ARTICLE

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Everyone Makes Mistakes: Attorney's Fee Recovery in Legal Malpractice Suits

Abstract. This Article argues that the American Rule should be changed for legal malpractice suits because the attorney–client relationship is the quintessential fiduciary relationship and because of the added concern of unequal information available to each party as a result of the large disparity in power. Attorneys must abide by ethical rules and owe fiduciary duties to their clients, which include the duties of competence, diligence, and loyalty. Because it is this very relationship that distinguishes legal malpractice suits from an ordinary lawsuit, awarding attorney's fees to the damaged plaintiff client helps maintain fiduciary relationships and furthers the interests of justice.

This Article first explains the law of legal malpractice and fiduciary duty. Then, the Article examines the American Rule on attorney's fees and the current exceptions, including contractual agreements, the common fund doctrine, the private attorney general doctrine, federal and statutory exceptions, and the bad faith doctrine. Finally, the Article looks at the treatment of legal malpractice cases and awards of attorney's fees in the fifty states and sets forth the argument that legal malpractice cases should be an additional exception to the American Rule. Lawyers should accept responsibility for their mistakes and do what is required to make their clients whole.

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I. INTRODUCTION

Have you heard the joke about the lawyer who . . . ? Of course you have. Lawyer jokes are pervasive because lawyers are perceived badly by many in our society, and many of these jokes are about how lawyers interact with their clients.[1] Although changing the rules about how legal malpractice cases are handled will not necessarily change the perception of lawyers in our society, it is nevertheless time that lawyers be held responsible for their misconduct by making sure their clients are made completely whole when lawyers have been negligent. Your parents and other mentors probably told you that if you make a mistake you need to accept responsibility for it, say you are sorry, and then do your best to fix it.[2] The same concept should apply to lawyers.

Under the American Rule, each side must pay its own attorney's fees, win or lose.[3] For example, if someone negligently runs into your car but refuses to pay for the damages, you have to hire a lawyer and sue them to recover the damages. Although you prevail and recover an amount sufficient to cover the cost of having your car fixed, you are still out money because you have to pay your lawyer about one-third of the recovery. A legal malpractice suit, however, adds insult to injury because plaintiffs then incur more damages from having to retain another attorney to rectify the consequences of the previous attorney's mistake.[4] Unlike breach of contract or personal injury cases, legal malpractice suits are distinguishable from other lawsuits because of the special fiduciary nature of the attorney–client relationship.

1. *See* Albert Nerenberg, *Can We Humanize Lawyers, or Are the Jokes Too Funny*, HUFFINGTON POST CANADA: THE BLOG (Feb. 22, 2013, 10:09 AM), http://www.huffingtonpost.ca/albert-nerenberg/can-lawyer-jokes-be-defie_b_2727358.html (reviewing the reasons for the numerous jokes about lawyers).

2. *See Bruce Lee*, BRAINYQUOTE.COM, http://brainyquote.com/quotes/quotes/b/brucelee383809.html (last visited Jan. 7, 2016) ("Mistakes are always forgivable, if one has the courage to admit them."); *John C. Maxwell*, BRAINYQUOTE.COM, http://www.brainyquote.com/quotes/quotes/j/johncmaxw391398.html (last visited Jan. 7, 2016) ("A man must be big enough to admit his mistakes, smart enough to profit from them, and strong enough to correct them."); *Dale Turner*, BRAINYQUOTE.COM, http://www.brainyquote.com/quotes/quotes/d/daleturner121034.html (last visited Jan. 7, 2016) ("It is the highest form of self-respect to admit our errors and mistakes and make amends for them. To make a mistake is only an error in judgment, but to adhere to it when it is discovered shows infirmity of character.").

3. *See, e.g.*, Trope v. Katz, 902 P.2d 259, 262 (Cal. 1995) (citing Gray v. Don Miller & Assocs., 674 P.2d 253, 257 (Cal. 1984) (explaining the American Rule, which requires both parties to pay their own attorney's fees)).

4. *See, e.g.*, Jordache Enters., Inc. v. Brobeck, Phleger & Harrison, 958 P.2d 1062, 1078 (Cal. 1998) ("Jordache expended attorney fees as a direct result of its attorney's alleged negligence well before the resolution of any collateral judicial action.").

This Article argues that the American Rule should be changed for legal malpractice suits because the attorney–client relationship is the quintessential fiduciary relationship and because of the added concern of unequal information available to each party as a result of the large disparity in power. Attorneys must abide by ethical rules and owe fiduciary duties to their clients, which include the duties of competence, diligence, and loyalty.[5] Because it is this very relationship that distinguishes legal malpractice suits from an ordinary lawsuit, awarding attorney's fees to the damaged plaintiff–client helps maintain fiduciary relationships and furthers the interests of justice.

This Article first explains, in Part II, the law of legal malpractice and fiduciary duty. Part III explains the history behind the American Rule and further examines its support, including the encouragement for litigants to prosecute or defend a lawsuit, the burden on courts and parties to determine what reasonable attorney's fees are, and the goal to preserve independent advocacy. Part III then provides the basic arguments against the American Rule, including the encouragement for litigants to entertain frivolous suits and the consequent prevention of litigants from defending meritorious claims, and, finally, the denial of full recovery to successful plaintiffs.

