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# THE UNCHANGING FACE OF LEGAL MALPRACTICE: HOW THE "CAPTURED" REGULATORS OF THE BAR PROTECT ATTORNEYS

LAWRENCE W. KESSLER*

## I. INTRODUCTION

Over the last century the legal malpractice tort has remained constant while the rest of the legal world of negligence has been modified to increase duties and influence conduct to conform to our modern sense of fairness. In a century in which consumers of products have been catapulted out of the legal dungeon of "no privity" to the shining sea of strict product liability, in which consumers of medical services have been protected by the creation of an entirely new tort of informed consent, and in which trespassers have been given protections against dangerous conditions, only the consumers of legal services have been left with the meager rights provided by unmodified nineteenth-century doctrine. The legal malpractice tort, alone, retains defendant protections that have been denied to others.

The primary focus of this Article is to identify the dynamic that has prevented the incorporation of modern doctrines of liability into this tort. These doctrines would enhance the ability of those who have been injured by negligent legal services to gain compensation. However, the judicial system, through which malpractice rules regulate the bar, has prevented their adoption. This Article will also propose modifications to these judicially created rules and demonstrate that they lack justification. But no proposal to change such rules, which have withstood the assault of time and vast changes in public perceptions, could succeed unless it identified the factors that have caused them to persist. Without knowing how the legal malpractice tort has withstood the whirlwind of twentieth-century tort reform and remained stagnant

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while all else has changed, no changes are likely to be adopted.

The simple explanation is that the legal malpractice tort has maintained its unique status because the judicial lawmakers who are supposed to regulate the bar have instead been "captured." Capture is a term developed in the early part of the last century to explain the dynamic through which regulatory agencies often failed to zealously restrict the industries that they were supposed to regulate.[1] The term reflects a scenario in which those being regulated gain an undue influence over the regulations.[2] This Article will treat the subject of regulatory capture as it relates to attorneys, and expose and analyze the degree to which the lawyers who regulate the bar, through their roles as judges, legislators, and advocates, have had their neutrality undermined by over-identification with the legal profession.

The doctrine of regulatory capture is not new, but it has not been utilized as a tool to analyze the efficacy of judicial, statutory, and ethical regulation of the bar. By examining discrete malpractice doctrines, this Article will examine the degree to which the bar's regulators have been captured. The goal of the examination is to determine whether the regulators have used their powers to enhance or subvert regulation.

The regulators of bar client service provisions are not the type of regulatory agencies that have traditionally been the subject of capture theory.[3] They are not minions of some administrative agency. Rather

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1. "The idea of agency capture can be traced to a book published by Marver Bernstein in 1955." Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1060 (1997) (presenting a thorough and insightful analysis of the development and importance of capture theory); *see also* MARK ALLEN EISNER, REGULATORY POLITICS IN TRANSITION 125 (1993); Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 364–68 (1989) (citing numerous selections from environmental law opinions from the 1960s and 1970s reflecting the power of capture doctrines); Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1302–18 (1988); John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723–25 (1986).

2. Merrill, *supra* note 1, at 1066. Merrill identifies the key features of the capture theory as "a concern with undue industry influence over agency decision-making; the adoption of new common law procedural rules in an effort to open up or 'ventilate' agency processes so as to neutralize this influence; and the underlying commitment to salvaging the New Deal ideals of activist government." *Id.*

3. *Id.* at 1060 ("By the time the late 1960s rolled around, agency capture had come to be regarded as something more akin to the universal condition of the administrative state.") *Id.* For an analysis using capture doctrines as they effect 1967–1983 administrative law, see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1570 (1992).

the bar's regulators are primarily the lawyers who sit as judges and craft, revise, and define the standards of conduct through rulings in legal malpractice cases,[4] or, the lawyers and legal academics who create the ethical standards for legal practice.[5]

The legal system is dominated by attorneys. Many legislators and judges are attorneys. When the system devises rules that effect the relationship between attorneys and clients it subjects itself to special scrutiny.[6] It is a fact of the very structure of legal institutions that the individuals who create the rules of law can protect themselves and their colleagues before the bar by slanting the process in favor of the attorneys. This potential for favoritism should not be ignored. The risk is especially troubling when the rules are created by common law courts. Legislatures may be dominated by lawyers, yet they are responsive to the public through the election process. Judges are protected from this process.[7] Judge-made rules should never appear to unfairly benefit the bar.[8]

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4. "The time has come to consider legal malpractice law as part of the system of lawyer regulation." John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 102 (1995). "Finally, legal malpractice cases offer courts an unusual opportunity to effectuate the rules they promulgate by influencing lawyers' conduct. Lawyers read malpractice decisions, and will heed the possibility of personal liability." *Id.* at 107–08.

5. The Canons of Professional Ethics were initially adopted by the self-regulating entity known as the American Bar Association in 1908. *See* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role,* 68 FORDHAM L. REV. 723, 741 (1999). In 1969, the same group replaced the Canons with the Model Code of Professional Responsibility, which contained a "Canons" and "Ethical Considerations" supplement. *Id.* These were eventually supplemented with "Disciplinary Rules." *Id.*

6. *See generally* JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (2d ed. 1986) (analyzing the degree to which legal rules are political and social choices and the decisions of courts should be analyzed to determine their political impact); Ahilan T. Arulanantham, Note, *Breaking the Rules?: Wittgenstein and Legal Realism*, 107 YALE L.J. 1853 (1998); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997); Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607 (1995).

7. Canons of Ethics, for example, prohibit judges from campaigning on legal issues:

> A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH L. REV. 811, 814 (1998).

8. *See generally* Merrill, *supra* note 1, at 1077. Analyzing capture theory which "at least in the form familiar to judges and legal academics in the 1970s, was about the

Two discrete rules will be closely explored. Both rules favor lawyers who are charged with legal malpractice. Both rules disadvantage the consumers of legal services who seek judicial remedies for malpractice. Legal malpractice doctrines must be the center of any investigation of the degree to which capture induces rules that favor lawyers because it is the area in which the self-interest of the bar is most evident. Lawyers may be affected by laws that are directed at clients. For example, laws may reduce or increase the amount of fee generating business. But, legal malpractice litigation places the bar in the role of a party. The rules of this litigation directly impact the individual attorney litigants. These particular doctrines have been selected as the fulcrum of the analysis of potential regulatory capture because they are both important and technical legal malpractice rules. The importance of the rules is essential to an analysis of capture. An indicia of capture is the creation or maintenance of rules that significantly benefit the purportedly regulated industry.[9] Unimportant rules might be maintained, but not because of capture. Their perpetuation might be the result of inattention. The technical nature of the rules means that no political pressures can be identified to explain their existence. If important rules can be identified that uniquely benefit attorneys, rules that are created and maintained by those who regulate attorneys, their existence would be a significant indicator of capture. But, the rules would only demonstrate capture if they lack rational justifications and if they are different from those judicially created rules defining the duties of other professionals. Thus, the justifications that have been given for maintaining these rules will be examined to determine whether they reflect the wisdom of neutral regulators or the bias of those who have

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disproportionate influence of one type of group—business or producer groups—and focused . . . on the influence that this type of group wielded over one governmental institution—the administrative agency," Merrill demonstrates the degree to which capture theory has influenced judicial action and argues its continuing vitality despite the ascendance of public choice theory. *Id.* at 1069.

9. An example of capture was found in OSHA regulations that changed over time: "OSHA may have originally seemed to follow the public-interest theory of regulation, but in the last several years it has more closely resembled the capture theory; in effect, it seems to have been co-opted over time so that its policies benefit those it regulates." LARRY N. GERSTON ET AL., THE DEREGULATED SOCIETY 193 (1998). Capture theorists base their theories on specific investigations of the actual functioning of regulatory agencies: "[A] series of classic papers [by] George Stigler (1962, 1964) investigated the impact of the regulation of electricity prices and the securities markets in the U.S." THE REGULATION GAME 15 (Alan Peacock et al. eds., 1984). Thus, capture theory is not an abstract construct, but rather "capture theory describes actual agency behavior." GERSTON, *supra*, at 69.

been captured.[10]

Both doctrines act to limit the amount of the judgment that a negligent attorney owes her ex-client. One precludes recovery for pain and suffering, and the other reduces judgments by deducting the amount of the negligent attorney's fee. It is easy to underestimate the importance of these two rules, in that they appear to do nothing but marginally lower the amount of damages. Their existence does not preclude a judgment against the attorney. Nonetheless, they are critical because they reduce the size of verdicts or make any collection extremely difficult.[11] The major significance is that these rules diminish the incentive to engage in litigation to protect clients' rights. Litigation is expensive. Tort litigation is generally funded through a contingent-fee arrangement, in which the plaintiff's attorney advances the funds to pay for the litigation and then recovers them out of the judgment. The smaller the possible recovery, the more difficult it will be for injured clients to find attorneys to bring legal malpractice cases. The amount of money in a judgment represents more than just the compensation to the individual. It is the fuel that stimulates others to seek legal remedies for their injuries. The greater the potential recovery, the greater the number of lawsuits and the greater the effort to modify rules that protect defendants.[12] The smaller the estimated judgment, the less

10. "Whatever the original guidelines given them, goes the [capture] argument, the agents get drawn into doing what is in the best interest of those they are regulating—they are, wittingly or unwittingly, captured by the people they are supposed to be policing . . . ." MICHAEL WATERSON, REGULATION OF THE FIRM AND NATURAL MONOPOLY 7 (1988).

11. Malpractice litigation is both a useful and under-utilized mechanism for changing defendant behavior. There have been a substantial number of proposals designed to enhance its regulatory impact on the legal profession by encouraging litigation both by increasing the size of the judgments in legal malpractice actions and through other reforms. *See* Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 SAN DIEGO L. REV. 401, 421, 522 (2000); *see also* Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583 (1996).

12. The type of aggressive litigation that can be stimulated by the profit incentive is best seen in attorney-funded litigation against cigarette companies. Glenn Collins, *Judge Allows Big Lawsuit on Tobacco,* N.Y. TIMES, Feb. 18, 1995, at A1. A consortium of plaintiff malpractice attorneys was created to fund a litigation campaign against the cigarette industry. In 1994 a group of sixty-five law firms committed themselves to invest $100,000 annually per firm for this purpose. *Id.*; *see also* Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability,* 73 CAL. L. REV. 677, 679 (1985) (developing an economic analysis of the mechanism by which different liability rules affect behavior and applying these rules to all potential defendants and especially to attorneys whose "problem-solving" behavior is oriented to their personal profit). In a different and quite conceptual paradigm, utilitarian analysts identify this self-protective conduct as system based efficiencies. *See* George P. Fletcher, *Fairness and Utility in Tort Theory,* 85 HARV. L. REV. 537, 567–69 (1972). Large

incentive to sue and, consequently, the less effort to reform the law.[13]

The causation rule limiting liability for pain and suffering caused by legal malpractice[14] is based upon the concept that litigation malpractice, even when it causes an action to be lost, does not significantly enhance the emotional trauma of the litigation itself.[15] It is a "proximate-cause" rule. The issue is removed from the jury and is decided by the court as a matter of law. The jury is not permitted to consider the facts and determine that the plaintiff has, in fact, suffered. Because pain and suffering damages can constitute a substantial amount in excess of the damages for tangible injuries, its exclusion from the legal malpractice tort severely limits the size of verdicts.

The rule requiring the deduction of the attorney's fee from a legal malpractice judgment[16] is another causation rule, specifically a "cause-in-fact" rule. Courts have found that it would be inappropriate for the plaintiff to be compensated for an economic loss that she did not suffer. Thus, in a personal injury action, if a plaintiff proves that attorney malpractice caused her to lose a case in which she would have received a verdict for one hundred thousand dollars, the amount of compensation would equal the one hundred thousand, less the amount of the contingent fee.

An examination of the justifications given for these rules will demonstrate that they are unsupportable. The judicial opinions will then be analyzed to demonstrate that the unstated and unexamined value judgments which act to perpetuate these lawyer protective doctrines are the result of capture. The impact of capture will be revealed, and the Article will urge that these and other similar capture-reflective legal malpractice doctrines be modified.

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potential verdicts induce plaintiffs' attorneys to protect the interests of the poor and injured. *Id.* Thus, the bar, in its self-interest maximizes the social good. *See id.*

13. *See* Patrick E. Tyler, *Tobacco-Busting Lawyers on New Gold-Dusted Trails,* N.Y TIMES, Mar. 10, 1999, at A16 (reviewing the impact of huge recoveries on the incentives for attorneys to pursue specific types of tort reform litigation).

14. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 20.11, at 141 & n.4 (5th ed. 2000) (offering an extensive compendium of case law in thirty states supporting this proposition).

15. "With some jurisdictional exceptions, the rule is that damages for emotional injuries are not recoverable if they are a *consequence* of other damages caused by the attorney's negligence." *Id.* at § 20.11, at 141.

