State Deceptive Trade Practices and Consumer Protection Acts: Should Wisconsin Lawyers be Susceptible to Liability Under Section 100.20?

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STATE DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION ACTS: SHOULD WISCONSIN LAWYERS BE SUSCEPTIBLE TO LIABILITY UNDER SECTION 100.20?

I. INTRODUCTION

Every state in this country has enacted a deceptive trade practice or consumer protection statute. Although these statutes vary from state to state and may be modeled after different federal acts, they all have the same basic purpose—to protect the public from unfair or deceptive acts or practices with respect to the sale of goods or services. It is the application of these statutes to those who supply services, rather than goods, which has produced mixed results among the states. Perhaps the most surprising result has occurred in jurisdictions that have applied these acts to certain types of attorney conduct, including advertising by

lawyers and other commercial or entrepreneurial aspects of the practice of law.

This Comment seeks to provide an overview of the application of consumer protection acts as well as to propose an extension of the application of Wisconsin's Deceptive Trade Practices Act\(^2\) to certain aspects of the practice of law.\(^5\) Section II provides a brief general history of unfair trade practice and consumer protection acts, including how they developed and their general purposes. Section III includes an overview of the conflicting positions taken by courts and legislatures faced with the issue of whether to apply their state's deceptive trade or consumer protection statute to the conduct of attorneys. Section IV discusses a client's typical methods of recovery against an attorney, such as a malpractice action, and explains how a claim brought under an unfair trade statute would differ. Section V examines Wisconsin's Deceptive Trade Practices Act\(^4\) and concludes with a recommendation that the Wisconsin Department of Agriculture, Trade and Consumer Protection Division issue a ruling extending the scope of section 100.20 to include unfair and deceptive conduct by lawyers, limited to the commercial and entrepreneurial aspects of law.

II. THE HISTORY OF DECEPTIVE TRADE PRACTICE AND CONSUMER PROTECTION ACTS

Consumer protection legislation is a relatively new concept, developed primarily in the past three decades.\(^5\) The purpose of these statutes is "to provide a private cause of action for consumers injured by unfair or deceptive commercial practices."\(^6\) The Uniform Deceptive Trade Practices Act\(^7\) served as a model for some states; others based their statutes on the Sherman Antitrust Act\(^8\) or the Federal Trade

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3. See infra text accompanying notes 146-55.
5. See Gatlin, supra note 1 at 399.
6. Id. at 400.
Commission Act of 1938. The development of these laws has been attributed to "the increasingly impersonal nature of the marketplace and consumer dissatisfaction with the traditional commercial law remedies for mistreatment by large-scale business organizations."^10

Wisconsin's Deceptive Trade Practices Act provides: "[m]ethods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited."^11 The Wisconsin Legislature enacted its version of an unfair trade practice act in 1921,^12 well before most other states had done so. This Comment will examine Wisconsin's unfair competition statute more thoroughly in Section V. First, this Comment will review the approaches taken by other states, ranging from judicial application to attorneys to legislative exclusion of attorney conduct.

III. LIABILITY OF ATTORNEYS UNDER DECEPTIVE TRADE PRACTICE AND CONSUMER PROTECTION ACTS

A. Liability Extended to Attorneys

An attorney's liability under a deceptive trade practice act was first recognized by the Fourth Circuit Appellate Court of Louisiana in Reed v. Allison & Perrone.^13 The defendant attorneys operated a legal clinic and used newspaper advertisements to promote the services of their clinic. The plaintiffs, attorneys who also operated a legal clinic, alleged that the defendants' advertisements were "misleading, confusing, and deceptive" and had damaged plaintiffs' business and reputations. They sought an injunction under the Louisiana Unfair Trade Practices and Consumer Protection Law,^16 preventing defendants from further advertising.

The defendants conceded that a portion of one of their

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11. See WIS. STAT. ANN. §100.20 (West 1998).
12. 1921 Wis. Laws ch. 571.
14. See id. at 1068.
15. Id.
advertisements might have been misleading.\textsuperscript{18} That particular advertisement stated, "[w]e have resolved the problems of roughly 60% of our clients at the initial consultation with no additional fee."\textsuperscript{19}

Despite defendants’ admission, the court refused to grant the injunction on the grounds that the plaintiffs had failed to prove that the defendants’ false advertisements had caused them "irreparable injury."\textsuperscript{20} However, the court’s holding proved very significant. It clearly stated that attorney advertising is subject to Louisiana’s Unfair Trade Practices Act because it constitutes a "trade" or "commerce" as defined in the Act.\textsuperscript{21} In addition, the court noted that although attorney advertisements are also subject to review by the state bar association, they are not immune from liability under state legislation.\textsuperscript{22} This was an unprecedented step for any court and proved to be the beginning of an extension of liability under deceptive trade practices acts.