Part IV discusses the current exceptions to the American Rule, including contractual agreements, the common fund doctrine, the private attorney general doctrine, federal and statutory exceptions, and the bad faith doctrine. In discussing the bad faith doctrine, Part IV details its history, its different categories, its goals and problems, and the applicable ethical rules and fiduciary relationships.

Part V looks at the treatment of legal malpractice cases and awards of attorney's fees in the fifty states. Part VI then sets forth the argument that legal malpractice cases should be an additional exception to the American Rule. Part VII concludes the Article.

II. LEGAL MALPRACTICE AND BREACH OF FIDUCIARY DUTY

A lawyer's actions can constitute attorney malpractice or breach of fiduciary duty in many different ways. Some actions can be criminal, such as stealing client funds;[6] others can be simple mistakes, like missing an

5. Sande Buhai, *Lawyers as Fiduciaries*, 53 ST. LOUIS U. L.J. 553, 554–55 (2009); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2013) (requiring lawyers to "provide competent representation to [their clients]"); *id.* r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

6. *See* Palomo v. State Bar of Cal., 685 P.2d 1185, 1191–92 (Cal. 1984) (finding grounds for

important deadline.[7] Other common issues entail either representing clients with some sort of conflict of interest or some other law-practice management issue.[8]

Legal malpractice cases are different from other causes of action because of the special nature of the attorney–client relationship.[9] An attorney owes fiduciary duties to his clients, including "the duty to exercise in all his relationships with this client–principal the most scrupulous honor, good faith and fidelity to his client's interest."[10] Consequently, when a lawyer is sued for legal malpractice, he is often sued for breach of fiduciary duty as well.[11]

Because legal malpractice and breach of fiduciary are both tort causes of action, they require proof of similar elements.[12] However, a breach of fiduciary duty is not per se legal malpractice because the elements of each cause of action are different in fact—a distinction further explored in the discussion below.[13] Nevertheless, they are often concurrently alleged because a breach of a fiduciary duty can also constitute legal malpractice.[14] For example, in many cases, failure to segregate a client's funds, as required by state ethical rules, constitutes both legal malpractice and

willful misappropriation and comingling of funds constituting gross negligence where an attorney allegedly endorsed a client's check without permission and deposited the check into the firm's payroll account instead of the client's trust).

7. *See* Adams v. Paul, 904 P.2d 1205, 1215 (Cal. 1995) (explaining an attorney may be found liable for legal malpractice based upon failure to file a lawsuit prior to the expiration of the applicable statute of limitations).

8. *See, e.g.*, Stanley v. Richmond, 41 Cal. Rptr. 2d 768, 779 (Ct. App. 1995) (finding an attorney breached her duty of loyalty to the client where the attorney failed to disclose her plans to join the legal practice of opposing counsel).

9. *See* Michael C. Moore, Note, *Legal Malpractice and the Bad Faith Exception to the American Rule: A Suggested Approach for Addressing Intentional Lawyer Misconduct*, 48 WASH. & LEE L. REV. 1141, 1164 (1991) ("The justification for treating legal malpractice cases stemming from ethical violations differently from other types of tortious conduct comes largely from the unique nature of the lawyer–client relationship.").

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

11. *See, e.g.*, *Stanley*, 41 Cal. Rptr. 2d at 769 (considering an appeal from nonsuit judgment in case involving claims of malpractice and breach of fiduciary duty).

12. The elements of legal malpractice include:

> (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.

Jackson v. Johnson, 7 Cal. Rptr. 2d 482, 484–85 (Ct. App. 1995).

13. *See Stanley*, 41 Cal. Rptr. 2d at 776 (distinguishing breach of fiduciary duty from professional negligence).

14. *See, e.g.*, *id.* at 783 (finding evidence supporting action for both legal malpractice and breach of fiduciary duty based on the same alleged misconduct).

breach of a fiduciary duty.[15]

A. *Legal Malpractice*

An attorney is liable for legal malpractice if she is negligent in the performance of her professional duties.[16] This cause of action requires a plaintiff to show: (1) a legal duty of care; (2) breach of that duty; (3) causation; and (4) harm.[17] Whether an attorney has a duty to a client is a question of law; whether the attorney has breached this duty is a question of fact.[18]

An attorney owes a client the duty to use the skill, prudence, and diligence that lawyers of ordinary capacity commonly possess.[19] This requires an attorney to "possess knowledge of those plain and elementary principles of law which are commonly known by well[-]informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques."[20] This duty to act competently is required by Model Rule 1.1[21] and California Rule of Professional Conduct 3-110.[22]

An attorney's duty to act competently requires the attorney to perform reasonable research into relevant legal principles to make an informed decision about various aspects of the representation.[23] If an attorney is a

15. T & R Foods, Inc. v. Rose, 56 Cal. Rptr. 2d 41, 45 (App. Dep't Super. Ct. 1996).

16. *See Jackson*, 7 Cal. Rptr. 2d at 484–85 (defining duty in legal malpractice cases as "the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise").