16. Abetting this rule is the rule that the client must prove that the underlying judgment could have been collected. The premise is to prevent a plaintiff from receiving a windfall. The result, however, is a windfall for the attorney.

## II. CAPTURED REGULATORS

Before considering an exotic doctrine such as capture, the simpler hypothesis of conspiracy must be considered. Lawyers make these rules and the rules protect lawyers. Courts and legislatures have created and maintained protections that are now virtually unique to the legal malpractice tort. The obvious conclusion that these beneficial rules are the product of an agreement (implicit or explicit) by the regulators to maintain protections that benefit themselves and their colleagues cannot be ignored.[17] However, a conspiratorial explanation would mean that there was some type of communication between the legal decision-makers in over fifty discrete jurisdictions[18] over a period of decades.[19] In

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17. But, it may not be worthy of substantial consideration. Occam's Razor is defined as: "[A] scientific and philosophic rule that entities should not be multiplied unnecessarily which is interpreted as requiring that the simplest of competing theories be preferred to the more complex or that explanations of unknown phenomena be sought first in terms of known quantities." WEBSTER'S NEW COLLEGIATE DICTIONARY 816 (9th ed. 1989). The rule is named after William of Ockham (Occam) and also called "Law of Economy" or "Law of Parsimony." 8 NEW ENCYCLOPEDIA BRITANNICA 867 (15th ed. 1994).

18. Because each state's judiciary and each state's legislature have independent power to create rules modifying or creating obligations and duties in tort law, each would have to be considered discrete jurisdictions. This would create 100 decision-makers without even considering the federal government.

19. Causation doctrines that beleaguer plaintiffs in legal malpractice actions have been modified in other types of actions for over a century.

> The past forty years have witnessed sweeping reforms in legal doctrines. In tort law these winds of reform have produced a dramatic expansion in the duty of care. Common law tort rules that limited the responsibility of economic elites to those dependant on their conduct were systematically modified or eliminated. For example, in the 1960s, a manufacturer's duty to the consumer was expanded by the limitation of the negligence standard and its replacement with strict liability. In the 1970s, a personal injury defendant's favorite defense, the contributory negligence defense, was replaced by comparative negligence. In the 1980s, the property owner's bastion of protection against reasonable care requirements—the trespasser, licensee, and invitee duty classification structure—was eliminated or modified.

Kessler, *supra* note 11, at 402–03 (citation omitted); *see also* Lisa Perrochet et al., *Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability*, 27 TORT & INS. L.J. 615, 615–16 (1992). In medical malpractice actions,

> jurisdictions have taken two approaches to allow a patient to sue for damages even though the patient probably would have been in the same physical condition absent the defendant doctor's negligence. The first approach is to relax the reasonable medical probability causation standard and allow recovery where the patient proves the physician's conduct deprived the patient of a possibility of a better medical result.
>
> ... The alternative approach is to define the decreased possibility as a

light of the sheer size of the numbers of distinct judges and legislators who have participated in this rule making, the chance of intentional collusion is remote.

Hence, the core of the problem is not likely collusion, but rather a matter of values common to attorneys everywhere. The regulators of the bar—whether judges, legislators, or ethicists—are nevertheless lawyers. They are so well versed in the problems faced by attorneys that they share common values and perceptions with each other. Such a sharing of values by decision-makers induces the creation of legal doctrines that are justified by seemingly neutral principles, but actually protect the interests of the economic elite. Karl Marx wrote of how the law occupies a vital role in the creation of a "culture-complex," or a system developed upon the core of values commonly accepted by the rule makers.[20] Marx was "interested in explaining the character and development of the whole culture-complex as effects of the relations of

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compensable *injury*. Jurisdictions which follow this course adhere to the "reasonable medical probability" standard of causation, but require the plaintiff to show that the physician's conduct probably caused a lost *chance* of improvement or cure.

*Id.*

20. KARL MARX & FREIDRICH ENGELS, BASIC WRITINGS ON POLITICS AND PHILOSOPHY 43 (Lewis S. Feuer ed. 1959).

> I was led by my studies to the conclusion that legal relations as well as forms of state could be neither understood by themselves nor explained by the so-called general progress of the human mind, but that they are rooted in the material conditions of life, which are summed up by Hegel after the fashion of the English and French of the eighteenth century under the name 'civil society'; the anatomy of that civil society is to be sought in the political economy.... The mode of production in material life determines the general character of the social, political, and spiritual processes of life. It is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness.

*Id.* at 43.

A nineteenth-century English case, decided during the time that Marx was writing in England, may be the most perfect example of this 'culture-complex' phenomenon. The House of Lords created the hearsay doctrine known as the "implied assertion" doctrine in an 1837 case, *Wright v. Doe D.'Tatham*, 112 Eng. Rep. 488 (L.J. K.B. 1838). John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 749–60, 777 (1961). The doctrine holds that out-of-court statements that are relevant because of the inferences that can be drawn from the statements about the opinion of the declarant must be excluded. *Id.* The doctrine is justified by analogies to mundane events such as a person walking down the street carrying an umbrella or paying a debt (to prove that it is raining or that the event bet upon actually happened). *See id.* But, the doctrine just happened to prevent an untitled servant from inheriting a vast estate and caused that estate to be vested in a member of the nobility. *Id.*

production. In this culture-complex are included the legal codes, day-by-day legislation, and court decisions which we ordinarily designate as the *laws* of a culture."[21] Of course, the aspect of this culture-complex that Marx would assign as the cause of the bar's maintaining rules that protect attorneys rather than those who are dependent upon the bar, is the "relations of production" that affect the economic underpinnings of the legal profession.

The more modern and less pernicious application of this concept is to attribute the regulators' blindness as to the discriminatory impact of their rules to "regulatory capture." In effect, the regulators have been "captured" by those they should be controlling.[22] Capture is generally considered to be a problem of administrative agencies. Administrative agencies are created to regulate a particular industry. The regulators work with the industry on a daily basis, and eventually come to understand every nuance of the industry and its problems. Although such knowledge is essential to effective regulation, it also can have the unintended side effect of capture.[23] Capture often occurs when the regulators become so familiar with the industry and its problems that they begin to have more understanding and empathy for the problems of the industry than for those caused by the industry.[24]

Legal regulators include law reform lobbying groups, influential legal analysts (the ALI Reporters who draft the Restatement of Torts, for example), judges, and legislators. These are the groups that could be expected to furnish the impetus for modification of rules so that they

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21. SIDNEY HOOK, MARX AND THE MARXISTS 20 (Robert E. Kneger Pub. Co., 1982) (1955).

22. For an extensive analysis of the problem of captured regulators in the supervision of the bar, see generally RICHARD L. ABEL, THE REGULATION OF THE AMERICAN LEGAL PROFESSION AND ITS REFORM (1989); David B. Wilkins, *Institutional Choices in the Regulation of Lawyers: Afterword: How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465, 490 (1996) (highlighting both the positive and negative affects of agency capture with respect to regulating the conduct of lawyers).

23. *See* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 3, 8–10 (1981); Sidney A. Shapiro, *Symposium on the 50th Anniversary of the APA: A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 100 (1997) ("Fortified by numerous studies by Nader's Raiders documenting the failure of regulation in the previous period, the activists saw existing administrative procedures as abetting the 'capture' of agency government by regulated interests.").

24. Capture theory states: "Whatever the original guidelines given them, goes the argument, the agents get drawn into doing what is in the best interest of those they are regulating—they are, wittingly or unwittingly, captured by the people they are supposed to be policing. . . ." WATERSON, *supra* note 10, at 7 (citation omitted).

fairly balance the interests of the consumers of legal services and the bar. In fact, however, they have been uncharacteristically silent.[25] The reason for this silence is capture. Lawyers, like administrators who identify with the regulated industry, understand the problems of the legal industry too well. Every aspect of the legal regulatory system is dominated by lawyers. All judges are lawyers. All of those responsible for the Restatement of Torts are lawyers. A majority of legislators are lawyers. Even lobbying groups such as the various state public interest research groups, are lawyer dominated. Capture does not suggest corruption or conspiracy; but rather, is a phenomenon of identification. Lawyers will rarely lead a movement to impose new obligations on the bar, because lawyers will never underestimate the problems of compliance with those new duties or minimize the importance of their professional services. Indeed, the bench and the bar can be trusted to overvalue the importance of law and lawyers, and to use that valuation as a justification for obstructing change.

### *A. The Judiciary*

The most obvious examples of the way in which lawyers overvalue the importance of legal representation can be found in judicial opinions.[26] Such overvaluation is very persuasive, suggesting that the judiciary was not captured gradually over a course of time, but from the beginning. In substance, the common training and experience of attorneys who become judges is so persuasive that they are already captured by over-identification with the legal industry before they assume the mantles of regulators. Thus, the very life experience at the bar, which is the essential background necessary for an attorney to become a judge, simultaneously causes them to be captured. They are "captured-at-origin."[27]

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25. *See* Leubsdorf, *supra* note 4, at 101.

> Increasingly, professional ideals have been turned into enforceable law, and self-regulation by the organized bar has become regulation by courts and legislatures. The civil liability of lawyers obviously has a role to play in promoting the goals of this regulatory system. These goals include ensuring that lawyers fulfill their fiduciary duties to clients, restraining overly adversarial behavior which is harmful to non-clients, and promoting access to legal services. Yet legal malpractice law has rarely been considered in the light of such goals.

*Id.* at 102–03 (citation omitted).

26. *See* Leubsdorf, *supra* note 4, at 103.

27. GERSTON, *supra* note 9, at 69. "*Capture theory* itself holds two views. One, the

Examples of the ways in which judges over-identify with the bar can be found in a wide range of judicial decisions. In 1998, for example, the United States Supreme Court was faced with the task of defining the access of defendants in criminal cases to exculpatory information.[28] The defendant wished to compel an attorney to provide him with statements made by a now deceased ex-client.[29] The Court had to balance the defendant's liberty interest against the right of confidentiality of the deceased client.[30] The Court held that the lawyer-client privilege continued after the death of the client.[31] The majority based this holding on its view that it was of vital importance to maintain the confidence of clients in the confidentiality of their conversations with their attorneys.[32] This need for confidence in confidentiality was portrayed as an essential prerequisite of effective protection of a client's legal interests.[33] Without total confidentiality, clients would withhold information.[34] The Court's holding is based on a value judgment that the amorphous social interest in protecting the incentive to communicate to an attorney is more important than society's interest in avoiding the conviction of the innocent. No exception would be made for providing information to a prosecutor that would avoid the conviction of an innocent person. The prohibition was extended so completely that it precludes any exception, even one based upon prior judicial review to protect a living person's right to be free from wrongful conviction.[35] The rationale was that the risk to the lawyer-client relationship could not be justified.[36] Thus, the Court's ruling even precludes innocent defendants from obtaining confessions made by deceased individuals to their attorneys.[37]

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*capture-at-origin* view, argues that regulation is adopted at the behest of business to protect its needs. The other view, that of *co-opting*, contends that although regulatory agencies were originally formed to serve the public interest, they have been co-opted over time by those they were meant to regulate." *Id.*

28. Swidler & Berlin v. United States, 524 U.S. 399, 401 (1998).

29. *Id.*

30. *Id.*

31. *Id.* at 410.

32. *Id.*

33. *Id.*

34. "Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel." *Id.* at 407.

35. *Id.* at 402–03.

36. *Id.* at 407.

37. There is no suggestion in the majority opinion that the underlying nature of the criminal case in which discovery of a deceased client's statements are demanded has any relevance to the continuity of the privilege. *See generally id.*

The majority opinion in *Swidler* is based entirely upon the Justices' concept of the importance of the lawyer. No data exists to suggest that a partial exception to the privilege, after death and with prior approval of a judge, would have even the most minor effect on clients. In fact, the majority ignored data that strongly suggested the contrary. The California courts have operated under a modified attorney-client privilege, which includes an exception for posthumous disclosure, for many years.[38] However, nothing indicates that the system of law in California has been diminished because of the exception. The data, however, did not fit in with the majority's inflated view of the critical importance of lawyers and attorney-client confidentiality. Instead, the court simply "understood" the role of lawyers so well that empirical data was not needed. Such justice can only be explained by capture.

Another example of capture can be found in *Prudential Insurance Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood.*[39] In *Prudential*, the New York Court of Appeals held that a law firm was free from liability for negligence because its conduct, though inept, did not constitute a breach of duty.[40] Prudential was owed $92,885,000 from a 1978 loan to United States Lines. Anticipating trouble in meeting its

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> It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this. While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation nonetheless—as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.

*Id.* at 410 (O'Connor, J., dissenting).