In 1980, the Court of Civil Appeals of Houston, Texas went a step further than the Reed court and held that the Texas Deceptive Trade Practices Act\textsuperscript{23} “applied to the purchase or acquisition of legal services.”\textsuperscript{24} The plaintiffs in this case sought recovery from the defendant attorney for defective preparation of a petition for the name change of a minor child.\textsuperscript{25} With respect to this name change, the trial court found that Attorney DeBakey had failed “to secure the appointment of an attorney ad litem,” filed a petition that he knew to be defective, and basically offered nothing of value to the plaintiffs.\textsuperscript{26}

Among other things, the plaintiffs alleged a cause of action under Texas’s Deceptive Trade Practices Act.\textsuperscript{27} The court rejected the defendant’s argument that the plaintiffs were not “consumers” as required by the Act because they were purchasing “services of an intangible nature.”\textsuperscript{28} The court held that the attorney’s actions constituted “services” under the Act and that the plaintiffs were

\begin{itemize}
\item \textsuperscript{18} See id. at 1069.
\item \textsuperscript{19} Id. The opinion offers no further explanation of exactly what made this statement misleading.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} See id. at 1068-69.
\item \textsuperscript{22} See id. at 1068.
\item \textsuperscript{23} TEX. BUS. & COM. CODE ANN. § 17.45 (West 1979).
\item \textsuperscript{24} DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. App. 1980).
\item \textsuperscript{25} See id.
\item \textsuperscript{26} See id. at 632.
\item \textsuperscript{27} See id.
\item \textsuperscript{28} Id. at 633.
\end{itemize}
"consumers" who purchased these services. The court awarded the plaintiffs both attorney's fees and treble damages as mandated by the Act; an obvious advantage to recovery under this act rather than a typical malpractice cause of action.

The Supreme Court of Connecticut encountered a much different situation in *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*. The defendant attorneys were under investigation by the State Commissioner of Consumer Protection for alleged misleading advertising. This advertising included misuse of the term "legal clinic" and misrepresentations as to their fees and the fees of other attorneys offering the same services as the clinic. The Commissioner ordered an investigative demand pursuant to the Connecticut Unfair Trade Practices Act and the defendant refused to comply claiming a lack of authority on the part of the Commissioner.

The point of contention in this inquiry was whether the "provision of legal services constitutes 'the conduct of any trade or commerce,'" as required by the Connecticut statute. The court noted that many such acts do not mention legal services, primarily because they were often enacted "before lawyers engaged in advertising." In fact, the Connecticut statute, as well as its equivalent in many other states, was enacted before the seminal case of *Bates v. State Bar of Arizona*.

The United States Supreme Court in *Bates* held that advertising by lawyers was protected commercial speech under the First Amendment. This decision was in part based on the fact that "the belief that lawyers are somehow 'above' trade has become an anachronism." The Court realized that permitting lawyer advertising would expose the public to a risk that lawyers might engage in misleading or deceptive advertising and that regulation would be necessary to minimize that risk.

29. *Id.*
30. See *id.* at 634.
32. 461 A.2d 938 (Conn. 1983).
33. See *id.* at 939.
34. See *id.*
35. See *id.* at 940.
36. *Id.* at 941.
37. *Id.*
39. See *id.* at 380.
40. *Id.* at 371-72.
41. See *id.* at 379.
The *Heslin* court found the reasoning from *Bates* to be dispositive—lawyers who advertise are engaging in trade.\(^{42}\) In addition, the court looked at the intent of the Connecticut Legislature, which provided that interpretations of its statute should be guided by the Federal Trade Commission and the federal courts' interpretations of section 45(a)(1) of the Federal Trade Commission Act.\(^{43}\) Although the federal courts have not addressed whether section 45(a)(1) applies to attorneys, the Supreme Court has applied the Act to medical professionals.\(^{44}\) Furthermore, the Court has "decided that the practice of law may constitute the conduct of a trade or commerce under the Sherman Anti-Trust Act."\(^{45}\) Based on Supreme Court precedent, the *Heslin* court concluded that "the federal courts would construe the FTC Act as applying to attorneys" under this particular set of facts.\(^{46}\)