17. *See id.* (listing the elements of a cause of action for legal malpractice).

18. Ishmael v. Millington, 50 Cal. Rptr. 592, 595 (Ct. App. 1966). Although many of the cases cited are from California, they reflect the majority view of the many states. *See generally* RONALD E. MALLEN WITH ALLISON MARTIN RHODES, LEGAL MALPRACTICE (2015 ed.) (providing an extensive treatise on legal malpractice in the United States).

19. *See* Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961) (detailing the high level of skill and capacity lawyers impliedly agree to employ by accepting employment in the legal profession).

20. Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975).

21. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2013) (explaining the requirement for attorneys to be competent when representing clients).

22. As of 2011, forty-six jurisdictions have adopted a revision of the Model Rules of Professional Conduct; California and Texas have not. *Status of State Review of Professional Conduct Rules*, A.B.A., http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf (last updated Sept. 14, 2011); *see also* CAL. RULES OF PROF'L CONDUCT r. 3-110 (2004) (defining competence as required from an attorney acting in a professional capacity).

23. *See* Stanley v. Richmond, 41 Cal. Rptr. 2d 768, 780 (Ct. App. 1995) ("When rendering advice to a client, 'an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.'" (quoting *Smith*, 530 P.2d at 595)).

specialist, he must exercise the standard of care of other specialists in the same field.[24] Expert testimony is the preferred method of establishing whether the requisite legal standard of care has been met in a case.[25]

Generally, an attorney will only be liable for legal malpractice to clients retained in a contractual attorney–client relationship.[26] An exception to the attorney–client relationship requirement may apply if an attorney breaches a duty owed to a successor in interest of a client who was originally in privity of contract with the attorney.[27] This situation usually arises in the trust or estate context, where an attorney may owe a duty to intended beneficiaries of legal services, even if those beneficiaries are not in privity of contract with the attorney.[28] For example, courts have noted that an attorney may owe a duty of care to foreseeable beneficiaries of a will.[29]

An attorney is not liable for every mistake made, but only for those that are so deficient as to violate the average standard of care in the legal profession.[30] For example, one court held that a remote, minor error made when interpreting an unsettled and confusing area of the law—the rule against perpetuities—was not a sufficient breach of an attorney's standard of care.[31]

A violation of the Model Rules of Professional Conduct or any state version of those rules does not constitute a per se breach of an attorney's duty but may be evidence of legal malpractice.[32] Expert testimony is also

24. *See* Neel v. Magana, 491 P.2d 421, 428 (Cal. 1971) (citing RESTATEMENT (SECOND) OF TORTS § 299A cmt. d (1965) (applying a heightened level of skill to attorneys who specialize within the profession)).

25. Lysick v. Walcom, 65 Cal. Rptr. 406, 419 (Ct. App. 1968).

26. *See* Borissoff v. Taylor & Faust, 93 P.3d 337, 340 (Cal. 2004) (generalizing the concept that attorneys will only be liable for malpractice to parties with whom they have contracted).

27. *See id.* at 340 (extrapolating from the probate code to explain instances when a successor-in-interest may have standing to sue an attorney for breach of fiduciary duty).

28. *See id.* (holding "a successor fiduciary does have standing to sue an attorney retained by a predecessor fiduciary to give tax advice for the benefit of the estate").

29. *See* Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961) (allowing intended beneficiaries of a will to recover where the attorney failed to fulfill his obligations to the testator). *But see* Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996) (barring estate-planning legal malpractice claims brought by third-party beneficiaries).

30. *See* Smith v. Lewis, 530 P.2d 589, 593 (Cal. 1975) (describing the appropriate standard for determining whether an attorney should be held accountable for the quality of legal advice given).

31. *See Lucas*, 364 P.2d at 689–90 (holding the attorney did not breach the standard of care in drafting a will, which may have violated the rule against perpetuities, highlighting the complicated state of the rule).

32. *See* Noble v. Sears, Roebuck & Co., 109 Cal. Rptr. 269, 271 (Ct. App. 1973) (differentiating disciplinary action available for breach of the Rules of Professional Conduct from liability in damages).

used to show whether an attorney's actions conformed to the applicable legal standard.[33] However, expert testimony is not required where an attorney's actions constitute readily apparent, "numerous, blatant[,] and egregious violations of . . . professional standards."[34] The legal malpractice plaintiff must prove a proximate causal connection between an attorney's conduct and the client's actual injury.[35] To do this, the plaintiff can show that but for the alleged negligence, the plaintiff would have obtained a more favorable judgment or settlement or that the alleged negligence was a concurrent independent cause of the harm.[36]