38. The attorney-client relationship appeared to exist without diminution in California even though the California Evidence Code explicitly limits the scope of the privilege in estate matters to the pendency of that client's estate. *Swidler*, 524 U.S. at 415 (O'Connor, J., dissenting). "[T]here is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged." *Id.* (quoting CAL. EVID. CODE § 954, cmt. at 232, § 952 (West 1995)). The Court, in finding that client communication would be stifled if the privilege ended with the death of the client, also ignored the fact that the California judiciary had routinely so limited it. "And a state appellate court has admitted an attorney's testimony concerning a deceased client's communications after 'balanc[ing] the necessity for revealing the substance of the [attorney-client conversation] against the unlikelihood of any cognizable injury to the rights, interests, estate or memory of [the client].' " *Id.* at 415 (quoting Cohen v. Jenkintown Cab Co., 357 A.2d 689, 693 (Pa. Super. Ct. 1976)).

39. 605 N.E.2d 318 (N.Y. 1992). The law firm of Dewey, Ballantine, Bushby, Palmer & Wood is hereinafter designated "Dewey, Ballantine."

40. *Id.* at 323.

obligations, United States Lines requested permission to reorganize that debt.[41] Prudential told that company that it was willing to permit the reorganization, but only if the *company's* attorneys wrote Prudential an opinion letter which found that the process would not undermine the security of the money.[42] The firm reviewed the documents and found that the legal mechanism proposed was sound.[43] However, in reviewing the papers the firm failed to note that a critical document was drawn up for $92,885, not $92,885,000.[44] The strategy worked but only the $92,885 was protected.[45] The court held that although there was a duty owed to the non-client plaintiff, it was not breached.[46] The law firm's duty was limited to opining on the merits of the legal theory, which did not include a duty to Prudential to actually review the documents.[47] The court so held, despite the fact that the law firm actually possessed, read and analyzed the documents as part of its process of formulating an opinion on the legality of the proposed strategy.[48]

At best, this court demonstrates an extraordinary sensitivity to nuances. The lawyers had a duty to opine on the viability of the legal theory applied in the document. There was no duty, however, to opine on whether those very documents viably implemented that theory. Such nuance is remarkable. To determine whether it represents an actual capture of conscience on the part of the legal profession, a simple comparison can be constructed between the case law concerning attorneys and that concerning other professionals. Such a comparison reveals whether such nuanced views are representative of the way rules are applied to everyone, or just to lawyers.

Medical malpractice cases supply a useful source of comparison, as the medical profession, like the legal profession, provides vital services

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41. *Id.* at 319.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 323. Oddly, the court in *Prudential* actually undermined the traditional rule protecting lawyers from *any* liability outside of the scope of contract privity in the process of ruling for the defendant. The plaintiff, in effect, won the battle but lost the war. *See* Lucia Ann Silecchia, *New York Attorney Malpractice Liability to Non-Clients: Toward a Rule of Reason & Predictability*, 15 PACE L. REV. 391 (1995). For a similar limitation on an attorney's duties, see *One Nat'l Bank v. Antonellis*, 80 F.3d 606 (1st Cir. 1996). *But see* Donald v. Garry, 97 Cal. Rptr. 191 (1971); RESTATEMENT (SECOND) OF TORTS § 324A (1965).

47. *Prudential*, 605 N.E.2d at 322–23.

48. *Id.* at 319.

to untrained individuals who generally lack the skill necessary to independently evaluate the merits of the care they receive. Both groups of consumers are thus dependent upon professionals and should receive similar protections if victimized by negligence. However, doctor defendants do not benefit from the *Prudential*-style subtle and limited duty. When comparable medical malpractice cases are examined, it appears that only the attorneys reap the benefits of judicial micro-management of their duty.

For example, courts have considered the obligation of various medical experts to provide a patient with informed consent. In one case, the defendants had a relationship to the patient/plaintiff that was strikingly similar to that of the attorneys of Dewey, Ballantine to Prudential. In *Prooth v. Wallsh,*[49] the defendant was a consulting specialist.[50] The plaintiff sought a rule imposing a duty on the consulting specialist to inform him of risks that might exist from the conduct of the treating physicians.[51] He asked the court to impose a duty upon the physician to inform him of the potential consequences of the proposed treatment.[52] The theory of liability was that the consultants had to transcend their relationship with the treating doctors and provide information directly to the patient.[53] Although the court rejected this claim, the court expounded in dicta the duty of a medical consultant.[54] In a startling contrast to the approach taken by the *Prudential* court, the court stated that consultants should be responsible for such informed consent if they are brought into the case at the request of the plaintiff.[55] Such was the nature of the relationship between the consultant defendants and the plaintiff in *Prudential.* The court's dicta, which constitutes a surprisingly clear statement of the scope of duty that they would apply to a medical or legal consultant in the relationship similar to that of Dewey, Ballantine and Prudential, noted that the doctors would have been liable, "*if* the consulting physician *were called in directly by the patient for a 'second opinion.'*"[56] In other words, the *Prooth* court has clearly stated that a consultant who is brought into the

49. 432 N.Y.S.2d 663 (N.Y. Gen. Term 1980).
50. *Id.* at 664.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 666.
55. *Id.*
56. *Id.* (emphasis added).

matter at the patient's request has an obligation of care to that patient that extends to informing her of all potential consequences of the treatment. No distinction was made between theory and document. This dicta precisely tracks the relationship between the law firm of Dewey, Ballantine and Prudential, in that the plaintiff in that case had directly sought the law firm's opinion.[57]

*Prooth* is not the exception, but rather the rule in defining the duties of medical consultants. *In re Sealed Case*[58] involved a medical consultant who had been hired *by* a doctor for the sole purpose of reviewing *that doctor's* medical patients' charts "to ensure that tests [that the] Doctor had ordered had actually been conducted and any necessary follow-up performed."[59] The court held that the consultant would have an obligation to the patient if he "misread the six pages of results he reviewed,... [or] failed to inquire into or diagnose any underlying medical problem that he should have suspected based on those six pages."[60] Again, the court articulated a clear duty for medical consultants to review the records for *all* purposes. Unlike *Prudential*, there was no nuance or limitation of duty. The duty of a medical consultant who reviews patient records extends beyond any theoretical analysis. Instead, her duty is to review the documents with the care necessary to reveal known or unknown problems if they could be "suspected" or discovered through inquiry.[61]

A hypothetical substitution of a medical consultant for Dewey Ballantine permits a visualization of the different rules of law that would be applied. Consider the duty that a court would apply if a famed surgeon had been asked to review a set of diagnostic images (*e.g.*, MRI, CT, or X-rays) and give an opinion about the viability of a novel type of surgery. Assume that she reviewed the documents and failed to notice that the hospital records reflected a planned surgery for the left lung, when the damage shown in the images was actually to the right lung. After the healthy lung was mistakenly removed using the technique that the consultant had ratified, the consultant is sued. The medical consultant would, of course, cite *Prudential* for the proposition that her duty was limited to reviewing the theoretical viability of the novel

57. Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318, 319 (N.Y. 1992).

58. 67 F.3d 965 (D.C. Cir. 1995).

59. *Id.* at 969.

60. *Id.*

61. *Id.*

surgery technique and that her duty to review the records did not include a consideration of how the technique was actually being applied. She would claim that she was only asked to opine on the efficacy of the technique for this type of lung condition. She would demonstrate, accurately, that she was never specifically asked to evaluate the plans of the hospital as to that particular patient. In a medical malpractice context, courts would clearly reject such a duty limitation as absurd. As stated in *In re Sealed Case*, the court would undoubtedly hold that the consultant's duty extended to "any underlying medical problem that he should have *suspected* based on those . . . pages."[62]

Clearly, doctors may be held liable where lawyers are not. Doctors' duties to patients are broader than lawyers' duties to clients, and the bench itself constructs theories that justify limiting the duty of the legal profession to protect its clients. At this point, it is necessary to remember that these limited duties are applied to attorneys whose services the courts have found to be so vitally important that innocent people must be incarcerated rather than reveal attorney-client communications and threaten the possible efficacy of legal representation. Only the phenomenon of capture explains the courts' willingness to protect blatant attorney incompetence. Only capture allows an understanding of how a court could craft duties so subtle that they protect attorneys who caused non-client plaintiffs to lose millions of dollars, just because the lawyers were unable to read and understand the significance of a number on a document. Such decisions are the product of captured regulators who are overly understanding of the problems of their own profession.[63]

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62. *Id.* (emphasis added).

63. Another example of the degree to which capture permeates the judiciary in its role as regulator of attorney conduct can be found in cases in which courts consider the liability of attorneys who abet client fraud. The attorneys in these cases have affirmatively made false statements or by silence concealed false statements by clients. Neutral application of fraud doctrine would seem to mandate liability for these attorneys. Yet the language in many of these cases, if not the holdings, justifies and absolves such lawyer misconduct. As in other areas of capture, an attribute of the attorney's representational obligation (here confidentiality) is seen as so critically important that otherwise sanctionable conduct must be excused. The captured courts so totally identify with the lawyer's interests that preferential treatment for malfeasing lawyers is seen as essential. *See, e.g.*, Schatz v. Rosenberg, 943 F.2d 485, 493 (4th Cir. 1991); Schlaifer Nance & Co. v. Estate of Andy Warhol, 927 F. Supp. 650 (S.D.N.Y. 1996), *aff'd*, 119 F.3d 91 (2d Cir. 1997) (discussed in Peter C. Kostant, *Business Law Symposium Multidisciplinary Practice: Sacred Cows or Cash Cows: The Abuse of Rhetoric in Justifying Some Current Norms of Transactional Lawyering*, 36 WAKE FOREST L. REV. 49 (2001)). According to Professor Kostant, in *Schatz*:

### B. The Bar: The Conspiracy of Silence

Thirty years ago, it was virtually impossible to get a doctor to testify against another doctor in a medical malpractice case.[64] That refusal to participate in the process of judicial control of the medical profession was called the "conspiracy of silence."[65] The barrier of silence was the product of a communal attitude about the practice of medicine, which exhibited a feeling that medical practitioners' problems could not be fairly assessed by anyone outside of the community of medical expertise. Today, this communal identification has largely faded, in that medical experts are commonly available to testify for plaintiffs in medical malpractice cases.[66]

By contrast, there is still a conspiracy of silence in the world of legal malpractice. However, it is not created by the absence of willing experts. As in the medical profession, there are now attorneys who are willing to testify against other attorneys and attorneys who actively prosecute legal malpractice actions. Instead, the legal conspiracy of silence operates at a different level.

Lawyers have simply not been aggressive in developing new doctrines of legal malpractice. The most obvious example of this phenomenon is the absence of legal malpractice litigation attempting to gain the adoption of the "loss-of-chance" doctrine. It has been more

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> The Fourth Circuit dismissed all claims for primary liability as well as for "aiding and abetting" under rule 10b-5 or common law fraud. It also rejected the plaintiffs' argument that "as a matter of public policy, lawyers should not be permitted to perpetrate or assist in a fraud without being held responsible for their wrongdoing." The court concluded that such a policy would prevent a client from reposing complete trust in his lawyer and the "net result would not be less securities fraud."

*Id.* at 56. The decision in *Schlaifer* is then described in the following manner:

> [A] federal district court overturned a jury's finding of fraud and explained that the lawyer had no duty to speak even if he knew his client was making a material misrepresentation. The court also concluded that the lawyer could not be liable for statements in an opinion letter that were "absolutely and unequivocally false" because no one could reasonably believe them.

*Id.* at 59.

64. *See* Leubsdorf, *supra* note 4, at 144–45 ("Starting in the nineteenth century, the malpractice profession sought to protect itself from malpractice claims by discouraging doctors from testifying against each other.").

65. Kessler, *supra* note 11, at 415.

66. *See id.* ("In thirty years, the medical malpractice bar has gone from losing cases because of the 'conspiracy of silence among doctors' to winning a seemingly endless stream of million-dollar verdicts.").

than a decade since the Washington Supreme Court applied the loss-of-chance doctrine in *Herskovits v. Group Health Cooperative*,[67] in which the plaintiff could not prove that the medical malpractice was the cause of death.[68] The court held that, even though the plaintiff had only a 39% chance of living, the doctor was liable because his negligence deprived her of a 14% chance of survival.[69] In light of the many legal malpractice claims that fail because a plaintiff cannot overcome the causation requirement of proving that she would have prevailed but for the negligence of her attorney, *Herskovits* should have been a bonanza for the legal malpractice bar. If applied in legal malpractice, even cases with little chance of success could become vehicles for compensation because a failure to comply with a statute of limitations or the like could easily be proven to have caused a loss-of-chance.[70] But there are only a sparse few reported decisions concerning the applicability of *Herskovits* to legal malpractice actions.[71] For over a decade and across the nation

67. 664 P.2d 474 (Wash. 1983).

68. *Id.*

69. *Id.* at 475.

70. *See* Kessler, *supra* note 11, at 509 (proposing that loss-of-chance be adopted in litigation malpractice action).