The court also quickly disposed of the defendants' contention that application of the Unfair Trade Practices Act would be a violation of the separation of powers doctrine under the Connecticut Constitution.\(^{47}\) The defendants argued that because the constitution grants "the judiciary exclusive authority to regulate the professional conduct of attorneys" it implicitly prohibits the regulation of attorneys by the legislature.\(^{48}\) Although the court conceded that conduct covered by the Consumer Unfair Trade Protection Act might also overlap with areas under control of the court, it held that this does not render the application of the statute to lawyers unconstitutional.\(^{49}\) The disciplinary function of the judiciary differs significantly from the Act in one aspect—it does not allow for recovery by those who are victims of

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\(^{42}\) *See* Heslin v. Connecticut Law Clinic of Trantolo, 461 A.2d 938, 941-42 (Conn. 1983).

\(^{43}\) 15 U.S.C. § 45(a)(1) (1976). This section provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.*


\(^{46}\) *Heslin*, 461 A.2d at 942.

\(^{47}\) *See id.* at 943. The relevant portion of the Connecticut Constitution provides: "[t]he powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." *Id.* (citing CONN. CONST. art. V § 1).

\(^{48}\) *See* Heslin, 461 A.2d at 943.

\(^{49}\) *See id.*
attorney misconduct—and this is where the Act steps in.\textsuperscript{50}

Although it may appear that the Connecticut Supreme Court opened the floodgates of claims against lawyers under the Act, the scope of its holding was restricted by a later decision. In \textit{Haynes v. Yale-New Haven Hospital}, the court held that the Act covered "only the entrepreneurial aspects of the practice of law" and not "professional negligence ... [i.e.] malpractice."\textsuperscript{51} The court was only willing to apply the Act to claims against attorneys that differed from traditional malpractice claims and recognized that the Act has a unique purpose.\textsuperscript{52}

\textbf{B. Suggested Extension of Liability to Attorneys}

Several state courts have held that although in a particular case a lawyer's conduct did not fall within the purview of that state's deceptive practices act, certain conduct would be subject to the act. For example, in \textit{Short v. Demopolis}, the Supreme Court of Washington held that Washington's Consumer Protection Act governs "certain entrepreneurial aspects of the practice of law."\textsuperscript{53} These aspects include "how the price of legal fees is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients."\textsuperscript{54}

In this case, a law firm sought recovery of fees that a former client allegedly owed to it.\textsuperscript{55} The client filed a counterclaim, disputing the fees owed and alleging both malpractice and violations of Washington's Consumer Protection Act.\textsuperscript{56} The court looked to legislative intent in order to interpret the statute.\textsuperscript{57}

Like the Connecticut Legislature, the Washington Legislature had prescribed that because the Consumer Protection Act was modeled after federal law, federal law should be followed in interpreting its reaches.\textsuperscript{58} The court reasoned that lawyers should not be categorically exempted from the Act since Washington's law was adopted practically

\begin{footnotes}
\item See id. at 945.
\item 699 A.2d 964, 972 (Conn. 1997).
\item See id.
\item 691 P.2d 163, 168 (Wash. 1984).
\item Id.
\item See id. at 164. Some insurers have "reported that malpractice claims filed in response to fee actions comprise approximately twenty percent of all claims against attorneys." RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 1.1, at 6 (3d ed. 1989).
\item See id. at 165.
\item See id. at 166.
\item See id. at 168.
\end{footnotes}
verbatim from federal antitrust laws and the federal law no longer followed the "learned professions" exception. The intent of the Act, in the court's view, was "to bring within its reaches every person who conducts unfair or deceptive acts or practices in any trade or commerce."

The Short court also explored "whether the application of the CPA to attorneys would be an unconstitutional legislative invasion of the jurisdiction of the Supreme Court in its power to regulate the practice of law." The plaintiff attorneys argued that application of the Act to the practice of law would violate the separation of powers doctrine because the state constitution vested the state supreme court with the power to regulate the legal field. The court recognized that the purposes of the judicial disciplinary system and the Consumer Protection Act were very different and could coexist without violating the constitution.