In litigation, criminal, and transactional contexts, the plaintiff is required to prove "that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result."[37] As such, the plaintiff must prove a "case-within-a-case," by showing that, had the attorney not been negligent, the outcome of litigation or settlement would have been more favorable to the plaintiff.[38] Therefore, even in a transactional context, the plaintiff must also show what would have happened but for the negligence.[39] Causation does not need to be proven with absolute certainty; instead, the plaintiff can establish causation by showing enough evidence to support a reasonable conclusion that the attorney's actions were more likely than not the cause in fact of the resulting harm.[40]

The plaintiff must show "that the loss suffered was in fact caused by the

33. *See* Lysick v. Walcom, 65 Cal. Rptr. 406, 419 (Ct. App. 1968) ("Expert evidence in a malpractice suit is conclusive as to the proof of the prevailing standard of skill and learning in the locality . . . and of the propriety of a particular conduct by the practitioner in particular instances because such standard and skill is not a matter of general knowledge and can only be supplied by expert testimony.").

34. Day v. Rosenthal, 217 Cal. Rptr. 89, 102–03 (Ct. App. 1985).

35. *See e.g.*, *Lysick*, 65 Cal. Rptr. at 417 ("The question remains whether defendant's breach of duty was a proximate cause of damage to the estate, that is, whether there was causation in fact upon which loss to the estate could be predicated." (citing Ishmael v. Millington, 50 Cal. Rptr. 592, 595 (Ct. App. 1966))).

36. *See* Viner v. Sweet, 70 P.3d 1046, 1051 (Cal. 2003) (refusing to distinguish the causation element in legal malpractice cases from the well-established standard already used in negligence cases).

37. *Id.* at 1054.

38. *See* Ambriz v. Kelegian, 53 Cal. Rptr. 3d 700, 709 (Ct. App. 2007) (evaluating the underlying premises liability action in a legal malpractice action as the "case within a case").

39. *See Viner*, 70 P.3d at 1052 ("The 'but for' test of causation applies to a claim of legal malpractice in the settlement of litigation, even though the settlement is itself a form of business transaction." (citing Marshak v. Ballesteros, 86 Cal. Rptr. 2d 1, 3–4 (Ct. App. 1999))).

40. *See id.* at 1053 (clarifying the burden of proof necessary to establish "but for" causation to be only such evidence as required to provide a reasonable basis to conclude that a defendant's action was more likely than not the cause of the harm).

alleged attorney malpractice."[41] The loss suffered cannot have been remotely or speculatively caused by the attorney's negligence, and the court will "deny recovery where the unfavorable outcome was likely to occur anyway, the client already knew the problems with the deal, or where the client's own misconduct or misjudgment caused the problems."[42] When the harm may be attributed to multiple independent causes—one of which being attorney negligence—courts will seek to determine whether the attorney's negligence was "a substantial factor in bringing about [the] harm."[43] The causation element will be satisfied if the attorney's conduct, which alone would be sufficient to cause the injury, was a substantial factor in causing the injury.[44]

A plaintiff must show actual injury sustained as a result of an attorney's negligence, which is a question of fact.[45] Legal negligence that causes "only nominal damages, speculative harm, or the threat of future harm" is not actionable.[46] Proving actual injury does not depend on a prior adjudication, judgment, or settlement.[47] Rather, "[t]o establish this harm or damage, the client must prove that careful management of the underlying action would have resulted in a favorable judgment and the collection thereof, or, if the client were defending, that the proper handling of the case would have resulted in a defense verdict."[48] Although a showing of a quantifiable monetary sum is favorable, it is not required because actual injury may also consist of the loss of a right or remedy, such as a loss of the right to sue due to the tolling of the statute of limitations.[49] A client may also suffer actionable injury on the entry of adverse judgment

41. *See id.* at 1052 (quoting John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1154–55 (1988) (referring to the showing of loss suffered having been caused by attorney malpractice as the first hurdle for a client claiming malpractice)).

42. *Id.*

43. *See id.* at 1051 ("[I]f 'two forces are actively operating . . . and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about." (quoting RESTATEMENT (SECOND) OF TORTS § 432(2) (AM. LAW INST. 1965))).

44. *Id.*; *see also* Mitchell v. Gonzales, 819 P.2d 872, 876 (Cal. 1991) (explaining when negligence actions involve independent but concurrent causes and the defendant's conduct is found to be a substantial factor in causing the harm, the defendant is liable for his negligence, notwithstanding the fact "that identical harm would have occurred without it").

45. Adams v. Paul, 904 P.2d 1205, 1212 (Cal. 1995).

46. *Id.* at 1209.