71. To attempt to determine the degree to which the bar has attempted to use the loss-of-chance doctrine to benefit plaintiffs in legal malpractice litigation, a broad-based Westlaw search was conducted as recently as February 1, 2002. The terms searched were: "legal malpractice" and "loss of chance," "loss-of-chance," "relaxed causation," or "Herskovitz." The purpose of this search was to discover the number of times the doctrine, loss-of-chance, or even the major case associated with the doctrine was mentioned in a legal malpractice case. The search produced twenty-four cases. Of these twenty-four, thirteen were medical malpractice cases discussing the loss-of-chance of survival due to negligent diagnosis of disease. The twelve that did not apply are as follows: *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984) (class action suit against chemical manufacturers utilizing alternative liability causation standard); *American Home Assurance Co. v. Hagadorn*, 56 Cal. Rptr. 2d 536 (Cal. Ct. App. 1996) (name coincidence of Herskovitz, case has no relevance whatsoever); *Gooding v. University Hospital Building Inc.*, 445 So. 2d 1015 (Fla. 1984) (medical malpractice action alleging loss of chance of survival); *Holton v. Memorial Hospital*, 679 N.E.2d 1202 (Ill. 1997) (medical malpractice action for failure to timely diagnose osteomyelitis caused patient to suffer paraplegia and thereby lost chance of recovery); *Cahoon v. Cummings*, 715 N.E.2d 1 (Ind. Ct. App. 1999) (wrongful death suit suing for loss of chance of survival due to negligent diagnosis of esophageal cancer); *Smith v. State*, 676 So. 2d 543 (La. 1996) (medical malpractice action for failure to timely diagnose patient's cancer thereby causing patient to lose chance of survival); *Weymers v. Khera*, 563 N.W.2d 647 (Mich. 1997) (medical malpractice action for failure to timely diagnose Goodpasture's Syndrome, in which the court held that there is no recovery for loss of an opportunity to avoid physical harm less than death); *Leubner v. Sterner*, 493 N.W.2d 119 (Minn. 1992) (medical malpractice action alleging loss of chance of survival due to negligent diagnosis of breast cancer); *Baker v. Guzon*, 950 S.W.2d 635 (Mo. Ct. App. 1997) (medical malpractice action alleging loss of chance of survival); *Hardy v. Southwestern Bell Telephone Co.*, 910 P.2d

just these few plaintiffs attorneys have even tried to convince courts to adopt loss-of-chance doctrines in legal malpractice cases. The plaintiff's bar that has willingly put up millions to fund innovative suits against the tobacco industry has done nothing to attempt to change legal malpractice doctrine.[72]

This passive acceptance of a legal structure that favors lawyers and disadvantages the consumers of legal services is not limited to the litigation bar. The educators and legal analysts who compose the Reporters of the American Legal Institute's committees that draft the influential Restatements of the Law Governing Lawyers have never proposed a change in the basic principles of legal malpractice litigation.[73]

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1024 (Okla. 1996) (wrongful death suit alleging loss of chance of survival due to the negligent failure of the 911 emergency calling system); *Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397 (Tex. 1993) (medical malpractice action against hospital for negligence in causing death or in the alternative causing the loss of chance of survival); *Parrott v. Caskey*, 873 S.W.2d 142 (Tex. Ct. App. 1994) (alleging loss of chance of survival due to negligent diagnosis). One case was for accounting malpractice. *See* Mattco Forge, Inc. v. Arthur Young & Co., 60 Cal. Rptr. 2d 780 (Cal. Ct. App. 1997) (accounting malpractice suit analogizing to negligence of litigation support professionals considering whether or not to adopt a loss of chance causation approach). The last involved fire damage to real property. *See* Lohse v. Faultner, 860 P.2d 1306 (Ariz. Ct. App. 1992) (adjoining property owners alleging loss of chance to escape harm from fire). Of the remaining nine cases, while loss of chance was mentioned in the body of the opinion, eight did not deal with the application of the doctrine to legal malpractice: *Wright v. St. Mary's Medical Center of Evansville, Inc.*, 59 F. Supp. 2d 794 (S.D. Ind. 1999) (applying Indiana law); *Wysocki v. Reed*, 583 N.E.2d 1139 (Ill. App. Ct. 1991); *Thomas v. Bethea*, 718 A.2d 1187 (Md. 1998); *Singleton v. Stegall*, 580 So. 2d 1242 (Miss. 1991); *Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc.*, 740 A.2d 1262 (R.I. 1999); *Green v. Brantley*, 11 S.W.3d 259 (Tex. App.-Ft. Worth, 1999); *Tennison v. Krist*, No. 01-97-00039-CV, 1998 WL 502557 (Tex. App. Aug. 20 1998); and *Nielson v. Eisenhower & Carlson*, 999 P.2d 42 (Wash. Ct. App. 2000). *See also* Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479 (1986). The only instance in which the loss-of-chance doctrine in a legal malpractice case was applied was in *Daugert v. Pappas*, 704 P.2d 600 (Wash. 1985). Further, the hostility of the bench to such efforts is consistent with its capture. Courts have consistently refused to apply any standard other than the "but for" standard of proof in legal malpractice settings. Alternative proof theories have been routinely rejected. *See* Sheppard v. Krol, 578 N.E.2d 212, 217 (Ill. App. Ct. 1991); *Thomas*, 718 A.2d at 1197; *Nielson*, 999 P.2d at 47; *Daugert*, 704 P.2d at 605.

72. Even the response of the legal elite, those who draft the Restatement (Third) of the Law Governing Lawyers, is distorted by their identification with the bar. The fact that the attorney dominates access to information in any litigation and controls most critical litigation decisions is not even thought of as a reason to modify causation proof burdens. Section fifty details the bar's special duties to clients, while section fifty-three (which perpetuates the "trial-within-the-trial" burden of proof on malpractice plaintiffs, rejecting the application of alternative proof theories) makes these duties extremely difficult to enforce. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 50, 53 (2000).

73. *See* id. § 53 cmt. b (2000) (concerning the onerous burden of proving the "case-within-the-case" element of causation).

A clear example of these regulators' parochial, or captured, analysis of the appropriate duty of attorneys in performing their job of representation can be seen by examining the Restatement sections dealing with the proof of causation. Cause-in-fact is a core element of negligence litigation. The burden of proving causation has traditionally been allocated to the plaintiff, but this allocation has caused unjust results in a variety of circumstances. Many of these involve situations in which there is a significant variance between the access to information between the plaintiff and defendant. In such situations, the courts have developed a variety of alternative doctrines to mitigate the harshness of causation.[74] Among these mitigating doctrines are *res ipsa loquitur*, alternative causation, and relaxed causation. Loss-of-chance, discussed above, is such a doctrine. It has been applied so that victims of medical malpractice can receive compensation for negligent care even though they cannot comply with the historically mandated burden of proving that the medical professional's conduct was the cause-in-fact of the injury.[75] The Restatement (Second) of Torts specifically limits this doctrine to cases in which there are claims of physical injury.[76] Therefore, by such language the regulators insulate the legal profession from responsibility for the full cost of the injuries that they create. As such, attorneys are immune from responsibility for any injuries caused to clients with weak cases. A client with a weak underlying case was not likely to win in the first place. Thus, the lawyer, no matter how inept, could never have deprived that client of any probable compensation in the underlying case.[77]

The protective reflex induced by capture explains the limitation of the loss-of-chance doctrine to cases involving physical injuries. Lawyers

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74. For an extensive analysis of the development of these doctrines, see Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1475 n.2 (1986); Kessler, *supra* note 11, at 402–11; Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); Paul Zweir, *"Cause in Fact" in Tort Law: A Philosophical and Historical Examination*, 31 DEPAUL L. REV. 769, 784–96 (1982); ROBERT HOROWITZ, THE DOCTRINE OF OBJECTIVE CAUSATION IN THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 201 (1982).

75. *See* Herskovits v. Group Health Coop., 664 P.2d 474, 479 (Wash. 1983).

76. *See* Kessler, *supra* note 11, at 476; *see also* RESTATEMENT (SECOND) OF TORTS § 323A (1965) (specifically limiting loss of chance modifications of causation proof burdens in a manner precluding their use by plaintiffs in legal malpractice actions).

77. The skill of lawyering certainly includes that ability to evaluate the chances of success in a particular litigation. Some clients just do not have cases that appear to be likely to win. Good lawyering with a reasonable client might reduce the impact of the loss, but the loss is more likely than not.

do not cause physical injuries through malpractice. However, this construct disguises the fact that legal malpractice cases are not all devoid of personal injury issues. The claim of negligence in a medical malpractice case, for example, is a claim of the loss of compensation for a personal injury. The fact that the personal injury was caused by the non-defendant doctor rather than the defendant lawyer is irrelevant. The sole goal of the litigation is to obtain compensation for that physical loss. The Restatement in its silence about such distinctions is hostile to the claims of these plaintiffs. The failure to enthusiastically accept the task of removing such barriers to suits by the recipients of legal services may not reflect ill will. No legal regulator is likely to be hostile to the efforts of a plaintiff injured by medical malpractice to gain compensation. It is more likely that this effective doctrine was excluded from the legal malpractice action because the regulators never thought outside of the envelope. They just failed to segregate those malpractice plaintiffs whose underlying actions were for physical injuries from those whose were not. They, like the bench, were captured.

No matter how the system is rationalized, lawyers (acting as judges) are less zealous in attacking rules that protect their negligent prior colleagues (the lawyer defendants) and themselves from the consequences of their misfeasance.

The captured regulators, the bar in its uncharacteristic laxity in legal malpractice litigation, and the bench, in its uncharacteristic consideration for the practical consequences of clients suing lawyers, are combining to protect malfeasant attorneys.

## III. THE COMPENSABILITY OF PAIN AND SUFFERING

Pain and suffering is a core element of compensable damages in a tort action.[78] It permits plaintiffs to obtain monetary compensation for both the physical pain of injury or loss of bodily functions and the anxiety and humiliation caused by the negligence.[79] Pain and suffering, although crucial to full plaintiff compensation, is generally not recoverable in a legal malpractice action, regardless of the plaintiff's

78. *See* Vajda v. Tulsa, 572 A.2d 998, 1003 (Conn. 1990); Sourbier v. State, 498 N.W.2d 720, 723, 723–24 (Iowa 1993); McGranahan v. McGough, 820 P.2d 403, 408–09 (Kan. 1991); Duguay v. Gelinas, 182 A.2d 451, 453 (N.H. 1962).

79. *See* Capelouto v. Kaiser Found. Hosps., 500 P.2d 880 (Cal. 1972); Ledbetter v. Brown City Sav. Bank, 368 N.W.2d 257, 262 (Mich. Ct. App. 1985).

actual suffering.[80] Although the clients who have been victimized by negligent counsel may have lost their homes, the custody of their children, their freedom, or their life's savings, in most jurisdictions, lawyers are immune from the common obligation to compensate for the emotional harm that they have caused.[81] This *de jure* preclusion of compensation exists despite the fact that no commentator can be found who has denied that negligence in litigation does in fact cause anxiety, depression, fear, and other normally compensable types of emotional harm.

Of course, not every negligently represented client suffers emotionally. The existence and degree of such harm depends upon the nature of the underlying litigation and the economic resources of the client. For example, if a lawyer's negligence causes a large partnership to lose a copyright claim, the clients are not likely to be happy, but they have many other resources and are unlikely to have suffered emotional harm. However, if the owner of a small store loses a similar case, the loss could force her out of business. The loss might threaten her ability to pay her mortgage and support her family. The economic hardship engendered by the legal malpractice would cause her at least a high degree of anxiety and it might practically cause her much more. Thus, actual and severe emotional distress as the result of a negligently botched legal representation is foreseeable but is inevitably the product of the resources of the individual plaintiffs.

Further, the rules of compensation for emotional harm in legal malpractice cases apply equally to the rich and the poor; nobody can be compensated. Those who suffered no emotional harm and those who did cannot collect.

Courts rely on three other theories to justify the deprivation of pain and suffering compensation. The first, and primary reason given for this

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80. For an extended discussion of the jurisdictions rejecting pain and suffering recovery, see *Leonard v. Walthall*, 143 F.3d 466 (8th Cir. 1998); *Reed v. Mitchell & Timbanard*, 903 P.2d 621, 626 (Ariz. Ct. App. 1995); *Segall v. Berkson*, 487 N.E.2d 752 (Ill. App. Ct. 1985); *Singleton v. Stegall*, 580 So. 2d 1242, 1247 (Miss. 1991); *Carroll v. Rountree*, 237 S.E.2d 566, 571 (N.C. Ct. App. 1977); *Magnuson v. Velikanje, Moore & Shore, Inc.*, P.S., No. 15662-1-III, 1997 Wash. App. LEXIS 471 (Wash. Ct. App. Apr. 3 1997). *But see* Cunningham v. Hildebrand, 755 N.E.2d 384, 391–92 (Ohio Ct. App. 2001) and David v. Schwarzwald, Robiner, Wolf & Rock Co., 607 N.E.2d 1173, 1182 (Ohio Ct. App. 1992).

81. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 53 cmt. g (2000) (for differing rules about when damages for emotional distress are recoverable); MALLEN, *supra* note 14, at 141–44 & n.4 (compiling state cases rejecting the compensability of pain and suffering in a legal malpractice action).

prohibition, is that pain and suffering is not foreseeable and, thus, not the proximate cause of the emotional distress.[82] The second is that emotional harm is speculative and permitting general recovery would open attorneys to an unreasonable amount of litigation by unhappy clients.[83] The third is that imposing liability on attorneys for emotional distress would act to deter access to legal representation by the emotionally disturbed.[84] None of these justifications is persuasive.[85]

### *A. Pain and Suffering is Foreseeable*

Discerning the reasons for the prohibition of compensation to plaintiffs who can prove that they suffered emotional harm is not a simple task. The starting point for this exploration is to seek a factual basis. Do the victims of legal malpractice suffer? The result of this

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82. *See* Camenisch v. Super. Ct., 52 Cal. Rptr. 2d 450, 454 (Ct. App. 1996) (barring recovery for pain and suffering in a legal malpractice action where severe emotional harm was not a foreseeable consequence of the plaintiff's loss of an economic claim due to the defendant's malpractice); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. g (2000) (generalizing that "damages [for emotional distress] are inappropriate in types of cases in which emotional distress is unforeseeable").

83. *See* Pleasant v. Celli, 22 Cal. Rptr. 2d 663, 668–71 (Ct. App. 1993); Smith v. Super. Ct., 13 Cal. Rptr. 2d 133 (Ct. App. 1992); Suppressed v. Suppressed, 565 N.E.2d 101, 106 (Ill. App. Ct. 1990).

84. *See* McLaughlin v. Sullivan, 461 A.2d 123 (N.H. 1983) (declining to find the alleged negligent attorney responsible for his client's suicide after a conviction).

> Neither are we unmindful of the fact that attorneys, if exposed to such liability, would naturally be discouraged from representing what may be a sizeable number of depressed or unstable criminal defendants, in the fear that it would later be alleged that one such client committed suicide out of despondence over a 'wrongful' conviction based on inadequate representation.

*Id.* at 127–28; *see also* MALLEN, *supra* note 14, § 20.11 at 147.

85. An additional theoretical justification could be fabricated. In this construct the limitation of damages would become justifiable by the ploy of defining the nature of the attorney-client relationship by the retainer agreement. If that is the entirety of the relationship, then the relationship is a mere contract. Thus, contract theories should apply to legal malpractice actions which would only be breaches of contract. Because the underlying relationship between the lawyer and client is contractual, damages should be limited to those recoverable in contract. Thus, collateral damages (emotional harm) should not be compensable. This theory is a logical canard. It is merely stating the view that lawyers only deal with monetary issues which are impersonal. Another way of expressing this factually-inaccurate concept is that economic issues (*e.g.*, obtaining judicially-ordered compensation for physical injuries) do not naturally create emotional harm. *But see, infra* text accompanying note 118 for a discussion of the liability of insurance companies under the tort of bad faith. In those actions, the insurance companies' breach of a contractual duty of *representation* can lead to compensation for pain and suffering.

search is obvious. The doctrine has no empirical support and is blatantly false. The victims of legal malpractice, in many types of actions, are clearly likely to suffer emotional harm. An obvious example is the divorce action. Little is more traumatic than a divorce action.[86] Despite that consensus view of those who actually talk to divorce clients, in many jurisdictions the victims of legal malpractice who lose custody of their child[87] or the ownership of their family home are denied compensation for the emotional harm. The reason given, of course, is that the emotional distress that everyone knows occurs and which is constantly discussed, is deemed not "foreseeable." In a different context, most jurisdictions even deny recovery for emotional harm where the negligence has caused the client to suffer the risk of incarceration.[88] The doctrine is clearly not based on a factual analysis of what happens to real clients.

The next approach to determine the reasons for the doctrine is to compare damage jurisprudence in other areas of law to attempt to identify a consistent policy which rejects compensation for other plaintiffs who can prove that they have been emotionally harmed. No similar group of plaintiffs can be found. There are many areas of law in which the identical negligent conduct causes emotional harm to some plaintiffs but not to all. This type of varied impact of negligent conduct is the norm. The issue has arisen so often that the catch phrase taught to every first year torts student is: "You take your victim as you find

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86. *See* Debbie Geiger, *Separation Anxiety,* NEWSDAY (New York), July 17, 2001, at B10; Sara Lee Goren, *Understanding the Impact of Divorce on Children,* THE LEGAL INTELLIGENCER, May 2, 2001, at 5; Donna Kutt Nahas, *Under One Roof,* NEWSDAY (New York), June 5, 2001, at B10; Karen Nazor, *KidsCare: Program is for Parents and Children who Have Experienced Profound Loss,* CHATTANOOGA TIMES, June 23, 2001, at F4; Karen Springen & Pat Wingert, *Is it Healthy for the Kids?,* NEWSWEEK, May 28, 2001, at 54.

87. *See* Thornton v. Squyres, 877 S.W.2d 921 (Ark. 1994). Some jurisdictions permit compensation in limited types of malpractice cases such as custody, adoption, criminal and other "unique" cases. *See* MALLEN, *supra* note 14, § 20.11, at n.1–3 (compiling the few cases permitting pain and suffering recovery); *see also* Person v. Behnke, 611 N.E.2d 1350 (Ill. App. Ct. 1993) (where malpractice led to loss of parental custody, lawyer liable for damages for loss of children's society); Kohn v. Schiappa, 656 A.2d 1322 (N.J. Super. Ct. Law Div. 1995) (improper revelation of names of adopted children).

88. Galu v. Attias, 923 F. Supp. 590 (S.D.N.Y. 1996). *But see* Perez v. Kirk & Carrigan, 822 S.W.2d 261, 264–67 (Tex. App. 1991) (allowing recovery of damages for mental sensation of pain resulting from public humiliation after plaintiff's attorney disclosed a privileged statement to district attorney resulting in plaintiff's incarceration). *Contra* Wagenmann v. Adams, 829 F.2d 196 (1st Cir. 1987) (involuntary psychiatric commitment); Holliday v. Jones, 264 Cal. Rptr. 448 (Ct. App. 1989) (manslaughter conviction).

him."[89] This rule of tort law has long been applied to all types of torts, including those that do not cause physical injuries.[90] That, of course, does not apply to legal malpractice injuries. In cases other than those involving legal malpractice, compensation does not depend upon the extent of the harm being foreseeable.[91] In every other area of tort law, this maxim reflects the balance of interests protected and explains the broad availability of recovery for both tangible and intangible injuries. Foreseeability has no role in limiting such recovery. For example, it is certainly not foreseeable that a driver would hit a car driven by a Major League Baseball pitcher. Yet, there is no limitation on the compensation recoverable by such an unlikely plaintiff. The defendant who injures the arm of that pitcher has caused a far greater economic loss than if she had caused the same injuries to an attorney.[92] If the damages are proven, they can be compensated. Legal malpractice doctrine stands alone in its protection of lawyers against the obligation to compensate its injured clients.

Outside of the law of legal malpractice, once a plaintiff has established that the defendant's negligence has caused harm to a protected interest, plaintiffs may obtain compensation for both the tangible and intangible injuries—the emotional injuries.[93] The key to compensability is that the defendant committed a tort of negligence which caused non-emotional injuries, and from which flowed provable

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89. *See* Moore v. Ashland Chem., Inc., 151 F.3d 269 (5th Cir. 1998); Testa v. Village of Mundelein, 89 F.3d 443 (7th Cir. 1996); RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 524 (7th ed. 2000); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 291-92 (5th ed. 1984).

90. *See* Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20, 32-33 (1939).

> [T]he tortfeasors should be liable irrespective of the unexpectedness of such harm. Thus where the defendant has negligently struck a person whose skull is so fragile that it is broken by the comparatively slight blow, all courts are agreed that the defendant is liable for the wholly unexpected breaking. This is true not only with reference to physical harm but also other forms of harm.

*Id.*

91. *See* Weaver v. Arthur A. Schneider Realty Co., 381 S.W.2d 866, 869 (Mo. 1964); Meech v. Hillhaven W., Inc., 776 P.2d 488 (Mont. 1989).

92. *See* Ellen Smith Pryor, *Compensation and a Consequential Model of Loss*, 64 TUL. L. REV. 783, 808 (1990).

93. *See* Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Cal. 1993); Carlson v. Ill. Farmers Ins. Co., 520 N.W.2d 534, 536 (Minn. Ct. App. 1994); Air Florida, Inc. v. Zondler, 683 S.W.2d 769, 773 (Tex. App. 1985).

emotional harm.[94] As with the physical harm, the extent of the emotional harm need not be foreseeable.[95] If the defendant injures an emotional "thin skull" plaintiff, it may be unfortunate for her, but presents no legal issues different from those involved in determining the proper compensation for the injured baseball star. Both the star and the emotional fragile represent small segments of the community. The fact that there are comparatively few of the latter plaintiffs and that their injuries are, therefore, unforeseeable, does not justify discriminating against them.

It is instructive to examine the nature of the rules by which the law imposes duties on our society's other great profession, medicine. Medicine and law are vast service professions in which the customers lack the sophisticated knowledge to deal with their difficulties alone and, as a result, rely on others. The difference in the ability of the customers of doctors and lawyers to collect for emotional harm caused by professional malpractice is stark. In medical malpractice actions, pain and suffering is always compensable.[96] Indeed, the amount of the pain and suffering component of medical malpractice judgments has become so large that it has been viewed as a social problem threatening the provision of medical services. As a result of this perception, many state legislatures have placed "caps," or limits, on the size of such

94. The compensability of an act of negligence that causes nothing but emotional harm raises different issues. One of the central elements of negligence is injury. When the only injury is emotional harm, significant issues exist concerning whether the defendant acted improperly and whether the plaintiff is not fabricating. *See* Kathleen M. Turezyn, *When Circumstances Provide a Guarantee of Genuineness: Permitting Recovery for Pre-Impact Emotional Distress*, 28 B.C. L. REV. 881 (1987); Mark A. Beede, Comment, *Duty, Foreseeability, and the Negligent Infliction of Emotional Distress*, 33 ME. L. REV. 303 (1981). Although many jurisdictions still formally speak of the requirement of a physical injury, the cases strongly support the belief that "physical" for this purpose simply means an identifiable and provable emotional harm. *See* Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); Johnson v. Ruark Obstetrics & Gynecology Assocs., 395 S.E.2d 85, 97 (N.C. 1990) (holding that severe emotional distress includes mental disorders "recognized and diagnosed by professionals trained to do so").

95. *See* Steinhauser v. Hertz Corp., 421 F.2d 1169 (2d Cir. 1970) (involving a fourteen-year-old girl in the back seat of a car who was institutionalized as a result of an automobile accident in which she was not physically hurt). The court found that some emotional stress was foreseeable from having been in an automobile accident. *Id.* at 1173. It was only the extent that was unusual. *Id.*

96. *See* EPSTEIN, *supra* note 89, at 437 ("All jurisdictions recognize a right to recover damages for bodily injuries, generally defined to cover 'any impairment of the physical condition of the body, including illness and physical pain.'").

awards.[97] However, the support for a plaintiff's right to collect damages for pain and suffering, where the defendant is a doctor, is such a critical component of compensation that many state courts have found such caps unconstitutional.[98] The victim's right to this crucial type of compensation vanishes when the defendant is an attorney in a legal malpractice action. An almost absurd conflict exists in Alabama, where the Alabama courts simultaneously hold that a legislative cap on pain and suffering compensation in medical malpractice actions is unconstitutional and that compensation for pain and suffering may not be extended to victims of legal malpractice.[99]

Because the above analysis demonstrates that no basis in fact or compelling legal analogy can be found to justify these doctrines, the only remaining basis is that subjective perceptions of the bench require their existence. In fact, the core policies are not factually justified, or justifiable. The degree to which the courts rely on a non-factual policy basis in fashioning this special protection for attorneys is made particularly clear in the comparison of the damages permitted in three eccentric, but bizarrely similar suicide cases. In *Fuller v. Preis*,[100] the plaintiff's estate claimed that injuries caused in an automobile accident led to emotional distress and suicide.[101] In *McPeake v. William T. Cannon, Esquire, P.C.*,[102] and *McLaughlin v. Sullivan*,[103] the plaintiffs'

97. *See* Timms v. Rosenblum, 713 F. Supp. 948 (E.D. Va. 1989); Merenda v. Super. Ct., 4 Cal. Rptr. 2d 87 (Ct. App. 1992). For a survey of the states that have adopted pain and suffering caps in medical malpractice actions, see Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989). *Contra* Wagenmann v. Adams, 829 F.2d 196, 221–22 (1st Cir. 1987); Bowman v. Doherty, 686 P.2d 112 (Kan. 1984); Rhodes v. Batilla, 848 S.W.2d 833 (Tex. App. 1993).