The Short case provides two important factors for courts to look at when making the determination of whether to extend the application of consumer fraud and unfair trade practices statutes to the practice of law. First, would extension of coverage in the particular situation be in the public interest? Second, is the particular situation presented regulated by the state supreme court and if so, can the two forms of regulation coexist without stepping on each other's toes?

The Washington Supreme Court briefly mentioned another consideration in Roach v. Mead. In this case, the plaintiff client, upon investment advice by his attorney, made personal loans to the attorney that the attorney never repaid. The attorney subsequently filed for bankruptcy and the client sued the attorney's partnership, alleging various causes of action including recovery under the state's Unfair Trade Practices Act. The claim under the Act alleged "that the partnership created a likelihood of confusion concerning the service it

59. "Learned Professions" such as medicine, theology, and law were generally exempted from certain statutory provisions. For more on this topic, see generally Debra D. Burke, The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?, 15 CAMPBELL L. REV. 223 (1993).
61. Id.
62. Id. at 169.
63. See id.
64. See id. at 170.
65. 722 P.2d 1229, 1234 (Wash. 1986)
66. See id. at 1231.
67. See id.
provided to plaintiff, ... represented” that it had “qualities that it didn’t possess . . ., and misleadingly represented the nature of the loan.”

To determine whether the Unlawful Trade Practices Act covered legal services, the court looked at “the customary or predominant purpose of the legal services obtained by [the] plaintiff.” The court ultimately found that the Act did not cover the particular situation at hand because the plaintiff was seeking recovery from the partnership and the attorney was not acting within the scope of his employment. However, it did suggest that if the legal services sought were “generally and customarily for a personal, family, or household purpose,” the Act would govern the lawyer’s conduct.

From these cases we can develop a framework for determining whether an attorney’s conduct should be governed by a deceptive trade practices act. When the “conduct” engaged in is deceptive advertising, there is a strong presumption that advertising constitutes a “trade” or “commerce” meant to be governed by the act. Likewise, if coverage of the conduct that the attorney engaged in would serve the public interest, the act should govern the conduct. The situation is a bit stickier, however, when the conduct engaged in is conduct that typically would fall under a malpractice claim—for example, negligent handling of a case, failure to make timely filings with the court, or omission of a cause of action. Is application of a deceptive trade practices act really necessary at that point or is it just another, most likely unnecessary, route for recovery in our litigious society? The answer may become clearer after an examination of decisions from courts that have rejected application of such acts to lawyers.

C. Refusal to Extend Liability to Attorneys

At least six states have explicitly refused to extend liability under their Unfair Trade or Consumer Protection Acts; however, they have done so in two different ways. Three of the six—Maryland, North Carolina, and Ohio—have expressly excluded lawyers via the statute while the other three, absent statutory exclusion, have judicially created exceptions.

68. Id.
69. Id.
70. See id.
71. Id. at 1234-35.
72. See infra text accompanying notes 112-28.
1. Statutory Exclusion

The Ohio Legislature chose to specifically exclude lawyers from its "Unfair, Deceptive, or Unconscionable Acts or Practices" statute. In relevant part, the statute defines a "Consumer Transaction" as "a sale, lease... or other transfer of an item of goods [or] a service... to an individual... but does not include [a] transaction between... public accountants and their clients [or] attorneys, physicians, or dentists and their clients or patients." Both North Carolina and Maryland have similar provisions. For example, North Carolina's statute provides that "commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." This exemption was not part of North Carolina's original Act but was added in 1977. Thus far, North Carolina has been the only state to specifically exclude "members of the 'learned profession.'"

Historically, these professions were excluded from antitrust laws because they "were characterized by a spirit of public service." However, this is no longer always the case because the Supreme Court has held that antitrust laws do apply to the "learned professions" in certain circumstances. Many states' unfair trade practices acts were modeled after federal antitrust laws; for this reason, it is illogical to use the "learned profession" standard as a basis for exclusion of the legal profession from an unfair trade practice act.

As noted earlier, many of these statutes were enacted before the landmark Supreme Court decision in Bates v. State Bar of Arizona. The Court's holding essentially removed the legal profession from its lofty perch as a profession that was "above trade." From this

73. OHIO REV. CODE ANN. § 1345.01(A) (West 1998).
74. Id. (emphasis added). This is Ohio's version of a "learned profession" exemption. See Burke, supra note 59.
76. N.C. GEN. STAT. § 75-1.1(b) (emphasis added).
77. See Burke, supra note 59, at 241.
78. Id. at 242.
79. Id. at 243.
81. See id. at 779.
83. See id.
Conclusion it logically follows that the legal profession, in certain instances, does engage in trade and is therefore not "above" the realms of unfair trade practices acts. However, several courts have not come to this conclusion.