47. Jordache Enters., Inc. v. Brobeck, Phleger & Harrison, 958 P.2d 1062, 1073 (Cal. 1995).

48. Laird v. Blacker, 828 P.2d 691, 696 (Cal. 1992).

49. *See Jordache Enters., Inc.*, 958 P.2d at 1070 (rejecting the assertion that damages must be attributed to a quantifiable sum of money to constitute appreciable actual injury, clarifying that loss of a remedy, or right, or impairment, or diminution may also be actual injury).

or on a dismissal order.[50] Generally, in a legal malpractice action, the measure of damages is limited to the value of the claim lost and those damages directly and proximately caused by the attorney's negligence.[51]

B. *Breach of Fiduciary Duty*

An attorney's duty to a client is not limited to the requirement that he exercise a professional standard of care; rather, an attorney also owes an ethical duty to satisfy "a wider obligation to exercise due care to protect a client's interests in all ethical ways and in all circumstances . . . conclusively established by the Rules of Professional Conduct."[52] Courts will often refer to the state rules of professional conduct in defining the scope of the attorney's fiduciary duty.[53] Accordingly, certain attorney misconduct can constitute a breach of a fiduciary duty and legal malpractice.[54] However, "breach of a fiduciary duty is a species of tort distinct from a cause of action for professional negligence."[55] While the main duty implicated in a legal malpractice action is the duty to act competently, various decisions have stated that as fiduciaries, attorneys owe clients enhanced duties of loyalty and confidence.[56]

Because ethical rules highlight the special nature of the attorney–client relationship, clients have an absolute right to enjoy the rights that are reflected in the ethical rules and are inherent in the attorney–client relationship.[57] The American Bar Association (ABA) created a set of ethical rules that outline a standard of legal ethics and professional responsibility for lawyers in the United States: the ABA Model Rules of

50. *See Laird*, 828 P.2d at 696 (rejecting attorney's argument that reversal of an adverse judgment negates a possible legal malpractice action).

51. *See* Ferguson v. Lieff, Cabraser, Heimann & Berenstein, LLP, 69 P.3d 965, 969, 973 (Cal. 2003) (citing Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (identifying liability of attorneys in negligence as being for direct and proximately caused damages, and reviewing the policy reasons for rejecting a claim for punitive damages awards in a negligence claim)).

52. Day v. Rosenthal, 217 Cal. Rptr. 89, 102 (Ct. App. 1985). "The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct." *Id.*

53. Stanley v. Richmond, 41 Cal. Rptr. 2d 768, 776 (Ct. App. 1995).

54. *See* T & R Foods, Inc. v. Rose, 56 Cal. Rptr. 2d 41, 45 (App. Dep't Super. Ct. 1996) (finding legal malpractice actionable when an attorney breaches the duties of good faith and fidelity owed to a client).

55. *Stanley*, 41 Cal. Rptr. 2d at 776–77. To prevail in an action for breach of fiduciary duty, a plaintiff must prove: (1) a fiduciary duty exists; (2) breach of a fiduciary duty; (3) causation; and (4) damages. *Id.* at 776.

56. *See, e.g.*, *id.* at 778 (reiterating an attorney's long-standing duty of loyalty to clients to include a keeping a client's confidences, even to the attorney's own peril).

57. *See* Rice v. Perl, 320 N.W.2d 407, 410 (Minn. 1982) (stating obligations incumbent on an attorney because of the fiduciary duty owed to a client).

Professional Conduct (Model Rules).[58]

To create a fiduciary relationship, an attorney must knowingly enter into an attorney–client relationship, and the fiduciary duty will not extend to anyone outside of this relationship.[59] Entering into the attorney–client relationship automatically implicates the attorney's duty of loyalty.[60] For example, an attorney does not owe a duty of care to prospective clients that are not retained because the duty of loyalty attaches only to clients in the attorney–client relationship.[61] Therefore, while, in limited situations, an attorney can be liable to persons outside the attorney–client relationship, an attorney cannot otherwise be liable to third parties for a breach of a fiduciary duty.[62] Nevertheless, fiduciary duties can extend to protect former clients, such as in conflict of interest situations.[63]

The scope of an attorney's duty to a present or former client is determined as a matter of law.[64] The basic fiduciary duties involve loyalty and confidentiality.[65] "Although the phrasing . . . is varied and often dependent upon the context of particular circumstances," these duties "exist in every jurisdiction in the United States,"[66] and "include acting

58. *See generally* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2013) (establishing guidelines for attorney ethical standards which individual states have subsequently used and adopted from to establish local ethical guidelines). The Model Rules of Professional Conduct replaced the Model Code of Professional Responsibility in 1983. PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 1 (John S. Dzienkowski ed., 2014–15 ed. 2015) (tracing the history of standards, codes, and rules promulgated by the ABA since 1908).

59. *See* Pierce v. Lyman, 3 Cal. Rptr. 2d 236, 241 (Ct. App. 1991) (explaining an attorney–client relationship may not typically be created by implication).

60. *See* Flatt v. Superior Court, 885 P.2d 950, 960 (Cal. 1994) (Kennard, J., dissenting) (asserting the duty of care attaches when the attorney agrees to represent the client).

61. *See id.* at 959–60 (holding an attorney has no duty to advise a potential client to seek alternate representation if doing so would violate the duty of loyalty owed to a current client). There are, however, some ethical duties that attach to potential clients, namely the duties of confidentiality and competence. *See* MODEL RULES r. 1.18 (providing "[e]ven when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information," except as permitted by the rules); *id.* r. 1.18 cmt. 9 (suggesting a duty of competence is owed to a prospective client who receives "assistance on the merits of a matter").