98. *See* Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995) *overruled on other grounds by Ex parte* Apicella, 809 So. 2d 865 (Ala. 2001); Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987); Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997); Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999); Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); Sofie v. Fibreboard Corp., 771 P.2d 711(Wash. 1989); *see also* Wright v. Cent. Du Page Hosp. Ass'n., 347 N.E.2d 736 (Ill. 1976); Carson v. Maurer, 424 A.2d 825 (N.H. 1980). However, the majority of states has found such caps constitutional. *See* Mitchell S. Berger, Note, *Following the Doctor's Orders—Caps on Non-Economic Damages in Medical Malpractice Cases*, 22 RUTGERS L.J. 173 (1990).

99. *See Smith*, 671 So. 2d at 1338 (holding that a cap on the pain and suffering component of a personal injury action violated the state constitution); Boros v. Baxley, 621 So. 2d 240, 244–45 (Ala. 1993) (holding that, unless there was affirmative wrongdoing, pain and suffering damages could not normally be collected in legal malpractice actions).

100. 322 N.E.2d 263 (N.Y. 1974).

101. *Id.* at 264.

102. 553 A.2d 439 (Pa. Super. Ct. 1989).

estates alleged that emotional traumas caused by legal malpractice led to suicide.[104] In *Fuller*, the plaintiff was permitted to prove that the suicide was the result of the emotional distress caused by physical injuries (uncontrollable seizures) occasioned by an automobile accident.[105] In both *McPeake* and *McLaughlin*, the plaintiffs were prevented from proving that suicide was the result of emotional distress caused by legal malpractice that led to prison sentences.[106] According to the latter courts, suicide is such an unforeseeable result of negligent representation leading to incarceration that it could not be the proximate cause of legal malpractice.[107] There was no data to support this conclusion. Indeed, the facts are all on the other side. It is common knowledge that "suicide watches" are frequently provided for new prisoners because the emotional stress of incarceration often causes suicide attempts.[108] Further, there have been successful lawsuits brought by the estates of prisoners who committed suicide, allegedly because of inadequate observation by the prison staff.[109] Car drivers take their victims as they find them, but lawyers who represent emotionally fragile clients need not worry about driving them to suicide. The lawyers' negligence may cause it to happen, but judicially manufactured damage doctrines make sure it does not "count," as a matter of law.

### *B. Emotional Harm is Not Speculative*

The second justification for the denial of compensation for emotional harm is that it is too speculative. This theory flies in the face of fifty years of jurisprudence. A century ago, the courts feared that emotional harm would be the refuge of charlatans reaping havoc on

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103. 461 A.2d 123 (N.H. 1983).

104. *McPeake*, 553 A.2d at 440; *McLaughlin*, 461 A.2d at 124.

105. *Fuller*, 322 N.E.2d at 266.

106. *McPeake*, 553 A.2d at 443; *McLaughlin*, 461 A.2d at 127.

107. *McPeake*, 553 A.2d at 443; *McLaughlin*, 461 A.2d at 127.

108. *See* Al Baker, *Facing Murder Charge in Classmate's Death, Hofstra Student is Held on Suicide Watch*, N.Y. TIMES, May 19, 2001, at B5 (discussing a student charged with murder and mutilation of a classmate held on suicide watch); Lisa Teachey, *Yates' Lawyers Plan to Enter Insanity Plea,* HOUSTON CHRONICLE, July 31, 2001, at A1 (discussing a woman indicted on two charges of capital murder for allegedly drowning her five children in a bathtub remains on suicide watch).

109. *See* Myers v. County of Lake, 30 F.3d 847 (7th Cir. 1994); Simmons v. City of Philadelphia, 947 F.2d 1042 (3d Cir. 1991); Molton v. City of Cleveland, 839 F.2d 940 (6th Cir. 1988).

defendants with fraudulent claims.[110] Gradually, over time, the need to permit compensation for plaintiffs with real emotional injuries became obvious. Emotional harms that were the result of physical injuries were compensated.[111] With the passage of time, victims of negligence who had only emotional injuries became able to gain compensation through the tort of negligent infliction of emotional harm[112] while those who had varied injures were permitted to have their emotional harm compensation in other torts even if they did not develop physical injuries.[113] Emotional harm is now compensable when the plaintiff can simply prove that she suffered. Unless the plaintiff is the victim of legal malpractice there is no requirement that the emotional distress be foreseeable or probable, it simply must be proven.

An analysis of employment discrimination and insurance company liability actions readily demonstrates that the denial of compensation for emotional harms in legal malpractice actions is the exception, not the norm. In a Title VII sexual harassment action, for example, a plaintiff who may not be the victim of harassment, but merely an observer, is allowed to prove that she suffered emotional harm from having heard of the events.[114] The foreseeability of such harm is generally held to be

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110. The dominant rule followed in the nineteenth century, and which persisted throughout the first half of the twentieth century, reflected the thought that "a suspicion about the genuine character of emotional distress . . . and a concern that recognition of emotional distress would open the floodgates to fraudulent claims." R. L. Raben, *Tort Law in Transition: Tracing the Patterns of Sociological Change*, 23 VAL. U. L. REV. 1, 29 (1988).

111. *See* Richardson v. Chapman, 676 N.E.2d 621 (Ill. 1997); American States Ins. Co. v Audubon Country Club, 650 S.W.2d 252 (Ky. 1983); McDougald v. Garber, 536 N.E.2d 372 (N.Y. 1989); Bovbjerg, *supra* note 97, at 919–24.

112. *See* RESTATEMENT (SECOND) OF TORTS § 436 (1965).

113. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In *Gertz*, the Supreme Court held that the victim of defamation could gain compensation for emotional harm even though no economic damages could be established; *see also,* Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980); Burnett v. Nat'l Enquirer, Inc., 193 Cal. Rptr. 206 (Ct. App. 1983); David Anderson, *Reputation, Compensation, and Proof*, 25 WM . & MARY L. REV. 747, 758 (1984).

114. *See, e.g.*, Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985) ("Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive."), *aff'd in part and rev'd in part*, 477 U.S. 57 (1986); *see also* Hall v. Gus Constr. Co., 842 F.2d 1010, 1014–15 (8th Cir. 1988) (Congress evinced an "intention to define discrimination in the broadest possible terms" (citation omitted), and "evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile work environment."); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415–16 (10th Cir. 1987) ("[O]ne of the critical inquiries in a hostile environment claim must be the *environment.*" Evidence that other employees had been harassed by supervisor "should be considered . . . in determining whether a hostile work

irrelevant. As long as the plaintiff can prove the existence of harm,[115] she should be allowed to collect.

Similarly, the Supreme Court has held that an employee who has been threatened with the denial of a promotion could sue for damages even though she got the promotion.[116] There is little logic to a legal system that permits a plaintiff who merely heard of harassment to obtain compensation for emotional harm, but denies such compensation to plaintiffs who have been victims of legal malpractice even the opportunity to prove that they have been harmed.

Lawyers may perform a public service, but they do it for a profit. They are in business and, as such, the same rules should be applied to them when they perform their professional role as in their other conduct. Under our present rules, an employee of an attorney who heard the attorney sexually harass a co-worker can collect compensation for emotional distress, while the client of that lawyer who lost her home or business cannot. The attorneys' clients are less protected by the legal system than are their employees. These Title VII cases are pertinent to the issue of damages in legal malpractice cases because they reveal the normative scope of legal protection against emotional harms. They establish the proposition that the homilies of speculative-ness and the need to protect a defendant that are claimed to be the justification to preclude such compensation in legal malpractice actions have been ignored in virtually all areas of law.

The lack of rational support for this lawyer protective doctrine is, however, even more starkly apparent when the legal obligations of insurance companies are compared to those of attorneys. An insurance

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environment sexual harassment claim has been established"); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) ("[A] hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute a violation of Title VII"); Stockett v. Tolin, 791 F. Supp. 1536, 1553 (S.D. Fla. 1992) (quoting the language from *Vinson, supra*).

115. In assessing the hearsay nature of the plaintiff's Title VII claim, the court posited, "Does the law deny that an environment where a superior refers to co-workers in vulgar sexual terms, while studiously avoiding calling one favored female profane names, is demeaning, harassing, and incompatible with the dignity and well being of all the women in that workplace?" Leibovitz v. New York City Transit Auth., 4 F. Supp. 2d 144, 152 (E.D.N.Y. 1998), *rev'd on other grounds,* 252 F.3d 179 (2d Cir. 2001) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)). Answering in the affirmative, the court held that "[b]enign neglect by an employer under such circumstances is not permitted. A Title VII hostile work environment claim may be based upon this form of discrimination because the statute affords 'employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.'" *Id.*

116. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

company's refusal to settle an action can cause exactly the same injuries as those created by legal malpractice. The liability of the lawyers is limited. However, insurance companies are routinely held liable for both the economic and emotional harms caused by their acts. The tort is bad faith refusal to settle a case within the limits of the insurance policy.

The only difference between litigation malpractice and bad faith settlement is the identity of the defendant, and that cannot be a justifiable basis for differences in liability. If a personal injury defense attorney commits malpractice, and as a result of that conduct the client has to personally pay a substantial judgment, the attorney will not be required to compensate for the client's emotional distress.[117] If the very same defendant's insurance company refuses to settle that action within the policy limits and, as a result, the defendant has to pay a substantial judgment, the insurance company, if found liable for bad faith, will have to compensate for both the economic loss and any proven emotional harm.[118] The injured party in both scenarios is the same—the personal injury defendant. The harm caused by the legal malpractice and the insurance bad faith are the same.[119] Both types of conduct cause

117. *See generally* Reed v. Mitchell & Timbanard, P.C., 903 P.2d 621, 626 (Ariz. Ct. App. 1995); Gavend v. Malman, 946 P.2d 558, 562–63 (Colo. Ct. App. 1997); Lawrence v. Grinde, 534 N.W.2d 414, 422–23 (Iowa 1995); Heath v. Herron, 732 S.W.2d 748, 753 (Tex. App. 1987).

118. *See* Merlo v. Standard Life & Accident Ins. Co. of Cal., 130 Cal. Rptr. 416, 423 (Ct. App. 1976) (entitling the plaintiff to "recover compensatory damages for all detriment proximately resulting from the tortious breach of the covenant, including economic loss as well as emotional distress"); Gibson v. W. Fire Ins. Co., 682 P.2d 725, 738 (Mont. 1984) (allowing recovery of damages for mental anguish, including emotional distress in an action against an insurer for breach of its implied covenant of good faith and fair dealing towards the insured); DeChant v. Monarch Life Ins. Co., 547 N.W.2d 592, 596 (Wis. 1996) (permitting recovery of damages for emotional distress, loss of reputation, and economic injury to insureds who prove that their insurers acted in bad faith); State Farm Mut. Auto. Ins. Co. v. Shrader, 882 P.2d 813, 833 (Wyo. 1994) (holding that the scope of available compensatory damages for a breach of the duty of good faith and fair dealing includes damages for harm to pecuniary interests and emotional distress).

119. Assume that the personal injury defendant has a one-hundred-thousand-dollar insurance policy and that there is a five-hundred-thousand-dollar verdict against the defendant after a trial. If the insurance company has refused to settle in bad faith, it has caused an economic loss to the defendant of four hundred thousand dollars. Assume now that there is no insurance. If the defense attorney is responsible for causing a four-hundred-thousand-dollar verdict because of malpractice (the non-malpractice verdict would have been no liability), the attorney has caused an economic loss to the defendant of four hundred thousand dollars. If the client had the resources to pay the judgment, it is hard to imagine that there would not also be a lot of anxiety and emotional distress. The insurance company has to compensate for the four-hundred-thousand-dollar loss and the emotional distress. The attorney's liability is limited to the economic loss.

economic losses to a party in a litigation. The insurance company causes an unnecessarily large loss to a defendant. The attorney may cause such a loss to either the defendant or the plaintiff. There is no difference to the victimized client. The difference is in the rules of compensation. The attorney's liability is capped by the judicial prohibition against compensating clients for pain and suffering.

Unfortunately, neutral principles cannot be found to explain the distinction. The only explanation is that the bar is the recipient of special favoritism. The bar is sheltered from responsibility for part of the injuries that they cause. Both insurance companies and litigation attorneys are in business. Both have insurance to pay for injuries that they commit through negligence. No policy factors exist to justify the distinction. The protection of the bar is simply the result of successful special interest pleading by a privileged group.

### *C. Limiting Damages for Emotional Harm is Not Necessary to Insure Representation for All*

The third justification is even more disturbing than the others. It is that lawyers must be immune from the obligation to pay for emotional harm because that is the only way to insure the availability of legal services. In essence, if compensation for emotional harm is permitted, there would be so many lawyers fleeing practice or shunning potential clients who appear to have emotional problems in fear of liability that clients would go unrepresented.[120] The essence of this argument is that the only way to guarantee an attorney for an emotionally fragile person, is to give the bar protection against liability for emotional harm.