2. Judicial Exclusion

The first court to hold that a state unfair trade practice act did not apply to attorneys was an Illinois Appellate Court in *Frahm v. Urkovich.* In this case, the plaintiffs alleged that the defendant, an attorney who had represented them in various real estate transactions, had given false and misleading information to the plaintiffs. This information caused the plaintiffs to cosign a loan for a real estate project. This project directly benefited the defendant in this case and resulted in a substantial loss to the plaintiffs. The plaintiffs filed suit against the defendant attorney, alleging "attorney malpractice, breach of fiduciary duty," and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.

The purpose of the Illinois Act "is to protect consumers and borrowers and businessmen against fraud, unfair or deceptive acts or practices in the conduct of any trade or commerce." The court refused to apply the Act to attorney conduct and stated that to do so would "necessarily equate the practice of law with an ordinary commercial enterprise." The court viewed the defendant's actions as "misconduct amounting to professional malpractice" and interpreted the statute as not applicable to an attorney engaged in the actual practice of law. It did not see the practice of law as the type of practice that reaches consumers generally.

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85. See id. at 1008.
86. See id.
87. See id. at 1008-09.
88. Id. at 1009.
89. Id.
91. Id. at 1009.
92. See id. at 1014. The Illinois Supreme Court again examined the application of Illinois' Consumer Fraud and Deceptive Business Practices Act in *Cripe v. Letter,* 703 N.E.2d 100 (Ill. 1998). In this case the plaintiff alleged that her attorney, the defendant, charged "excessive and unreasonable fees that bore no relationship to the actual time spent... representing [the plaintiff]." Id. at 102. The plaintiff sought recovery under the Consumer Fraud and Deceptive Business Practices Act. See id. The court rejected the plaintiff's claim for two reasons. First, the court held that legal fees could not be separated from legal
The Supreme Court of New Hampshire faced a similar situation in *Rousseau v. Eshleman*.93 This case involved a real estate transaction in which the defendant attorney advised his client to purchase a commercial property with an assumable mortgage.94 However, after the sale was completed Eshleman’s client “learned that the mortgage was not assumable, and that the note instead became a demand note due and payable at the option of the bank upon the plaintiff’s purchase of the property.”95 The client subsequently “sustained a substantial loss on [the] investment.”96 In addition to claims of legal malpractice and negligent misrepresentation, the client sought recovery and alleged entitlement to treble damages under New Hampshire’s Consumer Protection Act.97

The trial court jury found that “the defendant’s actions constituted a willful and knowing violation of the consumer protection act.”98 The supreme court reversed, holding that the Act did not apply to attorneys.99 It based its holding on the fact that pursuant to the New Hampshire Constitution, the regulation of attorney conduct was “an area of shared responsibility between the legislative and judicial branches of government” and absent specific legislative intent to include attorneys, the statute was not meant to govern attorney conduct.100 The court also reasoned that because the state legislature and constitution had given the power to regulate the professional conduct of attorneys, application of the consumer protection act to this area could give rise to “practical problems.”101

The Superior Court of New Jersey has also exempted the legal profession from liability under New Jersey’s Consumer Fraud Act.102

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services, which are not covered by the Act. See id. at 107. Second, the court held that since attorneys’ fees were regulated by the Rules of Professional Conduct, it was not necessary to provide an additional remedy for excessive fees. See id. at 106. What the court failed to take into consideration is the fact that although an attorney may be subject to disciplinary action for charging excessive fees, this offers most plaintiffs little comfort.

93. 519 A.2d 243, 244 (N.H. 1986).
94. See id.
95. Id.
96. Id.
97. See id.
98. Id.
100. Id.
101. Id. The Supreme Court of New Hampshire did not offer any explanation of what these “practical problems” may be.
The case that led to this holding involved a fee dispute between an attorney and his client. The client refused to pay fees in excess of an alleged fee cap agreement between the attorney and client. The attorney sought recovery of the fees and the client filed a counterclaim, asserting violations of the Consumer Fraud Act and legal malpractice.