62. *See* Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 265 Cal. Rptr. 330, 335 (Ct. App. 1990) (providing an attorney's fiduciary duties may extend "to conduct not strictly pertaining to representation of a client, and to conduct with a nonclient which affects the relationship with a client").

63. *See, e.g.*, *id.* at 335–36 ("[A] breach can arise when an attorney gains an unfair advantage over a former client by using confidential information acquired from the relationship.").

64. Stanley v. Richmond, 41 Cal. Rptr. 2d 768, 776 (Ct. App. 1995). Further, whether a duty exists is also a question of law. David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 341 (Ct. App. 1988).

65. Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 240 (1994).

66. *Id.* at 240–41 (quoting RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE

with utmost fairness to clients, making full disclosure, avoiding conflicts of interest, and preserving confidences of the client."[67] The duties of loyalty and confidentiality are higher with the attorney–client relationship than other relationships from which causes of action begin.[68] That is, an attorney involved in a legal malpractice case because of an ethical rule violation is different from "a person who breaches a contract or runs someone down with an automobile" for the reason that society expects a higher standard of care from attorneys than from laypeople.[69]

An attorney's duty of loyalty is most often implicated in matters regarding conflicts of interest and prohibits attorneys from taking a position inconsistent with the interests of present or former clients.[70] In the civil context, an attorney's duty of loyalty is most often implicated in conflicts of interest pertaining to the representation of either former or present clients.[71] In criminal cases, the duty is implicated in the representation of co-defendants.[72] Model Rule 1.7 delineates the standard pertaining to representation involving conflicts of interest:

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[73]

A preexisting attorney–client relationship requires an attorney to obtain informed consent of the former client before undertaking future adverse representation, and an attorney will be liable to the former client for breach of fiduciary duty if he does not do so.[74] However, proper written

§ 11.1, at 631 (3d ed. 1989)).

67. *Id.* at 241.

68. *See* Moore, *supra* note 9, at 1166 (analyzing the different duties that arise from an attorney–client relationship versus from a breach of contract).

69. *Id.*

70. *See* Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton, 117 Cal. Rptr. 2d 685, 699 (Ct. App. 2002) (finding a conflict of interest exists if the attorney has an interest adverse to that necessary to represent a current or former client).

71. *See id.* at 698 (affirming trial court judgment in favor of client where jury found the attorney breached his duty of loyalty by violating state ethical rule prohibiting representation of clients with conflicting interests).

72. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2013) (explaining when a concurrent conflict of interest arises as between co-defendants in a criminal case).

73. *Id.*

74. *See* David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 343 (Ct. App. 1988) (quoting the trial court, which held that the defendants breached fiduciary duty to plaintiff when defendants "knowingly acquired a pecuniary interest adverse to [the] plaintiff without first obtaining plaintiff's

consent from a client informed of a potential conflict will insulate an attorney from violating the duty of loyalty.[75] There are some conflicts that cannot be waived because they are so harmful that no reasonable lawyer would ask their client to sign such a waiver.[76]

A fiduciary relationship involves confidentiality, which arises when a client places trust and confidence in the integrity and fidelity of the attorney.[77] California Business and Professions Code Section 6068(e)(1) defines an attorney's duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets[] of his or her client."[78] The duty of confidentiality is premised on the trust and confidences in an attorney that a client has because of the protections of the attorney–client privilege.[79] The duty is a fiduciary one "because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party."[80]

The fiduciary duty of confidentiality does not necessarily end when the attorney–client relationship terminates because an attorney is prohibited from using confidential information obtained in the course of the relationship in the future.[81] A breach of a fiduciary duty often arises when

informed written consent").

75. *See* Lysick v. Walcom, 65 Cal. Rptr. 406, 413–14 (Ct. App. 1968) ("[A]n attorney may usually, under minimum standards of professional ethics, represent dual interests as long as full consent and full disclosure occur."); *see also* MODEL RULES r. 1.7(b) (requiring the client's written informed consent).

76. MODEL RULES r. 1.7 cmt. 14; *see also id.* r. 1.7 cmt. 15 ("[R]epresentation is prohibited if[,] in the circumstances[,] the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation."); *id.* r. 1.7 cmt. 16 (describing some conflicts are rendered non-consentable when statute or decisional law prohibits such representation); *id.* r. 1.7 cmt. 17 ("[C]onflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding.").

77. *See* Wolf v. Superior Court, 130 Cal. Rptr. 2d 860, 863 (Ct. App. 2003) (explaining a fiduciary relationship is essentially a confidential relation in which one person places trust or confidence in another person's integrity and fidelity). Model Rule 1.6 states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted . . . ." MODEL RULES r. 1.6. California Rule of Professional Conduct 3-100 states: "A member shall not reveal information protected from disclosure . . . without the informed consent of the client . . . ." CAL. RULES OF PROF'L CONDUCT r. 3-100 (2004).

