exercise of that power." *Id.* at 68. The essence of the theory is the power of one party over the other and the relative weakness of the reliant party. The domination does not have to be overt, but instead may arise implicitly because of the respective roles of the parties in the relationship or because of the inherent power the fiduciary has in the relationship. *Id.* at 68-69.

47. Kenneth L. Penegar, *The Professional Project: A Response to Terrell and Wildman*, 41 EMORY L.J. 473, 475 (1992).

48. Frankel, *supra* note 5, at 819.

49. *Id.* at 819, 830.

dies ultimately available to the client. For example, basic procedural defenses which are usually available to attorneys in contract and tort actions may be denied to the attorney if the client's cause of action is for breach of a fiduciary duty.[50] Similarly, defenses based on good faith and reasonable workmanlike performance may be raised by the attorney in contract and tort actions, but if the cause of action is for breach of fiduciary duty, such defenses may not be used.[51]

The basis for fiduciary responsibility is dominance of one person over another. The law of fiduciary obligations presumes from the lawyer's expertise and professionalism a lawyer's dominance over her client. Although the dependent client may choose from among lawyers and even negotiate, often with specificity, terms of the relationship, the lawyer's expertise assures that ultimate power in that relationship will rest with the attorney. Classical contract theory would view the relationship between the contracting parties much differently. Indeed, contract theory celebrates the parties' freedom to contract and presumes arms length bargaining. According to contract theory, parties do not use monopoly to achieve purpose, but instead rely upon persuasion and exchange with each party being free to determine and achieve his own needs from the bargain.[52] Classical contract theory, then, ignores the relational aspect of the transaction and, in so doing, deprives the parties of protections that might arise from the status relationship.[53]

As with all contracts, the attorney-client contract may expressly establish performance obligations and, although attorney-client contracts rarely expressly establish warranties of the level of performance expected from the attorney, many courts have found an implied promise by the lawyer to exercise due care while representing the client.[54] Thus, a suit between a client

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50. *See* Burgin v. Godwin, 167 S.W.2d 614, 619 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.) (holding that lawyer had no statute of frauds defense to contract with client because lawyer had fiduciary duty to warn client of need for writing when contract was orally modified). "A finding that a relationship is fiduciary can result in the avoidance not only of limitation periods, but also of the rules relating to remoteness of damages and other restrictive doctrines." J. C. SHEPHERD, LAW OF FIDUCIARIES 9 (1981).

51. "The presence of good faith and sincere motives may prevent constructive fraud from becoming actual fraud, but cannot excuse noncompliance with the obligations that there be uncompromised fidelity, complete confidentiality and full disclosure." MALLEN & SMITH, *supra* note 4, § 11.3, at 640.

52. For an excellent discussion of classical notions of freedom of contract, see Friedrich Kesslery, *Contracts of Adhesion - Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

53. Of course, much of the recent development in contract law has been marked by an infusion of relational contract theory and its concomitant policing of bargains to root out unfair and opportunistic behavior by a contracting party who takes unfair advantage of his status relation. *Cf.* Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789 (1993) (arguing that Article 2 of the Uniform Commercial Code inadequately addresses the relational aspect of contracts). *See generally* Melvin A. Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107 (1984); Symposium, *Law, Private Governance, and Continuing Relationships*, 1985 WIS. L. REV. 461; Ian R. McNeil, *Relational Contracts: What We Do and Do Not Know*, 1985 WIS. L. REV. 483.

54. Some courts have found implicit in any agreement for professional services a promise to exercise ordinary judgment, care, skill, and diligence in the rendition of the services. Bucquet v. Livingston, 129 Cal. Rptr. 514, 518 (Ct. App. 1976); Floro v. Lawton, 10 Cal. Rptr. 98, 107 (Dist. Ct. App. 1960); Brackett v. Norton, 4 Conn. 517, 524-25 (1823); Kartikes v. Demos,

and his lawyer may be based on a breach of contract without raising issues of negligence or violation of the attorney's fiduciary obligations. In such cases, the allegation is simply that the attorney did not do what the contract, by expression or implication, said that he would do.

On the other hand, when the attorney's performance falls short of that expected of an ordinary, reasonably prudent lawyer, the attorney is guilty of the tort of malpractice. And this holds true whether or not the attorney has violated the terms of the contract or the norms established for him as a fiduciary. Further, the attorney might breach his fiduciary duty to the client even though he has complied fully with the terms of the attorney-client contract and even though the level of his performance has not been substandard. The fiduciary standard of care is not that of an ordinary, prudent lawyer, but a standard of "the most scrupulous honor, good faith and fidelity to his client's interest."[55]

Consequently, all lawyers are necessarily under three concurrent obligations to their clients: (1) to perform their contractual obligations, (2) to perform in representing the client as ordinary, prudent lawyers, and (3) to exercise in that performance utmost good faith and fidelity. The availability of a particular cause of action to a client against her attorney thus depends upon two specific factors: the parameters of the attorney-client relationship and the particular misconduct of the attorney at issue.

V. PARAMETERS OF THE RELATIONSHIP

The formal relationship between attorney and client normally begins with a contract. This contract can vary in complexity on a continuum from, on the one end, a detailed legal document, such as a multi-page conditional fee contract, articulating specific obligations of both parties to, on the other end, a cursory oral agreement concluded by a perfunctory handshake through jailhouse bars. The contract embodies the attorney's contractual obligations, the breach of which gives rise to a cause of action for that breach. The breach need not, however, be of an oral or written obligation, but may result from the nonperformance of an obligation that arises by rational implication

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214 So. 2d 86, 86-87 (Fla. Dist. Ct. App. 1968); Rooker v. Bruce, 90 N.E. 86, 87 (Ind. Ct. App. 1909); Thomas v. Schee, 45 N.W. 539, 540 (Iowa 1890); Gill v. DiFatta, 364 So.2d 1352, 1356 (La. Ct. App. 1978); Roehl v. Ralph, 84 S.W.2d 405, 409 (Mo. 1935); Dunn v. McKay, Burton, McMurray & Thurman, 584 P.2d 894, 896 (Utah 1978); Peters v. Simmons, 552 P.2d 1053, 1056 (Wash. 1976). The implied promise reflects the same standard of care applicable in determining negligence. MALLEN & SMITH, *supra* note 4, § 8.5, at 417. If an attorney agrees to perform specific services or acts, there may be an action for breach of express contract. A cause of action for breach of express contract may not require proof of the applicable standard of care or proof by expert testimony as is required in other malpractice cases because it is based on a breach of a specific promise. Some courts and commentators do not characterize such a breach as malpractice at all because the breach is not unique to the profession and because it is viewed as merely a failure to perform a promise rather than a deficiency in the quality of services. *See* Lindner v. Eichel, 232 N.Y.S.2d 240, 244 (Sup. Ct.), *aff'd*, 233 N.Y.S.2d 238 (App. Div. 1962); MALLEN & SMITH, *supra* note 4, § 8.4, at 416. Cases based on actions for breach of express contract seldom occur because the attorney-client contracts rarely express specific promises or guarantees.

55. Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978).

from the terms of the contract. For example, in *Santulli v. Englert, Reilly & McHugh, P.C.*[56] the client had retained the law firm to represent him in the sale of a business. The law firm negotiated the terms of the contract of sale at a price of $75,000, a substantial portion of which was to be secured by a first mortgage on property owned by the buyer's father. The law firm prepared the mortgage but failed to execute it properly. The client suffered a loss when the buyer subsequently defaulted and the improper execution of the mortgage was discovered. The client then sued the law firm for breach of the retainer agreement. The law firm alleged that it was not liable for breach of contract because it had not made a specific promise to perform the act of preparing and executing the mortgage. In finding for the client on the contract claim, the court reasoned that a promise to prepare and execute the mortgage properly arose by reasonable implication from the retainer contract and that the law firm had breached the implied promise.[57]

Nevertheless, to emphasize a trite but important point, no contract action may be maintained against the attorney unless the client can show that the attorney has breached an express or implied obligation assumed by the attorney under the terms of the contract.[58] A breach of contract action in favor of the client, thus, is based on the consensual undertakings of the attorney. The gist of the action is the attorney's violation of an agreement willingly made. The law of tort, through the action for malpractice, and the law pertaining to fiduciaries, through the action for breach of a fiduciary obligation, however, add an important gloss to the contractual relationship of the attorney and client by *imposing* on the attorney, notwithstanding negotiation or agreement, tort obligations of due care and non-negligent performance and fiduciary obligations of utmost propriety and consideration for the interests of the client. The essence of an action for breach of contract is violation of an obligation assumed by consent. The essence of an action in tort for negligence or for breach of a fiduciary obligation is violation of a standard imposed, not by agreement, but by societal norms.[59] Whether a cause of action exists in tort or in contract for a failure to abide by these various obligations depends upon the nature of attorney misconduct.

VI. NATURE OF MISCONDUCT

In theory, the distinction between contract law and tort law is thus clear. Contract law applies to obligations voluntarily undertaken between parties and is premised upon mutual agreement and the expectations of the parties. Tort law involves social responsibility regardless of undertaking and requires a standard of conduct for the protection of others. The failure to comply with that standard imposes liability even absent a contract. Tort duties de-

56. 586 N.E.2d 1014 (N.Y. 1992).

57. *Id.* at 1016.

58. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979) (defining contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty").

59. *See* DeMott, *supra* note 5, at 887.

pend upon foreseeability, the likelihood of injury, the nature of risks, the magnitude of the burden of guarding against injury, and the consequences of placing the burden upon the defendant.[60]

Courts in most jurisdictions do not limit a plaintiff in a suit for attorney wrongdoing to one particular cause of action, but instead allow an action for legal malpractice to sound in either tort or contract.[61] However, the courts have traditionally maintained that the causes of action for breach of contract and tort are distinct and individual. This tradition is soundly rooted in the historical distinctions regarding pleading requirements, and in the vast differences in the underlying rationales for the existence of the causes of action. In the words of one court:

> Where the act complained of is a breach of specific terms of the contract without any reference to the legal duties imposed by law upon the relationship created thereby, the action is contractual. Where the essential claim of the action is a breach of a duty imposed by law upon the relationship of attorney-client and not of the contract itself, the action is in tort.[62]

These concepts, however, are not always independent. Contractual promises do create duties, and the failure to perform a particular contractual duty may represent not only a breach of contract, but negligence as well. This may be particularly true where an attorney's failure to perform a service as promised will often also represent a failure to perform with a standard of care of a reasonably prudent attorney. This overlapping of contract and tort duties is well illustrated by the case of *Hale v. Groce*.[63] The case is particularly interesting because it involved actions against an attorney for both tort and breach of contract brought by a plaintiff who was not a client of, nor in privity of contract with, the defendant attorney. The attorney had been directed by his client to prepare testamentary instruments and to include a bequest of a sum of money to the plaintiff. After the death of the client, the plaintiff discovered that the gift was not included either in the will or in the related trust instrument.

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60. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 326-27 (4th ed. 1971). While Prosser recognizes the difficulty of stating an adequate rule for when a tort duty exists, he concludes that "[n]o better general statement can be made, than that courts will find a duty where . . . reasonable men would recognize it and agree that it exists." *Id.*

61. *See* Flaherty v. Weinberg, 492 A.2d 618, 627 (Md. 1985); Hutchinson v. Smith, 417 So. 2d 926, 927 (Miss. 1982); Denzer v. Rouse, 180 N.W.2d 521, 523 (Wis. 1970). *See generally* RONALD E. MALLEN & VICTOR B. LEVIT, LEGAL MALPRACTICE § 382 (2d ed. 1981).

62. Pancake House v. Redmond, 716 P.2d 575, 578 (Kan. 1986); *see also* Hall v. Nichols, 400 S.E.2d 901, 904 (W. Va. 1990); Malone v. University of Kan. Medical Ctr., 552 P.2d 885, 888 (Kan. 1976). The *Malone* court found:

> A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement. A tort, on the other hand, is a violation of a duty imposed by law, a wrong independent of contract. Torts can, of course, be committed by parties to a contract. The question to be determined here is whether the actions or omissions complained of constitute a violation of duties imposed by law, or of duties arising by virtue of the alleged express agreement between the parties.

Id.

63. 744 P.2d 1289 (Or. 1987).

The plaintiff then sued the attorney, maintaining status as an intended beneficiary[64] of the attorney-client retainer contract. The petition set forth two separate claims, one for negligence and the other for breach of the promise made by the attorney to his client to make the bequest for the benefit of the plaintiff. The trial court granted defendant's motion to dismiss both claims, apparently on the ground that neither stated a cognizable cause of action in either contract or tort. The intermediate appellate court reinstated the tort claim but affirmed the trial court's dismissal of the contract claim. On further appeal, the Supreme Court of Oregon held for the plaintiff, finding that a cause of action had been stated under both tort and contract theories.[65] In reaching its conclusion, the court specifically rejected the defendant's assertion that an attorney owes a professional duty of care only to his client and thus could be sued for malpractice only by that client.[66]

The court noted a split in authority on the issue. While many courts have recognized the right of non-clients to sue an attorney for professional negligence,[67] other courts have rejected such "open-ended tort liability to foreseeably injured third parties"[68] and have allowed non-clients to recover against attorneys, if at all, only as third-party beneficiaries under contract law's more restrictive standards regarding foreseeability and scope of risk.[69] The court in *Hale*, however, opted to reaffirm its earlier decision in another case[70] by leaving both theories of recovery open to third parties depending upon the legal rule at issue[71] and the nature of misconduct alleged by the complaint.[72] The court then made a detailed examination of the plaintiff's complaint. The court found that, although part of the complaint alleged professional negligence, other paragraphs of the complaint alleged breach of a specific promise.[73] Since these latter allegations were "not that defendant performed this promise negligently, but that he did not perform it at all,"[74] the plaintiff had stated a cause of action for breach of contract as well as for

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64. The RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979) states:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

65. *Hale*, 744 P.2d at 1290.

66. *Id.* at 1292.

67. The leading case is that of the California Supreme Court in Heyer v. Flaig, 449 P.2d 161 (Cal. 1969); *see also* Ogle v. Fuiten, 466 N.E.2d 224, 227 (Ill. 1984) (allowing action on both tort and breach of contract theories).

68. *Hale*, 744 P.2d at 1291.

69. A leading case for this more restrictive attitude is that of the Pennsylvania Supreme Court in Guy v. Liederbach, 459 A.2d 744 (Pa. 1983).

70. Securities-Intermountain, Inc. v. Sunset Fuel Co., 611 P.2d 1158 (Or. 1980).

71. The legal rule at issue in *Hale* was the applicable statute of limitations. *Hale*, 744 P.2d at 1292.

72. *Id.* at 1292-93.

73. *Id.* at 1293.

74. *Id.*

malpractice.[75]

A much different type of misconduct distinguishes the tort action of malpractice from the tort action for breach of fiduciary duty.[76] The malpractice action sanctions negligent performance.[77] The 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. As a fiduciary, an attorney has a 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]."[78]

It is hornbook law that proof of legal malpractice requires expert testimony that the defendant attorney has violated a standard of care and reasonableness so that a jury may properly determine whether an attorney has acted in a reasonably prudent manner. However, since an action for breach of fiduciary duty requires merely a showing of misconduct rather than violation of a standard of care, proof of a breach of fiduciary duty may be shown without resort to expert testimony.[79] An attorney's fiduciary duty encompasses undivided loyalty, and a standard of solicitude that requires placing the client's interests over those of the attorney. These duties may be violated without any showing of negligence.[80] On the other hand, the malpractice/negligence standard allows an attorney to take his own interests into consideration while performing legal services in a reasonably prudent manner.[81] Thus, legal malpractice contemplates a balancing of interests between attorney and client, a concept which the law of fiduciary obligation definitely rejects.

Conversely, an attorney may violate the malpractice standard of care without being in violation of the fiduciary standard of conduct. For example, in *Calhoun v. Rane*[82] the client retained an attorney to represent him before the Illinois Industrial Commission. Although the attorney did file a

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75. *Id.*

76. Although the breach of fiduciary duty does not involve violation of a negligence standard of care, most courts nevertheless characterize the breach of fiduciary duty as a tort. *See* Citizens State Bank v. Shapiro, 575 S.W.2d 375, 387 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

77. MALLEN & SMITH, *supra* note 4, § 1.1, at 3.

78. *Id.* § 11.1, at 631.

79. *See* Johnson v. DeLay, 809 S.W.2d 552, 555 (Tex. App.—Corpus Christi 1991, writ denied).

80. The fiduciary duty between an attorney and client is so strong that it gives rise to a duty for the attorney to disclose the possibility of his own malpractice as long as the attorney-client relationship is in existence. Conversely, nondisclosure is treated per se as concealment and the statute of limitations on any cause of action is tolled until the relationship ends. Crean v. Chozick, 714 S.W.2d 61, 62 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). But once the attorney-client relationship ends, the statute of limitations is no longer tolled. Guy v. Schuldt, 138 N.E.2d 891, 895 (Ind. 1956); *see also* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 429 (Cal. 1971).

81. "The duty of loyalty sometimes requires the fiduciary to give no weight to her own interests. This same requirement, however, becomes unreasonable in the duty-of-care context." Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1058-59 (1991).