In considering whether this factor justifies the deprivation of compensation for clients, it is again useful to examine the law's treatment of analogous groups. The clients who are most likely to suffer emotional harm from legal malpractice fall within two groups. The first is those with some degree of pre-existing emotional problem. The second is those with limited economic resources. The first is more likely to suffer emotional harm because of their emotional instability. The second is more likely to suffer emotional harm due to the fact that the

120. *See* McPeake v. William T. Cannon, Esq., P.C., 553 A.2d 439 (Pa. Super. Ct. 1989). Plaintiff committed suicide after being convicted of a crime because of his attorney's negligence. *Id.* at 440. In rejecting compensation for the pain and suffering, the court stated that compensation could not be allowed because the result would be to discourage attorneys "from representing what may be a sizeable number of depressed or unstable criminal defendants." *Id.* at 443 (citation omitted); *see also* MALLEN, *supra* note 14, § 20.11.

losses created by the legal malpractice will have a greater impact on those clients than it will on clients with greater economic resources.

Although our legal system has not created many rules that reflect special concern for the poor, there are many rules that protect those with emotional problems. The most significant is the Americans With Disabilities Act (ADA).[121] The ADA prohibits the denial of services to those with disabilities and nationalizes protections that were already provided by statutes in many states.[122] Individuals with disabilities, emotional or physical, are among those protected by the ADA and the similar state statutes.[123] By the very fact that these statutes grant a bona fide cause of action, attorneys are obligated by them to serve the disabled. With or without potential liability, it is their legal obligation to serve.

Notwithstanding, the courts that justify liability limitation do not believe that the bar will accept this statutory duty. They apparently believe that lawyers, without the economic incentive of immunity from any obligation to pay damages for emotional harm, would violate the ADA by refusing services to the emotionally disturbed.[124] If the bar were not given the economic kick back of liability limitation, the attorneys would not obey the law. The courts, in other words, have articulated as a justification for limiting liability the fact that without it, they believe that attorneys would violate state and federal statutes.

In such decisions there is no data that justifies the belief that liability for emotional harm would induce lawyers to shun the representation of the emotionally challenged. These decisions are rather the product of reverse lawyer bashing. It is a rule induced by the courts' perception of the nature of lawyers and the practice of law. The courts reason that the limitation is needed because of their experience and impression of the conduct of the bar.

The bar deserves no greater protection than other professions. Although attorneys receive no formal training in the treatment of the emotionally distraught,[125] a divorce or criminal defense attorney can be

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121. 42 U.S.C. § 12181-89 (2000).

122. *See, e.g.*, MICH. COMP. LAWS ANN. § 37.1102 (West 1998); MINN. STAT. ANN. § 363.03 (West 1998); N.Y. EXEC. LAW § 296 (McKinney 1998).

123. *See generally* Bragdon v. Abbot, 524 U.S. 624 (1998) (holding that HIV constitutes a disability within the purview of the ADA).

124. *See* MALLEN, *supra* note 14, § 20.11, at 147.

125. In *Witte v. Desmarais*, 614 A.2d 116, 118 (N.H. 1992), the court found that lawyers were not able to handle emotional problems because of their lack of training.

at least as experienced in dealing with emotional distress as any anesthesiologist, dermatologist, or podiatrist. Doctors, like lawyers, have to treat emotionally fragile people. Both professions have an interest in lowering their malpractice exposure. The courts, however, find no need to protect patients' access to medical treatment by limiting doctor's liability. No court has ever opined that damages must be limited to encourage the medical profession to treat the emotionally sensitive patient. The bar is neither more deserving nor less ethical than the medical profession. It is an economic elite with far more resources than most of the people it represents,[126] and does not deserve special protections. Rather, the clients need the protection.

The bizarre notions about lawyer conduct and the antiquated concerns about fraudulent claims of emotional harm that support the denial of compensation for pain and suffering would be entertaining if they did not have such significant consequences for those who are victimized by legal malpractice. The cost of litigation acts as a critical protection of such attorneys. In part because of the preclusion of pain and suffering damages, legal malpractice judgments are often too small to justify the cost. It is not worth the money to go after the negligent attorneys, and it certainly is not worth the money to invest in litigation to induce a court to reverse precedent. The individual is left without proper compensation and the system of law is left without the necessary incentive to use tort litigation to supervise the bar.

When doctors complain that their legal duties leave them vulnerable to unreasonable liability claims, courts find that the duties owed to the patient are more important.[127] Medical malpractice insurance rates soar, patients collect multi-million dollar judgments, and doctors retire prematurely.[128] When legal malpractice defendants make similar

126. *See THE RICH: Who They Are; The Upper Tail*, N.Y. TIMES, Nov. 19, 1995, § 6 at 70 ("The typical partner in an American law firm earned $168,000 last year, 7.5 times more than median earnings . . . .").

127. *See* Robak v. United States, 658 F.2d 471, 473 (7th Cir. 1981) (creating a cause of action for wrongful birth and awarding damages to the parents of a child born with rubella where a doctor neglected to inform a pregnant mother that she had rubella); Cruz Aviles v. Bella Vista Hosp. Inc., 112 F. Supp. 2d 200 (P.R. 2000) (deciding that, under Puerto Rican law, a patient suing for lack of informed consent does not need to prove a separate negligent act, such as medical malpractice, other than the lack of informed consent); Herskovits v. Group Health Coop., 664 P.2d 474 (Wash. 1983) (allowing plaintiff's estate to recover for decedent's loss of chance of survival absent a showing that the doctor's negligence was the proximate cause of death).

128. *See* Kimberly Atkins, *State Becoming Less Desirable for Physicians, Report Says Lower Pay, Rising Costs Seen Driving Young Doctors Away*, BOSTON GLOBE, July 24, 2001,

appeals, the courts listen. As a result, legal malpractice litigation has not had a significant impact on the bar. While courts understand the need to limit attorney duty and compensation burdens, no court bemoans the exposure of the medical profession to excessive liability. The courts understand that doctors will not be deterred from practicing even if they are fully liable for the cost of their negligence.[129] The same understanding does not apply to the bar. Only lawyers have retained the legal right to negligently cause clients to suffer emotional harm through malpractice without being required to compensate their clients.

There is no logical impediment to compensating legal malpractice plaintiffs for their proven pain and suffering. The technical arguments that have supported the limitation of damages do not withstand careful scrutiny. The limitation, in light of decisions in other areas, is a vestige of a prior era. It is among the least tolerable special protections for the bar. This singular protection of the bar from bearing its financial responsibility for injuries to the consumers of legal services has no logical justification. Capture is the only possible explanation for the willful blindness of the judiciary to the craven protectionism of this doctrine, and consequently, whenever malpractice has been established provable, emotional harm must be compensated.[130]

## IV. ATTORNEYS' FEES SHOULD NOT BE DEDUCTIBLE FROM LEGAL MALPRACTICE VERDICTS

The rule requiring the deduction of the negligent attorney's fee from a legal malpractice verdict seriously and illogically denies legal malpractice plaintiffs full recovery. In so doing, it protects the malpracticing bar by reducing liability in individual cases and by limiting incentives to sue in all cases.

Although this rule is rationalized as a mere application of traditional

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at B5; Joelle Babula, *Medical Malpractice: Rising Insurance Costs Threaten Care,* LAS VEGAS REV. J., July 1, 2001, at 1B; Michael Prince, *Rates Hikes Symptomatic,* BUS. INS., June 11, 2001, at 3.

129. The problem of the unstable patient was not ignored in medical malpractice cases, but rather than eliminate the duty entirely, as the courts did with lawyers, a very limited modification of duty was created. *See, e.g.*, Rogers v. Comm'r of Dep't of Mental Health, 458 N.E.2d 308 (Mass. 1983). When it appears unreasonable to require a doctor to obtain informed consent from unstable patients, a suit can still be filed. *Id.* But the doctor can defend by proving that a reasonable doctor would find that a particular patient could not rationally evaluate the medical alternatives. *Id.*

130. Some jurisdictions have adopted this principle. *See, e.g.*, Burton v. Merrill, 612 A.2d 862 (Me. 1992); Salley v. Childs, 541 A.2d 1297, 1300–01 (Me. 1988).

causation doctrine,[131] careful analysis reveals that it also lacks a basis in logic or analogous precedent. The causation rationalization stems from the fact that the plaintiff's burden of proof of cause in fact includes the obligation of establishing the extent of the damages caused by the defendant's conduct. The plaintiff in a tort action is entitled to compensation for the injuries caused by the defendant's conduct;[132] however, she is not entitled to overcompensation. She must establish that the defendant caused damage and the exact amount of that damage.

When this doctrine is applied to a legal malpractice case, it often leads to the reduction of the negligent attorney's fee from the plaintiff's judgment.[133] The traditional analysis is simple. The malpractice has deprived the plaintiff of her judgment. Thus, she should get that money. Despite that, because the attorney's fee would have been deducted from any judgment, without malpractice, the client would have paid the fee. She would never have received those monies even if she had obtained the original judgment. Therefore, to prevent an unjust enrichment of the plaintiff, the unpaid fee should be deducted, because the plaintiff would not have gotten the money without negligence on the part of her attorney; it is not part of her damages.

The contingent fee case presents the clearest application of this doctrine. If a judgment would have been for one hundred thousand dollars, the plaintiff would have received only sixty-six thousand dollars.[134] The remaining sum would have been the contingent fee. Thus, the amount of a judgment for malpractice should not be the full one hundred thousand of the verdict, but the net sixty-six thousand that the plaintiff actually lost. Giving the plaintiff the thirty-three thousand dollars of the contingent fee would be overcompensation.

This analysis, however superficially logical, is nevertheless flawed. It ignores the consequences of deducting the fee from the one-hundred-thousand-dollar verdict. Deducting the fee from the amount that the attorney owes the client is the functional equivalent of giving that fee to

131. *See* McGlone v. Lacey, 288 F. Supp. 662, 665 (D.S.D. 1968).

132. *See* Seaward Constr. Co. v. Bradley, 817 P.2d 971, 975 (Colo. 1991); Mendillo v. Bd. of Educ. of E. Haddam, 717 A.2d 1177 (Conn. 1998); Thames v. Zerangue, 411 So. 2d 17, 19 (La. 1982).

133. *See* Moores v. Greenberg, 834 F.2d 1105, 1113 (1st Cir. 1987). *Contra* Campagnola v. Mulholland, Minion & Roe, 555 N.E.2d 611, 613 (N.Y. 1990); Leubsdorf, *supra* note 4, at 152–53 ("The question is not what the lawyer will be paid, but how much the lawyer will have to pay to recompense the client.")

134. Assuming a contingent fee of one-third.

the attorney. Without negligence, the client would not have had this money. However, there *was* negligence. Thus, with negligent representation, the attorney would not have had the money, either. If it is as inequitable to give this sum to the plaintiff, it is similarly inequitable to give it to the attorney. Neither the malpractice plaintiff nor the malpracticing attorney deserves the fee. The client does not deserve it because she would not have received the full one hundred thousand dollars without malpractice, and the attorney does not deserve the fee because of her malpractice.[135]

The solution to the appropriate allocation of the fee is not simple, since neither side of the controversy deserves the monies represented by the legal fee. Indeed, it represents something of a Hobson's choice.[136] If the client receives the money, the client appears to get more through the malpractice verdict, than would have been received in the underlying case. On the other hand, if the attorney gets the benefit of the fee, by the reduction in the malpractice award, the attorney gets the benefit of a fee that was not earned.

Although neither party deserves the fee, the blind application of the traditional causation burden of proof rules acts to allocate this sum to the attorney. The plaintiff has the burden of establishing damages. Obviously, the plaintiff cannot prove that she would have received the full amount of a verdict. Thus, the plaintiff receives only what she can prove. The decision to give the value of the fee to the attorney is derived from burden of proof policies. The apparent justification is that we cannot violate the principle that plaintiffs should receive no more than they deserve.

This allocation does not equitably balance justice interests in this special type of case. The reason is that the nature of the relationship between the lawyer, the client, the fee, and the malpractice creates a special problem of equity. Normally, a judgment reflects the amount that the plaintiff has lost. In general, defendants pay because they

135. Malpractice is a defense to an action to collect a fee. *See* Nickerson v. Martin, 374 A.2d 258 (Conn. Super. Ct. 1976); Klem v. Greenwood, 450 N.W.2d 738 (N.D. 1990); CLS Assocs. v. A.B., 762 S.W.2d 221 (Tex. App. 1988); Short v. Demopolis, 691 P.2d 163 (Wash. 1984).