The court held that "it is clear that attorney's services do not fall within the intendment of the Consumer Fraud Act." It based this holding on a prior case where the court concluded that real estate brokers, like other "professionals", perform an activity that "is recognized as something beyond the ordinary commercial seller of goods or services—an activity beyond the pale of the act under consideration." Although the New Jersey Legislature responded to this holding by amending the Act to include deceptive practices in the sale of real estate, it did not amend the Act to include professionals such as doctors, dentists, and lawyers. The court basically interpreted the legislature's failure to include the "learned professions" as an endorsement of its prior holding in Nevroski. Finally, the court noted that the New Jersey Supreme Court regulates the practice of law in New Jersey, a possible separation of powers issue.

103. See id. at 1340-41.
104. See id. at 1341.
105. See id.
106. Id. at 1342.
107. Id. (quoting Nevroski v. Blair, 141 N.J. Super. 365, 358 (1976)).
108. See id. at 1339-42.
109. See id.
110. See id. The court was alluding to the separation of powers doctrine as discussed (and dismissed) by the Supreme Court of Connecticut in Heslin v. Connecticut Law Clinic of Trantolo and Trantolo, 461 A.2d 928 (Conn. 1983) and the Supreme Court of Washington in Short v. Demopolis, 691 P.2d 163 (Wash. 1984). Both the Heslin and Short courts recognized that unfair trade practices acts serve a different purpose than judiciary's regulation of attorney conduct and the two can peacefully, and constitutionally, coexist.
111. It should also be noted that three additional states have examined whether unfair trade practices statutes apply to lawyers and have suggested that they do not. See Robertson v. White, 633 F. Supp. 954, 978 (W.D. Ark. 1986) (holding that complaint failed to demonstrate any fraud by lawyer or accountant but regardless, Consumer Protection Act is not meant to regulate lawyer-client or accountant-client relationships); Keyser v. St. Mary's Hosp., 662 F.Supp. 191, 194 (D. Idaho 1987) (refusing to apply Consumer Protection Act to medical profession); Gatten v. Merzli, 579 A.2d 974, 976 (Pa. Super. Ct. 1990), app. denied, 596 A.2d 157 (Pa. 1991) (holding that application of Unfair Trade Practices and Consumer Protection law to physicians would "... mak[e] a physician the absolute guarantor of both his treatment and the anticipated results.").
IV. OTHER CAUSES OF ACTION AGAINST ATTORNEYS

Although some states have held that attorneys can be liable to their clients under consumer fraud and unfair trade practices statutes, this is obviously not the common route of recovery for most plaintiffs. The majority of “actions brought by clients against their attorneys are for negligence [or] a fiduciary breach.” Liability under any “malpractice” theory must be premised on the following: the existence of a duty, which was breached by the lawyer and that breach was the proximate cause of the plaintiff’s (client’s) damage.

The extent of the attorney’s duty depends on the nature of the attorney-client relationship and a breach of that duty will typically give rise to a claim of negligence. To determine whether a duty existed, the first inquiry is “whether the attorney undertook to perform any service [for the client/plaintiff].” However, the issue in a legal malpractice suit usually is not whether a duty existed, but the extent of that duty.

Proving causation presents the greatest hurdle for a plaintiff in a legal malpractice action. To establish causation, the plaintiff must prove that “the [plaintiff’s] loss would not have occurred or that the amount would have been less . . . but for the attorney’s conduct.” This is often referred to as “a trial within a trial.” Not only must the plaintiff show that the attorney was negligent, but he or she must also prove that the negligence was the reason that the harm occurred—typically, that it was the reason that the plaintiff lost his or her case.

A client may also have a cause of action against his or her attorney based on fraud. The same basic rules that apply to any defendant who committed fraud also apply to a professional who committed fraud. The primary difference is that “an attorney’s advice or opinion, if knowingly false, may constitute fraud.” A plaintiff “in a fraud case must establish that there was a ‘(1) [F]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to

112. MALLEN & SMITH, supra note 55, § 8.1, at 401.
113. See id. § 8.2, at 401.
114. See id. at 402.
115. Id. § 8.2, at 405.
116. See id. at 407.
118. See MALLEN & SMITH, supra note 55, § 8.3, at 412.
119. See id. § 8.11, at 429.
120. Id. § 8.8, at 422.
deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party."  