78. CAL. BUS. & PROF. CODE § 6068(e)(1) (West 2015).

79. *See* Barbara A. v. John G., 193 Cal. Rptr. 422, 432 (Ct. App. 1983) (emphasizing the relationship between an attorney and client is one of the highest character).

80. *Id.*

81. *See* Wutchumna Water Co. v. Bailey, 15 P.2d 505, 508 (Cal. 1932) ("The relation of attorney and client is one of highest confidence, and, as to professional information gained while this relation

an attorney undertakes representation of a client with interests adverse to those of current or former clients.[82] In one case, while taking this position was insufficient to constitute "traditional professional negligence," it still constituted a breach of the attorney's fiduciary duty to his clients, as outlined in the Rules of Professional Conduct.[83] An attorney does not need to actually disclose a prior client's confidences; rather, it is the conduct of putting himself in a position of being able to do so that breaches the fiduciary duty.[84]

Sometimes discussed as a duty to disclose, an attorney has a duty to provide full written disclosures to clients because of the nature of the trust and confidence clients have in their attorneys.[85] For example, not only do attorneys have to represent their clients diligently and competently but also even when they do not make a competent litigation move, they are still required to tell the client of this mistake because attorneys have a duty to disclose all material facts pertaining to the case.[86]

Whether an attorney has breached a fiduciary duty is a question of fact.[87] Unlike the legal malpractice cause of action, an action for breach of fiduciary duty may be, and often is, based on violations of the Rules of Professional Conduct.[88] When both legal malpractice and breach of fiduciary duty causes of action are alleged, many courts analyze the duty and breach elements separately but use one causation analysis for both.[89]

exists, the attorney's lips are forever sealed, and this is true, notwithstanding his subsequent discharge by his client and notwithstanding lack of any justification for such action.").

82. In *Wutchumna Water Co v. Bailey*, the California Supreme Court went on to say:

> It is the general and well-settled rule that an attorney who has acted as such for one side cannot render services professionally in the same case to the other side, nor, in any event, whether it be in the same case or not, can he assume a position hostile to his client, and one inimical to the very interests he was engaged to protect.

Id. (quoting *In re* Boone, 83 F. 944, 952 (N.D. Cal. 1897).

83. *Id.*

84. *See* Benasra v. Mitchell Silberberg & Knupp LLP, 20 Cal. Rptr. 3d 621, 628 (Ct. App. 2004) (discussing that a final analysis of a case hinges on attorney's failure to exhibit loyalty to client when approached by an adverse party); *Watchumna Water Co.*, 15 P.2d at 508 (explaining the test of inconsistency is whether an attorney accepting a new client will require him or her to do anything injurious to a former client in any matter in which the attorney formerly represented him).

85. *See* MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM. BAR ASS'N 2013) (explaining when a written statement is necessary when dealing with a conflict of interest).

86. *See id.* r. 1.4 (discussing lawyer–client communications).

87. David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr 339, 342 (Ct. App. 1988).

88. *See* Stanley v. Richmond, 41 Cal. Rptr 2d 768, 777 (Ct. App. 1995) (explaining a cause of action for breach of fiduciary is a species of its own because the Rules of Professional Conduct help define the fiduciary duty an attorney owes to a client).

89. *See id.* at 783 (analyzing the two elements for both breach of fiduciary duty and legal malpractice).

The rules governing causation in legal malpractice actions also govern actions for the breach of a fiduciary duty.[90] However, the "case-within-a-case" requirement of showing "but for" causation in legal malpractice is not necessarily required when an attorney breaches a fiduciary duty.[91] The fiduciary duty cause of action may succeed regardless of the outcome of the underlying case or transaction in which the attorney was hired to represent the plaintiff.[92]

A client is entitled to recover damages for all harms caused by the breach of a fiduciary duty.[93] More remedies are available for a client alleging breach of a fiduciary duty than one alleging legal malpractice.[94] For example, a client can obtain disqualification of an attorney in a conflict of interest situation, or recover financial, emotional distress, punitive, or physical damages.[95] Punitive damages are not recoverable for legal negligence but may be recoverable if a breach of a fiduciary duty is accompanied by malice, fraud, or oppression constituting an extreme level of indifference to a client's rights.[96]

Several cases have highlighted the special nature of the attorney–client relationship and how attorneys are held to the highest standard of ethical behavior. In *Sanguinetti v. Rossen*,[97] the court stated an attorney "should be a paragon of candor, fairness, honor, and fidelity in all his dealings with those who place their trust in his ability and integrity, and he will at all times, and under all circumstances, be held to the full measure of what he ought to be."[98] In addition, the court stated equity would not exist if "a trusted legal adviser could profit by withholding the benefit of his special

90. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. i (AM. LAW INST. 1998) (outlining the rules for both breach of fiduciary duty and legal malpractice).

91. *See* Gutierrez v. Girardi, 125 Cal. Rptr. 3d 210, 214–17 (Ct. App. 2011) (discussing how "but for" causation is merely an assumption).

92. *See id.* at 218 (explaining how a breach of fiduciary duty claim is not tied to the outcome of the underlying cause of action).