136. Hobson was a man who rented horses in England in the nineteenth century. The phrase developed because of his practice of presenting renters with the choice of the horse he selected, or no horse at all. Apparently many of Hobson's horses left the renter wondering which choice to make. Thus, the choice between two undesirable options was given a name. *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 675 (1992); 7 OXFORD ENGLISH DICTIONARY 279 (2d ed. 1989).

caused the loss. But the legal fee in the case that underlies a malpractice action is different. It is deducted from a verdict because the competent attorney who won the case would have earned it. In other words, it is taken from the plaintiff because it belonged to the defendant. With malpractice, however, the defendant no longer has a valid claim to the money. It would not have been her money because the malpractice deprives her of the right to the fee. The special equitable problem is that the amount of the fee cannot simply be removed from the case. Its value has to be given to one of the parties. Either the attorney gets the value of the fee in a reduced judgment, or the client gets the fee by receiving the full judgment.

In applying the traditional burden of proof criteria, the legal system simply chooses to ignore the inequity of giving the attorney the benefit of an unearned fee. A direct examination of the equitable claims of the parties reveals a fairer basis upon which to make the allocation. Although neither party deserves this sum, the equitable claims of the two are dramatically different. The defendant, through legal malpractice, has injured the client, while the client has committed no wrongful act. It is self-evident that the malfeasor is less deserving of any equitable allocation than is her victim.

Moreover, the client brings a further equitable claim to bear on the allocation decision. This factor is the pragmatic reality of legal malpractice litigation. The reality is that the legal system does not fully compensate the plaintiff, even when she wins. For example, the client who should have received a net of sixty-six thousand dollars from the properly conducted case, will receive a sixty-six-thousand-dollar judgment in the malpractice action. This seems to be fair. However, she does not keep that sum. The attorney who represented her in the malpractice action will take a fee out of the proceeds. Assuming a typical contingent fee of one-third, the sixty-six-thousand-dollar judgment would dwindle to forty-four thousand. Because of the malpractice, the client has lost twenty-two thousand dollars.[137]

137. For similar reasons, nine jurisdictions have recently rejected the common view and permitted the prevailing legal malpractice plaintiff to retain the full judgment without deduction of the legal fee. *See* MALLEN, *supra* note 14, § 20.18, at 161, n. 5; *see also* Alvin O. Boucher, *North Dakota Legal Malpractice: A Summary of the Law*, 70 N.D. L. REV. 615, 629–30 (1994). The most aggressive state in protecting client's interests is New Jersey. It has both precluded any deduction for the fee of the negligent attorney, and gone on to require the negligent attorney to compensate the ex-client-plaintiff for the attorney's fees in the malpractice action. *See* Packard-Bamberger & Co. v. Collier, 771 A.2d 1194 (N.J. 2001); Saffer v. Willoughby, 670 A.2d 527 (N.J. 1996); Bailey v. Pocaro & Pocaro, 701 A.2d 916,

This factor should be considered in determining the proper allocation of the monies representing the attorney's fee. The present system effectively rewards the negligent attorney by giving her the benefit of the undeserved fee.[138] It penalizes the injured by forcing the client to pay two attorneys' fees. These are the fees of the negligent attorney (deducted from the judgment) and the fee of the malpractice attorney (deducted after the judgment). It is a classic "win-win" system for the bar.

The failure of the legal system to consider the total impact of legal malpractice on the client is not surprising. The judicial system is wedded to the notion of thinking by analogy.[139] In the area of tort causation and attorneys' fees, the precedents are clear. Two principles are well established. The plaintiff should not be overcompensated, and legal fees are not collectable from the defendant.[140] The fact that the application of these principles to a legal malpractice case causes the attorneys to reap undeserved benefits while leaving clients inadequately compensated has no role in the analysis. The basic principles appear to be too well established to be reconsidered.

Reconsideration is necessary, however. The economics of this issue are simple, and the economics define the fair result. In the above case of negligence, by depriving the client of a one-hundred-thousand-dollar judgment, the lawyer is presently receiving the benefit of a thirty-three-thousand-dollar windfall. As a result of this windfall, the client suffers a twenty-two-thousand-dollar loss.

The steps necessary to reverse this inequity are well established in analogous tort compensation jurisprudence. The technique is to modify the traditional proof standards by redefining what may be proven. In this manner, varying traditional proof burdens to prevent an undeserved

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(N.J. Super. Ct. App. Div. 1997). The rule is not absolute, however, since New Jersey would permit *quantum meruit* recovery in cases in which the attorney, although negligent, provided such beneficial services that the deprivation of all compensation would be unfair. *See* Strauss v. Fost, 517 A.2d 143 (N.J. Super. Ct. App. Div. 1986).

138. The effect of the present allocation method can be compared to the tax expense budget. The government loses income that it defined as not subject to tax just as much as it loses income that it permits to be deducted. *See* Gordon T. Butler, *The Line Item Veto and the Tax Legislative Process: A Futile Effort at Deficit Reduction, But a Step Toward Tax Integrity*, 49 HASTINGS L.J. 1, 63–69 (1997); Douglas A. Kahn, *Accelerated Depreciation—Tax Expenditure or Proper Allowance for Measuring Net Income*, 78 MICH. L. REV. 1 (1979).

139. *See* Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 800–01 (1991).

140. *See* Thurman v. State Farm Mut. Auto. Ins. Co., 942 P.2d 1327 (Colo. Ct. App. 1997); Columbus Fin., Inc. v. Howard, 327 N.E.2d 654 (Ohio 1975).

windfall going to the malfeasor is a routine event in tort jurisprudence. The rule is also simple. When the correct allocation of an aspect of the financial injuries cannot be determined, the legal system gives the money to the victim.

Two clear examples are immediately apparent. The first is the court's refusal to reduce tort judgments by the amount of income tax that would have been paid on lost income. The second is the court's refusal to permit judgments to be reduced by collateral benefits. The most obvious example is the rule concerning the treatment of anticipated income tax. Although nothing appears more certain than death and taxes, projected income taxes are not deducted from tort verdicts.[141] When a plaintiff has lost income as a result of negligence the amount of the gross income that was lost would certainly have been reduced by taxes. The exact tax rate, however, fluctuates. Thus, it is unclear how much to deduct.[142] The defendant has an obligation to compensate the plaintiff for lost income. This loss is often for a period of many years. If present tax rates were applied to reduce the verdict, the result might deprive the plaintiff of income in the event of falling tax rates. Of course, if taxes were not deducted, the defendant would almost certainly be overcompensating the plaintiff, since some level of taxation is a certainty. The conclusion of the common law courts was to completely ignore taxes. Rather than deduct more in taxes than might

141. *See* Klawonn v. Mitchell, 475 N.E.2d 857, 858–61 (Ill. 1985); Lumber Terminals, Inc. v. Nowakowski, 373 A.2d 282 (Md. Ct. Spec. App. 1977); Lazano v. City of New York, 519 N.E.2d 331, 332 (N.Y. 1988); *see also* I.R.C. § 104(a)(2) (West 1998) (stating that taxable gross income does not include "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical illness . . . ."). For further discussion of the non-taxability of tort verdicts, see Malcolm L. Morris, *Taxing Economic Loss Recovered in Personal Injury Actions: Towards a Capital Idea?*, 38 U. FLA. L. REV. 735, 737–38 (1986). *But see* Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 493–94 (1980) (permitting the deduction of income taxes in wrongful death suits under the Federal Employers' Liability Act (FELA)).

142. Deducting projected income taxes from tort verdicts creates numerous complications. For a discussion of these difficulties, see Robert J. Aalberts & Melvin W. Harju, *Utilizing Net Income as the Basis for Calculating Damages for Lost Earnings in Personal Injury and Wrongful Death Actions: A Case for Creating Consistency and Fairness in Louisiana*, 51 LA. L. REV. 943 (1991). Aalberts and Harju point out that "[o]ne reason is that future tax liability is too conjectural . . . . Moreover, some courts have expressed a reluctance to inject the issue of income taxes because they felt that it would unduly complicate the trial and even create more problems than it was worth." *Id.* at 944; *see also* Douglas K. Chapman, *No Pain—No Gain? Should Personal Injury Damages Keep Their Tax Exempt Status?*, 9 U. ARK. LITTLE ROCK L. REV. 407, 427 (1987).

be appropriate, the fairer result was to require the culpable party to pay more. The principle was simple; uncertainty must be resolved in favor of the innocent party. To achieve this result, the courts redefined collectable damages as they concerned income taxation. Plaintiffs were freed from the obligation of proving net loss after taxes, and defendants were precluded from proving the amount of loss that would never go to the plaintiff because of taxation. The traditional burden of proof of damages would have led to an inequitable result, and was therefore changed.

The same determination was made when defendants sought to have the amount that plaintiffs received from insurance deducted from verdicts (collateral benefits). Defendants' theory was simple: plaintiffs were being double compensated. They had money from insurance (payment for medical care, for example) and were now going to collect twice for the same injury. The existence of compensatory insurance payments should, therefore, prevent plaintiffs from meeting the burden of proving economic loss. The courts rejected this theory.[143] Although the result would be double compensation for plaintiffs, it would be even worse to give the undeserved benefit to the defendant. Plaintiffs were again absolved of the burden of proving actual loss. All that was required was proof of loss before insurance.

Further analysis reveals that a rule allocating the unpaid attorney's fee to the plaintiff would be both equitable and would not result in overcompensation. In the above one-hundred-thousand-dollar personal injury case hypothetical, the plaintiff would receive one hundred thousand dollars from the negligent attorney. Even a one-third contingent fee to the second attorney (the attorney representing the plaintiff in the malpractice action) will leave the plaintiff fully compensated, as she would be without the negligence. If there is any undue profit under the proposed system, it would be the increase of eleven thousand dollars in the fee of the successful attorney in the malpractice action.[144] This is one-third of the benefit presently given to

143. *See* Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61 (Cal. 1970); Harding v. Town of Townshend, 43 Vt. 536 (1871). Defendants met the same ruling when arguments were made to offset damages by the amount of salary, sick, and vacation pay given to the plaintiff by an employer during the period of the injuries. *See* Motts v. Mich. Cab Co., 264 N.W. 855 (Mich. 1936).

144. The malpractice attorney could be thought of as deserving one-third of the sixty-six thousand dollars that the malpractice caused the plaintiff to lose. If she gets one-third of a hundred-thousand-dollar recovery, she receives a "windfall" of eleven thousand dollars.

the malfeasor. At least the second attorney has achieved a good result for the victimized client. If an attorney has to be overcompensated, it should not be the malfeasor.

In situations in which the underlying case does not involve a contingent fee, the reversal of the present rule might still leave the client under-compensated. Assume that the client suffered a one-hundred-thousand-dollar loss in a commercial litigation, and that the attorney's fee was twenty thousand dollars. The malpractice action would still be a tort in which the attorney's fee would be at a higher rate (a contingent fee at one-third of the verdict). The result under the proposed rule would be that the client would receive a verdict for the full hundred thousand, rather than sixty-six thousand representing the net after the undeserved legal fee. The client, however, would then have to give one-third to the malpractice attorney. The result is that the client would be left with the exact same sixty-six thousand dollars that she would have received if properly represented in the original case.

The system cannot be made perfect. However, the above precedents make it clear that when perfection is not possible the malfeasor should suffer the inequity. The legal mechanism used to achieve an equitable result is to relieve plaintiffs from proof requirements on damages. This approach is appropriate whenever the traditional burdens produce an inequitable result. It is especially appropriate when the malfeasor is an attorney and that attorney is benefiting from the very act of negligence that caused the plaintiff's injuries.

The allocation of the unpaid attorneys' fees in a malpractice action is exactly the type of rule that should be closely scrutinized to avoid the appearance of undue favoritism. Like collateral benefits and income taxes, the only equitable rule is the one that ignores the potentially excessive benefit to the plaintiff. The key is avoiding any undeserved benefit to the malfeasor. Malfeasing attorneys must be required to make full compensation. The silent hand of capture, however, has made the bench blind to the unsupportable favoritism reflected in this rule. To achieve this just result, plaintiffs should not be required to prove net loss after the payment of fees to the malfeasing attorney. The attorney's fee should not be deducted from a malpractice verdict.

## V. CONCLUSION

Despite the lack of change in the malpractice tort, there is no reason to believe that judges lack the desire to protect the recipients of legal

services. Judicially created rules have been developed to protect consumers of all types of products and services. The plight of the consumers of legal services has yet to be effectively communicated. Rules like the two discussed in this Article exist because the profession has been willfully blind to the danger of over identification with the business of lawyering. The institutions have been captured, but they remain unaware of their lack of neutrality. The solution to capture is education. Capture may never be eliminated; however, a judiciary that is aware of its biases can control them. Thus, it is vital that doctrines which unduly protect the bar be held up to close scrutiny, for under such scrutiny they will fall of their own weight.

The rules that preclude recovery for pain and suffering and reduce malpractice judgments by deducting the amount of the negligent attorney's fee are exactly the type of rules that could not persist if the bench and bar had not been captured. These rules should be eliminated. Each doctrine can and should be modified to make the legal malpractice tort a viable mechanism for protecting the purchasers of legal services.

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