Fraud can be difficult to prove, and is not a "favored action" for plaintiffs.

An action under a consumer fraud and unfair trade practice statute has several advantages for a plaintiff. First, it is easier to prove a violation of most statutes than to prove fraud or even negligence. Most statutes "merely require proof of either a representation which tends to deceive or some act of unfairness." A plaintiff does not need to prove an intent to deceive nor does he or she have to worry about contributory negligence because the "effect of the actor's conduct on the consuming public" is the relevant factor.

In addition, an action under a consumer protection and unfair trade statute often allows the plaintiff to recover more money than in a legal malpractice or fraud action. Typically, these statutes allow for treble damages; "punitive damages for fraud or negligence are to be awarded only when the wrong is done willfully or there are other extenuating circumstances evidencing a reckless disregard for the plaintiff's rights." Finally, most fraud statutes allow the plaintiff to recover attorney's fees, especially in cases where the wrongdoer's action was willful.

Consumer fraud and unfair trade practices acts appear to be an easy route of recovery for the victim of the actions these statutes seek to prevent. So why aren't more plaintiffs turning to these statutes, especially in Wisconsin? A more careful inspection of Wisconsin's Unfair Trade Practices statute reveals the answer.

V. UNFAIR TRADE PRACTICES IN WISCONSIN

A. Origin and Interpretation

Section 100.20 was enacted in 1921. The purpose of the statute is to regulate unfair trade practices and unfair methods of competition in

121. See Burke, supra note 59, at 236 (citing Ragsdale v. Kennedy, 209 S.E.2d 494, 500 (N.C. 1974)); see also Goerke v. Vojvodich, 226 N.W. 2d 211 (Wis. 1975).
122. MALLEN & SMITH, supra note 55, § 8.8, at 423.
123. See Burke, supra note 59, at 236–37.
124. Id. at 237.
125. Id.
126. See id. at 238.
127. Id. at 238.
128. See Burke, supra note 59, at 240.
129. See WIS. STAT. ANN. § 100.20 (West 1998).
130. Id.
business. Section 93.01 defines the term "business":

The following terms, whenever used in chs. 93 to 100 or in any other regulation thereunder . . . , have the meaning here indicated. (1m) "Business" includes any business, except that of banks, savings banks, savings and loan associations and insurance companies. "Business includes public utilities and telecommunications carriers to the extent that their activities . . . are exempt from regulation from the public service commission."

The statute was patterned after section 5 of the Federal Trade Commission Act of 1914. Although this statute was enacted at the beginning of the century, it was not really used until the late 1960's and early 1970's. The Department of Agriculture, Trade and Consumer Protection has the job of regulating business under this Act and assessing what constitutes "unfair" business practices. The Department "has been largely guided by the rules and decisions under section 5 of the FTC Act." The FTC has broad discretion in making determinations of fairness and has developed a flexible standard that looks to public policy considerations to determine whether a particular act or practice is unfair.

B. Applications

Section 100.20 has been applied to a variety of unfair practices. These unfair practices are identified through both general and specific orders promulgated by the Department of Agriculture, Trade and Consumer Protection. For example, through general orders, the Department has classified deceptive home improvement trade practices as an area governed by section 100.20. Other areas include referral selling plans, chain distributor schemes, and certain landlord-tenant situations. Wisconsin has not looked at whether this statute should apply to the "business" practices of members of the "learned professions."

134. See id. at 573.
136. See Jeffries, supra note 133, at 573-74.
137. See id. at 578 (referring to Wis. Admin. Code, ch. Ag 110 (1974)).
138. See Jeffries, supra note 133, at 580-97.
Should Wisconsin decide to hold professionals liable under section 100.20, it would do so under subsection (1t). This section makes it unlawful "for a person to provide any service ... that facilitates or promotes an unfair method of competition in business [or] an unfair trade practice in business." Attorneys and other professionals are supplying a service, not a product.

C. Remedies

The remedies available under section 100.20 are found in subsections three through six. Subsection three gives the Department the authority to issue an order enjoining a party "from employing any method of competition in business or trade practice in business which is determined ... to be unfair." In addition to injunctive relief, under subsection five, any person suffering pecuniary loss because of a violation of an order issued under section 100.20 "may sue for damages and recover twice the amount of [his or her] monetary loss, together with costs [and] a reasonable attorney's fee."

