

DAMAGES FOR LEGAL MALPRACTICE: AN APPRAISAL OF THE CRUMBLING DIKE AND THE THREATENING FLOOD

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INTRODUCTION

Whether we are presently in the midst of a litigation explosion is a topic much debated today, with knowledgeable people on both sides of the issue. About one facet of the problem, however, there can be little dispute: the past 25 years has witnessed a dramatic increase in malpractice litigation.¹ This explosion first occurred in controversies involving the medical profession, and was a phenomenon viewed by the bar with equanimity if not with downright satisfaction. This complacency was short lived, however, for it did not take long for lawyers to discover that the dereliction of their brothers and sisters at the bar provided an equally lucrative target. As attorney malpractice actions mushroomed there soon developed a respectable body of decisional law involving these problems.² This article will examine how the courts have managed the damage issues presented by attorney malpractice litigation.

The issue of damages will be divided into three parts. Part I of this article examines the problems involved in calculating the economic loss suffered by a client when the attorney's malpractice occurs during the course of litigation.³ In this type of case the client can face formidable problems of proof because of the way the courts have structured the elements of a prima facie legal malpractice case. The barriers to recovery are lowered somewhat when the attorney is guilty of more aggravated misconduct than negligence.⁴ Part I concludes with a suggested modification of the rules of damages in all such malpractice cases.⁵ Part II surveys the measure of damages when malpractice occurs in a transactional setting.⁶ Part II further considers the problem of consequential economic loss caused by malpractice. Finally, Part III examines the recovery of damages unrelated to the client's economic losses.⁷ These elements of damages include compensation for emotional distress and loss of reputation, and punitive damages.

In considering the damages to be awarded to a client injured by attorney malpractice, the courts begin, perhaps naturally enough, with a background and

1. In the field of legal malpractice, a survey of the digests shows that this increase is reflected in the increasing number of appellate decisions on the subject. Note, *Improving Information on Legal Malpractice*, 82 YALE L.J. 590 (1973).

2. As this symposium demonstrates, the pace of scholarly commentary has also increased. Other works on legal malpractice include Haughey, *Lawyer's Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888 (1973); Probert & Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708 (1980); Terrell, *Collateral Estoppel and Legal Malpractice: Do You Only Get One Shot?*, — SUFF. L. REV. — (to be published); Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959); Wallach & Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA LAW. 257 (1970).

3. See *infra* notes 8-120 and accompanying text for a discussion of basic damages for malpractice in the conduct of litigation.

4. See *infra* notes 76-92 and accompanying text for a discussion of the use of a more flexible measure of damages when the attorney is guilty of serious misconduct.

5. See *infra* notes 93-120 and accompanying text for a discussion of an alternative method of measuring damages.

6. See *infra* notes 121-203 and accompanying text for a discussion of basic damages for malpractice in the transactional setting.

7. See *infra* notes 204-59 and accompanying text for a discussion of recovery of noneconomic elements of damages.

case law tradition largely protective of the attorney who makes an error in judgment. When the attorney is merely negligent, the client's recovery, if any, is generally limited to the hard economic loss arising directly from the breach of duty. The courts are considerably less tolerant of affirmative misconduct. In such cases the courts are more liberal in allowing recovery and in the measure and types of damages that the client can recover. In other words, the courts seem to tailor the client's recovery to the degree of the attorney's breach of duty. The more serious the misconduct, the more likely (and more generously) the client will recover.

I. BASIC DAMAGES FOR LEGAL MALPRACTICE IN THE CONDUCT OF LITIGATION

Assessing the damages caused by an attorney's negligence in conducting litigation presents difficult and perplexing problems because of the way the courts have conceptualized this type of legal malpractice litigation. The client's right to recovery turns upon the outcome of a case that has never been tried or was tried improperly because of the lawyer's negligence.⁸ This foray into the "counterfactual" has a dual aspect. The client must establish, as in any negligence case, that the lawyer's breach of duty was the cause in fact of the client's loss.⁹ Thus, the burden is imposed on the client to show that but for the attorney's negligence, there would have been a favorable judgment. Proof of that hypothetical favorable judgment is then used as a basis for plaintiff's assertion that there was indeed an actionable injury and that this injury is to be measured by what the hypothetical judgment would have been. Where the injured client is a plaintiff, the measure of damages is the value of the lost claim.¹⁰ For clients who are defendants, damages are the amount of the judgment (or increase in the judgment) entered against them.¹¹ On the other hand, if the client cannot show that there would have been a favorable judgment in the properly handled hypothetical case, the negligent attorney will prevail because the malpractice did not cause the loss, which would have occurred anyway.¹²

8. See *Flynn v. Judge*, 149 A.D. 278, 280, 133 N.Y.S. 794, 796 (1912), where the court stated that "the measure of damages is the difference in the pecuniary position of the client from what it should have been if defendant had acted without negligence."

9. The cause in fact inquiry will normally begin by focusing on what the attorney did wrong, that is, on the negligent aspect of the defendant's conduct. The next inquiry is whether this negligence brought about the adverse result for the client. See *Wright, Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1759-60 (1985) (discussion of link of causal inquiry and tortious conduct). As an example, an attorney's failure to name a particular defendant in a complaint would not cause the client to lose if the statute of limitations on the claim had already expired when the client first consulted the attorney.

10. *Smith v. Lewis*, 13 Cal. 3d 349, 361, 118 Cal. Rptr. 621, 629, 530 P.2d 589, 597 (1975) (measure of damages is value of claim lost). See also *Flynn v. Judge*, 149 A.D. 278, 280, 133 N.Y.S. 794, 796 (1912) (measure of damages is difference in the pecuniary position of the client from what it should have been if attorney had not been negligent); *Titsworth v. Mondo*, 95 Misc. 2d 233, 244-45, 407 N.Y.S.2d 793, 799 (1978) (measure of damages equals value of claim lost).

11. See, e.g., *Pickens, Barnes & Abernathy v. Heasley*, 328 N.W.2d 524, 526 (Iowa 1983) (damages for negligently conducted defense is the amount of judgment in the prior case, including costs).

12. See, e.g., *Kieller v. Reynolds*, 344 N.W.2d 556, 561 (Iowa Ct. App. 1983) (client lost for

This generally accepted method of resolving malpractice cases is termed the "trial within a trial" method.¹³ How it is applied will be examined first in relation to the claim of a client who was a plaintiff in the underlying action that was allegedly mishandled by the attorney.¹⁴ Valuation of the loss of a defense and loss of an opportunity to appeal will then be examined.¹⁵ This review of the cases will expose the theoretical difficulties with the trial within a trial method. These difficulties arise because requiring clients to prove that the lost claim or defense would have ultimately prevailed at trial confuses the fact of harm with the amount of harm. The loss of the claim should be sufficient to establish that the client suffered a legal wrong as a result of the attorney's negligence. The trial within a trial method, however, requires proof that the trial of the underlying claim would ultimately have resulted in a verdict for the client in order to show both an actionable wrong *and* the value of what was lost. But a claim may have some value even if the chances of ultimately prevailing at trial are questionable. This part concludes by noting that courts are increasingly willing to look to the potential settlement value of a claim, rather than strictly at the ultimate trial value, in determining the value of the lost claim or defense.¹⁶

A. The Trial Within a Trial Method of Proving Liability and Damages

The trial within a trial method of resolving malpractice litigation is based on the simple premise that the best way to determine a client's loss from the lawyer's misconduct is to litigate the underlying claim against the original defendant as part of the malpractice action against the attorney. Thus a client whose cause of action is lost because the attorney failed to file within the statute of limitations is required to prove that, had the attorney filed in time, the plaintiff would have obtained a verdict of a particular amount. If the defendant in the underlying case had a good defense, the plaintiff will lose the malpractice action, because no loss resulting from the attorney's negligence could be established.

The justification for the trial within a trial method is apparent. If we wish to know what a client has lost because of an attorney's negligence, it is relevant to ask what would have happened had the case gone forward without the attor-

failing to prove that physical injuries were in fact caused by automobile accident that was the subject of the underlying action); *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 393 So. 2d 851, 857-58 (La. App. 1981) (client lost because facts showed that client was contributorily negligent, and claim would therefore have been barred), *aff'd*, 422 So. 2d 1109 (La. 1982).

13. Coggin, *Attorney Negligence . . . A Suit within a Suit*, 60 W. VA. L. REV. 225, 233-35 (1958), used this term to describe the method of trial of litigation malpractice actions. The basic problem had long been understood by the courts, however. *See, e.g., Lynch v. Munson*, 61 S.W. 140, 142 (Tex. Civ. App. 1901) (legal malpractice cases present "the anomaly of trying two suits in one").

14. *See infra* notes 17-63 and accompanying text for a discussion of the trial within a trial method. So-called "consequential" damages resulting from the loss of the case will be discussed later. *See infra* notes 170-203 and accompanying text for a discussion of the recovery of economic damages.

15. *See infra* notes 65-75 and accompanying text for a discussion of the value of a lost defense.

16. *See infra* notes 93-120 and accompanying text for a discussion of the "settlement value of a claim" method.

ney's breach of duty.¹⁷ But the technique almost inevitably results in a confusion of two distinct questions, causation and injury. In considering what would have happened but for the attorney's negligence, it is natural to assume that if plaintiff fails to show that a trial of the underlying action would have resulted in a favorable judgment, the attorney's negligence is not actionable because plaintiff was not able to show a loss.¹⁸ Thus, the hypothetical trial method requires that plaintiff prove that a favorable judgment in the underlying action would have resulted but for the attorney's negligence. This requirement is essential to plaintiff's prima facie case because without a favorable judgment, there is no injury, and without an injury, there is no liability for a negligent act.¹⁹

The actual operation of the trial within a trial method can be illustrated by examining cases where the client's injury consists of the loss of a good cause of action. As the next section of this article explains, the client may have to prove not only that a favorable judgment would have been obtained, but also that the judgment would have been collectible and that no viable remedy remains against the defendants in the underlying action.

1. The Value of a Lost Cause of Action

a. *Establishing the full trial value of the lost claim*

The trial within a trial method purports to recreate the trial of a lost cause of action. The malpractice trial jury sits as a replacement for the jury that was never convened because of the attorney malpractice.²⁰ In this substitute trial, the courts generally accept any evidence that could have been admitted in the underlying case and allow the defendant attorney the benefit of any defense that could have been asserted against the original claim.²¹ The unspoken premise is that the substitute trial will provide an accurate substitute for the trial of the underlying claim, and that the jury verdict on the underlying action is the precise and only measure of the client's loss.

Using this approach, any element of damage recoverable in the underlying claim is potentially recoverable in the suit against the attorney whose breach of duty resulted in the loss of the opportunity to collect it. The issue is always whether or not an element of damages was properly recoverable in the underlying action. The problem for the plaintiff, of course, is how to put satisfactory evidence of the amount of damage before the trier of fact.

*Glamann v. St. Paul Fire and Marine Insurance Co.*²² illustrates the foregoing point. In that case, the client accused the defendant attorney of negligently

17. See Coggin, *supra* note 13, at 225-26.

18. Cf. Kessler v. Gray, 77 Cal. App. 3d 284, 292, 143 Cal. Rptr. 496, 500 (1978) (attorney's negligence actionable where evidence indicates favorable judgment for client).

19. See Jenkins v. St. Paul Fire & Marine Ins. Co., 393 So. 2d 851, 857-58 (La. App. 1981) (claim against attorney failed because client contributorily negligent and therefore failed to show attorney's negligent conduct caused loss).

20. Coggin, *supra* note 13, at 234-35.

21. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 810, 817-18 (2d ed. 1981).

22. 140 Wis. 2d 640, 412 N.W.2d 522 (Wis. Ct. App. 1987), *rev'd in part*, 144 Wis. 2d 865, 424 N.W.2d 924 (1988).

losing a suit for sex discrimination in employment. At trial, the client successfully established that the attorney was negligent. On appeal, however, the intermediate court of appeal reversed the verdict on the amount of damages.²³ The appellate court generally agreed with the trial court that the value of the claim included all the amounts that might have been awarded but for the attorney's negligence.²⁴ In a statutory sex discrimination action, that amount would include lost wages, prejudgment interest on lost wages, and reasonable attorneys fees.²⁵ If proved, these amounts could be recovered from the negligent attorney. The appellate court, however, found that the client failed to establish adequately the amount of attorney's fees recoverable in the underlying action.²⁶ The Wisconsin Supreme Court reinstated the trial court's judgment, holding that the client had provided acceptable proof and that the amount of statutory attorney fees should be set by the court rather than by the jury.²⁷

Similarly, if the underlying action for medical malpractice included a consortium claim on behalf of the injured patient's spouse, the value of that additional claim can be included in the action against the attorney.²⁸ Indeed, if the client can establish that punitive damages could be properly awarded in the underlying action, the client is entitled to recover this sum from the attorney, even if the attorney's conduct itself would not have supported such a sanction directly.²⁹ The common factor in each case is the trial within a trial approach to determining the value of what was lost due to the attorney's negligence.

While this technique gives a spurious sense of precision, it is merely an estimate of what might have happened in the underlying suit. This is starkly illustrated in cases where the relief which should have been awarded in the underlying suit cannot be duplicated in the malpractice case. For example, in *Smith v. Lewis*,³⁰ the client claimed that her attorney was negligent in handling her divorce because he did not claim her community share of her husband's military pension.³¹ The court noted that the client could only have recovered in

23. *Id.* at 656-58, 412 N.W.2d at 529.

24. *Id.* at 652-56, 412 N.W.2d at 527-28.

25. *Id.* at 652-62, 412 N.W.2d at 527-31. See also *Freeman v. Rubin*, 318 So. 2d 540, 543 (Fla. Dist. Ct. App. 1975) (damages in suit for loss of civil rights claim arising out of criminal conviction through the use of perjured testimony would include economic losses sustained, impairment of mental health, and legal expenses of appeals of convictions if plaintiff shows attorney's negligence caused lesser recovery).

26. *Glamann*, 140 Wis. 2d at 660-62, 412 N.W.2d at 530-31. Note that in *Glamann*, the client had a statutory claim to attorneys' fees expended in pursuing the underlying discrimination claim. Generally, courts do not allow recovery of attorneys' fees expended in the malpractice action against the attorney. See *infra* note 192 for a discussion of the limitations on recovery of attorney fees in legal malpractice actions.

27. *Glamann*, 144 Wis. 2d 865, 424 N.W.2d 924, 926-27 (1988).

28. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 695 (Minn. 1980) (claim for negligence in handling medical malpractice action; evidence of husband's impotence as result of negligent medical treatment supported award to wife for damages of loss of consortium).

29. *Patterson & Wallace v. Frazer*, 79 S.W. 1077, 1083 (Tex. Civ. App. 1904), *rev'd on other grounds*, 100 Tex. 103, 94 S.W. 324 (1906).

30. 13 Cal. 3d 349, 118 Cal. Rptr. 621, 530 P.2d 589 (1975).

31. *Id.* at 354-55, 118 Cal. Rptr. at 623, 530 P.2d at 591.

the divorce action the right to her share of the pension as it accrued, an award that the law court could not duplicate.³² The court nevertheless awarded the client a lump sum equivalent to the present value of her share of the pension.³³ Clearly this result is at odds with the rationale of the trial within a trial method, and it emphasizes that it is at best but one method of trying to estimate the loss caused by the malpractice.

Thus far we have considered the problem of damages on the assumption that the lawyer's negligence has caused a total loss of the plaintiff's claim. Of course, this is not always the case. The malpractice may result in a reduced judgment or unsatisfactory settlement. In the latter case, where it is alleged that the negligence of the attorney in recommending a settlement has caused a loss to the client, the trial within a trial method is again employed to establish damages.³⁴ If plaintiff can prove that more could have been recovered at trial but for the defendant's malpractice, plaintiff can recover the difference between the actual judgment or settlement and the amount that should have been recovered.³⁵ Thus, an unsatisfactory settlement does not bar recovery because under the trial within a trial method plaintiff may prove the full trial value of the claim and thus establish the amount of damages. If plaintiff in fact recovered anything less, the demonstrated full value of the claim, less the amount actually recovered, sets the measure of recovery.³⁶

As a way of measuring of damages, then, the trial within a trial method allows plaintiffs to maximize the amount recoverable in the attorney malpractice action by seeking the amount that their claims would have brought if *properly prepared and tried*. The trial within a trial method in effect presumes that these two events can now take place in the legal malpractice action; that is, that the client's underlying claim can still be properly prepared and fully tried.

While in many cases this presumption may be justified, there are cases in which the attorney's negligence has compromised not only the underlying action, but also any chance of recreating the trial that "should have been." This occurs, for example, where the attorney has lost or otherwise mishandled the collection of vital evidence that cannot be replaced. In such cases, the premise of the trial within a trial method is undercut, because the underlying case cannot now be properly prepared and tried as part of the malpractice action. This defect is critical since under the orthodox view the value of the claim must be established in order to prove up a claim for malpractice.³⁷

32. *Id.* at 362, 118 Cal. Rptr. at 630, 530 P.2d at 598.