82. 599 N.E.2d 1318 (Ill. App. Ct. 1992).

petition with the Commission, he allowed it to be dismissed for want of prosecution, failed to vacate the dismissal, and failed to inform the client that the petition had been dismissed. In the ensuing action by the client against the attorney, the court held that the client had failed to demonstrate a breach of fiduciary duty by the attorney apart from professional negligence.[83] Although the court acknowledged that malpractice does evidence a breach of trust, the court held that such a breach "does not mean every cause of action for professional negligence also sets forth a separate and independent cause of action for breach of fiduciary duty."[84]

Similarly, in *Bukoskey v. Walter W. Shuham, C.P.A., P.C.*[85] the client, an accounting firm, sued its former attorneys who had drafted trust fund documents for the accounting firm on behalf of the firm's client, a union. Although the attorneys were not hired as trustees for the union fund nor to provide general advisory services to the union, the accounting firm claimed that the attorneys should have known that the trustees for the union were not in compliance with certain federal duties and that the attorneys should have properly advised the trustees regarding such compliance. The accounting firm thus sued the attorneys for both malpractice and breach of fiduciary duty for their alleged failure to exercise reasonable care in drafting the appropriate documents and in advising the union. The court found on these facts that the claim for breach of fiduciary duty was a "red herring."[86] The court found no indication in the record to suggest that the attorneys had breached their duty of loyalty and fidelity, or had committed any sort of fraud.[87] The court thus held that the only appropriate claim was for legal malpractice for the alleged negligent misconduct of the attorneys.[88]

Although the actions for breach of fiduciary duty and malpractice are thus distinct from each other, it is, of course, possible for the same set of facts to give rise to both actions when the circumstances indicate that the attorney has breached both the appropriate standards of care and of conduct. In *Holmes v. Drucker*,[89] for example, the plaintiff client brought suit against her attorney for negligence, fraud, and breach of fiduciary duty. The client had engaged the attorney to file a personal injury suit. The client's malpractice claim was based on the attorney's failure to file the lawsuit in a timely manner, and her fraud and breach of fiduciary duty claims were based on the attorney's subsequent misrepresentations and false statements regarding the timely filing of the suit. The trial court granted actual damages to the client for the attorney's dilatory conduct, but determined that the wrong was not committed under circumstances that would justify an award of punitive damages. Although the attorney's *subsequent* fraudulent acts and misrepresentations might have justified a punitive damage award, the trial court re-

83. *Id.* at 1321.
84. *Id.* at 1321.
85. 666 F. Supp. 181 (D. Alaska 1987).
86. *Id.* at 184.
87. *Id.*
88. *Id.*
89. 411 S.E.2d 728 (Ga. Ct. App. 1991).

fused to hear evidence regarding the client's claims based on that misconduct, citing the general rule that conduct subsequent to a tort is not admissible to support a claim for punitive damages.[90]

The court of appeals reversed the trial court's holding, finding that the trial court had erred in not recognizing the client's independent claims of fraud and breach of fiduciary duty in addition to the claim of negligence.[91] The court reasoned that the claim of negligence, in failing to adhere to the requisite standard of care for filing lawsuits, was completely different from the causes of action for fraud and breach of fiduciary duty based on the attorney's subsequent misconduct of making false representations to the client.[92] Those independent claims, if properly proved, would support an award of punitive damages.[93]

The lesson is thus clear. Just as a contract claim against an attorney for breach of promise is separate and distinct from tort actions for malpractice and breach of fiduciary duty, the tort actions themselves are distinct depending upon the particular misconduct of the attorney. We turn now to an examination of how these distinct actions for attorney wrongdoing conflict and overlap in different contexts and with respect to various legal issues. In particular, we will examine how pleading and proof requirements, recoverable damages, and applicable statutes of limitations vary with the cause of action.

VII. PLEADING AND PROOF REQUIREMENTS

A. CONTRACT

The core ingredient of a contract action by a client against his attorney is breach of promise by the attorney. Accordingly, the client must plead and prove by a preponderance of the evidence breach of promise, as well as the other basic ingredients of a contract cause of action, such as foreseeability, causation, and damages.[94]

Frequently courts allow the same set of facts to support causes of action against attorneys for both malpractice and breach of contract. The theory behind this line of decision is that, when an attorney commits malpractice, he is liable not only in tort for that negligence, but in contract as well for breach of an implied promise to perform legal services in a reasonably competent manner.[95] For example, *Heritage Square Associates v.*

90. *Id.* at 729.
91. *Id.* at 730.
92. *Id.*
93. *Id.*
94. RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. b (1981) ("If the injured party has suffered loss [caused by the breach] but cannot sustain the burden of proving it, only nominal damages will be awarded.").
95. *See, e.g.*, Stowe v. Smith, 441 A.2d 81, 84 (Conn. 1981) (holding that the client may choose to bring action in either contract or tort unless particular rules applicable to contract require otherwise); Robbins v. McGuinness, 423 A.2d 897, 899 (Conn. 1979) (upholding a contract claim against an attorney); Mac's Car City v. DeNigris, 559 A.2d 712, 714 (Conn. App. Ct. 1989) (applying the contract statute of limitations to a claim by a client against an

Blum[96] involved a malpractice action within a malpractice action. The client sued its attorney Blum for his failure to file a malpractice claim against the client's former attorney within the three-year tort statute of limitations. Attorney Blum defended that the client had failed to state a claim because an alternative remedy of breach of contract, governed by a longer statute of limitations, remained available to the client against the former attorney. The court agreed with attorney Blum and dismissed the action against him.[97] The court reasoned that the attorney-client relationship creates an implicit promise by the attorney to perform the agreed legal services in a professional and competent manner.[98] An attorney who commits malpractice is thus liable not only in tort but for breach of contract as well.[99] Since the contract action against its previous attorney remained available to the client, any wrongdoing by attorney Blum had caused the client no injury.[100]

Other courts eschew implied promises as a basis for attorney liability and allow a breach of contract action for alleged malpractice only where the attorney can be shown to have breached an express promise to the client. For example, the Kansas Supreme Court has held that a client may maintain an action in contract for an attorney's malpractice only "[w]here the act complained of is a breach of specific terms of the contract without any reference to the legal duties imposed by law upon the relationship created thereby."[101] A similar test has been adopted in other jurisdictions.[102] In jurisdictions following the express contract rule, then, the client's petition should allege with specificity the express promise alleged to have been breached by the attorney.

A good case in point is the *Hale v. Groce*[103] decision, which we discussed

attorney where the complaint is "couched in the language of contract"); *see also* Westport Bank & Trust Co. v. Corcoran, Mallin & Aresco, 605 A.2d 862, 865 (Conn. 1992) (allowing contract action against attorneys for failure to conduct a proper title search); Competitive Food Sys., Inc. v. Laser, 524 N.E.2d 207, 212-13 (Ill. App. Ct. 1988) (finding client stated all essential elements of a valid breach of contract claim); *Hale*, 744 P.2d at 1292 (Or. 1987) (holding third-party, as intended beneficiary of contract between attorney and client, stated proper contract cause of action against attorney for malpractice).

96. No. CV 91-0117855, 1992 WL 175072 (Conn. Super. Ct. July 21, 1992).

97. *Id.* at *6.

98. *Id.*

99. *Id.*

100. *Id.*

101. Pancake House, Inc. v. Redmond, 716 P.2d 575, 577 (Kan. 1986); *see also* Malone v. University of Kan. Medical Ctr., 552 P.2d 885, 888-89 (Kan. 1976); Pittman v. McDowell, Rice & Smith, 752 P.2d 711, 715 (Kan. App. 1988).

102. *See* Hall v. Nichols, 400 S.E.2d 901, 904 (W. Va. 1990). In some jurisdictions malpractice actions against attorneys are governed by statute. *See* ALA. CODE §§ 6-5-570 to -581 (Supp. 1992); TENN. CODE ANN. § 28-3-104 (1980); CAL. CIV. PROC. CODE § 340.6 (West 1982). In these jurisdictions, of course, requirements of pleading and proof will be dictated by the requirements of the statute.

Still other jurisdictions have made an attempt, largely without success, to distinguish contract and tort actions for malpractice based on the type of damages alleged by the plaintiff-client, restricting the contract cause of action to those situations where the client alleges only economic loss and allowing a cause of action in tort for malpractice only where the client can show personal injury. *See* Collins v. Reynard, 553 N.E.2d 69, 70-72 (Ill. App. Ct. 1990), *rev'd*, 607 N.E.2d 1185 (Ill. 1992); Fitzgerald v. Congleton, 583 A.2d 595, 597-601 (Vt. 1990).

103. 744 P.2d 1289 (Or. 1987).

previously.[104] In that case, the court allowed the plaintiff to recover against an attorney for malpractice as a third-party beneficiary of the retainer contract between the attorney and his client.[105] The attorney had agreed to prepare testamentary instruments for his client and to include a bequest of $300,000 to the plaintiff. After the death of the client, the plaintiff discovered that the gift was not included in the testamentary documents. Before allowing the plaintiff's cause of action, the court carefully examined the plaintiff's pleadings to ascertain whether the plaintiff had properly pled a contract cause of action apart from a claim for negligence.[106] The court concluded that he had, finding that the pertinent portion of the complaint alleged "not that defendant performed his promise negligently, but that he did not perform it at all."[107] The court reasoned that, under the allegations of the complaint, the defendant "might have broken the promise purposely, or under circumstances that might be a partial or entire defense to a negligence claim."[108] Accordingly, the specificity of the plaintiff's pleadings allowed him to maintain a cause of action in contract against the attorney in addition to his malpractice claim.[109]

B. TORT

To prevail in an action against an attorney for the tort of malpractice,[110] a client must allege and prove: (1) an attorney-client relationship; (2) breach of a duty arising from the scope of that attorney-client relationship; (3) that the conduct of the attorney was not that of a reasonable and prudent lawyer; and (4) that but for the attorney's misconduct the client would not have suffered damage.[111] Thus, in malpractice actions the burdens of pleading and proof follow the normal procedural rules. The situation is much different once the client has pled the tort of breach of fiduciary duty. Although the client retains the ordinary burdens of pleading and proof regarding causation and damages, the attorney has the full burden of proving that she has not violated her fiduciary obligation — that she has dealt fairly with her client[112] and that her actions were not only acceptable but were above reproach.[113]

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104. *See supra* notes 63-75 and accompanying text.

105. 744 P.2d at 1292.