While this may sound like a generous remedy, there remains one problem for the client injured by his or her attorney. According to the language of the statute, damages may be recovered only when the defendant violates an order of the Department. This means that for a plaintiff to have a cause of action under section 100.20, the Department of Agriculture must have promulgated a code section (general order) specifically prohibiting the conduct committed by the defendant, as it did in cases of home improvement or chain distributor schemes.

D. Application to the Legal Profession

There is no language in section 100.20 that precludes a court from holding an attorney liable under the statute. In fact, the statute specifically makes it unlawful for any person to provide a service in violation of the statute and the legislature did not exclude the practice of law from the definition of business found in section 93.01. There is no

139. See WIS. STAT. ANN. § 100.20(1t) (West 1998).
140. Id. (emphasis added).
141. See WIS. STAT. ANN. § 100.20(3)-(6) (West 1998).
142. § 100.20(3).
143. § 100.20(5).
144. See id.
145. See Jeffries, supra note 133, at 577.
146. See WIS. STAT. ANN. §93.01 (West 1997).
reason that the Department of Agriculture, Trade and Consumer Protection should not issue an order prohibiting members of the legal profession from providing any services that facilitate or promote an unfair method of competition or an unfair trade practice in business.

In addition, as noted above, the Wisconsin Legislature has provided that interpretation of the statute should be guided by the federal courts’ interpretations of section 45(a)(1) of the Federal Trade Commission Act. This presents a situation exactly like the one discussed by the *Heslin* court. The court was interpreting Connecticut's Unfair Trade Practices Act, also based on section 45(a)(1). Based on the United States Supreme Court's application of section 45(a)(1) to the medical profession and decision that the practice of law may constitute a trade or commerce under the Sherman Anti-Trust Act, the *Heslin* court held that in certain circumstances, the "federal courts would construe the FTC Act as applying to attorneys."

Wisconsin should follow Connecticut's lead and allow persons injured by unfair trade practices engaged in by attorneys to bring an action under its Deceptive Trade Practices Act. Like Connecticut, however, Wisconsin should limit the extent that attorneys can be held liable under the Act. Liability should be limited to situations where attorneys are engaged in the commercial and entrepreneurial aspects of law. In addition, application of the Act should be limited to situations where it would be in the public interest to prevent the conduct. This could include "how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients;" false and misleading advertisements; and other situations where an attorney is not providing traditional "legal services" to a client. This would not include negligence and other traditional legal malpractice actions.

148. See *Heslin v. Connecticut Law Clinic of Trantolo & Trontolo*, 461 A.2d 938 (Conn. 1983); see also supra text accompanying notes 32-50.
150. See *Heslin*, 461 A.2d at 942.
153. *Heslin*, 461 A.2d at 942
154. These standards were recognized by the Washington Supreme Court in *Short v. Demopolis*, 691 P.2d 163, 168 (Wash. 1984).
155. See supra text accompanying notes 112-28.
Additionally, Wisconsin courts would need to address whether applying the Act to attorney conduct would violate the separation of powers doctrine under the Wisconsin Constitution. However, the courts should recognize that Wisconsin’s Rules of Professional Conduct and the Act serve distinct purposes and provide different remedies. There is no legitimate reason to deny a proper plaintiff a remedy through the Act in certain limited circumstances.

VI. CONCLUSION

Unquestionably, the nature of the legal profession is changing. The public and even the courts no longer perceive legal professionals as “above trade.”\textsuperscript{155} It is permissible for lawyers to engage in advertising\textsuperscript{157} and their practices can be subject to anti-trust laws.\textsuperscript{158} Along with these changes come increased risk of liability for attorneys under theories of negligence, fraud, and in some circumstances, unfair trade conduct.

Attorneys should be held accountable for their actions and if these actions include a violation of a consumer unfair trade protection act, then they must face the consequences. By holding attorneys liable under these acts in limited circumstances, courts are not opening the floodgates of litigation. On the contrary, liability under such an act would be premised only on unfair and deceptive conduct. The availability to plaintiffs of twice the amount of pecuniary loss along with costs including attorney’s fees,\textsuperscript{159} will serve as a strong deterrent to the attorney who engages in unfair and deceptive conduct and as an appropriate remedy to members of the public damaged by such conduct.

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\textsuperscript{157} See id.
\textsuperscript{159} See WIS. STAT. ANN. § 100.20(5) (West 1998).