33. *Id.* *Accord*, *Martin v. Northwest Washington Legal Services*, 43 Wash. App. 405, 411-13, 717 P.2d 779, 784 (1986) (value of military pension not claimed in divorce proceeding).

34. *See, e.g.*, *Glenna v. Sullivan*, 310 Minn. 162, 245 N.W.2d 869 (1976); *Gimbel v. Waldman*, 193 Misc. 758, 84 N.Y.S.2d 888 (1948); *Stafford v. Garrett*, 46 Or. App. 781, 613 P.2d 99 (1980). In these cases, the plaintiffs lost because they failed to persuade the court that, given the situation of the particular case, the attorney was actually negligent in advising settlement.

35. *Kay v. Bricker*, 485 So. 2d 486 (Fla. Dist. Ct. App. 1986) (sum original tort-feasor paid in settlement to plaintiff should have been deducted from jury award against attorney).

36. *Titsworth v. Mondo*, 95 Misc. 2d 233, 244-45, 407 N.Y.S.2d 793, 799 (1978) (settlement of underlying action does not bar claim against attorney for malpractice).

37. As noted above, this is a requirement of proof of actual causation of injury. In some cases

The effect of this doctrinal approach in cases of lost evidence is apparent, but the problem is scarcely less significant in any legal malpractice action. The trial within a trial method requires a client to establish that a favorable judgment would have been recovered in the underlying action. Its dubious premise is that a client who failed to establish that a favorable judgment would have been obtained in the underlying action has sustained no injury. This position obviously places a very high burden of proof on the plaintiff client in a malpractice action and has been criticized for that reason.³⁸ While some have suggested that the method could be reformed by changing the standard of causation, a better approach is to take a different view of what constitutes an actionable loss.³⁹ The orthodox view ignores the fact that the loss of a claim, without more, is itself a genuine injury. Acceptance of this latter view permits a differentiation between proof of the fact of loss and proof of the amount of loss. If loss of a legitimate claim is an actionable injury, that loss can be measured in terms other than the ultimate result of a hypothetical trial.

The fundamental misconception underlying the orthodox approach thus appears to be its assumption that the only way to value a case is to try it. It is well established, however, that only a small percentage of cases are actually

where the proof that a favorable judgment could have been obtained has been made difficult by the very malpractice complained of, the courts might try to help the client by placing the blame for the difficulty of proof on the attorney and reversing the burden of proof. As precedent, the courts could rely on cases grappling with the problems presented where the misconduct of the defendant has obscured actual causation of the injury. *See, e.g., Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948); *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). The burden would then be on the attorney to disprove that the malpractice caused the loss of the claim. This was, in effect, the approach taken by the court in *Winter v. Brown*, 365 A.2d 381 (D.C. 1976), where the court believed that the causation problem could be solved by reversing the burden of proof on damages. In that case, the defendant attorneys had negligently failed to file notice of a medical malpractice claim with the county, which operated the hospital where the medical malpractice occurred. *Id.* at 382. The attorneys contended that because plaintiffs had not exercised their right to sue hospital employees and staff members, they had not yet suffered any loss, and thus damages in the malpractice action were not shown. *Id.* at 383. The court instead took the position that the admitted loss of the claim against the hospital not only demonstrated that damage had occurred, but that the amount of the damage was the full value of the claim. *Id.* at 383. The defendant attorneys had the burden of demonstrating that the loss due to their negligence might be less than total. *Id.* at 385. In fact, however, this case simply trades a causation problem for a damage problem, because plaintiff still has the basic burden of establishing the monetary value of the claim.

38. Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 667-72 (1978); Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 694-95 (1977). Both authors complain that the plaintiff must meet an unreasonable burden of proof under this rule. An author writing some twenty years earlier, however, felt compelled to defend the trial within a trial method from the charge that it was too generous in allowing speculation about the amount of damages that the first jury, had it heard the case, would have awarded. *See Coggin, supra* note 13, at 234.

39. Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, *supra* note 38, at 679-81. The author recommends use of a "lost substantial possibility of recovery" causation standard borrowed from medical malpractice cases such as *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966) (requirement of proof that medical malpractice caused injury satisfied by demonstrating a lost possibility of recovery due to doctor's negligent failure to timely diagnose disease).

tried.⁴⁰ In a system that depends upon settlement of the vast majority of legal actions, it is odd that the standard of proof of causation and damages in legal malpractice cases not only presumes that the action would have been tried, but actually requires that the action be tried, deeming this procedure the only possible way of establishing the fact and amount of harm resulting from defendant's malpractice. Plaintiffs therefore are forced to choose trial of a claim that might very well have been one of that "vast majority" that get compromised and settled. Plaintiffs whose claims are not clear winners are therefore deprived of the chance of settling and accepting half a loaf.⁴¹

b. *The requirement of collectibility*

Whatever its defects, the trial within a trial method requires proof of a favorable judgment in order to establish a prima facie case of malpractice. Closely related and logically following from this requirement is the added burden imposed on the client of showing that any judgment would have been collectible. Thus, if the promissory note that the attorney negligently failed to collect was valueless, the negligence has left the plaintiff no worse off than if the attorney had diligently but fruitlessly pursued payment. Further, collectibility seems to relate both to questions of causation as well as to amount of damage. Not surprisingly, therefore, courts tend to treat it as part of the plaintiff's prima facie case.⁴² Here again, if collectibility is viewed as part of plaintiff's prima facie case, it suffers from the same objections as the requirement that plaintiff demonstrate likelihood of ultimate success on the merits.⁴³

It was certainly legitimate to conclude that the collectibility of any judgment in the underlying action was at least relevant in determining the client's

40. Statistics from the federal courts indicate that less than five percent of all civil actions reach trial, although the percentage of tort cases reaching trial is much higher, on the order of twelve percent. Bureau of the Census, U.S. Department of Commerce, Statistical Abstract of the United States: 1987 (107th ed. 1986) 168, table 292.

41. It could be argued that plaintiffs still have such an option, since the legal malpractice action is also likely to be among those cases that get settled. The rule that virtually mandates trial of the underlying action, however, would tend to weight the settlement process in favor of the attorney, because the client now has two liability hurdles to clear: proof of the attorney's liability for malpractice, and proof of the original defendant's liability for the underlying claim. Granted that the first hurdle is necessary, the second may not be if the plaintiff could demonstrate a substantial possibility of settlement with the original defendant.

42. *Sitton v. Clements*, 257 F. Supp. 63, 67 (E.D. Tenn. 1966) (plaintiff has burden to show judgment would be collectible, taking into account financial resources of attacker and length of time judgment is good in Tennessee), *aff'd*, 385 F.2d 869 (6th Cir. 1967); *Whiteaker v. State*, 382 N.W.2d 112 (Iowa 1986) (failure to prove judgment would have been collectible); *Pickens, Barnes & Abernathy v. Heasley*, 328 N.W.2d 524 (Iowa 1983) (same); *Koeller v. Reynolds*, 344 N.W.2d 556 (Iowa Ct. App. 1983) (same); *Jernigan v. Giard*, 398 Mass. 721, 500 N.E.2d 806, 807 (1986) (client made no showing that attorney's negligence made proof of collectibility more difficult); *Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27 (S.D. 1983) (in suit against attorney for failure to collect on past due account and negligently substituting another party for debtor, no recovery allowed where plaintiff failed to prove that judgment could have been collected against original debtor).

43. One author suggested that the early cases imposing a collectibility requirement set the precedent that led to the adoption of the trial within a trial method of proving both liability and damages. Note, *A Modern Approach to the Legal Malpractice Tort*, *supra* note 38, at 694-95.

loss. Viewed as part of the proof of the value of the lost claim, the collectibility of the judgment in the underlying action establishes what plaintiff could actually have expected to recover, and is thus in essence a damage question.⁴⁴ It is in this sense that the inquiry into collectibility becomes proper.

Whether as a damage or causation inquiry, collectibility has long been, and still is, recognized by the courts as an important part of the plaintiff's case.⁴⁵ In its simplest form, collectibility requires the plaintiff to show that the original defendant in the underlying action was solvent and able to pay a money judgment. This is typically an issue where the case involves the attorney's failure to collect an obligation or obtain a judgment. Even in these situations, however, the inquiry can quickly become complicated. In *Sitton v. Clements*,⁴⁶ the court considered the earning power of the original defendant and the amount of time available in Tennessee to collect on a judgment.⁴⁷ The court then reduced the judgment that the plaintiff could recover from his attorney for failing to file the lawsuit against this defendant to an amount representing an estimate of the sum actually recoverable.⁴⁸ Thus, it is plain that collectibility is not an all or nothing requirement. Partial recovery is possible.⁴⁹

Courts allow relatively few exceptions or variations to the requirement of collectibility. One court noted in dicta that it might be prepared to shift this burden if plaintiff showed that the attorney's negligence had made proof of collectibility difficult or impossible.⁵⁰ A more reforming spirit was shown in *Hoppe*

44. The earliest cases imposing a collectibility requirement involved an agent's (not necessarily an attorney's) failure to collect the amount due on a promissory note or other obligation. In these cases, the courts seemed to keep distinct the issues of the agent's failure to collect and the amount of the loss that plaintiff suffered as a consequence. See, e.g., *Governor v. Baker*, 14 Ala. 652, 655-56 (1848) (whose sheriff failed to return writ of attachment it was proper to present evidence that defendant in attachment had disposed of property to be attached not to excuse sheriff's default but to reduce extent of recovery). See also *Goodman & Mitchell v. Walker*, 30 Ala. 482, 500-01 (1857); (attorney liable to client injured in malpractice action because of attorney's lack of care and skill); *Pennington v. Yell*, 11 Ark. 212, 228 (1850) (nominal damages awarded when full extent of damages not determined). One possible explanation why these courts were able to separate the issues of liability and damages is that the negligence cause of action, with its requirement of actual injury, had not yet been clearly formulated. Thus, the courts were able to contemplate a theoretical wrong, on the order of a technical trespass to land, that justified at least nominal damages.

45. The lineage of this requirement goes back at least as far as *Russell v. Palmer*, 95 Eng. Rep. 837, 2 Wils. 325 (K.B. 1767) (jury allowed to consider what plaintiff could actually have recovered).

46. 257 F. Supp. 63 (E.D. Tenn. 1966).

47. *Id.* at 66. The plaintiff would have had ten years within which to collect the judgment, and could have renewed the judgment for an additional ten years. *Id.*

48. *Id.* at 67.

49. The same theory, i.e., what could plaintiff have actually recovered had the attorney performed properly, can be applied outside the pure litigation context. See, e.g., *Tilly v. Doe*, 49 Wash. App. 727, 731, 746 P.2d 323, 325 (1987) (where attorney failed to perfect security interest it was proper for court to value collateral at auction value rather than fair market value because evidence showed that clients would not have received fair market value even if security interest had been perfected), *review denied*, 110 Wash. 2d 1022 (1988).

50. *Jernigan v. Giard*, 398 Mass. 721, 500 N.E.2d 806, 807 (1986) (court may shift burden of proving collectibility from client to attorney if attorney's negligence made proof of collectibility more difficult).

v. Ranzini,⁵¹ where the New Jersey Superior Court reversed the burden of proof of collectibility for all cases. The court's innovation was to order the issue of collectibility to be bifurcated and tried after the determination of liability and the full value of the claim.⁵² In this bifurcated hearing, the burden of proof was placed on the defendant to show that the plaintiff could not have recovered the full value of the claim as found by the jury.⁵³

The New Jersey court was arguably correct in placing the burden of proof on the collectibility of any judgment in the underlying case on the defendant attorney. Placing this burden on the plaintiff reflects the same rigid causation analysis that led to the trial within a trial method as the only way for the plaintiff to demonstrate causation of actual harm. Instead, collectibility should be flexibly viewed as another important consideration in determining the value of what the plaintiff lost through the negligence of the defendant attorney. Thus, while the plaintiff ought to have the burden of establishing the basic merit of the claim in the underlying suit, it is by no means so clear that collectibility is necessarily a part of that proof. Shifting the burden of proof in essence turns collectibility into an affirmative defense. If the defense appears to have merit (for example an automobile accident case with catastrophic injuries but only minimal assets or insurance coverage) it will be up to the defendant attorney to raise the point and pursue it at trial. Collectibility thus becomes a means of reducing the damages that might otherwise be owed, taking its place with such doctrines as the avoidable consequences rule.⁵⁴ Furthermore, it will not be necessary for proof to be presented on the issue unless the defendant, the party most interested in the point, believes it is worth litigating.

Like the issue of the value of the underlying claim, the collectibility of the underlying judgment is not necessarily an issue that lends itself to a categorical response. In other words, a claim may be partly collectible, and either side should be able to introduce evidence relevant to this issue. Courts should allow the trier of fact to consider, for example, all possible sources for payment of the

51. 158 N.J. Super. 158, 385 A.2d 913 (1978).

52. *Id.* at 167, 385 A.2d at 918. Bifurcation seems to be a favored solution in New Jersey to problems relating to proof of a legal malpractice claim. Thus in *Fuschetti v. Bierman*, 128 N.J. Super. 290, 319 A.2d 781 (1974), the court ordered bifurcation of the issues of breach of duty and validity of the claim. Under this procedure, the jury would first determine whether the attorney was guilty of malpractice. If malpractice is proved, the damage trial proceeds to consider the validity of the underlying claim. *Id.* at 297-98, 319 A.2d at 785. Presumably the *Hoppe* rationale would lead to trifurcated trials, with the defendant in the third phase arguing that the claim, although valid, was uncollectible.

53. *Hoppe*, 158 N.J. Super. at 171, 385 A.2d at 920.

54. The avoidable consequences rule says that the plaintiff may not recover any item of special damages that could have been avoided with reasonable effort after the actionable conduct has occurred. The "reasonable effort" required may include the expenditure of reasonable sums. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 186-88 (1973). As pointed out in this work, it is arguable that some elements of the basic damage rules incorporate notions regarding avoidance of economic waste under the avoidable consequences rule, and it may be appropriate to allocate the burden of proof on these issues to the defendant even though formally part of the basic damage rule. *Id.* at 189-90. Thus the defendant will be forced to raise the issue, if it appears merited by the facts of the case.

judgment, the amount of time the judgment is valid and can be executed upon, and whether or not the judgment is dischargeable in bankruptcy.⁵⁵ As long as any part of the judgment in the underlying claim is collectible, plaintiff should be able to recover a comparable amount from the negligent attorney who lost the claim.

Complications raised by the collectibility requirement are further magnified when an underlying case involves multiple defendants and multiple theories. A jury may be required to evaluate what the plaintiff could have recovered where strong causes of action exist against relatively poor defendants, and weak or dubious causes of action exist against rich defendants. Counsel trying these cases will have to guide the jury through the process so that some reasonably fact-based evaluation can be made. This requires an initial evaluation of the total value of the claim, together with a separate inquiry into the ability of each defendant to pay that value.

c. The requirement of exhaustion of remedies against the underlying defendant

One way to limit the speculation that often accompanies the determination of the value of the lost cause of action is to require that the plaintiff fully pursue all reasonable avenues of recovery on the underlying cause of action before turning to the legal malpractice case.⁵⁶ If this requirement is followed, the trier of fact will not have to speculate on the value of any remaining cause of action as an offset to the claim against the delinquent attorney. Instead, the result in the underlying case (dismissal of the claim or partial, unsatisfactory recovery) can be taken as settled, and the claim against the attorney therefore fully accrued.

The courts that have considered the issue seem to agree that the plaintiff may not pursue the attorney malpractice claim if the underlying action is still pending.⁵⁷ Thus, plaintiff may be required to litigate an appeal⁵⁸ or otherwise continue with the underlying action until a final disposition is obtained. If the actual result in the underlying action is satisfactory, the attorney's negligence cannot be said to have cost the plaintiff the value of the claim. The negligent attorney may still be liable, however, for additional or increased litigation costs resulting from the malpractice.⁵⁹

55. See, e.g., *Sitton v. Clements*, 257 F. Supp. 63 (E.D. Tenn. 1966) (plaintiff has burden to show judgment would be collectible, taking into account financial resources of attacker and length of time judgment is good in Tennessee), *aff'd*, 385 F.2d 869 (6th Cir. 1967).

56. When the plaintiff expends funds trying unsuccessfully to resurrect or pursue the underlying action, courts allow these costs as additional damages in the action against the attorney. See *infra* note 192 and accompanying text.