106. *Id.* at 1292-93. The plaintiff's pleadings included the following language: "Defendant and Rogers [the client] specifically contracted for defendant to draft the trust document with plaintiff's gift in it. Defendant breached that contract by failing to include the provision for plaintiff to receive the $300,000 gift." *Id.* at 1293.

107. *Id.*

108. *Id.*

109. *Id.*

110. One treatise notes that "[t]he phrase 'legal malpractice' is commonly used to describe a kind of tortious conduct, but there is little consensus on or even discussion of its meaning." MALLEN & SMITH, *supra* note 4, § 1.1, at 2.

111. *See* Federal Deposit Ins. Corp. v. Ferguson, 982 F.2d 404, 406-07 (10th Cir. 1991).

112. Barbara A. v. John G., 193 Cal. Rptr. 422, 432 (Cal. Ct. App. 1983).

113. *Id.*; *see also In re* Neuschwander, 747 P.2d 104, 105-06 (Kan. 1987); *In re* Flayer, 611 A.2d 1111, 1118 (N.J. 1992); *In re* Lundberg's Will, 197 N.Y.S.2d 871, 872-73 (Sur. Ct. 1960); Office of Disciplinary Counsel v. Lewis, 426 A.2d 1138, 1142-43 (Pa. 1981).

Other procedure-related distinctions may be made between the two tort causes of action. For example, in a malpractice action, where the basis for the complaint is negligence, contributory or comparative negligence is a proper defense for the attorney, although the attorney does retain the burden of pleading and proving the defense.[114] However, since actions based on a breach of an attorney's fiduciary obligations are not grounded in negligence, defenses based on the client's contributory or comparative negligence do not apply to such actions.[115]

A most significant distinction between the two tort causes of action is in the nature of proof necessary for the client to prevail. Because the tort action of malpractice sanctions conduct falling below a standard of professional care and reasonableness, proving violation of this standard requires expert testimony on the issue of whether the attorney's conduct met the applicable professional standard.[116] However, because an action based on breach of fiduciary duty raises the issue only of whether the attorney's conduct violated rules governing the profession, an expert's testimony is not required to show violation of those rules.[117] This distinction between the two causes of action is well demonstrated by the court's decision in *Badis v. Martinez.*[118] In that case, the trial court dismissed a cause of action for breach of fiduciary duty brought by a client against his attorney because the client-plaintiff had failed to file a certificate, required by state statute for malpractice actions, verifying expert opinion that the client's claim for malpractice was justified. The plaintiff had sued the attorney alleging both malpractice and breach of fiduciary duty. On appeal, the court reinstated the client's claim for breach of fiduciary duty, holding that the verification statute applied only to a "claim to recover damages for negligence"[119] and not to a claim for breach of fiduciary duty.[120]

Similarly, in *Johnson v. DeLay*[121] the plaintiff retained an attorney to draft the necessary legal documents for the sale of her business. She subsequently sued the attorney for malpractice in negligently drafting the documents and for misrepresentations subsequently made by the attorney to the client regarding the legal effect of the documents. Because the plaintiff had failed to properly qualify her expert witness prior to trial, the trial court directed a verdict for the defendant attorney. On appeal, the court upheld the trial court's verdict regarding the malpractice claim but reinstated the client's

114. Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118, 132 (Wis. 1985).

115. Koral Indus. v. Security-Connecticut Life Ins. Co., 802 S.W.2d 650, 651 (Tex. 1990); Isenhower v. Bell, 365 S.W.2d 354, 357 (Tex. 1963).

116. Barth v. Reagan, 564 N.E.2d 1196, 1201 (Ill. 1990) (explaining that unless common knowledge exception applied, an expert's testimony was necessary to prove malpractice); *see also* Godbout v. Norton, 262 N.W.2d 374, 376 (Minn. 1977) (affirming trial court's holding that failure to present expert testimony constituted insufficiency of evidence), *cert. denied*, 437 U.S. 901 (1978).

117. Badis v. Martinez, 819 P.2d 551, 554 (Colo. Ct. App. 1991), *aff'd in part and rev'd in part*, 842 P.2d 245 (Colo. 1992).

118. *Id.*

119. *Id.*

120. *Id.*

121. 809 S.W.2d 552 (Tex. App.—Corpus Christi 1991, writ denied).

claim based on the attorney's misrepresentations.[122] The court properly concluded that claims based on an attorney's misrepresentations did not go to professional competence, and thus did not require expert testimony, but were instead claims that a "jury could rightfully decide, without the benefit of expert testimony." [123]

VIII. REMEDIES FOR BREACH

The basic remedy for either breach of contract or tort is the remedy at law of money damages. Both the purpose and limitation of the remedy of damages is compensation, meaning that the aggrieved party may recover for the loss suffered, but the recovery may not exceed that amount.[124] Compensation theory, of course, differs for contract and tort. In contract, the theory is that the promise should have been performed or the breach should not have occurred, and thus the basic rule is that damages should be measured so as to put the injured party in the position that would have been occupied had the contract been performed.[125] The tort theory of compensation is converse, that the tort should not have occurred, and thus the rule is that damages should be measured so as to put the injured party in the immediate pre-tort monetary position; the position the aggrieved party would have occupied had the tort not occurred.[126] Damages for breach of contract include losses directly resulting from the breach so long as such losses were reasonably within the contemplation of the parties at the time they entered into the contract.[127] Tort damages, on the other hand, extend to all losses proximately caused by a breach of duty and, unlike contract damages, may include punitive damages as well.[128]

Since breach of a fiduciary obligation is a tort, the normal tort damage remedies are available to the aggrieved client. However, the client is also entitled to certain extraordinary relief. For example, an attorney who violates his fiduciary duty is not entitled to any compensation for services rendered to the client under the retainer contract.[129] Further, an attorney who profits through a breach of his fiduciary obligation will be held accountable to his client for that profit regardless of whether the breach caused the client a loss or was in any way at the expense of the client.[130] Extraordinary equitable remedies such as constructive trust, equitable lien, and rules of tracing

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122. *Id.* at 555.

123. *Id.*

124. *See generally* DAN B. DOBBS, LAW OF REMEDIES § 3.1 (2d ed. 1993).

125. *See* Robert Cooter & Melvin A. Eisenberg, *Damages for Breach of Contract*, 73 CAL. L. REV. 1432, 1477 (1985); E. Allen Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970).

126. *See* John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1150 (1988); *see also* PROSSER, *supra* note 60, § 1.

127. The root case for this proposition is, of course, Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

128. *See* PROSSER, *supra* note 60, § 1.

129. *See In re* Estate of Lee, 9 N.W.2d 245, 251 (Minn. 1943).

130. *See* GEORGE E. PALMER, LAW OF RESTITUTION § 2.11, at 141 (1978).

are available to the client to disgorge the profit from the hands of the attorney.[131] The theory that justifies allowing recovery to the client in such cases is that retention of the benefit by the fiduciary is clearly unjust, and since no injury has occurred, no one will be able to maintain action against the attorney unless restitution is granted to the client.[132]

Although availability to the client of these restitution remedies exists for any breach of fiduciary duty, they usually arise in conflict of interest cases. For example, in one case, after first mortgage participation certifications had been issued for the financing of the construction of a hotel, the hotel corporation was placed in receivership.[133] A trustee was appointed to hold the mortgage property for the benefit of the certificate holders. Subsequently, attorneys for the trustee purchased some of the certificates at a fraction of their face value. Some time later the trustee made partial distributions to the certificate holders (including the attorneys) greatly in excess of the amount which the attorneys had paid for the certificates. The result was that the attorneys received an enormous profit from their investment and still retained the certificates themselves. It was undisputed that the purchases by the attorneys were with the knowledge of their client, the trustee, and without fraud, bad faith, or manipulation of the trust by the attorneys.

Nevertheless, because the attorneys were in a fiduciary relation to the certificate holders, the court held that the attorneys would hold the certificates in constructive trust for the benefit of the trust estate.[134] Further, the attorneys were ordered to account to the trustee for the amount of any profit they had made on the certificate investment and to transfer title to the certificates to the trustee upon repayment of the amount the attorneys had invested in the certificates.[135] The court held that the attorneys had breached a duty of "undivided loyalty" and thus "the question of bad faith or damage is irrelevant."[136] Finally, the court reasoned that an actual conflict of interest was not necessary and that it was enough that the personal purposes of the attorneys "might" conflict with those of the trust beneficiaries.[137] The net result is thus that, in an action for breach of fiduciary duty, the client may recover from the breaching attorney amounts well in excess of any losses suffered by the client and even where no loss has been suffered at all.

In the garden variety actions for malpractice and breach of contract, the client is limited to compensatory damages. However, under the current trend in judicial decisions, some question exists as to whether aggrieved clients will continue to be allowed to recover in tort for economic losses caused

131. *Id.* § 2.11, at 141-47.
132. *Id.* § 2.11, at 141.
133. *In re* Bond & Mortgage Guar. Co., 103 N.E.2d 721 (N.Y. 1952).
134. *Id.* at 725.
135. *Id.* at 727.
136. *Id.* at 725.
137. *Id.*; *see also* David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 345 (Ct. App. 1988) (awarding constructive trust in the amount of $350,000 to client against attorneys for profits earned by attorneys through wrongful use of confidential information and procedures learned from client, even though profits were earned after the attorney-client relationship had ended).

by the malpractice of their attorneys. The so-called "economic loss" doctrine has been developed by the courts over the past decade or so in what is probably a vain attempt to distinguish and keep separate contract and tort actions. The rule is that, where the plaintiff's injury is solely economic in nature, recovery may be had in contract but not in tort.[138] The rule is followed in numerous jurisdictions and the Supreme Court of the United States has sanctioned the rule with the reasoning that, without its application, the law of contract would "drown in a sea of tort."[139] The question is a provocative one because most losses caused by attorney wrongdoing are economic in nature.

The Supreme Court of Illinois adopted the economic loss doctrine in *Moorman Manufacturing Co. v. National Tank Co.*[140] The *Moorman* decision led to speculation among commentators as to how the economic loss doctrine would play out in subsequent litigation involving various types of service contracts, including malpractice claims against attorneys.[141] The Illinois Supreme Court finally addressed that issue in *Collins v. Reynard*,[142] initially concluding that the economic loss doctrine did indeed apply to malpractice claims.[143] The plaintiff-client had employed an attorney to negotiate and consummate an installment sale of her business. The client later sued the attorney for negligent performance of legal services, alleging that the attorney had improperly drafted or approved a sales contract that failed

138. A representative line of cases from the Supreme Court of Texas developing the economic loss doctrine is: Nobility Homes v. Shivers, 557 S.W.2d 77, 81 (Tex. 1977) (adopting the economic loss doctrine on the reasoning that damages in tort and in contract should be kept separate); Mid-Continent Aircraft Corp. v. Curry County Spraying Servs., Inc., 572 S.W.2d 308, 313 (Tex. 1978) (denying tort claim under economic loss doctrine where defect in product caused damages only to product itself; proper claim was for breach of warranty not strict liability); Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 325 (Tex. 1978) (finding that where defect in product caused damages only to product itself the proper claim was for breach of warranty not strict liability; but where defect in product caused injury not merely to the product itself but to surrounding property as well, loss was not merely economic and recovery could be had in a tort claim for strict liability), *overruled by*, Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984); Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 459 (Tex. 1980) (allowing damages for personal injury allowed in contract/warranty action because UCC §§ 2-314 and 2-715 permit such recovery); *see also* Southwestern Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 494 (Tex. 1991) (holding that in a service contract case, if only loss is economic resulting from a failure to perform a contractual obligation, action does not sound in tort and recovery may be had only for breach of contract); William E. Marple, *Requiescat for an Epitaph: Breach of Contract is Not a Tort*, 56 TEX. B.J. 656, 659 (1993). *See generally* Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at Robins Dry Dock v. Flint*, 20 J. LEGAL STUD. 249, 275 (1991).

139. East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986).

140. 435 N.E.2d 443, 449 (Ill. 1982).

141. *See* Blanche M. Manning, *Legal Malpractice: Is It Tort or Contract?*, 21 LOY. L.J. 741, 743 (1990); *see also* Timothy L. Bertschy, *Negligent Performance of Service Contracts and the Economic Loss Doctrine*, 17 J. MARSHALL L. REV. 249, 261-78 (1984); Mark K. Friedlander, *The Impact of Moorman and its Progeny on Construction Litigation*, 77 ILL. B.J. 654, 656 (1989); Kelly M. Hnatt, *Purely Economic Loss: A Standard for Recovery*, 73 IOWA L. REV. 1181, 1186 (1988); Steven G. M. Stein et al., *A Blueprint for the Duties and Liabilities of Design Professionals After Moorman*, 60 CHI.-KENT L. REV. 163, 187-89 (1984).

142. 607 N.E.2d 1185 (Ill. 1992).

143. Collins v. Reynard, No. 70325, 1991 Ill. LEXIS 104, at *12-15 (Ill. Oct. 31, 1991) (opinion withdrawn after rehearing).

to carry out her intention of retaining a perfected purchase money security interest in the business. The buyer had defaulted on the installment contract after pledging the assets of the business to another creditor, who was able to foreclose on his security interest and take possession of the assets. The client claimed that the damages resulting from the attorney's negligence included all sums remaining unpaid under the installment contract, including interest, as well as cost of collection and attorney's fees.

The court correctly noted that all of these damages were economic in nature and held that the economic loss doctrine barred plaintiff's tort claim.[144] Any claim that the plaintiff might have had was for breach of contract because, reasoned the court, contract law "provides a superior basis to tort law for the resolution of issues concerning the failed expectations of clients of professionals where only economic loss is sought to be recovered."[145] The court expressed concern that to allow recovery in tort would expose professionals to unlimited and unforeseen damages.[146] The court's conclusion was in the teeth of a vigorous dissenting opinion, which argued that the economic loss doctrine was entirely inappropriate for malpractice actions because the doctrine is grounded on the notion that the complaining party should have bargained for protection in the event of breach when the parties negotiated the terms of the contract.[147] Presumptions of arms length bargaining between a fiduciary and principal, particularly attorney and client, undermine the most basic tenets of the law of fiduciary obligation.[148] The dissent suggested that the decision of the majority would "find a warm reception among those who are eager to see the practice of law transformed from a learned profession into a trade, with the respective rights and duties of the parties bartered for in advance of a contract for legal representation."[149]

On further reflection, the Supreme Court of Illinois granted a rehearing in the *Collins* case and reversed its previous position, holding that a client may recover damages for economic loss against an attorney in either tort or contract.[150] Although the court did criticize the economic loss doctrine generally as a method of distinguishing tort and contract actions, the court did not abandon the doctrine but merely carved out an exception for legal malpractice claims.[151] The court reached its conclusion based on what it termed historical precedent rather than logic, noting that if something has been handled in a certain way for a long time and if it is reasonable to continue to do so, then the method should continue unless good cause is shown.[152]

144. *Id.* at *15.
145. *Id.* at *14.
146. *Id.*
147. *Id.* at *25 (Miller, C. J., dissenting).
148. *Id.*
149. *Id.* at *27.
150. *Collins*, 607 N.E.2d at 1186.
151. *Id.* at 1187.
152. *Id.* at 1186. Justice Jackson put it more succinctly: "The mere fact that a path is a beaten one is a persuasive reason for following it." Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 26 (1945).

Thus, in Illinois a bullet fired by the nonsense inherent in the economic loss doctrine was dodged. It remains to be seen how the many other jurisdictions that follow the doctrine will handle the issue. Although at least one of us would find comfort in the prospect of the law of tort drowning in a sea of contract,[153] no one seriously believes that the economic loss doctrine sounds the death knell anywhere for tort actions for malpractice. We suspect, however, that it will be at least a decade more before the courts will abandon the doctrine and its silliness, and in the meantime the likelihood is that, when faced with the question, the courts elsewhere will follow the Illinois lead by simply making malpractice claims an exception to the rule.[154]

IX. STATUTES OF LIMITATIONS

Time periods in statutes of limitations applicable to each of the three causes of action potentially available to clients for attorney wrongdoing may vary significantly. This heightens the necessity for claimants to frame their actions in terms of the appropriate cause. It also heightens the need for courts to make certain that the appropriate cause is indeed correctly framed, so that claimants are given relief as allowed by law or denied relief as the applicable statute requires. As a rule, contract statutes of limitations begin to run at the time of breach and are longer than those for tort.[155] The tort statutes are more apt to be a major bar to a client's successful action against an attorney, because of the limited time period allowed for bringing the action, and because of the difficulty in discovering both the attorney's wrongdoing and the injury thereby caused.[156] However, statutes applicable to actions based on the tort of breach of fiduciary duty typically provide for much longer time periods than malpractice, or even contract, statutes. Thus, a claimant may successfully recover for breach of fiduciary duty even though her tort or contract claims have long since become time barred.[157]

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153. That "one" is, of course, Anderson. Steele suggests that we at least clarify the metaphor by citing to our previous quotation of Justice Blackmun. *See supra* note 139 and accompanying text.

154. Another possibility is represented by a rule adopted in New Jersey which makes an exception to the doctrine in cases involving "special relationships." The relationship between attorney and client would certainly qualify for exception. *See* People Express Airlines v. Consolidated Rail Corp., 495 A.2d 107, 112 (N.J. 1985).

155. *See* DAVID I. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 5.2, at 67 (1980). Historically, most courts found a legal malpractice action as essentially *ex contractu* and thus subject to the contract statute of limitations. *See* Wilcox v. Executors of Plummer, 29 U.S. 172, 174 (1830); Sitton v. Clements, 385 F.2d 869, 870 (6th Cir. 1967); Barrett v. Burt, 250 F. Supp. 904, 905 (S.D. Iowa 1966); Wheaton v. Nolan, 39 P.2d 457, 457 (Cal. Ct. App. 1934); Juhnke v. Hess, 506 P.2d 1142, 1145 (Kan. 1973); Hendrickson v. Sears, 310 N.E.2d 131, 136 (Mass. 1974); Hillhouse v. McDowell, 410 S.W.2d 162, 166 (Tenn. 1966); A.T. Burce & Co. v. Baxter, 75 Tenn. 477, 479 (1881); Jones v. Gregory, 215 P. 63, 64 (Wash. 1923). An occasional case continues to hold that an action for malpractice is contractual in nature and may not be brought in tort. *See* Chicago Title Ins. Co. v. Holt, 244 S.E.2d 177, 180 (N.C. Ct. App. 1978).