57. *Bowman v. Abramson*, 545 F. Supp. 227 (E.D. Pa. 1982) (until underlying judgment is final, client's damages are speculative); *Amfac Distribution Corp. v. Miller*, 138 Ariz. 152, 673 P.2d 792 (1983) (cause of action for legal malpractice does not accrue until plaintiff's damages are certain and not contingent upon the outcome of an appeal); *Eddleman v. Dowd*, 648 S.W.2d 632 (Mo. Ct. App. 1983) (plaintiff can prove no damages against attorney for professional negligence so long as underlying personal injury lawsuit remains pending).

58. See *Amfac Distribution Corp. v. Miller*, 138 Ariz. 152, 673 P.2d 792, 794 (1983).

59. See *infra* note 192 and accompanying text.

From the point of view of damages, requiring the claim to be fully accrued before pursuing the attorney makes sense. In the first place, it will reduce one source of uncertainty. Further, it is appropriate to make the defendants in the underlying case, if liable, bear the burden of the damages they have caused. To the extent that the underlying defendants can be found liable in spite of the attorney's malpractice, they are the ones who should be primarily responsible for those losses. The reason for the rule should be kept in mind. The point is to wait until the underlying case is clearly over so that the damages can be more certainly determined. The accrual rule is not designed to require plaintiff to expend time and effort on pointless litigation tactics or frivolous appeals. As a matter of damage mitigation, plaintiff should not be required to do more than act reasonably to avoid increasing the defendant attorney's damages. For example, if the plaintiff's failure to appeal the underlying action results in a final disposition of the case, the claim against the attorney has accrued. While the attorney may be able to argue that the plaintiff should not recover based on the doctrine of avoidable consequences,⁶⁰ it is clear that the accrual requirement is satisfied.

The answer to the accrual issue becomes more complicated in cases where the attorney's malpractice results in the loss of a claim against some but not all defendants. For example, the court in *Winter v. Brown*⁶¹ faced a situation in which tort claims against a county hospital were lost, while claims against the hospital's agents and employees remained. The attorneys argued that the action must fail because the claims that remained rendered the value of the lost claim against the hospital speculative.⁶² In rejecting this argument, the court took the position that the action against the attorneys should go forward but that the burden of proof of the value of the remaining claims should be placed on the defendants.⁶³ The court did not consider the possibility of staying the legal malpractice case until the underlying action against the hospital employees or agents was over.⁶⁴ If it had done so, and if the plaintiff obtained full compensation for his injuries against those defendants, the attorneys' negligence would not have caused the plaintiff to lose the value of the underlying claim.

Again, the purpose of the accrual requirement is to aid the determination of damages. Requiring plaintiff to pursue a valid and collectible claim that would provide a measure of relief from the original defendants places the loss on the primary wrongdoer and helps to make the damage inquiry in the legal malpractice case more manageable. Plaintiff therefore should not have to exhaust every imaginable claim in order to be able to pursue the malpractice claim, but only such claims as would be required by the doctrine of avoidable consequences. On the other hand, if such a viable claim exists, it is reasonable to hold the legal

60. See D. DOBBS, *supra* note 54. Thus, if feasible, plaintiff may be required by this doctrine to expend money to pursue the underlying action, if it appears that there is a reasonable chance of recovery.

61. 365 A.2d 381 (D.C. 1976).

62. *Id.* at 383.

63. *Id.* at 385.

64. *Id.*

malpractice action in abeyance pending the outcome of the underlying action. Thus, in *Winter v. Brown* the court should at least have considered whether the remaining claims could result in some substantial recovery for the plaintiff. If so, the answer was not to dismiss the plaintiff's legal malpractice case, but to stay it until the underlying action was resolved. If the claims were insubstantial, or were directed at peripheral or insolvent parties, so that plaintiff would not be required by the doctrine of avoidable consequences to pursue it, then the action against the attorneys could properly go forward.

2. The Value of a Lost Defense

Thus far litigation malpractice has been examined from the perspective of the client who has lost a claim. The other side of the coin is the client who was a defendant in the underlying action and who suffered an adverse judgment because of the negligence of defense counsel. In this situation, the damage issue may be thought of as the value of the lost defense, just as the plaintiff client sought the value of the lost claim. In contrast to the lost claim situation, however, the difficult question is one of causation rather than the amount of damages.

The reason why causation is a more important element is because, from the standpoint of a defendant, the primary source of injury from litigation malpractice is the adverse judgment entered in the underlying action, and this judgment usually sets a fixed measure of damages.⁶⁵ The client must demonstrate, however, that the attorney's malpractice did in fact cause this adverse judgment.⁶⁶ Thus, whatever damages, fines, surcharges, costs, fees or exemplary damages resulted from the attorney's negligence are recoverable, once the plaintiff client demonstrates that the judgment in the underlying case is unmerited and attributable to the attorney's malpractice.⁶⁷

In order for the plaintiff to satisfy the burden of proof, the trial within a trial method is once again relied on as a plausible way to demonstrate what the result in the underlying action would have been had the attorney not acted negli-

65. Elements of damage other than the underlying judgment are possible, however, when the client defendant asserts that the underlying judgment had effects beyond simply the monetary liability. Thus, in *Lieberman v. Employers Ins. of Wausau*, 84 N.J. 325, 419 A.2d 417 (1980), the client was a doctor charged with medical malpractice in the underlying action. The underlying action was settled without his consent for a substantial sum. As a result, the doctor's medical malpractice insurer imposed a premium surcharge, which the doctor attempted to recover from his defense counsel. *Id.* at 333-34. Because the premium surcharge would be imposed for any settlement or judgment in excess of \$3500, the court held that the doctor could only succeed if he could show that such a successful result would have ensued if the case had not been settled. *Id.* at 341-42. A further example is *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730 (7th Cir. 1976), discussed in note 68, *infra*.

66. *Pickens, Barnes & Abernathy v. Heasley*, 328 N.W.2d 524 (Iowa 1983) (damages for negligently conducted defense is amount of judgment in the prior case, including costs).

67. *Hunt v. Dresie*, 241 Kan. 647, 740 P.2d 1046, 1057 (1987) (client can recover from attorney punitive damages awarded against client in underlying action, if award proximately resulted from attorney's negligence). In *Hunt*, the attorney filed suit on the client's behalf without probable cause, resulting in malicious prosecution judgment against client. *Id.*

gently. In the loss of defense situation, however, the action has typically gone forward to judgment or settlement, in contrast to the usual loss of claim case where often the underlying action was never heard. In other words, a trial often has taken place, and a trier of fact has made a decision. As a result, courts have felt somewhat uncomfortable about relitigating or rehearing an action that has already had its day in court.⁶⁸ Perhaps this discomfort is caused because the retrial of the action suggests that more clever lawyering could have defeated a claim that one trier of fact at least found to have merit. Nevertheless, courts have acknowledged that the client is not making a collateral attack on the judgment in the underlying suit, but rather seeking compensation for an injury that, it is claimed, would not have happened if the attorney had handled the case properly.⁶⁹

Because the underlying action often has gone to trial and has been decided against the client, courts using the trial within a trial method have required convincing proof that the judgment was improper. This is particularly true where the alleged malpractice involves the failure to take an appeal from the adverse judgment. Thus in *Better Homes, Inc. v. Rodgers*,⁷⁰ the court held that the client could only prevail against the attorney if proof in the malpractice action indicated the client was entitled to a directed verdict or the equivalent in the underlying action.⁷¹ This extremely rigorous burden of proof must be met in order to establish that the malpractice caused the loss.⁷² The *extent* of the loss is

68. See *Better Homes, Inc. v. Rodgers*, 195 F. Supp. 93, 95 (W. Va. 1961) ("repugnant" task of reviewing the judgment of another court). In *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730 (7th Cir. 1976), the court was faced with a claim that the mishandling of the underlying products liability case by the defendant attorney had encouraged the filing of a class action suit against the client. The client, a manufacturer of all-terrain vehicles, claimed that the result in the underlying action would prejudice the defense of the class action, either through collateral estoppel or because the record in the underlying suit could be introduced as evidence in the subsequent class action. The court agreed that the possibility of collateral estoppel foreclosing the defense of the product's lack of defect was a cognizable source of damages. On the other hand, the court ruled that if the class action went to the jury with all evidence, including records of the first action and the defendant's explanation of those records, the court would presume that any verdict against the client was based on the merits of the case, rather than any prejudice from the mishandling of the first action. *Id.* at 735-36.

69. See *Pete v. Henderson*, 124 Cal. App. 2d 487, 490, 269 P.2d 78, 79 (1954) (trial court improperly excluded evidence that appeal of adverse judgment was meritorious and would have succeeded).

70. 195 F. Supp. 93 (N.D. W. Va. 1961).

71. *Id.* at 97.

72. See Note, *Attorney Malpractice: Problems Associated with Failure-to-Appeal Cases*, 31 BUFFALO L. REV. 583 (1982). The failure to appeal cases present the most acute problems in proving that the malpractice caused the client's damages. In these actions, plaintiff must in effect litigate an appeal *and* a trial within a trial, by demonstrating that the appeal would have succeeded and that the subsequent retrial would have turned out favorably. *Id.* at 588-89. See also *Nunez de Villavicencio v. Cerny*, 662 F. Supp. 243, 244 (S.D.N.Y. 1987) (failure to appeal remittitur order by trial court did not cause damage to client; because of narrow standard of review of such order appellate court would uphold it); *Better Homes, Inc. v. Rodgers*, 195 F. Supp. 93, 97 (N.D. W. Va. 1961) (client must show that discretionary review would be granted, that lower court judgment would be overturned, and that client would have obtained a more favorable result on retrial; court held client is entitled to win if entitled to directed verdict in underlying case); *Pete v. Henderson*, 124 Cal. App.

still fixed by the judgment in the underlying action.

The trial within a trial method of calculating damages does not necessarily require that the client prove that plaintiff would not have obtained any judgment in any amount. The client should be able to prove that, properly handled, the claim would have resulted in a lower recovery, even if not a defense verdict. In this situation, the damages are measured by the difference between the amount actually awarded and the amount that should have been awarded in the absence of negligence.⁷³ Even here, however, the assumptions of the trial within a trial method usually prevail. The amount of damages is calculated based on a hypothetical assessment of how the case would have turned out if tried differently.⁷⁴ No allowance is made for the possibility that the defendant's position might have been strong enough to obtain a favorable settlement. It would seem that where the client had an absolute defense to all or to a distinct part of the claim that was, for example, lost through failure to plead it, the client could assert that the judgment was caused by the attorney's malpractice and run the gauntlet of the trial within a trial method. In other situations, the injury to the client may consist in so mishandling the case as to increase the amount of damages awarded or to miss the possibility of settlement on reasonable terms. In these situations a measure of damages other than the trial value of the defense may be available and appropriate.⁷⁵

B. Alternatives to the Trial within a Trial Method

1. Damages for an Attorney's Breach of Fiduciary Duty during the Conduct of Litigation

When the attorney's conduct goes beyond professional negligence to include elements of conflict of interest, actual or constructive fraud, and what may be termed breach of fiduciary duty, the courts have been more willing to abandon the strictures of the trial within a trial method in favor of a more flexible measure of damages. Some of these techniques are only appropriate in the setting of more aggravated misconduct, but others could probably be adapted to any case arising out of attorney malpractice in litigation.

2d 487, 490, 269 P.2d 78, 79 (1954) (amount of underlying judgment is damage proximately caused if judgment was erroneous); *Hoekstre v. Golden B. Products, Inc.*, 77 Or. App. 104, 108, 712 P.2d 149, 152 (1985) (judgment against client in derivative suit would have been reversed as a matter of law); *St. Paul Fire & Marine Ins. Co. v. Speerstra*, 63 Or. App. 533, 543, 666 P.2d 255, 261 (1983) (no negligence occurred where attorneys failed to appeal denial of motion of strike allegations of negligence against hospital when trial court ruling was correct), *petition denied*, 295 Or. 773, 670 P.2d 1036.

73. R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* 355 (2d ed. 1981).

74. The court in *Lieberman v. Employers Ins. of Wausau*, 84 N.J. 325, 342-43, 419 A.2d 417, 426-27 (1980) suggested that the trial court should have discretion to conduct something less than a full scale trial within a trial, particularly in the situation where the client was the defendant in the underlying action. The court suggested that the probable outcome of the trial might be proved through expert testimony. This is not at all a rejection of the trial within a trial method; rather, it is an alternative method of proving the actual trial value of the defendant's case.

75. See *infra* notes 76-120 and accompanying text for a discussion of alternatives to the trial within a trial method.

When an attorney is guilty of serious misconduct such as a conflict of interest, the attorney may be held liable for a judgment entered against the client, apparently without any showing that the client would have succeeded on the merits of the claim against him. In *Rejohn v. Serpe*,⁷⁶ the defendant attorney represented both the driver and the insurer of an automobile involved in a traffic accident.⁷⁷ The attorney did not reveal to the driver that the insurer took the position that his use of the car was unauthorized.⁷⁸ The attorney settled the lawsuit arising out of the auto accident and then successfully sued the driver of the car on the insurer's behalf to recover the amount of the settlement.⁷⁹ The court held that the driver of the car could recover the amount paid to the insurer in the second action, on the ground that these amounts were proximately caused by the attorney's breach of duty.⁸⁰ This award is clearly punitive in nature, since the driver of the car apparently never established that he had a valid defense to the insurer's claim, and thus, under ordinary negligence principles, had failed to prove that the attorney's misconduct had caused the loss.⁸¹

Similarly, an undisclosed conflict of interest may lead to a finding of breach of fiduciary duty or constructive fraud.⁸² Such misconduct may result in total⁸³ or partial⁸⁴ forfeiture of any fees owing to the attorney, even if the client cannot demonstrate that the conflict actually caused the plaintiff any actual financial injury. For example, in *Gilchrist v. Perl*⁸⁵ the defendant attorney had represented a number of plaintiffs in the Dalkon Shield litigation without disclosing a business relationship with the insurance adjuster representing A.H. Robbins, the manufacturer of the Shield. Even though the plaintiffs had obtained settlements in their cases and could not show that these settlements were in any way inadequate, the court held that the attorney's "constructive fraud" merited at least a partial forfeiture of attorney fees.⁸⁶ The forfeiture is punitive in nature, because no actual loss is shown; its purpose is to punish and deter the kind of unprofes-

76. 125 Misc. 2d 148, 478 N.Y.S.2d 799 (1984).

77. *Id.* at 149, 478 N.Y.S.2d at 801.

78. *Id.* at 151, 478 N.Y.S.2d at 802.

79. *Id.* at 149, 478 N.Y.S.2d at 801.

80. *Id.* at 151, 478 N.Y.S.2d at 802.

81. The decision in *Rejohn* was based on the theory that the attorney was negligent in undertaking the dual representation without informing the client of their adverse interests. *Id.* For the reasons set forth in the text, it is hard to reconcile the court's award in this case with the usual measure of damages in a negligence action for attorney malpractice.

82. See, e.g., *Gilchrist v. Perl*, 387 N.W.2d 412 (Minn. 1986), discussed in Comment, *Minnesota Adopts Sliding Scale Approach to Determine Damages for an Attorneys Breach of Fiduciary Duty*, 14 WM. MITCHELL L. REV. 169 (1988).

83. See *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn. 1984) (compensation paid to attorney who breaches fiduciary duty must be returned to client as damages); *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982) (attorney who breaches duty to client forfeits right to compensation).

84. See *Gilchrist v. Perl*, 387 N.W.2d 412, 417 (Minn. 1986) (damages should be assessed only after consideration of all relevant factors).

85. 387 N.W.2d 412 (Minn. 1986).

86. *Id.* at 416-17.

sional conduct alleged against the defendant attorney.⁸⁷

Other courts faced with such misconduct by attorneys have used a more compensatory measure of damages, particularly in cases where the attorney misrepresents or coerces a settlement. Courts recognize that such conduct often results in the client losing the cause of action for an inadequate return.⁸⁸ While some courts altogether abandon the value of the claim as a means of calculating the loss and propose measures such as a return of fees or even nominal damages,⁸⁹ others take a broader view of the plaintiff's predicament, suggesting that the injury in a case such as this is the loss of opportunity caused by the attorney's misconduct.⁹⁰ In other words, the improvident settlement coerced by the defendant attorney has deprived plaintiff of the chance to go forward and try to obtain a better result.

Unfortunately, measurement of the value of this lost opportunity is difficult. It could be argued that the value of the opportunity is nothing more or less than the value of the claim itself, and that the only way to determine the value of the claim is through the trial within a trial method. This conclusion is not inevitable. When the parties have in fact come to a settlement, the value of the lost opportunity to pursue the case could be measured by the reasonable settlement value. In the fraud context, one court approved a jury award that approximated the difference between the actual settlement and the client's "settlement expectation."⁹¹ Such an award is exceptional, however, since the subjective value of the claim to the plaintiff is frequently rejected as a measure of damages.⁹² Nevertheless, the concept of looking to something other than the trial value of the claim may prove useful in ordinary negligence based malpractice actions as well.

87. *Id.* at 416.

88. *See, e.g., Swann v. Waldman*, 465 A.2d 844, 847 (D.C. 1983) (summary judgment for attorney reversed where an issue of fact existed concerning whether defendant attorneys coerced client into accepting an unfavorable settlement that would have deprived client of a cause of action, thus providing a basis for damages).

89. *Sanders v. Townsend*, 509 N.E.2d 860 (Ind. App. 1987), involved a suit for damages after plaintiff accepted low settlement of physical injury claim due to defendant attorney's coercion. Summary judgment for defendant was reversed in part. On the negligence count, plaintiff failed to prove that a better result would have been obtained but for the attorney's negligence. Plaintiff succeeded on a constructive fraud count for coercion (breach of fiduciary duty). Plaintiffs' rights were injured by the fiduciary when plaintiff lost the right to choose trial or settlement or wait in hopes of better offer. Here, the loss of value of the claim was not the measure of recovery. The court suggested that breach might justify nominal damages or forfeiture of fee. *Id.* at 867.

90. In *O'Callaghan v. Weitzman*, 291 Pa. Super. 471, 436 A.2d 212 (1981), the evidence was sufficient for the jury on whether the attorney had perpetrated a fraud on the client in obtaining settlement, the true nature of which was not disclosed. In fact money came not from original tortfeasor, but from non-resident attorney who failed to institute suit within statute of limitations. The injury consisted of lost *opportunity* to present original claim in court, lost *opportunity* to obtain compensation for daughter's medical bills, and lost *opportunity* to have disinterested advocate pursue malpractice claim against non-resident attorney. *Id.* at 475.

91. *Boynton v. Lopez*, 473 A.2d 375, 377 (D.C. 1984).

92. *See, e.g., Sanders v. Townsend*, 509 N.E.2d 860, 864 (Ind. App. 1987) (testimony by plaintiffs of value to them of injury sustained ruled insufficient to establish damages for loss of claim).

2. An Alternative to the Trial within a Trial Method: The Settlement Value of the Lost Claim or Defense

As has been shown, the normal measure of damages for legal malpractice in litigation is based on the presumed result at a trial in which the factor of the defendant attorney's malpractice is eliminated. The result of this hypothetical trial is determined by trying the underlying action as part of the malpractice case against the attorney.⁹³ Courts have used other measures of damages, however, where the malpractice involved misconduct in the settlement of an action, including consideration of the settlement that the attorney should have obtained for the client.⁹⁴

While a measure of damages based on the settlement value of the underlying case is a useful alternative, it is seldom used because of the courts' rigid insistence that the trial within a trial method is necessary to prove the very existence of an actionable claim. An example of this phenomenon is found in *Campbell v. Magana*,⁹⁵ a case in which the settlement value measure of damages was clearly presented to the court and just as clearly rejected. In that case, counsel in the malpractice action argued that "a lawsuit (good or bad) is a chose in action, hence property, and that this one had an actual value other than that inhering in an existing right to recover; that it had a settlement or nuisance value which cannot be disregarded."⁹⁶

The rejection of this argument by the court is clearly founded on the way in which the court conceptualized the requirement of damage in the legal malpractice setting. Without proof of the inherent merit of the underlying claim, the court believed that damages were at best speculative and at worst nonexistent.⁹⁷ There is certainly sound basis for the courts to be concerned about using settlement value as the measure of damages. It is disturbing to envision malpractice suits against lawyers based on the failure to recover the nuisance value of a meritless lawsuit.

The logic of *Campbell v. Magana* is not inexorable, however, and it is instructive to see how easily the California court evaded it when the problem appeared outside of the context of legal malpractice. In *Clemente v. State*,⁹⁸ the plaintiff, a pedestrian, was struck and seriously injured by a motorcyclist. A California Highway Patrol officer appeared on the scene, called for help, and

93. See *supra* notes 17-19 and accompanying text for a discussion of the trial within a trial method.

94. See *supra* notes 76-92 and accompanying text for alternatives to the trial within a trial method.

95. 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (1960).

96. *Id.* at 753, 8 Cal. Rptr. at 33.

97. *Id.* at 754, 8 Cal. Rptr. at 33. The court bolstered its position by stating that the issue of the value of the plaintiff's lawsuit, apart from its inherent merit, could not be raised for the first time on appeal. Finally, the court found it unlikely that a settlement could actually have been reached between the parties given the difference between the plaintiff's demand (\$100,000) and the best offer (\$350). *Id.* at 758, 8 Cal. Rptr. at 36.

98. 40 Cal. 3d 202, 707 P.2d 818, 219 Cal. Rptr. 445 (1985).

apparently spoke to the operator of the motorcycle.⁹⁹ He left the scene of the accident, however, without obtaining the cyclist's identification.¹⁰⁰ The culprit left the scene of the accident also and could not later be located.¹⁰¹ As a result, the plaintiff sued the officer and the State of California, alleging that the officer was negligent in performing his duties, and that the negligence deprived him of his right to sue the motorcyclist to recover for his injuries.¹⁰² The State argued that, under *Campbell v. Magana*,¹⁰³ plaintiff must prove that, but for the officer's negligence, plaintiff would have recovered a collectible judgment against the motorcyclist.¹⁰⁴ A proposed instruction to this effect was rejected by the trial court, and the plaintiff received a verdict of over \$2 million.¹⁰⁵ The California Supreme Court, while admitting that the legal malpractice situation was "somewhat analogous," nevertheless upheld the verdict.¹⁰⁶ The "somewhat analogous" legal malpractice precedent was evaded by the simple expedient of reconceptualizing the nature of the injury:

The essence of plaintiff's cause of action here is that the officer's negligence prevented him or anyone else from ascertaining the identity of the motorcyclist. In legal malpractice actions the identities of the parties are known and their financial resources ascertainable. Thus, there is no inherent unfairness in limiting plaintiff's recovery to what he or she would have obtained in the absence of the attorney's negligence.¹⁰⁷

The decision in the *Clemente* case went well beyond simply reconceptualizing the nature of the injury. Also jettisoned was any notion that the plaintiff's recovery should in any way be limited by the viability or collectibility of the underlying action. The result was that plaintiff recovered full damages for personal injuries from the ultimate deep pocket because the negligence of a highway patrol officer made it impossible to identify the actual tort-feasor. Given the size of the verdict, it is not unlikely that the plaintiff was a good deal better off than if the officer had identified the motorcyclist. In that case the plaintiff would almost certainly have been limited to a personal injury action against an insolvent or underinsured individual. The California Supreme Court, in ignoring this reality, relied on a general rule governing the recoverability of damages, stating: "[i]f plaintiff's inability to prove his damages with certainty is due to defendant's action, the law does not generally require such proof."¹⁰⁸

If this reasoning justified the result in *Clemente*, it is hard to see why it is not equally applicable to legal malpractice cases generally. Notwithstanding the court's blithe assurance that damages can be proved with precision in legal malpractice cases (and therefore should be), there are many cases in which the negli-

99. *Id.* at 210, 707 P.2d at 821, 219 Cal. Rptr. at 419.

100. *Id.*

101. *Id.*

102. *Id.* at 212-13, 707 P.2d at 823-24, 219 Cal. Rptr. at 450-51.

103. 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (1960).

104. *Clemente*, 40 Cal. 3d at 218-19, 707 P.2d at 827, 219 Cal. Rptr. at 455.

105. *Id.* at 209 & 218, 707 P.2d at 821 & 827, 219 Cal. Rptr. at 448 & 455.

106. *Id.* at 220, 707 P.2d at 828, 219 Cal. Rptr. at 456.

107. *Id.*

108. *Id.* at 219, 707 P.2d at 828, 219 Cal. Rptr. at 455.

gence of the defendant attorney will have made it more difficult, if not impossible, to determine what the result would have been had the underlying action gone to trial. Should not the plaintiff in such a case have the advantage of a *Clemente* like rule, allowing full recovery for all possible damages? If so, not only is the trial within a trial method of proof circumvented, but any consideration of the collectibility of the judgment from the actual wrongdoer is also abolished. Such a rule makes attorneys virtual guarantors of recovery for their clients.

The *Clemente* opinion thus demonstrates that the conceptual straight-jacket of cases like *Campbell v. Magana*¹⁰⁹ can easily be loosened to permit other bases for calculation of damages. Particularly where the attorney's negligence has made proof of the underlying claim more difficult, it is appropriate for the courts to allow the plaintiff to prove damages in any manner that would provide the trier of fact with a rational basis for calculating damages. The better course in this situation would be to liberalize the types of evidence that both sides could present in order to prove the value of the claim. Plaintiff, for example, could present expert testimony regarding the settlement value of the claim, and the defense could respond with limiting evidence concerning the merits of the liability case, the ability and willingness of the underlying defendant to pay any settlement amounts, and anything else bearing on the settlement value of the claim.¹¹⁰

This scheme would result in a reconceptualization of the injury in these malpractice cases as the loss of the claim, and focus attention on its value. In so doing, it would preserve the notion that the value of the claim is determined by more than plaintiff's gross demand for damages, but also includes such factors as the likelihood of success on the merits and the ultimate collectibility of any judgment that may be recorded. Allowing proof of the settlement value of the claim simply widens the type of proof that plaintiff and defendant can present to establish the extent of the loss. In many cases, plaintiffs may prefer to prove the full trial value of the claim, where this is feasible. In other cases, however, it may not be feasible to do so, perhaps because of the defendant attorney's malpractice. In such cases, the courts should allow plaintiff to prove the value of the claim in ways other than the full scale trial within a trial method.¹¹¹

109. 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (1960).

110. In *Myers v. Beem*, 712 P.2d 1092 (Colo. App. 1985), the court allowed evidence of collateral source payments to the plaintiff, on the ground that such payments were relevant to the issue of whether, and how much, the settlement value of the negligence action was reduced by the loss of a particular defendant due to the bar of the statute of limitations. *Id.* at 1093.

111. A "broad evidence rule" such as this differs from the "loss of chance" method of trying to decide what percentage chance of victory was lost due to the lawyer's negligence and then awarding that percent of the total damages. The latter method really does not focus the jury on the value of the claim at the time of the attorney's negligence. "Loss of chance" as a basis for calculation of damages was rejected by the Washington Supreme Court in *Daugert v. Pappas*, 104 Wash. 2d 254, 261-63, 704 P.2d 600, 605-06 (1985). The defendant attorney was accused of negligently failing to appeal to the Washington Supreme Court an adverse judgment against his client, who had been the defendant in the underlying action. The client, faced with the difficult task of proving that the Supreme Court would have both granted review and reversed if the attorney had filed the appeal, tried a different approach. The client attempted to use the "loss of chance of recovery" doctrine

Some recent cases suggest that the courts may be more receptive to this notion in the future. In *Fishman v. Brookes*¹¹² the Massachusetts court took the first step towards recognizing a settlement value measure of damages. The case arose out of the settlement of a personal injury claim. The attorney brought an action to enforce a fee agreement, and the client counter sued for malpractice and abuse of process.¹¹³ After a jury found for the client and the attorney appealed, the Massachusetts court approved the admission of expert testimony by an experienced tort lawyer and experienced claims adjuster on the settlement value of the underlying personal injury claim.¹¹⁴ This testimony was combined with other evidence regarding the value of the claim, and the judgment for the client was accordingly confirmed.¹¹⁵

announced by the Washington court in *Herskovits v. Group Health Coop. of Puget Sound*, 99 Wash. 2d 609, 664 P.2d 474 (1983). In the earlier case, the Washington court had radically changed the notion of but-for cause in the medical malpractice field, allowing the plaintiff to recover for the loss of a chance to survive. *Id.* at 619, 664 P.2d at 479. Under this rule, damages are calculated by discounting the total damages to the percentage chance that was lost. *See, e.g., King, Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981). Thus, if the plaintiff lost a 15 percent chance of survival, plaintiff could recover 15 percent of the total loss. The client in *Daugert* attempted to use such a discounting method and persuaded the trial court to instruct the jury to determine the percentage chance that the Washington Supreme Court would have granted review and reversed the judgment in the underlying action. 104 Wash. 2d at 256-57, 704 P.2d at 602-03 (1985). When the jury found that the chance of reversal was 20 percent, the client was awarded judgment for 20 percent of the total judgment. On appeal, the Washington Supreme Court reversed, refusing to change the standard of causation in legal malpractice actions, or at least in failure-to-appeal cases. *Id.* at 261, 704 P.2d at 605. The court required the client to prove that "but for the attorney's negligence, the plaintiff would probably have prevailed upon appeal in a legal malpractice action wherein the negligence occurs at the appellate level." *Id.* at 263, 704 P.2d at 606. *See Comment, Loss of Chance in Legal Malpractice*, 61 Wash. L. Rev. 1479 (1986) arguing that the court erred in *Daugert* and urging adoption of loss of chance, which the author seems to equate with proof of settlement value. *Id.* at 1499-1500.

112. 396 Mass. 643, 487 N.E.2d 1377 (1986).

113. *Id.* at 644, 487 N.E.2d at 1378.

114. *Id.* at 647-48, 487 N.E.2d at 1380.

115. *Id.* at 648, 487 N.E.2d at 1381-83. Another case that indicates some judicial willingness to at least consider such a measure of recovery is *Fulton v. Woodford*, 26 Ariz. App. 17, 545 P.2d 979 (1976). In that case, judgment was entered against the clients in the underlying action in an amount that exceeded their insurance coverage. *Id.* at 19, 545 P.2d at 981. They sued their defense counsel, alleging he was negligent in failing to settle the case within policy limits. The court was willing to look to the amount the case could have settled for in this instance because the alleged professional negligence was the failure to secure a settlement. The court looked for evidence that the case could have settled within policy limits, and found that, although such a settlement was possible in theory, in fact the insurer of the client had consistently refused to offer enough of the policy amount to actually settle the case. *Id.* at 19-20, 545 P.2d 981-82. The court also found that this position of the insurer did not result from any negligence on the part of the defendant attorney, and that in the absence of substantially greater settlement authority, the case would not in fact have settled. *Id.* at 23-24, 545 P.2d at 985-86. Accordingly, the court found that a verdict should be directed for the defendant attorney. *Id.* at 24, 545 P.2d 986.

The allegation that an attorney committed malpractice by failing to settle an action has been termed "[p]articularly troublesome, potentially omnipresent, and foreboding . . ." because of its hindsight insistence that the case should have been settled and that the attorney was negligent in failing to do so. R. MALLIN & V. LEVIT, *LEGAL MALPRACTICES* § 580, 729 (2d ed. 1981). This

Other courts have indicated at least an openness to the idea that the settlement value of the claim may be a way of measuring damages.¹¹⁶ The court in *Boynton v. Lopez*¹¹⁷ approved an award said to represent the client's "settlement expectation."¹¹⁸ In *Duncan v. Lord*¹¹⁹ the court used expert testimony regarding the value of the underlying claim pursuant to a stipulation of the parties that damages could be proved in this way.¹²⁰

Use of settlement value to establish the measure of damages for litigation malpractice is an option that courts should make available, particularly where events have made the use of the trial within a trial method impracticable. The use of this measure does not necessarily equate with the notion that the actionable negligence of the attorney was the failure to settle. Rather, it acknowledges that a claim may have merit (and hence value) even though it is not a sure winner at trial. Settlement is the usual fate of such claims, yet strict adherence to the trial within a trial method fails to take account of this fact by supposing that all such cases would have been tried. Such a result is not required by the elements of a cause of action for professional negligence, since the loss of the claim or defense is the real injury suffered by the client. The courts should therefore take a broader view of the type of evidence that would demonstrate the value of what was lost. Thus, proof of negligence in the loss of a claim or defense should be sufficient to establish a *prima facie* case of malpractice, and the

type of malpractice allegation is not required in order for the settlement value of the case to be used to measure damages, however. Presumably, settlement value could be used regardless of the nature of the underlying malpractice, simply to put a value on the lost claim or defense. On the other hand, if actual settlement negotiations occurred, the positions taken by the parties will be relevant to any inquiry concerning the amount that the case could in fact have been realistically expected to settle for.

116. In some cases this acceptance is rather enigmatic. For example, in *Whiteaker v. State*, 382 N.W.2d 112 (Iowa 1986), the court rejected a malpractice claim against the state attorney in charge of the consumer protection division of the attorney general's office. In part this was done on the ground that the client had not shown that any judgment obtained by the attorney general against the allegedly fraudulent business would have been collectible. *Id.* at 115. In addition, however, the court also upheld the verdict for the attorney on the additional ground that the plaintiff had not shown that the business would have agreed to or could have paid an acceptable settlement had the state attorney more fully advised the plaintiff of the progress of settlement negotiations. *Id.* at 117. Such language suggests that the court might have been receptive to a claim based on the loss of a potential settlement if the plaintiff could have shown that such an agreement was in the offing and that the settlement amount could in fact be paid.