156. For this reason, some courts have adopted a discovery rule for malpractice actions, holding that the statute does not begin to run until the client discovered or should have discovered the wrong. *See* Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988). The *Willis* case is discussed more fully in the next section. *See infra* notes 170-79 and accompanying text.

157. *See* Gerdes v. Estate of Cush, 953 F.2d 201, 205 (5th Cir. 1992).

Most courts have demonstrated a marked solicitude for the legal profession's interests in malpractice cases by carefully ascertaining that a breach of fiduciary duty is correctly pled and proved before allowing the client access to the longer statutes of limitation available for breach of fiduciary duty and contract actions. Otherwise, reason the courts, the policy considerations underlying shorter tort statutes would be effectively neutered by the simple expedient of allowing clients unfettered access to longer limitation periods for contract or for breach of fiduciary duty.[158] For example, in *Gerdes v. Estate of Cush*[159] the court held that, because the evidence failed to support a finding that the attorney had engaged in self-dealing or a breach of loyalty to his client, the client's cause of action must be based solely on the attorney's alleged negligence and was thereby subject to a one-year statute of limitations rather than the ten-year statute governing breaches of fiduciary duty.[160] Similarly, in *Fitzgerald v. Congleton*[161] the Vermont Supreme Court held that claims by a client for damages for mental anguish, emotional distress, and personal humiliation[162] were time barred by the applicable tort statute, but allowed the client recovery for economic losses, which the court reasoned were governed by the longer contract statute of limitations.[163]

Clearly, then, the applicable statute of limitations may be a vital factor in determining which of the three potential causes of action a client might bring against her attorney.[164] Because of the typically shorter statute of limitations for tort actions, more and more clients will likely attempt to frame their actions against attorneys in contract or, where applicable, for breach of fiduciary duty. The avenue for contract actions will be particularly wide in those jurisdictions that regard the attorney-client relationship as the genesis for an implied promise by the attorney of competent performance. In those jurisdictions, as we have previously discussed,[165] contract actions for attor-

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158. Some states avoid the potential inequities in applying different statutes of limitations by making claims for attorney malpractice a statutory cause of action. *See, e.g.*, ALA. CODE §§ 6-5-570 to -581 (Supp. 1992); TENN. CODE ANN. § 28-3-104 (1980); CAL. CIV. PROC. CODE § 340.6 (West 1982).

159. 953 F.2d 201 (5th Cir. 1992).

160. *Id.* at 205. Some courts, however, have failed to recognize the important differences between actions for breach of fiduciary duty and for legal malpractice and have applied the same procedural and pleading requirements as for all torts. These courts classify the breach of fiduciary duty as simply a type of legal malpractice. For example, see Estate of Degley v. Vega, 797 S.W.2d 299, 302 (Tex. App.—Corpus Christi 1990, no writ). The *Degley* case is discussed more fully in the next section. *See infra* notes 183-86 and accompanying text.

161. 583 A.2d 595, 600-01 (Vt. 1990).

162. Clients often claim loss of business opportunities, lost profits and other economic damages in malpractice actions, but rarely make claims for physical or emotional injury or for other tort-like damages.

163. *Fitzgerald*, 583 A.2d at 601. The court described the losses from costs to regain custody of the plaintiff's child, including attorney's fees, as economic losses governed by the state's six-year statute of limitations. *Id.*

164. *See, e.g.*, Juhnke v. Hess, 506 P.2d 1142, 1145 (Kan. 1973) (applying contract statute of limitations where client pled breach of contract in action against attorney); Bland v. Smith, 277 S.W.2d 377, 380 (Tenn. 1955) (applying tort statute of limitations where plaintiff claimed personal injury); Family Sav. & Loan, Inc. v. Ciccarello, 207 S.E.2d 157, 160 (W. Va. 1974) (applying tort statute of limitations to plaintiff's claim for negligence).

165. *See supra* notes 61-75 and accompanying text.

ney wrongdoing are co-extensive with tort actions because the malpractice that gives rise to the tort also represents a breach of the attorney's implied promise regarding competence. For example, in *Santulli v. Englert, Reilly & McHugh, P.C.*[166] the court allowed the client to proceed against his attorney for malpractice under a claim for breach of contract even though there was no breach of a specific promise other than the implied promise to perform in a competent manner.[167] However, taking cognizance that the client's tort action was time barred and that the contract action allowed access to a longer limitations period, the court limited the client's recovery to only the economic losses normally recoverable for breach of contract.[168]

X. JUDICIAL FAILURE TO MAKE APPROPRIATE DISTINCTIONS

Courts at times do not make pertinent distinctions among the various causes of action for attorney wrongdoing. When that failure is intentional and is based upon proper policy considerations, the failure becomes conscious refusal and is rational.[169] However, when it is simply a failure resulting from ignorance, a lack of awareness, or other inadvertence, then the rights of the parties may be balanced akimbo and the ultimate decisions unjust.

A telling example of this inadvertence is a line of cases in the intermediate appellate courts of Texas. Ironically, the root authority for the courts' misguidance is the decision of the Supreme Court of Texas in *Willis v. Maverick*.[170] The irony is that, under any fair reading, *Willis* is a well reasoned

166. 586 N.E.2d 1014 (N.Y. 1992).

167. *Id.* at 1016. Other courts have held that the mere existence of an attorney-client relationship gives rise to an implied promise by the attorney to render professional services competently. *See In re* Hegstrom, 736 P.2d 370, 371-72 (Ariz. 1987); Heritage Square Assocs. v. Blum, No. CV 91-0117855, 1992 WL 175072, *6 (Conn. Super. Ct. July 21, 1992).

168. *Santulli*, 586 N.E.2d at 1016; *see also Heritage Square Assocs.*, 1992 WL 1750752 at *6. In that case the court held that a former client could sue an attorney either for negligence, governed by a three-year statute of limitations, or for breach of contract, governed by a six-year statute of limitations. *Id.* The court found an implicit contractual promise in attorney-client relationships that the attorney will perform the required services in a professional and competent manner. *Id.* According to the court, the breach of that promise supports a breach of contract claim even though negligent performance might also support an action for tort. *Id.* *But see Hale*, 744 P.2d at 1292 (suggesting that having causes of action in both tort and contract, with different statutes of limitations and distinct rules of procedure is nonsensical; and calling for legislative intervention); Bales for Food, Inc. v. Poole, 424 P.2d 892, 893 (Or. 1967) (criticizing the existence of a distinction between the limitations periods in the different causes of action). Quoting Prosser, the *Bales* court said that "there has been a failure to think the thing through and the courts have been little concerned with principles while preoccupied with the problem at hand." *Bales for Food*, 424 P.2d at 893-94 (quoting WILLIAM L. PROSSER, THE BORDERLAND OF TORTS AND CONTRACT, SELECTED TOPICS ON THE LAW OF TORTS, 451-52 (1953)). Finally, the *Bales* court opined that "there is a need for change in the law relating to the limitation of actions, but we think that the change should come through legislation rather than by a judicial effort to make refinements such as plaintiff suggests in this case." *Id.* at 894.

169. For example, the requirement by some courts that a contract action for attorney malpractice be based on an *express* promise is an example of rational choice. *See supra* notes 101-09 and accompanying text.

170. 760 S.W.2d 642 (Tex. 1988).

opinion wherein the court, after a careful policy analysis, rendered a decision balancing the interests of clients and attorneys in favor of clients in malpractice cases. The issue before the court was when the relevant statute of limitations should begin to run in a negligence suit brought by a client for attorney malpractice. The court adopted the so-called "discovery rule," holding that the statute does not begin to run until the client discovers or should have discovered the lawyer's misconduct.[171] In reaching its decision, the court eschewed the normal Texas rule in personal injury cases that the statute begins to run from the moment of injury.[172]

The court justified its decision on the basis of the unique and compelling nature of the attorney-client relationship.[173] The court emphasized that an attorney is required to use the high level of skill and diligence required of a practitioner of the legal profession and opined that it would be unrealistic to expect a lay person client to have similar legal acumen and knowledge necessary to perceive an attorney's wrongdoing at the moment of its occurrence.[174] Discovery will often occur much later, usually after the fiduciary relationship has ended. Indeed, because the attorney is obligated to make full disclosure of all relevant facts pertaining to the client's case, the client will reasonably feel free to rely on the attorney, and suspicion of wrongdoing will often not naturally occur during the term of the relationship.[175] Thus, reasoned the court, adopting the general rule of accrual at the time of injury would unfairly require a client to ascertain malpractice at the instant of its occurrence and would absurdly necessitate his hiring a second attorney to observe the work of the first.[176] Accordingly, the court concluded that any burden placed on the attorney by the adoption of the discovery rule would be less onerous than the injustice of denying recovery to victims who are unaware of the misconduct.[177]

Willis is a well crafted decision in favor of clients. Most importantly, the client had made no allegations of breach of contract nor of breach of fiduciary duty,[178] so the court was speaking only to causes of action for malpractice. In that context, the court quite naturally said that a "cause of action for legal malpractice is in the nature of a tort and is thus governed by the two-year limitations statute."[179]

Unfortunately, other courts in Texas have subsequently taken that language out of its context, concluding that claims by clients, whether sounding in malpractice, contract, or breach of fiduciary duty, are in the nature of tort. Perhaps the misreading is seductive because it allows the courts