117. 473 A.2d 375 (D.C. 1984).

118. *Id.* at 377.

119. 409 F. Supp. 687 (E.D. Pa. 1976).

120. *Id.* at 693. Similarly, two judges of the Michigan Supreme Court were also ready to accept some variation of the trial within a trial method of proving damages in *Ignotov v. Reiter*, 425 Mich. 391, 398-99, 390 N.W.2d 614, 616-17 (1986). In that case, the client's parental rights were terminated, because he failed to appear for a hearing that his attorney had allegedly not told him about. The Michigan Court of Appeals reversed a verdict for the client, and the reversal was sustained by an evenly divided Supreme Court. One of the opinions in favor of the client stated that damages were awarded in the case because the lawyer had deprived the client of the opportunity to settle the dispute, and indicated that in such a case expert testimony could be required regarding settlement value. *Id.* at 399 n.9, 390 N.W.2d at 617 n.9. Another judge disagreed with this characterization of the result of the trial. *Id.* at 403-04 n.3, 390 N.W.2d at 619 n.3.

courts should focus instead on what evidence may be admitted to demonstrate the value and extent of that loss.

II. BASIC DAMAGES FOR LEGAL MALPRACTICE IN THE TRANSACTIONAL SETTING

When legal malpractice takes place in a transactional setting—that is, in the advising and planning of business dealings—the courts take a much less structured approach to proof of damages. No longer wedded to a narrow interpretation of what can constitute adequate proof of the fact and amount of injury, the courts tend to treat such actions like ordinary business cases and allow considerably more flexibility to plaintiffs in proving their damages.

Some of the more common areas of “transactional malpractice” include careless title searches,¹²¹ erroneous tax advice,¹²² and sloppy contract preparation.¹²³ A survey of the cases indicates that the courts calculate damages by focusing on such matters as lost value, out of pocket expenses, and loss of future expectations. In many of these cases, the key damage issue will be whether the claimed element of damage was within the scope of duty owed by the attorney and whether the attorney malpractice in fact caused that injury. Courts are also concerned with traditional damage issues, such as the certainty of proof of future lost profits.

A major damage problem that arises most frequently in the transactional setting is the extent to which the plaintiff can recover so-called “consequential” damages.¹²⁴ Although these damages are often recoverable, courts typically try to place some limit on an attorney’s responsibility for the more remote or speculative effects of even admitted malpractice. Here, reliance seems to be placed on a variation of the *Hadley v. Baxendale*¹²⁵ “contemplation of the parties” or “foreseeable consequences” rule that applies even when the cause of action against the attorney nominally sounds in tort for negligence.

A. A Survey of Damages in the Most Common Transactional Settings

1. Damages for Malpractice in Securing a Claim to Real or Personal Property

One fertile source of error for attorneys representing clients in a business transaction occurs when the attorney fails to secure the client’s interest in real or personal property. The typical case involves an attorney hired to conduct a title search or perfect a security interest who either fails to discover an encumbrance

121. See *infra* notes 126-42 and accompanying text for a discussion of damages for malpractice in securing a claim to real or personal property.

122. See *infra* notes 145-56 and accompanying text for a discussion of damages resulting from malpractice in advising or handling tax matters.

123. See *infra* notes 152-69 and accompanying text for a discussion of damages resulting from malpractice in a business purchase or incorporation.

124. See *infra* notes 173-202 and accompanying text for a discussion of the recoverability of consequential damages in the transactional setting.

125. 9 Exch. 341, 156 Eng. Rep. 145 (1854).

or fails to protect the client's interest in the chattels. In these cases, the value of the property in question and the extent of the impairment of the client's interest are the primary variables in setting the measure of direct damages. In addition, the courts will generally award, as consequential damages, the cost of trying to correct or cope with the attorney's mistake.

In examining the value of the client's interest in the property in question, the courts are first concerned with the difference between what the client actually received and what would have been received had the attorney not been negligent. For example, when the negligence resulted in a lost opportunity to purchase property, this difference measures the benefit the client expected from the transaction. In *McClain v. Faraone*,¹²⁶ for example, a residential property was lost due to the foreclosure of a judgment lien that the attorney had negligently failed to discover during a title search. Damages were measured by the value of the land to the extent that value exceeded the purchase price.¹²⁷ If the client had not actually paid for the property, on the other hand, the loss is essentially the profit that the plaintiff could have made.¹²⁸ When the property is fully paid for and lost, the damage should be the full realizable value of the property at the time of the loss.¹²⁹ In many cases this will simply be the full fair market value of the property.

If it is apparent that the plaintiff would not have received the full value of the property even in the absence of negligence, it is proper to limit the plaintiff to the amount of loss caused by the malpractice. The effect of this limitation is illustrated by comparing the way damages are measured in *Sheetz v. Morgan*¹³⁰ and *Tilly v. Doe*.¹³¹ In both cases the alleged negligence was the attorney's failure to file financing or security statements to protect the client's interest in chattels. In both cases the client lost the secured property. In the *Sheetz* case, the court used the standard measure of damages: the market value of the chattels at the time of the loss, which in this case occurred when the possessor declared bankruptcy.¹³² In the *Tilly* case, on the other hand, the court held that it was proper to value the collateral at the auction value rather than the fair market value because the evidence showed that clients would not have received the fair market value even if the attorney had perfected the security interest.¹³³

In addition to awarding damages for lost property value, the courts award

126. 369 A.2d 1090 (Del. Super. Ct. 1977).

127. *Id.* at 1092.

128. See *Ware v. Durham*, 246 Ga. 84, 268 S.E.2d 668 (1980), *aff'g* *Durham v. Ware*, 153 Ga. App. 701, 266 S.E.2d 342 (1980) (where clients purchased unmarketable title, liability extends to all actual damages); *Myerberg, Sawyer & Rue, P.A. v. Agee*, 51 Md. App. 711, 446 A.2d 69 (1982) (failure to inform clients that alleged marketable property has no right of ingress or egress resulted in liability for entire loss suffered).

129. See *Nowakowski v. Rozbicki*, 39 Conn Super. 458, 466 A.2d 353 (1983) (attorney's negligent failure to include disputed strip of land in purchase resulted in damage awards for loss of value of property and survey costs).

130. 98 Ill. App. 3d 794, 424 N.E.2d 867 (1981).

131. 49 Wash. App. 727, 746 P.2d 323 (1987).

132. 98 Ill. App. 3d at 801, 424 N.E.2d at 872 (1981).

133. 49 Wash. App. at 731, 746 P.2d at 325 (1987).

damages representing further out of pocket losses and expenses incurred in reliance on the lawyer's performance or in attempting to straighten out the situation that the lawyer's negligence created.¹³⁴ Thus, in *McClain v. Faraone*,¹³⁵ the clients who had relied on the lawyer's title search were allowed to recover settlement expenses, moving expenses, storage expenses, and costs of improvements undertaken before foreclosure.¹³⁶ All of these items would fall into the category of reliance damages: expenses that the client would not have incurred had the lawyer performed the title search properly.

Expenses incurred in an attempt to mitigate or minimize losses resulting from the malpractice are also recoverable. A simple example is the cost of a survey needed to establish which portion of disputed land was actually conveyed to the client.¹³⁷ Similarly, attorneys fees spent trying to correct the situation created by the attorney, if reasonable, are also recoverable.¹³⁸ The same principle applied in *Gleason v. Title Guaranty Co.*,¹³⁹ in which the client insurance company guaranteed certain mortgages in reliance on the defendant lawyer's erroneous advice that they were first notes, not subordinate notes.¹⁴⁰ The court awarded the client its out of pocket loss, which in this case was measured by the amount the client had to expend to retire the superior notes, less the value of the collateral obtained.¹⁴¹ *Gleason* could also be viewed as another example of the attempt to measure the value lost to the client due to the attorney malpractice. In this instance, the client fixed the lost value through its out of pocket expenditures for the superior liens.¹⁴² In either view, it represents the court's professed purpose of awarding clients the "entire loss"¹⁴³ or all "actual damages"¹⁴⁴ accrued, at least to the extent of losses directly arising out of the transaction for which the client sought the lawyer's services.

134. Losses of this type may be considered consequential rather than direct damages. See, e.g., R. MALLIN & V. LEVIT, *LEGAL MALPRACTICES* 55 (2d ed. Supp. 1985).

135. 369 A.2d 1090 (Del. Super. 1977).

136. *Id.* at 1093.

137. See *Nowakowski v. Rozbicki*, 39 Conn. Super. 454, 458, 466 A.2d 353, 355 (1983) (direct consequences of attorney's negligent failure to include disputed strip of land in purchase included costs of survey).

138. See *Hiss v. Friedberg*, 201 Va. 572, 112 S.E.2d 871 (1960) (escrow attorney paid purchase price to vendors before getting title insurance policy which would have disclosed property was subject to lease; cost of suit versus vendors allowed).

139. 300 F.2d 813 (5th Cir. 1962).

140. *Id.* at 814.

141. *Id.* at 815.

142. *Id.*

143. See *Myerberg, Sawyer & Rue, P.A. v. Agee*, 51 Md. App. 711, 719-22, 446 A.2d 69, 74-75 (1982) (damages for unmarketable title include "entire loss" accrued to clients).

144. See *Ware v. Durham*, 246 Ga. 84, 268 S.E.2d 668 (1980), *aff'g* *Durham v. Ware*, 153 Ga. App. 701, 266 S.E.2d 342 (1980) (actual damages in defective title case are not limited to value of lost portion of the land); *Kirby v. Chester*, 174 Ga. App. 881, 331 S.E.2d 915 (1985) (possibility that lender relying on attorney's title certification could show actual damages precludes summary judgment for attorney).

2. Damages Resulting From Malpractice in Advising or Handling of Tax Matters

As might be expected, tax matters are a fertile source of actions for legal malpractice. The injury to the client may take many forms. One obvious type of injury is the imposition of penalties or surcharges because the return was filed late or not filed at all due to the attorney's neglect. Reliance on the performance of the attorney in filing the return is generally not recognized as a ground for abatement of penalties,¹⁴⁵ so that often the only redress available to the client is recovery from the attorney whose malpractice caused the imposition of the penalty.¹⁴⁶

A more difficult problem in calculating damages arises when the client claims error in the determination of the amount of his tax liability. If the alleged negligence involves only the preparation of the return, and the attorney fails to take lawful steps to minimize the amount owed, an award of damages measured by the amount of tax unnecessarily paid appears proper, although the client should probably be required to take reasonable steps to amend the return and secure a refund before suing the attorney.¹⁴⁷ Courts have also sanctioned damage awards measured by the amount of extra tax liability where the alleged negligence involved the attorney's failure to structure a transaction so as to minimize the amount of the tax. For example, in *Whitney v. Buttrick*¹⁴⁸ the client asserted that the attorney misled him into believing that the sale of a business could be structured without any tax consequences and that relying on this bad counseling, he agreed to enter into the transaction.¹⁴⁹ The court held that the client was not restricted to his out-of-pocket loss on the transaction itself, but additionally could claim the amount of the resulting tax liability, if it could be shown that the deal could have been structured so as to avoid all or part of the tax consequences.¹⁵⁰

145. See, e.g., *Sarto v. United States*, 563 F. Supp. 476, 477-78 (N.D. Cal. 1983) (reliance on attorney not reasonable cause for late filing; in dictum, court suggested that penalty can be recovered from attorney if late filing was due to attorney negligence).

146. *Id.* at 478. See also *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368, 413 N.E.2d 47 (1980) (penalty and interest incurred as direct result of attorney's untimely filing of tax form held recoverable).

147. If the extra work needed to mitigate damages in this fashion involves the expenditure of further sums for legal or accounting services, this amount should also be recoverable. *Sorenson*, 90 Ill. App. 3d at 376, 413 N.E.2d at 54 (attorney's fees to mitigate damages recoverable). But cf. *Whitney v. Buttrick*, 376 N.W.2d 274, 281 (Minn. Ct. App. 1985) (attorney's fees spent to mitigate loss not recoverable).

148. 276 N.W.2d 274 (Minn. App. 1985).

149. *Id.* at 276.

150. *Id.* at 281. It is unclear what significance should be given to the court's comments regarding the reliance of the client on the attorney's advice in entering into the deal in the first place. Such facts might justify an award even if the tax consequences were unavoidable, since the client might have then refused the deal altogether. On the other hand, courts have been reluctant to allow the client to transfer tax liability to the attorney when hoped-for tax benefits are disallowed and the client is required to pay additional tax. In that event, however, the court in *Whitney* required the client to show that the deal could have been structured to avoid part of the tax, in order to recover damages measured by the amount of excess tax paid. 376 N.W.2d at 281.

Courts have been reluctant to go beyond this and simply award to the client the expected tax savings that the client hoped to obtain through the attorney's advice.¹⁵¹ If these tax benefits were not legally available, they should not be considered as a loss properly compensable in damages for malpractice, although the attorney might be liable for actual out of pocket losses incurred in an improperly structured tax shelter arrangement. In such a case, the amount invested is probably the limit of the client's loss, assuming that the investment was worthless except for its ability to generate tax deductions.

3. Damages Resulting from Malpractice in a Business Purchase or Incorporation

When a business transaction goes awry, a natural target of the disappointed principals is the attorneys who arranged or advised the deal. Clients predictably attempt to shift some part of the loss and disappointment of a deal that goes sour onto the shoulders of the persons who were responsible for the underlying legal work. Before the loss can be shifted, however, the client has an initial hurdle to clear. It must be shown that the loss suffered was in fact caused by the alleged attorney malpractice. It is far too easy to make the legal advisor a scapegoat for a variety of business misjudgments unless the courts pay close attention to the cause in fact element, and deny recovery where the unfavorable outcome was likely to occur anyway,¹⁵² the client already knew of problems with the deal,¹⁵³ or where the client's own misconduct or misjudgment caused the problems.¹⁵⁴ It is the failure of the client to establish the causal link that explains decisions where the loss is termed remote or speculative.¹⁵⁵ Courts are properly cautious

151. See *Freschi v. Grand Coal Venture*, 588 F. Supp. 1257, 1260 (S.D.N.Y. 1984) (under New York law, damages for legal malpractice limited to value of what was lost as result of the malpractice and do not include loss of tax benefit from tax shelter deductions or tax savings client received).

152. See, e.g., *Blue Water Corp., Inc. v. O'Toole*, 336 N.W.2d 279, 282 (Minn. 1983) (claim for lost profits fails when client cannot demonstrate bank charter would have been obtained had attorney not been negligent); *Byrd v. Martin, Hopkins, Lemon and Carter, P.C.*, 564 F. Supp. 1425 (W.D. Va. 1983) (no damages from legal malpractice in preparing contract where contract as a matter of law was unenforceable against county), *aff'd*, 740 F.2d 961 (4th Cir. 1984).

153. See, e.g., *Lamb v. Barbour*, 188 N.J. Super. 6, 455 A.2d 1122, 1127 (1982) (alleged negligence of attorney in failing to warn clients that claim by seller of business that business enjoyed unreported income might be untrue was not cause of clients' loss, because clients already knew that business was losing money), *cert. denied*, 93 N.J. 297, 460 A.2d 693 (1983).

154. *Staab v. Cameron*, 351 N.W.2d 463, 446 (S.D. 1984) (attorney not responsible for damage when delays were caused by client's own actions).

155. See, e.g., *McGregor v. Wright*, 117 Cal. App. 186, 198, 3 P.2d 624, 629 (1931) (where plaintiff removed as bankruptcy trustee, allegedly due to attorney's negligence, court held financial loss from removal is too remote and speculative because plaintiff might have been removed anyway due to other actions); *Blue Water Corp., Inc. v. O'Toole*, 336 N.W.2d 279, 283 (Minn. 1983) (claim for lost profits fails when client cannot demonstrate that bank charter would have been obtained had attorney not been negligent); *Olson v. Aretz*, 346 N.W.2d 178, 183 (Minn. Ct. App. 1984) (client husband's claim in divorce proceeding that wife would have received a smaller lien on homestead but for attorney's delay in completing proceedings, held too conjectural); *Flynn v. Judge*, 149 App. Div. 278, 281, 133 N.Y.S. 794, 797 (1912) (*per curiam*) (executors who were removed cannot recover lost commissions from attorney because such commissions are speculative in amount and plaintiffs probably would have been removed even if attorney had not been negligent).

about making attorneys guarantors of their clients' faulty business judgment.

Where the connection between the malpractice and the loss is clear, however, an attorney can be held liable for the amount of benefit the client hoped to realize from the legal services. In *Gustavson v. O'Brien*,¹⁵⁶ an attorney failed to assign a land contract to the entity that purchased insurance on the property.¹⁵⁷ After a fire loss, the insurance company successfully defeated coverage by claiming that the entity that purchased insurance had no insurable interest in the property, while the entity that owned the land had no insurance.¹⁵⁸ The attorney was held responsible for the fire loss in addition to the costs and expenses paid by the client.¹⁵⁹ In this case the loss of the anticipated benefit from the attorney's services is so closely connected to the malpractice that the award seems proper, once it is clear that the purchase of land and its insurance were matters entrusted to the attorney and thus subject to a duty of care and diligence. Similarly, when the attorney fails to structure a transaction so as to obtain a desired result, when in fact it was possible to do so, the attorney may be liable for the losses that predictably result because the transaction does not work out as the client desired.¹⁶⁰

Conflict of interest or other misconduct on the part of the attorney may lead the court to grant a more generous measure of damages. For example, in *Hill v. Okay Construction Co., Inc.*,¹⁶¹ the attorney represented both the buyer and seller of a business. The seller wanted a complete sale of all assets and liabilities, while the purchaser wished to structure the transaction as a loan secured by the assets of the purchased firm.¹⁶² The court found that in fact the purchaser had assumed the liabilities of the business and was obligated to indemnify the seller for any creditor's claims against him.¹⁶³ The court also found, however, that the attorney who structured the transaction was liable to indemnify the purchaser for any such liability to the seller or the creditors of the business, since the dual representation was improper and led to this unfortunate result.¹⁶⁴ The attorney was ruled to be liable for the debts of the business, because the adverse interests of the principals to the transaction made proper representation of both impossible. Similar results are reached when the attorney is

156. 87 Wis. 2d 193, 274 N.W.2d 627 (1979).

157. *Id.* at 196, 274 N.W.2d at 629.

158. *Id.* at 197, 274 N.W.2d at 629.

159. *Id.* at 200, 274 N.W.2d at 631.

160. *See, e.g., Bohn v. Johnson*, 371 N.W.2d 781, 789 (N.D. 1985). In this case it was claimed that the attorney was negligent in drafting the buy-out provisions of a partnership agreement, leading to litigation between the surviving partner and the deceased partner's widow. *Id.* at 783. Among other damages, the attorney was held liable for the surviving partner's lost opportunity to receive income from deceased partner's share of assets for the period between the death and entry of judgment in the litigation with the widow. *Id.* at 789-90. Once one accepts that the attorney undertook to write the buy-out provisions so as to facilitate transfer to the surviving partner but negligently failed to accomplish this purpose, the connection between the malpractice and the loss seems close enough to justify the award of damages.

161. 312 Minn. 324, 252 N.W.2d 107 (1977).

162. *Id.* at 327-28, 252 N.W.2d at 111-12.

163. *Id.* at 346, 252 N.W.2d at 121.

164. *Id.* at 343-44, 252 N.W.2d at 119-20.

guilty of self dealing.¹⁶⁵

In addition to the loss of value of the transaction, the courts also try to provide compensation for the other losses (direct or consequential) arising out of the immediate transaction on which the lawyer worked. Thus, courts have sanctioned recovery of money spent in reliance on the attorney's proper completion of the work.¹⁶⁶ More commonly, courts allow recovery of increased costs incurred as the result of the malpractice. This is best illustrated in situations where the negligence of the attorney causes the client to lose a loan commitment¹⁶⁷ or a favorable lease.¹⁶⁸ The damages in these cases are the increased interest or rent that the client must pay. Again, money spent trying to minimize the loss is also recoverable.¹⁶⁹

Allowing plaintiffs to recover consequential damages in transactional situations, however, leaves the court at the top of the proverbial slippery slope. Malpractice damages for "lost opportunities" or "lost expectations" that are allegedly a consequence of malpractice threaten virtually unlimited liability unless some sort of limitations can be devised. The courts have responded with a variety of formulas to restrain the damages recoverable for malpractice in the transactional context. These are in addition to those safeguards discussed above based on the predictability or foreseeability of the loss and the closeness of its connection to the malpractice. These limitations, of central importance in determining the recoverability of consequential damages, are examined in the following section.

B. The Recovery of Consequential Economic Loss Caused by Legal Malpractice: The Courts Search for Limits

As suggested in the foregoing section, courts face a slippery slope when deciding how far to go in awarding damages for legal malpractice. The problem is one of defining what limits, if any, will be imposed on the type of loss that will be compensated with damages. Clearly the direct losses caused by the negligence of the attorney are to be compensated; just as clearly, some consequences

165. See, e.g., *DeToro v. Dervan Investments Corp.*, 483 So. 2d 717 (Fla. Dist. Ct. App. 1985) (prospective purchaser entitled to loss of bargain damages where attorney and firm appropriated opportunity for themselves).

166. *Wartzman v. Hightower Productions*, 53 Md. App. 656, 456 A.2d 82, 88 (1983) (reliance damages awarded).

167. *Meyers v. Imperial Casualty Indem. Co.*, 451 So. 2d 649, 653 (La. Ct. App. 1984) (damages include cost of interim financing for loss of loan commitment); *Slayton-Paltrow, Inc. v. Niles*, 60 A.D.2d 912, 401 N.Y.S.2d 568 (1978) (client forced to borrow money at inflated interest rates due to attorney's negligent representation in complex real estate deal).

168. *Speedee Oil Change, Inc. v. National Union Fire Ins. Co.*, 444 So. 2d 1304 (La. Ct. App. 1984) (damages for loss of favorable lease equal to amount of increased rent).

169. See *Hill v. Okay Const. Co., Inc.*, 312 Minn. 324, 347, 252 N.W.2d 107, 121 (1977) (joint clients can recover fees paid defending claims of creditors of business, where attorney was supposed to have structured deal to protect them from creditors); *Ninth Ave. & Forty-Second St. Corp. v. Zimmerman*, 217 App. Div. 498, 500, 217 N.Y.S. 123, 125-26 (1926) (in suit against attorney for negligence in failing to establish that lease purchased by plaintiff corporation was marketable, court held that mitigation costs are recoverable).

will seem too remote from the attorney's conduct to justify an award. In much of the literature, the task of distinguishing these situations is discussed as the problem of the recoverability of "consequential"¹⁷⁰ or "indirect"¹⁷¹ damages. In fact courts do compensate for indirect or consequential injuries of various types. The problem, then, is not whether to allow consequential damages at all, but rather to determine which types of consequential loss should be compensable.

The search for workable limitations is made more difficult by the lack of any clear distinctions between direct and consequential damages. According to one authority:

Consequential damages are those additional injuries which are a proximate result of the attorney's negligence but which do not flow directly from or concern the objective of the retention. In other words, a consequential injury is not the loss of the intended benefit of the attorney's services, but rather, damages which occurred because the benefit was lost.¹⁷²

Under this definition, it is fairly easy to classify mental distress or loss of personal reputation¹⁷³ resulting from attorney malpractice as a "consequential" loss: the object of the retention was usually not to obtain mental tranquility or personal reputation, but rather these elements were lost because the attorney did not obtain the actual object of the retention. Economic loss is not so easy to categorize, however, particularly when it arises in the transactional context.¹⁷⁴ For example, consider a case in which the negligence of the attorney resulted in the loss of a loan commitment, so that the client had to pay an inflated interest rate for interim financing.¹⁷⁵ Are these extra interests costs "direct," in the sense that the object of the retention of the attorney was to handle the transaction and obtain the loan, or are these costs consequential, because they resulted from the loss of the object of the transaction? The definition given above is of little help or even relevance, because the real issue is whether this type of economic loss (whether designated direct or consequential) is too remote to be compensable. The courts, in other words, are willing to give damages for some arguably "consequential" losses, so long as those losses are not too remote. In the example given above, the court granted damages for the cost of interim fi-

170. See R. MALLIN & V. LEVIT, *supra* note 134 at 349-50 (2d ed. 1981) for a definition of consequential damages.

171. See D. MEISELMAN, *ATTORNEY MALPRACTICE: LAW AND PROCEDURE* 55-56 (1980) for a definition of indirect damages.

172. R. MALLIN & V. LEVIT, *supra* note 134, at 350 (2d ed. 1981).

173. See *infra* notes 204-40 and accompanying text for a discussion of the recovery of such noneconomic damages.

174. Claims for consequential damages can arise in the context of litigation as well, but there the distinction is usually fairly clear. The object of the retention is to prosecute or defeat a claim, as the case may be, and the direct loss is measured by the value of the claim or defense. Other additional losses that occur because of the loss of the claim are "consequential." See *Kirtland and Packard v. Superior Court*, 59 Cal. App. 3d 140, 146, 131 Cal. Rptr. 418, 421 (1976) (attorneys liable to physician if their negligence in representing him in malpractice action resulted in increased premium costs).

175. *Meyers v. Imperial Casualty Indem. Co.*, 451 So. 2d 649, 656 (La. Ct. App. 1984).

nancing, but not for loss of business opportunity resulting from the situation, finding that such damages were not proved.¹⁷⁶

Another even more significant conceptual difficulty besets this area. The cause of action for legal malpractice partakes of the elements of both contract and tort. The relationship between the client and the attorney is usually founded on a contract, but the action for malpractice can be brought either as a breach of contract or as a professional negligence count (or as both). The problem arises because contract and tort have different approaches to limiting liability.¹⁷⁷ Contract law uses the rule of *Hadley v. Baxendale*¹⁷⁸ to deny recovery of consequential damages unless the defendant was on notice of the special circumstances giving rise to them. It is said that the possibilities of such damages must be within the contemplation of the parties at the time of contracting in order for them to be recoverable. In tort, on the other hand, the foreseeability of loss is an element of proximate cause and limits liability. Once a defendant's conduct is found to be the proximate cause of harm to the plaintiff, the defendant is generally liable for all harm of the type to be foreseen, even if it is unexpectedly severe.¹⁷⁹ In tort it is therefore no defense that the extent of the injury could not be foreseen.

In the combined contract/tort situation, courts and litigants have a choice of damage theories, but also something of a problem. In the transactional setting, the rules of tort damages create a potential of extended liability for the malpractice defendant. As in the old nursery rhyme about the loss of the horse-shoe nail causing (through various intervening disasters) the loss of the kingdom, plaintiffs have argued that the attorney's negligence in one transaction caused a loss that made it impossible to pursue other opportunities, the loss of which led to other losses, and so on in an ever-expanding ripple effect. Courts have generally rejected such expansive liability on a variety of grounds.¹⁸⁰ In effect, however, the limits used by the courts on these sorts of consequential damages seem to approximate the *Hadley v. Baxendale* rule, regardless of the precise theory of recovery used by the plaintiff. In other words, foreseeability of the loss appears to limit the recovery of consequential damages generally in legal malpractice cases.

This development parallels similar restraints found in other areas of tort law that raise the extended liability problem. For example, one scholar has pointed out that the rule against recovery of pure economic loss in a negligence

176. *Id.* at 658.

177. *See, e.g.,* Byrom, *Do Damages Depend on the Same Principles Throughout the Law of Tort and Contract*, 6 U. QUEENSLAND L.J. 118 (1968).

178. 9 Exch. 341, 156 Eng. Rep. 145 (1854).

179. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 43 at 292-97 (5th ed. 1984); Byrom, *supra* note 177, at 122-30.

180. For example, recovery of consequential damages may be denied because the loss was not foreseeable (*see, e.g.,* Chadwick v. Corbin, 476 So. 2d 1366, 1368 (Fla. Ct. App. 1985)), or because the loss was not proved (*see, e.g.,* Meyers v. Imperial Casualty Indem. Co., 451 So. 2d 649, 658 (La. Ct. App. 1984)), or because the loss was too speculative and remote (*see, e.g.,* McGregor v. Wright, 117 Cal. App. 186, 196-97, 3 P.2d 624, 628-29 (1931); O'Brien v. Larson, 11 Wash. App. 52, 54-55, 521 P.2d 228, 230 (1974)).

action is actually a rule against recovery of damages for the "ripple effect" (that is, the more remote economic consequences) of the defendant's negligence.¹⁸¹ Indeed, if taken seriously, the limitation on recovery of pure economic loss in a negligence case would virtually wipe out all damages for legal malpractice, which typically causes only economic loss. Instead, courts use this doctrine to deny claims for remote results or claims of unexpected plaintiffs who suffer some adverse economic effect from defendant's negligence. The distinction seems to turn upon the foreseeability of the loss to the particular plaintiff. Thus, in the field of legal malpractice, many jurisdictions will hold an attorney liable to foreseeable third parties injured by their negligence, at least where the loss is direct.¹⁸² A familiar example is the disappointed beneficiary of a negligently drafted will, who may be able to recover the lost inheritance.¹⁸³ Because the will was drafted to benefit this particular individual, the intended beneficiary is considered a foreseeable plaintiff. On the other hand, courts would probably not allow recovery to such a claimant for losing a business opportunity while waiting for payment of the legacy.¹⁸⁴

Another example of the use of the *Hadley v. Baxendale* limitation in a "negligent performance of contract" situation is the opinion of the Seventh Circuit by Judge Posner in *Eyra Corp. v. Swiss Bank Corp.*¹⁸⁵ Although the claim was specifically one for negligence in the handling of a wire transfer of funds, the court used *Hadley's* consequential damages limitation to deny recovery for the loss of valuable ship charter because the transfer payment was not made on time.¹⁸⁶ Here, one can see that courts are concerned with the possibility of extended liability. In *Eyra*, the defendant bank was not on notice that the failure to complete the transfer on time would lead to the immediate loss of the plaintiff's valuable contract rights, in an amount many times that of the actual fund transfer.¹⁸⁷ Because the defendant had no notice of the possibility of severe economic loss, the court found that it should not be liable for such consequential

181. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1534-38 (1985).

182. *Id.* at 1534. As Professor Rabin points out, courts allow recovery in situations where the close-knit "three cornered" relationship (attorney-client-intended beneficiary) makes the loss to the beneficiary easily foreseeable. *Id.* This principle has been extended to other contracting situations in cases such as *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 805-07, 598 P.2d 60, 63-65, 157 Cal. Rptr. 407, 410-12 (1979), in which the three-cornered relationship involved a building owner contracting with the defendant construction contractor to renovate space leased to the plaintiff lessee. *Id.* at 802, 598 P.2d at 62, 157 Cal. Rptr. at 409. The California Supreme Court held that the lessee could recover lost profits caused by the contractor's unexpected delay in completing construction. *Id.* at 806, 598 P.2d at 64, 157 Cal. Rptr. at 411.

183. See, e.g., *Heyer v. Flaig*, 70 Cal. 2d 223, 233, 449 P.2d 161, 167-68, 74 Cal. Rptr. 225, 231-32 (1969) (attorney allegedly failed to fulfill testamentary directions of client).

184. See, e.g., *Olson v. Aretz*, 346 N.W.2d 178, 182-83 (Minn. Ct. App. 1984) (attorney's delay in divorce proceedings allegedly caused client to lose profits he would have made on purchase of two bungalows but court held evidence that he actually would have purchased bungalows was "too speculative").

185. 673 F.2d 951 (7th Cir.), cert. denied, 459 U.S. 1017 (1982).

186. *Id.* at 952-53 & 955-59.

187. *Id.* at 956.

damages measured by the value of the charter to the plaintiff.¹⁸⁸

The foregoing analysis is pertinent to the search for limits to the recovery of consequential damages for legal malpractice. Courts allow recovery of damages for losses that are "direct" or "foreseeable," but reject attempts to recover for the "ripple effect" of a negligent act. Typically, courts reject these claims as remote or speculative, but their real concern in these situations is with the possibility of unlimited liability for a given act of negligence. Due to this concern, the courts would do well to adopt explicitly the *Hadley v. Baxendale* limitation on consequential damages for legal malpractice. In other words, the attorney should have notice of the type of loss likely to be suffered and the party likely to suffer it before consequential damages can be recovered. Adopting this standard provides all parties with a common vocabulary for discussing the issue of damages, and would probably be consistent with the actual results reached by courts under current practices.

Some courts do employ foreseeability as the standard for the denial or recovery of consequential loss. For example, in *Chadwick v. Corbin*,¹⁸⁹ the clients sued their former attorney for negligence for failing to record properly a security interest in the inventory of a business, seeking recovery of the value of lost inventory and "consequential damages."¹⁹⁰ Affirming the denial of the consequential damages, the court wrote:

In actions based on a tort arising out of a contract, damages must be such as can be said to have been within the contemplation of the parties. No damages may be recovered where losses do not usually result from or could not have been foreseen as a proximate result of a particular negligence.¹⁹¹

The *Chadwick* court thus explicitly adopted a contract-based limitation on the recoverability of consequential damages for attorney negligence. In doing so, however, the court equated the "within the contemplation" language of contract law with the "foreseeability" language of tort law. The two concepts are not the same, but the court's instincts here were nevertheless sound. Foreseeability of the particular type of damage does seem to be the appropriate standard to deal with this issue.