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171. *Id.* at 644-46.
172. *Id.* at 644; *see also* Marino v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990); WILLIAM V. DORSANEO III, ADVANCED LITIGATION GUIDE, TORT ACTIONS § 72.031[1][b] (1992).
173. *Willis*, 760 S.W.2d at 645.
174. *Id.* (citing Ward, *supra* note 14, at 613).
175. *Id.*
176. *Id.* at 646.
177. *Id.*; *see also* Robinson v. Weaver, 550 S.W.2d 18, 23 (Tex. 1977).
178. *Willis*, 760 S.W.2d at 646.
179. *Id.* at 644.

to lump various causes of action into one, and to avoid the difficult, and sometimes quite subtle, distinctions that would be required for a case-by-case analysis of different causes of action. For example, in *Pham v. Nguyen*[180] clients sued their attorney alleging both negligence and breach of contract. Relying on *Willis*, the court held that an action for malpractice is in the nature of tort regardless of how the suit is framed and that the two-year statute of limitations thus applied.[181] The clients prevailed in the case because their tort claim remained viable under the discovery rule applicable to malpractice actions sounding in tort even though four years had passed since the malpractice.[182]

The client was, however, not so fortunate in *Estate of Degley v. Vega*,[183] where the court held that actions for malpractice and breach of fiduciary duty were to be treated the same for statute of limitations purposes.[184] The estate had filed a motion against its former attorney to recover allegedly excess legal fees charged to the estate for its administration. The surviving widow had executed two secured notes to the attorney for his fees. The widow alleged that she had agreed only to pay a reasonable fee, that the fees charged were unreasonable, and that the attorney had fraudulently induced the widow into executing the two notes. The trial court, however, found that the fee charged was not excessive and that no fraud, overreaching, or breach of fiduciary duty had occurred.[185] On appeal, the court upheld the judgment of the trial court and, relying on the *Willis* and *Pham* decisions, reaffirmed the notion that, regardless of the nature of the claim, an action for malpractice sounds only in tort.[186]

Other Texas cases have continued this "lumping" approach to malpractice actions against attorneys.[187] We do concede, however, that all of the cases to date may have reached the correct result. Texas has no separate statute of limitations applicable to actions against fiduciaries. Tort actions, including actions for breach of fiduciary duty, are governed by a two-year statute,[188] ameliorated by the case law encrustation of a discovery rule. However, contract actions in Texas, although accruing at the time of breach rather than the discovery thereof, are governed by a four-year statute.[189] Under the lumping approach, a contract action for malpractice will presum-

180. 763 S.W.2d 467 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

181. *Id.* at 469.

182. *Id.* at 470.

183. 797 S.W.2d 299 (Tex. App.—Corpus Christi 1990, no writ).

184. *Id.* at 302.

185. For this reason, we do not quarrel with the result of the case but only with the court's analysis and, particularly, its reading of *Willis*.

186. *Estate of Degley*, 797 S.W.2d at 302-03.

187. *See* American Medical Elecs. v. Korn, 819 SW.2d 573, 576 (Tex. App.—Dallas 1991, writ denied); *see also* Woodburn v. Turley, 625 F.2d 589, 592 (5th Cir. 1980); Sledge v. Alsup, 759 S.W.2d 1, 2-3 (Tex. App.—El Paso 1988, no writ); Black v. Wills, 758 S.W.2d 809, 813-14 (Tex. App.—Dallas 1988, no writ); Gabel v. Sandoval, 648 S.W.2d 398, 399 (Tex. App.—San Antonio 1983, writ dism'd); Citizens State Bank v. Shapiro, 575 S.W.2d 375, 386 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

188. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986).

189. *Id.* § 16.004.

ably be treated as in the nature of tort, and thus subject to the two-year statute of limitations. The necessary effect will be to deny a right of action in Texas to a client who brings suit more than two years after discovering the wrong but less than four years after its occurrence.

That inequity was recognized in *Jampole v. Matthews.*[190] In *Jampole*, on the eve of settlement of the suit for which attorney Matthews had been retained, Matthews persuaded client Jampole to increase the contingent fee payable to him in the event of settlement from thirty-three to forty percent. More than two years after the settlement was paid, Jampole sued Matthews seeking damages for paying a fee higher than that called for by the retainer agreement, alleging breach of contract, breach of fiduciary duty, violation of the state consumer protection statute, and fraud. Matthews was granted summary judgment by the trial court in response to his argument that the cause of action, no matter the label given it, was for malpractice and was thus barred by the two-year statute of limitations. On appeal, the court reversed.

Noting that in *Willis* there were no allegations of fraud or breach of contract, the appellate court refused to interpret that decision as mandating that all malpractice actions, regardless of their nature, be governed by the two-year statute of limitations.[191] Instead, the court reasoned that actions for attorney wrongdoing sounding in contract, fraud, or breach of fiduciary duty should be distinguished from actions alleging negligent legal practice.[192] These other actions would be governed by the applicable four-year statute of limitations, while only the negligence action would be subject to the two-year statute.[193]

We think that the decision of the court of appeals in *Jampole* is correct. We submit that allowing incidentals such as statutes of limitations, kinds of damages suffered, and other peripherals to determine the nature of a client's action against her attorney for malpractice is to ignore traditional distinctions between causes of action, to misread or ignore cases like *Willis, Hale v. Groce,*[194] and their progeny (cases reaching their results only after careful analysis of the nuances of the attorney-client relationship), and to turn jurisprudence on its head. The traditional distinctions among causes of action were at issue in the recent case of *Peeler v. Hughes & Luce.*[195] The client, who had been convicted of tax fraud, sued her former attorneys, who had represented her in defending the criminal prosecution, alleging that they had failed to inform her of an offer of immunity from the prosecution and instead had encouraged her to sign a plea bargain agreement admitting criminal guilt. On the recommendation of her attorneys, she did plead guilty and was

190. 857 S.W.2d 57 (Tex. App.—Houston [1st Dist.] 1993, n.w.h.).

191. *Id.* at 61.

192. *Id.* at 62.

193. *Id.*

194. *See supra* notes 8-17, 63-75, 103-09, and 170-79 and accompanying text.

195. Peeler v. Hughes & Luce, No. 05-92-01541-CV, 1993 WL 398875 (Tex. App.—Dallas Oct. 11, 1993, n.w.h.). The decision in this case was reached while this article was in galley. We appreciate the courtesy of our editors in allowing us to include a brief analysis of the case.

given a probated sentence and a fine. In the subsequent suit against her attorneys, the client alleged various causes of action including negligence, gross negligence and breach of contract. The trial court granted summary judgment on all claims in favor of the defendant attorneys.

On appeal, the court affirmed the trial court's judgment on the client's malpractice claims.[196] Citing numerous cases from other jurisdictions,[197] the court on appeal held that a client who is adjudicated guilty of a crime cannot recover against her former attorneys for negligence in defending the criminal prosecution unless the client can prove her innocence of the underlying criminal offense.[198] The court reasoned that an action for malpractice requires a showing that the attorney's negligence proximately caused the client's conviction.[199] Unless the client can establish her innocence, the conviction must stand as the result of her guilt rather than of her attorney's negligence.[200]

In the trial court, the client had alleged an action for breach of contract, upon which the court also granted summary judgment for the defendant attorneys. Because the client did not appeal the contract claim, the appellate court did not have to address the issue of causation in the context of a contract action. The court, however, discussed at some length a recent decision of the Pennsylvania Supreme Court,[201] which held that a client who could not prove innocence of the underlying conviction so as to satisfy the proximate causation requirement for a malpractice action could, nevertheless, recover against her attorneys for breach of contract, needing to prove "only that he had an agreement with the attorney and did not receive the benefits of representation to which he was entitled under the contract."[202] We question this conclusion. We fail to see how a client who cannot prove that her attorney's incompetence caused her criminal conviction may nevertheless prove that the attorney's failure to honor his promise to represent her competently could have caused that conviction.[203] Thus, if one accepts the rea-

196. *Id.* at *12.

197. *Id.* at *5-7. The court noted that the question of causation in malpractice actions against criminal defense attorneys had not been definitively addressed by the Texas courts. *Id.* at *4.

198. *Id.* at *8.

199. *Id.*

200. *Id.* This reasoning is rather circular. Who is to say that even a guilty client would have been adjudicated guilty had her attorney not been guilty of malpractice? And even an innocent client may as a tactical matter accept a bargain to plead guilty in exchange for a light sentence and the opportunity to avoid the unpleasantness of a criminal trial.

The court also based its decision on policy concerns that a criminal not be allowed to profit from her criminal acts. *Id.* at *9. Presumably these concerns would only bar a criminal client from recovering punitive damages (and possibly damages for non-pecuniary losses such as mental suffering), but not purely compensatory damages, in an action based on her attorney's wrongdoing in defending her criminal prosecution. Purely compensatory damages would represent no profit to the criminal client.

201. Bailey v. Tucker, 621 A.2d 108 (Pa. 1993).

202. *Peeler*, 1993 WL 398875, at *7 (citing *Bailey*, 621 A.2d at 115).