In general, consequential damages are the foreseeable result of attorney negligence when they arise from the very transaction on which the attorney was working.¹⁹² Thus in *Myerberg, Sawyer & Rue, P.A. v. Agee*,¹⁹³ the attorney was

188. *Id.* at 957-58.

189. 476 So. 2d 1366 (Fla. Dist. Ct. App. 1985).

190. *Id.* at 1367. The opinion does not specify the nature of the consequential damages the plaintiffs requested, but it is clear that the clients were trying to recover something in addition to the value of the lost inventory. *Id.* at 1367.

191. *Id.* at 1368.

192. Attorney's fees incurred as the result of the malpractice are a special example of this kind of consequential loss. In general, courts will allow recovery of attorneys' fees spent trying to cope with or mitigate the effect of the attorney's malpractice. *See, e.g., United Fidelity v. Law Firm of Best, Sharp, Thomas & Glass*, 624 F.2d 145, 149-50 (10th Cir. 1980) (question for jury whether plaintiff can recover costs of appealing award of attorney's fees against him caused by defendant's negligence); *Spering v. Sullivan*, 361 F. Supp. 282, 288 (D. Del. 1973) (plaintiff can recover costs of

accused of breach of a contract to examine a title, resulting in the delay of a construction project. The court held that the increased construction and financing costs caused by this delay were "not unforeseeable" given the known upward trend of these costs at the time of the transaction.¹⁹⁴

Similarly, in *Wartzman v. Hightower Productions*,¹⁹⁵ the client retained the attorney to create a corporation that would sell stock to the public to finance an attempt to break the world record for flag-pole sitting.¹⁹⁶ The entity, however, was not properly incorporated, stock could not be sold to the public, and the entire venture collapsed.¹⁹⁷ In a suit for breach of contract and negligence, the court allowed the client to recover as reliance damages the amount the incorpo-

attempting to reinstate suit dismissed because of attorney's negligent failure to prosecute); *Rhine v. Haley*, 238 Ark. 72, 77, 378 S.W.2d 655, 658 (1964) (failure to mitigate is for jury); *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368, 376, 413 N.E.2d 47, 54 (1980) (attorney's fees incurred as a result of attorney's failure to file inheritance tax forms are recoverable); *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 393 So. 2d 851, 858-59 (La. Ct. App. 1981) (attorneys who failed to file lawsuit held responsible for attorney fees client paid while trying to litigate state claim through malpractice action), *aff'd*, 422 So. 2d 1109 (1982); *Ramp v. St. Paul Fire and Marine Ins. Co.*, 263 La. 774, 787-89, 269 So. 2d 239, 244-45 (1972) (attorney's fees recoverable); *Hill v. Okay Constr. Co., Inc.*, 312 Minn. 324-347, 252 N.W.2d 107, 121 (1977) (joint clients can recover fees paid defending claims of creditors of business, where attorney was supposed to have structured deal to protect them from creditors); *Ninth Ave. & Forty-Second St. Corp. v. Zimmerman*, 217 App. Div. 498, 500-01, 217 N.Y.S. 123, 124-25 (1926) (suit against attorney for negligence in failing to establish that lease purchased by plaintiff corporation was marketable; on appeal of trial court's denial of motion to strike certain defenses, held that mitigation costs are recoverable); *Hiss v. Friedberg*, 201 Va. 572, 577-79, 112 S.E.2d 871, 875-77 (1960) (escrow attorney paid purchase price to vendors before getting title insurance policy which would have disclosed that property was subject to a lease; cost of suit versus vendors allowed); *Gustavson v. O'Brien*, 87 Wis. 2d 193, 200, 274 N.W.2d 627, 632 (1979) (counsel responsible for all damages resulting from failure to assign land contract to insured entity, when insurer successfully denied coverage on ground that insured entity had no interest in damaged property; damages include legal expenses).

On the other hand, courts have generally resisted awarding to clients the attorney's fees incurred in the legal malpractice action itself. See *McClain v. Faraone*, 369 A.2d 1090, 1093-94 (Del. Super. Ct. 1977) (plaintiff not entitled to attorney's fees incurred in bringing malpractice action where attorney performed title search that resulted in loss of residential property due to foreclosure of judgment lien); *Gilchrist v. Perl*, 387 N.W.2d 412, 418 (Minn. 1986) (court denied claim for attorney's fees incurred in bringing the class action, even though attorney had failed to disclose relationship that indicated possible conflict of interest); *Whitney v. Buttrick*, 376 N.W.2d 274 (Minn. Ct. App. 1985) (attorney's fees not allowed); *Erving's Hatcheries, Inc. v. Thompson*, 204 So. 2d 188, 192 (Miss. 1967) (costs of previous appeal in malpractice action not taxable against defendant attorney).

193. 51 Md. App. 711, 446 A.2d 69 (1982).

194. *Id.* at 717-21, 446 A.2d at 73-74. See also *Meyers v. Imperial Casualty Indem. Co.*, 451 So. 2d 649, 656-57 (La. Ct. App. 1984) (where malpractice results in loss of loan commitment court included cost of interim financing as damages). Cf. *Slayton-Paltrow, Inc. v. Niles*, 60 App. Div. 2d 912, 401 N.Y.S.2d 568, 569 (1978) (mem.) (attorney's negligent representation of plaintiff in real estate transaction required client to borrow money at inflated interest rates but court held it was question of fact whether attorney's negligence proximately caused loss and whether that loss was foreseeable to defendant).

195. 53 Md. App. 656, 456 A.2d 82 (1983).

196. *Id.* at 658, 456 A.2d at 84.

197. *Id.* at 660, 456 A.2d at 85.

rators spent preparing for their public relations stunt.¹⁹⁸ The court's analysis liberally mixes contract and tort concepts. First, without carefully distinguishing the two theories of action, the court embarked on a discussion of contract-based reliance damages, concluding that the attorneys in this instance "knew, or should have known, that the success of the venture rested upon the ability of Hightower to sell stock. . . ."¹⁹⁹ Because the ability to sell stock depended on the proper completion of the work for which the attorney was hired, the court believed that the client had demonstrated a sufficient "nexus" between the malpractice and reliance damages.²⁰⁰ Based on the above finding, the court concluded that the reliance losses were sufficiently foreseeable to be a recoverable element of damages.²⁰¹

Unfortunately, the court then proceeded to approve a jury instruction that was clearly tort-derived, indicating that the plaintiff could recover by proving that the defendant was negligent and that the negligence was the proximate cause of loss the plaintiff.²⁰² The result is less a combination than a confusion of tort and contract. Nevertheless, the court's search for a nexus between the malpractice and the loss and its discussion of foreseeability is consistent with the emerging standard for imposing limits to recovery of consequential loss.

Whether consciously or not, courts thus seem to have accepted foreseeability of injury as the appropriate limitation on recovery of losses caused by contract based torts. This test restricts the recovery of damages to losses that are the immediate result of the negligence and excludes secondary or "ripple effect" losses.²⁰³ That there is a sound policy justification for this limitation is evident, for a lawyer's liability for malpractice will be directly affected by the lawyer's knowledge of the client's affairs. When a lawyer has extensive information about a client's affairs, as from a long and intimate attorney-client relationship, the lawyer will be in a better position to know of the possibility of loss and hence will be subject to greater liability. In such a situation, however, the lawyer will also be in a better position to advise and protect the client.

198. *Id.* at 661-62, 456 A.2d at 88.

199. *Id.* at 663, 456 A.2d at 86.

200. *Id.* at 663-64, 456 A.2d at 86.

201. *Id.* at 662-65, 456 A.2d at 86-87.

202. *Id.* at 666, 456 A.2d at 88. The instruction's only reference to reliance damages was the explanation that "loss" meant "that the Plaintiff was deprived of any right or parted with anything of value in reliance upon the negligence of the Defendants." *Id.* Nothing in the instruction mentioned foreseeability of the loss to the defendant.

203. A typical example would be the claim that, but for the malpractice, other business opportunities could have been profitably pursued. See *Olson v. Aretz*, 346 N.W.2d 178, 182-83 (Minn. Ct. App. 1984) (where attorney's delay in divorce proceedings caused client to lose profits he would have made on purchase of two bungalows, court held that evidence he actually would have purchased the bungalows was "too speculative"); *O'Brien v. Larson*, 11 Wash. App. 52, 521 P.2d 228 (1974) (alleged negligence of attorney in preparing security agreement did not cause lost profits to plaintiffs from other businesses they wished to buy).

III. RECOVERY OF NONECONOMIC ELEMENTS OF DAMAGES

A. *Damages for Noneconomic Injury Caused by Legal Malpractice: Emotional Distress and Loss of Reputation*

As with legal malpractice liability in general, the courts have been slow to expose lawyers to liability for noneconomic elements of damages caused to their clients by malpractice. Such claims primarily involve attempts to recover for emotional distress or loss of reputation. At the outset, the denial of such damages cannot be based on any claim that such injuries are an unforeseeable result of the malpractice; indeed, given the emotional content of much of what attorneys are hired to do, particularly in the litigation area, such damages seem all too clearly foreseeable.²⁰⁴ On the other hand, legal malpractice generally results in economic rather than physical injury, so that pain and suffering awards are not made as a matter of course as they are, for example, in medical malpractice. Instead, clients must clear at least two obstacles. First, they usually must establish that the malpractice resulted in economic loss. In addition, most courts have required proof of more than negligence before allowing recovery of noneconomic elements of damage.

The difficulty of overcoming these obstacles can be understood when one considers the problems clients face in making out a case of liability for even genuine economic loss. Under the trial within a trial method of proving litigation malpractice, the client must prove that the claim would have produced a favorable verdict at trial as an element in the *prima facie* case of liability. This proof therefore would also be necessary in order to recover for any emotional distress resulting from the loss of the case.²⁰⁵

Without such proof, it could be argued, the plaintiff has simply not proved actionable malpractice. The emotional distress suffered by the client would not satisfy the requirement of actual injury because, like the loss of the claim, the emotional distress would probably result anyway from losing the case even in the absence of malpractice.

If courts begin to award settlement value to clients whose claims are lost through malpractice, this first obstacle will be considerably lowered. Liability for litigation malpractice can then be established without having to prove that the case would ultimately have been won at trial.²⁰⁶ In many courts, however,

204. Indeed, foreseeability is not necessarily even relevant. One treatise on legal malpractice treats these noneconomic harms as a type of consequential loss. See R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* §§ 310, 311, at 362-63 (2d ed. 1981). In fact, however, emotional distress could well be either a direct or a consequential result of the malpractice, depending on the circumstances. For example, a client may purchase legal services in order to get security and mental tranquility, much as one might purchase insurance with similar goals in mind. Arguably, legal malpractice in that case could deprive a client of the "expected benefits" of the attorney's services, *cf. id.*, at 349, and thus qualify as "direct" rather than consequential loss.

205. See *Gautam v. DeLuca*, 215 N.J. Super. 388, 398, 521 A.2d 1343, 1348 (1987) (proof that underlying medical malpractice claim had merit necessary to recover damages from attorney who "lost" claim).

206. See *supra* notes 93-120 and accompanying text for discussion of the settlement value of a lost claim or defense method.

another obstacle remains: the plaintiff would still have to prove that the lawyer was guilty of more than negligence in order to recover damages for emotional distress. In such jurisdictions, therefore, plaintiffs who establish that the attorney's negligence deprived them of a meritorious cause of action and that they suffered emotional distress as a result, could not recover for the latter injury.²⁰⁷ A similar rule is applied in cases where the attorney's mishandling of a business transaction results in pecuniary loss and accompanying mental distress:²⁰⁸ something more than negligence is usually required.²⁰⁹

As in the case of consequential economic losses,²¹⁰ the limits that the courts impose here can be traced to the dual tort/contract aspects of the legal malpractice cause of action. Damages for emotional distress are commonly denied or limited in breach of contract actions, often on the ground that this type of injury was not within the contemplation of the parties.²¹¹ Courts limit nonpecuniary recovery in contract actions in order to avoid overcompensating plaintiffs²¹² and punishing defendants in what is nominally a regime of strict liability. Nonpecuniary recovery is usually allowed only when the misconduct by the breaching party is sufficiently severe that it amounts to an independent tort, and where the purpose of the contract is not pecuniary but "personal" in nature.²¹³

Both the limitation and the exceptions are replicated in the cases involving the recovery of nonpecuniary damages for legal malpractice. Although legal malpractice actions can be pleaded as both breach of contract and tort (profes-

207. See, e.g., *Quezada v. Hart*, 67 Cal. App. 3d 754, 761-63, 136 Cal. Rptr. 815, 819-20 (1977) (emotional suffering damages unwarranted); *Selsnick v. Horton*, 620 P.2d 1256, 1257 (Nev. 1980) (no damages for emotional distress absent proof of outrageous conduct); *Gautman v. DeLuca*, 215 N.J. Super. 388, 399, 521 A.2d 1343, 1348-49 (1987) (emotional distress damages denied); *Heath v. Herron*, 732 S.W.2d 748, 753 (Tex. Ct. App. 1987) (no damages for emotional distress, at least in absence of egregious or extraordinary circumstances).

208. See *McClain v. Faraone*, 369 A.2d 1090, 1099 (Del. Super. Ct. 1977) (damages denied).

209. Cf. *Gillespie v. Klun*, 406 N.W.2d 547 (Minn. App. 1987), a legal malpractice suit arising out of the purchase of an apartment complex. *Id.* at 549-51. Although the court discussed awarding emotional distress damages for negligence, the case involved a conflict of interest that the court found would also support punitive damages. *Id.* at 558-59.

210. See *supra* notes 170-203 and accompanying text for a discussion of the recovery of consequential damages.

211. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 12.4 at 819 (1973). As Professor Dobbs points out, emotional distress damages are denied even though the pecuniary loss likely to accompany the contract breach is also likely to cause some amount of mental anguish. The exceptions to this rule are limited. *Id.* In general contract law, however, this limitation on recovery of non-pecuniary elements of damage is being questioned and re-evaluated. See, e.g., *Goldberg, Emotional Distress Damages and Breach of Contract: A New Approach*, 20 U.C. DAVIS L. REV. 57 (1986); *Sebert, Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 U.C.L.A. L. REV. 1565 (1986).

212. *Sebert, supra* note 211, at 1566.

213. D. DOBBS, *supra* note 211, at 819-20. As Professor Dobbs describes this exception, "The essential idea seems to be that some contracts clearly have what might be called personal rather than pecuniary purposes in view, and that the purpose of such contracts is utterly frustrated until mental distress damages are awarded for the breach." *Id.* at 819. *Goldberg, supra* note 211 at 59, criticizes the attempt to determine which contracts are "personal" in nature and instead proposes a general test of whether the contract has an "emotional aspect."

sional negligence), emotional distress damages are not awarded unless the lawyer commits some more aggravated misconduct than negligence: the cases require "egregious conduct,"²¹⁴ "intentional wrongdoing,"²¹⁵ "extreme or outrageous conduct,"²¹⁶ "willful or wanton" misconduct,²¹⁷ or occurrences of an inflammatory nature.²¹⁸ When the "independent tort" requirement gets imported into this combined tort/contract situation, therefore, it is transformed into the requirement of additional misconduct beyond the ordinary professional negligence that entitles the client to recover for economic loss.

In most of the cases cited above, emotional distress was a secondary consequence of the lawyer's malpractice. That is, the malpractice caused the loss of the case²¹⁹ or loss of property,²²⁰ and the pecuniary loss caused the client to suffer emotional distress. Emotional distress can also be a more direct result of the attorney's misconduct, however. In these cases as well, courts tend to require something more than negligence, and it may be that courts are in effect compensating the clients for the emotional upset resulting from learning of their attorneys' misconduct. In some cases, the courts have justified awarding damages for emotional distress on the theory that the lawyer's conduct amounts to intentional infliction of emotional distress, as where the attorney was personally abusive to the client,²²¹ or engaged in significant financial improprieties.²²² Other cases do not proceed on an intentional infliction of emotional distress theory, but do require more than mere negligent misconduct. Examples would include abandonment of a client during representation²²³ and disobedience of a court order entered for the benefit of the plaintiff.²²⁴

214. *Gautam v. De Luca*, 215 N.J. Super. 388, 399, 521 A.2d 1343, 1348 (1987); *Heath v. Herron*, 732 S.W.2d 748, 753 (Tex. App. 1987).

215. *Quezada v. Hart*, 67 Cal. App. 3d 754, 761, 136 Cal. Rptr. 815-819 (1977).

216. *Selsnick v. Horton*, 96 Nev. 944, 620 P.2d 1256 (Nev. 1980).

217. *Whitehead v. Cuffie*, 185 Ga. App. 351, 364 S.E.2d 87, 90 (1987); *Bowman v. Doherty*, 235 Kan. 870, 876, 686 P.2d 112, 118 (1984).

218. *McClain v. Faraone*, 369 A.2d 1090 (Del. Super. 1977).

219. *Quezada v. Hart*, 67 Cal. App. 3d 754, 136 Cal. Rptr. 815 (1977); *Selsnick v. Horton*, 96 Nev. 944, 620 P.2d 1256 (Nev. 1980); *Gautam v. De Luca*, 215 N.J. Super. 388, 521 A.2d 1343 (1987).

220. *McClain v. Faraone*, 369 A.2d 1090 (Del. Super. 1977); *Gillespie v. Klun*, 406 N.W.2d 547 (Minn. App. 1987).

221. *Singleton v. Foreman*, 435 F.2d 962 (5th Cir. 1959).

222. *Gay v. McCaughan*, 272 F.2d 160 (5th Cir. 1970) (attorney hired to establish guardianship over client's grandmother allegedly took control of grandmother's estate, looted it, and had client sent to jail to contempt charge).

223. *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir. 1982) (attorney allegedly abandoned client two months before trial after fifteen years of litigation; damages for emotional distress were allowed, although with little discussion), *cert. denied*, 459 U.S. 839 (1982).

224. *McEvoy v. Helikson*, 277 Or. 781, 562 P.2d 540 (1977). In this case, the plaintiff was the former husband of the defendant attorney's client. After a divorce action, plaintiff's former wife, a citizen of Switzerland, obtained temporary custody of their children on condition that she deliver her and her child's passports to the defendant. *Id.* at 783, 562 P.2d at 541. The defendant, however, in violation of the court's order, returned the passports to the former wife, who took the child and left the country. In a suit against the defendant attorney, the plaintiff claimed damages for mental suffering from being deprived of the society of his child. *Id.* at 784-85, 562 P.2d at 542. Once the court

A striking illustration of emotional distress as a direct rather than consequential result of attorney misconduct can be found in *Betts v. Allstate Insurance Company*.²²⁵ The suit was a third party bad faith action brought against the plaintiff's automobile liability insurer and the attorneys retained by the insurer to defend the insured in a personal injury action brought by a seriously injured motorist.²²⁶ The insured sought recovery for bad faith for failure to settle within policy limits after the insured suffered a jury verdict far in excess of coverage.²²⁷ The insured also sought damages for emotional distress against both the insurer and retained defense counsel.²²⁸ Among other things, the defendant attorneys were accused of a conflict of interest for failing to advise the insured of her rights against the insurer once the excess verdict was entered.²²⁹

In response to special verdict questions, the jury found that although the attorneys were negligent, their negligence was not a proximate cause of the excess verdict against the plaintiff.²³⁰ For this reason, plaintiff could not have recovered on the theory that the attorney's negligence caused her to lose the case, and that emotional distress resulted from that loss. Instead, the jury went on to find that the negligence of the attorney had proximately caused the emotional distress.²³¹ According to the court:

The jury was most perceptive. While finding the negligent conduct of [the attorneys] was not a proximate cause of the excess judgment, it found their conduct was so egregious in concert with Allstate as to cause Betts to suffer humiliation, emotional distress, chagrin, worry and nervousness to her damages of \$500,000.²³²

Although the special verdict by the jury was premised on negligence, the court upheld the emotional distress award on the ground that the attorneys' misconduct went beyond mere failure in the preparation and trial of the action.²³³ The court found the award justified by the attorneys' actions after the jury rendered the excess verdict, when, in the court's words, the conflict of interest was unmistakable.²³⁴

The courts have also awarded damages for noneconomic losses in situations that correspond to the personal subject matter exception of general contract law. Thus, where the purpose of the representation is not to secure a pecuniary advantage, but rather to secure some more personal goal, damages for emotional distress are occasionally awarded. Presumably under this rule most civil litiga-

decided that the defendant owed a duty to the plaintiff regarding the passports, the court had no trouble finding that mental suffering was the foreseeable result of the violation of the court's order. *Id.* at 787-88, 562 P.2d at 543-44.

225. 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984).

226. *Id.* at 697, 201 Cal. Rptr. at 532.

227. *Id.*

228. *Id.* at 715, 201 Cal. Rptr. at 544.

229. *Id.* at 717, 201 Cal. Rptr. at 545.

230. *Id.* at 715, 201 Cal. Rptr. at 544.

231. *Id.*

232. *Id.* The trial court remitted the award for emotional distress to \$50,000.

233. *Id.* at 718, 201 Cal. Rptr. at 546.

234. *Id.* at 717, 210 Cal. Rptr. at 546.

tion malpractice would not support an award of emotional distress damages, since the representation would generally be undertaken to impose or avoid pecuniary obligations.²³⁵ Similarly, most business transactions handled by attorneys would be outside this exception.²³⁶ Cases in which the attorney is retained to protect the liberty of the client, however, probably fall squarely within the exception. If so, emotional distress damages are probably available for malpractice in criminal representation,²³⁷ as well as other situations, such as civil commitment proceedings, in which the client's interest in personal liberty is in issue.²³⁸ Although little authority exists on the subject, it is also likely that the courts will restrict an attorney's liability for the more remote consequences of malpractice even in the "personal" area.²³⁹

The other main category of nonpecuniary damages, lost reputation, is likely to be treated in a similar fashion. The few precedents in this area seem to indicate again that the courts will not award such damages for simple negligence, but will require some serious misconduct.²⁴⁰

235. *Selsnick v. Horton*, 96 Nev. 944, 620 P.2d 1256 (1980) (damages for emotional distress are proper when a peculiarly personal subject matter gives rise to emotional distress damages).

236. *McClain v. Faraone*, 369 A.2d 1090 (Del. Super. 1977).

237. Liability for malpractice in representing the criminally accused is generally restrained by the requirement that the client affirmatively prove innocence to recover. For discussion generally of attorney liability in this area see Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 545 (concluding that damage rules are unsettled and that useful principles have yet to evolve). Other commentators have described the task of setting damages in these cases as a nightmare and attempted to sketch out the factors that might be relevant. Kaus & Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice"*, 21 U.C.L.A. L. REV. 1191, 1220-26 (1974). Certainly one component of this recovery will be the emotional distress suffered by the wrongfully convicted client as a result of the stigma of criminal conviction and its consequences, including incarceration.

238. *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987). This case involved not only legal malpractice, but also claims against police officers based on 42 U.S.C. section 1983 for false arrest and wrongful civil commitment. The facts underlying the claim are so bizarre that the First Circuit described the client as having entered "a doorway into the twilight zone." *Id.* at 201. The claim against the attorney was based on the failure of the latter to take any steps to prevent the client's overnight commitment to a mental institution. The court approved an award against the attorney for the emotional distress caused by the wrongful commitment. *Id.* at 221-22. The court distinguished cases that denied recovery for emotional distress where only property rights were involved, holding that the attorney's malpractice in this case caused a loss of liberty, and further finding that emotional distress would foreseeably result. *Id.*

239. *McLaughlin v. Sullivan*, 123 N.H. 335, 461 A.2d 123 (1983) (attorney not liable for wrongful death of client who committed suicide after allegedly wrongful conviction caused by attorney's malpractice because connection "too attenuated").

240. See, e.g., *McClain v. Faraone*, 369 A.2d 1090 (Del. Super. 1977); *Hamilton v. Powell, Goldstein, Frazer & Murphy*, 167 Ga. App. 411, 306 S.E.2d 340 (1983), *aff'd* 252 Ga. 149, 311 S.E.2d 818 (1984). Cf. *Gillespie v. Klun*, 406 N.W.2d 547 (Minn. App. 1987) (conflict of interest). But cf. *Kirtland & Packard v. Superior Court*, 59 Cal. App. 3d 140, 131 Cal. Rptr. 418 (1976). This case has been cited for the proposition that damages for loss of reputation may be recoverable. See, e.g., R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* § 311 at 363 (2d ed. 1981). In *Kirkland*, the client, a physician, sued the attorneys for negligence in representing him in a medical malpractice action. 59 Cal. App. 3d at 142, 131 Cal. Rptr. at 419. The defendant attorneys moved for summary judgment that the client could not recover in the legal malpractice action amounts paid in the medical action by the physician's insurer and another defendant. *Id.* at 143, 131 Cal. Rptr. at 419. When

Thus, to date, the courts have limited the liability of attorneys for nonpecuniary injuries resulting from their malpractice. Given the recent trend of developments in general contract law, however, these limitations are likely to come into question. As it stands, however, a workable position may be developing. Professional negligence that causes economic loss will be compensated with economic damages. Recovery beyond the hard economic loss will be permitted when the attorney's misconduct is more severe. Compensation will be awarded for emotional injury done by the attorney who is not simply guilty of bad judgment, but who is actively disloyal. Thus, conflict of interest, breach of fiduciary duty, and other more abusive forms of attorney misconduct will be subject to the stiffer sanction of liability for noneconomic elements of damage. In effect, damages for emotional distress and loss of reputation function as a mild form of punitive damages, allowing increased recovery where the attorney is guilty of more significant misconduct. The final step, to deal with the very worst forms of misconduct, is to add real punitive damages to the economic and noneconomic compensatory award.

B. Punitive Damages

Given the elevated threshold for recovery of emotional distress damages, it is not surprising to find an even higher level of misconduct required to justify a punitive damage award. Courts are restrained in the first instance by the particular jurisdiction's rules regarding recovery of punitive damages. Typically, the client must prove the attorney was guilty of some form of fraud, malice or wanton misconduct before punitives are allowed. If the evidence does not support a finding of this level of misconduct, the claim will be denied.²⁴¹

Beyond this however, many claims for punitive damages are rejected by courts even though some form of gross misconduct is arguably present. In some of these cases, courts seem to reject punitive damages simply because they view the attorney's conduct as not bad enough to warrant the sanction of punitive damages.²⁴² Courts find either that the conduct was not sufficiently outrageous,²⁴³ or that it did not involve the kind of misrepresentation or fraud that

summary judgment was denied, the attorney sought and obtained a writ of mandate, the court finding that such amounts paid by others were not recoverable as damages by the physician. In dictum, the court noted that this decision did not insulate the attorneys from liability for malpractice, stating that the physician could recover for increased insurance premiums (consequential economic loss) and loss of reputation. *Id.* at 146, 131 Cal. Rptr. at 421.

241. See *McClain v. Faraone*, 369 A.2d 1090 (Del. Super. 1977) (negligence only); *Greening v. Klamen*, 652 S.W.2d 730 (Mo. App. 1983) (punitive damages not recoverable where client has failed to allege an independent willful tort); *Albright v. Burns*, 206 N.J. Super. 625, 503 A.2d 386 (1986) (attorney's misconduct did not amount to intentional wrongdoing or willful and wanton disregard for rights of client, and punitive damages therefore not warranted); *Cary v. Fisher*, 101 A.D.2d 924, 475 N.Y.S.2d 628 (1984) (no basis for punitive damages in the absence of proof of wanton and reckless disregard of client's rights).

242. See *Mosseri v. Zimmerman & Zimmerman*, 114 A.D.2d 338, 494 N.Y.S.2d 327 (1985) (attorney's conduct did not involve high moral culpability).

243. *McKinnon v. Tibbetts*, 440 A.2d 1028 (Me. 1982).

merits punitive damages.²⁴⁴ One court even found that a criminal conviction and prison sentence against the attorney made further punishment through punitive damages inappropriate.²⁴⁵

Where there are financial misdealings with a client, however, courts freely allow punitive damages. Bearing out the adage that "There are no transactions which courts will scrutinize with more jealousy than dealings between lawyers and their clients,"²⁴⁶ courts appear most willing to deal out the sanction of punitive damages when financial improprieties are shown.

Financial misdealing may take a variety of forms. One obvious example is the business transaction with the client. Not only are such deals subject to the stringent requirements of the codes of professional conduct,²⁴⁷ but they are also a prime source of potential punitive damage liability. Thus, where the attorney purchases property from a client, courts will scrutinize the deal carefully and may award punitive damages if the lawyer is guilty of a breach of fiduciary duty or undue influence.²⁴⁸ Usually this means that the deal was grossly unfair to the client. For example, punitive damages were awarded in one case where the lawyer accepted a conveyance of properties worth \$95,950 and gave the client a credit for only \$18,000 against legal fees, plus \$30,000 in promissory notes.²⁴⁹ This misconduct was aggravated by the apparent failure of the lawyer to perform any significant services for the fees.²⁵⁰

Other types of financial misdealing that merit punitive damages include fraudulent billing²⁵¹ and misuse of client funds.²⁵² The attorneys in *Stinson v. Feminist Women's Health Center, Inc.*²⁵³ managed to combine both offenses. The trial court found that the attorneys had agreed to work for a lower billing rate than that which was later charged.²⁵⁴ In addition, the court found that after the fee dispute began, the attorneys held up delivery of a settlement check

244. See *Boynton v. Lopez*, 473 A.2d 375 (D.C. App. 1984) (attorney misrepresentation of settlement to client insufficient to allow award of punitive damages); *Solodky v. Wilson*, 474 So. 2d 1231 (Fla. App. 1985) (apparent misrepresentation of area of expertise to lawyer referral service did not establish the required level of wanton or reckless indifference to rights of others to support award of punitive damages).

245. *Husted v. McCloud*, 450 N.E.2d 491 (Ind. 1983).

246. *Spilker v. Hankin*, 188 F.2d 35 (D.C. Cir. 1951).

247. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT, RULE 1.8(a); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 5-104(A) (1980).

248. See, e.g., *National Bank of Monticello v. Doss*, 141 Ill. App. 3d 1065, 491 N.E.2d 106 (1986) (breach of fiduciary duty found where attorney purchased property from client); *Green v. Evans*, 156 Mich. App. 145, 401 N.W.2d 250 (1985) (breach of fiduciary duty found where attorney purchases farm from client); *Fillion v. Troy*, 656 S.W.2d 912 (Tex. App. 1983) (where property deeded to attorney by client as credit against legal fees, court found undue influence and an "intimate" personal relationship between male attorney and female client).

249. *Fillion v. Troy*, 656 S.W.2d 912, 914 (Tex. App. 1983).

250. *Id.*

251. *Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 469 A.2d 867, cert. denied, 300 Md. 88, 475 A.2d 1200 (1984).

252. *Wiggin v. Gordon*, 115 Misc. 2d 1071, 455 N.Y.S.2d 205 (1982).

253. 416 So. 2d 1183 (Fla. App. 1982).

254. *Id.* at 1184.

to the client and then "obfuscated, manipulated and deceived their clients in a tortious attempt to take all of the settlement money."²⁵⁵ The court found that this misconduct justified the imposition of punitive damages on the attorneys.²⁵⁶

Finally, a few cases have awarded punitive damages for an attorney's conflict of interest. Certainly this seems justified where the attorney has actually betrayed or conspired against the client.²⁵⁷ Punitive damages have also been awarded, however, where the attorney failed to withdraw from a joint representation after an adverse situation had developed.²⁵⁸ The court in that case found that the failure to withdraw amounted to willful indifference to the rights of the client who was adversely affected.²⁵⁹

CONCLUSION

Even at a time when malpractice litigation is expanding, lawyers have enjoyed the benefit of relatively restrictive damage rules that have limited their monetary liability. The trial within a trial method and the need to prove more than negligence in order to establish a right to damages for emotional distress have the effect of limiting clients to recovery of their hard economic losses. Perhaps the courts, mindful of the difficulties facing practicing lawyers, have been unwilling to go beyond these limits for fear of what more expanded liability could do to the legal profession. On the other hand, the courts have been much stricter with attorneys guilty of fraud or conflict of interest, as opposed to ordinary negligence. Thus has developed the present state of the law, under which liability and the availability of damages expands based on the amount of the attorney's misconduct.

Nevertheless, the rules limiting damages for legal malpractice are likely to come under considerable pressure and questioning in the future. The conceptual basis of the trial within a trial method is open to attack and easy to avoid if a court has a mind to do so. Similarly, the limitations on recovery of noneconomic elements of damage may soon come into question as such damages become more readily available in contract breach situations generally. Indeed, it seems that the law of legal malpractice tends to lag behind and follow the developments in other areas of malpractice law or the law in general. While judges have more empathy for the defendant attorney than they are likely to have for the defendant doctor, it is unlikely that the rules applied to lawyers can long stay out of step with the general developments in the law. In other words, as tort-type damages become increasingly available for breach of contract, we can expect to see the malpractice liability of attorneys similarly expand.

255. *Id.*

256. *Id.* at 1185.

257. *Financial General Bankshares, Inc. v. Metzger*, 523 F. Supp. 744 (D.D.C. 1981).

258. *See, e.g., Gillespie v. Klun*, 406 N.W.2d 547 (Minn. App. 1987) (attorney who presented corporation secretly supported dissent shareholders).

259. *Id.* at 559.