203. The causation requirement in contract law is, in the present context, very similar to that in the law of tort. Simply stated, an aggrieved party may recover only for losses caused by the breach of contract. *See* E. ALLAN FARNSWORTH, CONTRACTS § 12.1, 841 (2d ed. 1990) ("There is, of course, a fundamental requirement, similar to that imposed in tort cases, that the

soning regarding causation in the tort action, the same reasoning would apply equally to the contract action.

Regardless, in *Peeler* this reasoning would not have applied to bar an action against the attorney for breach of fiduciary duty in failing to advise the client of an offer of immunity from prosecution. The client could certainly maintain without any proof of innocence of the underlying conviction that "but for" the nondisclosure, she would have accepted the offer and thereby avoided both the ensuing prosecution and the resulting conviction. In fact, a disclosure of an offer of immunity would be particularly attractive to a guilty client. Unfortunately for the client in *Peeler*, a claim for breach of fiduciary duty against her former attorneys was not before the court.

The three causes of actions we have discussed herein contemplate different underlying conduct, and they each balance differently the rights of the parties. Each cause of action has its own subset of incidentals designed to facilitate a proper adjustment of competing interests. Admittedly, a rigid enforcement of these distinctions may occasionally result in a worthy plaintiff being denied appropriate relief because of a mistake in choosing one cause of action rather than another.[204] However, such a result inevitably follows from an incorrect selection and is a necessary concomitant to having a choice among alternatives. Choosing the correct cause of action is a burden in all litigation.

Certainly, legal malpractice actions often fall on that "borderland of tort and contract,"[205] and commentators have documented that traditional boundaries of contract and tort have for some time been merging into a creature called "contort."[206] If expediency calls for a lumping approach, at least

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breach of contract be the cause in fact of the loss, although [as in tort] the presence of other contributing causes may not preclude recovery."). Professor Farnsworth quotes Texasgulf v. United Gas Pipe Line, 610 F. Supp. 1329 (D.D.C. 1985) to the effect that if the "defendant's breach proximately caused the plaintiff's injury, the defendant is not relieved in whole or in part from liability by the existence of other contributing causes." FARNSWORTH, *supra*, § 12.1, at 841

204. Where a party has two or more remedies for enforcement of a right, the fact that one remedy is barred by the statute of limitations does not bar the other remedies. However, where a plaintiff elects one of two remedies and such action is barred by the statute of limitations, the plaintiff is bound by his election and cannot thereafter resort to the other remedy for which a different limitation is provided.

Hutchinson v. Smith, 417 So. 2d 926, 928 (Miss. 1982) (referring to plaintiff-client in a legal malpractice action).

205. *See* PROSSER, *supra* note 168, at 380. Some courts rather openly manipulate the facts in order to sustain the plaintiff's choice of cause of action.

> This manipulation seems preferable to the alternative of barring an injured party's claim, but it is not the most rational or effective means of distributing justice, because a plaintiff's chance of success depends less on the merits of his claim than on the resourcefulness of counsel and the willingness of the court to read the facts and the law in a favorable light.

Jonathon M. Albano, Note, *Contorts: Patrolling the Borderland of Contract and Tort in Legal Malpractice Actions*, 22 B.C. L. REV. 545, 545 (1981).

206. *See generally* Albano, *supra* note 205; GRANT GILMORE, THE DEATH OF CONTRACT (1974); Eric M. Holmes, *Is There Life After Gilmore's Death of Contract? Inductions From a Study of Commercial Good Faith in First-Party Insurance Contracts*, 65 CORNELL L. REV. 330

the rules of the game should be known in advance, not applied ex post facto, and be concocted only after careful consideration of the vagaries, the nuances, and the equities of the available alternatives.

Causes of action evolve to form a paradigm tailored to distinct fact patterns so that repeatedly uniform and just results are achieved among parties who litigate within that paradigm. This artifact of well-ordered jurisprudence is defeated when courts allow a choice of causes of actions based, not on the conduct at issue in the litigation, but instead on what incidental trappings of a particular cause of action better suit the litigant's side of the case. Courts then are forced to merely square doctrine with result based on the claimant's choice, whether fortuitous or calculated, and the risk is that fundamental equities will be ignored. For example, one court, apparently armed with the conviction that the distinction between a tort action and one sounding in contract is quite clear, ruled that, where an attorney was employed to obtain a child support order but only partially performed the agreement, the correct cause of action was for breach of contract.[207] As a result, presumably distinguishing poor performance from non-performance, the former governed by contract and the latter tort, the court ruled that the appropriate action sui generis was for breach of contract, and the contract statute of limitations thus applied.[208] However, a detached observer might equally well conclude that the attorney's poor performance in the case was an act of negligent malpractice instead of, or at least more than, a breach of contract.[209] It is naive to assume that courts can, across the broad spectrum, distinguish fact patterns according to their true nature, tort or contract.[210]

XI. CONCLUSION

No one need apologize for the attempts of our courts to formulate a body of law that emphasizes lawyer obligations and that imposes harsh sanctions for violations of a client's trust.[211] However, at present, abstract differences among the various causes of action available for attorney wrongdoing in terms of pleading requirements, problems of proof, available defenses, appli-

(1980); Richard E. Spiedel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975).

207. Pittman v. McDowell, Rice & Smith, 752 P.2d 711, 718 (Kan. Ct. App. 1988).

208. *Id.*

209. *Cf.* Wascom v. State Farm Ins. Co., 517 So. 2d 228, 231 (La. Ct. App. 1987) (drawing a distinction between malpractice by malfeasance and malpractice by nonfeasance).

210. *See, e.g.*, Long v. Buckley, 629 P.2d 557, 559 (Ariz. Ct. App. 1981) (holding that attorney malpractice actions are governed by tort, not contract, statutes of limitations); Hillhouse v. McDowell, 410 S.W.2d 162, 166 (Tenn. 1966) (holding that client's action against attorney for failure to prosecute personal injury suit within statute of limitations was not governed by one-year personal injury statute of limitations, but rather by the six-year statute relating to contracts).

211. *Cf.* Roy R. Anderson & Walter W. Steele, Jr., *Ethics and the Law of Contract Juxtaposed: A Jaundiced View of Professional Responsibility Considerations in the Attorney-Client Relationship*, 4 GEO. J. LEGAL ETHICS 791, 802-03 (1991) (arguing that the profession is hampered by suffocating standards imposed upon attorneys and that the profession may not indeed deserve the heightened expectations heaped upon it any more than other types of professionals).

cable damage rules, and other nuances of trial procedure have made the effort of litigating attorney misconduct an illogical and sometimes impenetrable morass.

As things presently work, making the correct choice among causes of action for breach of fiduciary duty, for negligent malpractice, and for breach of contract is critical. Too often that choice of law is made on an ad hoc or accidental basis, or is superficially imposed by the courts, because differences between the causes of actions are misunderstood by lawyers representing aggrieved clients and by courts adjudicating their claims. In this article we have attempted to demonstrate that each of the causes of action has distinct advantages and disadvantages to both client and lawyer. Conceptionally the law of fiduciary obligation is static, ancient, and steady; while the law of malpractice changes and evolves over time with changes in the normative habits of lawyers. Furthermore, fiduciary obligations are sui generis and absolute, while the malpractice obligation of reasonable care is only relative and fact specific.[212]

Thus, choice of law and the availability of that choice are more than simply normative in the scheme of things. The current system of misunderstood causes of action and inconsistent results, as well as the split among courts in allowing malpractice actions in tort or contract, has caused great confusion among practitioners in this area of the law and has failed to provide effective enforcement mechanisms to redress clients' injuries for wrongs committed by their attorneys. All of the heroic notions of professionalism and dedication that ostensibly mark the legal profession (at least in the eyes of lawyers themselves) are meaningless without logical and effective enforcement mechanisms.

The legal profession, priding itself in its self regulation, has a tremendous responsibility to make discerning policy decisions so as to better define the ways in which meaningful rights may be provided to clients. As the volume of legal litigation malpractice continues to grow, the need for consistency and equity in the cause or causes available to clients also grows. It seems to us much more logical to classify legal malpractice as a hybrid of tort and contract and to establish a consistent set of rules, perhaps by statute, for

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212. Here we are referring to the distinction long made by jurists between discretionary and nondiscretionary rules of law. Generally speaking, malpractice actions are governed by discretionary rules, while breaches of fiduciary obligations are subject to nondiscretionary rules of law. The application of discretionary rules is dependent upon the facts and circumstances of the particular case and on the demands of equity and good faith. According to Professor Friedman, such rules "are tolerable as operational realities only in those areas of law where the social order or the economy can afford the luxury of slow, individuated justice." Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 792 (1967). Our society has apparently determined that we can afford such luxury with respect to malpractice actions. One the other hand, where "there is a social interest in mass handling of transactions, a clear-cut framework of nondiscretionary rules is vital." *Id.* To date, fiduciary obligation is governed by these kinds of rules. Professor Pound described the application of nondiscretionary rules as follows: "[N]o scope [is] given for application to circumstances. The cases are fitted to the straightjacket of the rule, not the rule shaped in its application to the circumstances of fact of the case." Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 927 (1960).

actions involving attorney wrongdoing.[213]

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213. Some states have come at least part way. *See, e.g.*, ALA. CODE §§ 6-5-570 to -581 (Supp. 1992); TENN. CODE ANN. § 28-3-104 (1980); CAL. CIV. PROC. CODE § 340.6 (West 1982).