93. *See* REBECCA A. WISEMAN & SARA CHURCH REESE, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL CLAIMS & DEFENSES § 3:565, Westlaw (database updated Aug. 2015) (discussing recovery of damages from breach of fiduciary duty (citing RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (AM. LAW INST. 1979))).

94. *See* Anderson & Steele, Jr., *supra* note 65, at 236 (suggesting "the emerging action for breach of fiduciary duty . . . may offer the greatest potential for recovery" when compared with remedies available in legal malpractice cases).

95. *Id.* at 255.

96. *See* Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton, 117 Cal. Rptr. 2d 685, 710–11 (Ct. App. 2002) (describing when punitive damages can be recovered for a breach of fiduciary duty).

97. Sanguinetti v. Rossen, 107 P. 560 (Cal. Ct. App. 1906).

98. *Id.* at 563.

knowledge and skill, or by giving false counsel during the continuance of a relation in the highest sense confidential and fiduciary."[99] There, the attorney "failed to protect his clients in every possible way."[100] The court stated, "It was a gross violation of that duty for him to mislead or deceive them."[101] The court went on to explain, "Had he retained the legal title obtained in the manner described in the answer, the most adventurous sophist would hardly assert that he could be protected by his breach of duty, and allowed to retain that which was obtained through his guile."[102]

In *In re Lee's Estate*,[103] the court stated an attorney owes his clients duty to act with utmost loyalty to their real interests and held an attorney who breaches his duty to his clients forfeits his right to compensation.[104] The court explained:

> It is equally well settled that an attorney at law who is unfaithful in the performance of his duties forfeits his right to compensation. An attorney is an officer of the court, sworn to aid in the administration of justice and to act with strict fidelity to both his clients and the courts. Unquestioned fidelity to their real interests is the duty of every attorney to his clients. When a breach of faith occurs, the attorney's right to compensation is gone.[105]

In *Demov, Morris, Levin & Shein v. Glantz*,[106] the court stated the attorney–client relationship was "founded in principle upon the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney, [and] remains one of the most sensitive and confidential relationships in our society."[107] In addition,

> [the attorney–client relationship is] built upon a high degree of trust and confidence [and] is obviously more susceptible to destructive forces than are other less sensitive ones. It follows, then, that an attorney cannot represent a client effectively and to the full extent of his or her professional capability unless the client maintains the utmost trust and confidence in the attorney.[108]

99. *Id.*

100. *See id.* (emphasizing an attorney who lied and misled clients grossly violated his duty to protect clients in every possible way).

101. *Id.*

102. *Id.*

103. *In re* Lee's Estate, 9 N.W.2d 245 (Minn. 1943).

104. *Id.* at 251.

105. *Id.*

106. Demov, Morris, Levin & Shein v. Glantz, 428 N.E.2d 387 (N.Y. 1981).

107. *Id.* at 389.

108. *Id.*

The court in *Campagnola v. Mulholland, Minion & Roe*[109] attributed the need to hold attorneys "to the highest standard of ethical behavior" to the "role attorneys play in the vindication of individual rights in our society."[110]

III. HISTORY AND GENERAL DISCUSSION OF THE AMERICAN RULE

The American Rule is the general policy that all litigants must bear their own attorney's fees.[111] Having been followed for more than two hundred years, the Rule's historical roots reach as far back as the beginning of the United States federal system.[112] In 1796, in *Arcambel v. Wiseman*,[113] the Supreme Court held each party had to pay its own attorney's fees and stated it did not believe attorney's fees should be awarded because "the general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute."[114]

In 1853, Congress enacted legislation limiting the award of attorney's fees in trials "before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars . . . . [i]n cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued."[115]

In colonial America, the early courts "routinely awarded attorney's fees to the successful litigant."[116] However, after the American Revolution, courts abandoned this English practice because the revolution created resentment toward anything English, and colonists felt distrust and open hostility toward the legal profession.[117] In addition, attorneys did not play a large role in the administration of justice because many judges did not have a formal legal education and litigants represented themselves.[118] Thus, the assistance of legal counsel was seen as an unnecessary luxury.[119]

109. Campagnola v. Mulholland, Minion & Roe, 555 N.E.2d 611 (N.Y. 1990).

110. *Id.* at 614.

111. Daniel H. Fehderau, Comment, *Rule 11 and the Court's Inherent Power to Shift Attorney's Fees: An Analysis of Their Competing Objectives and Applications*, 33 SANTA CLARA L. REV. 701, 702–03 (1993).

112. *See id.* (arguing to reduce sanctions available under the supervisory powers of the court).

113. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

114. *Id.* at 306.

115. Act of Feb. 26, 1853, ch. 80, 10 Stat. 161–62 (1855).

116. Lawrence D. Rose, Note, *Attorney's Fee Recovery in Bad Faith Cases: New Directions for Change*, 57 S. CAL. L. REV. 503, 505 (1984).

117. *Id.*

118. *Id.* at 506.

119. *Id.*

Lastly, there was an important emphasis on individualism.[120] Requiring an unsuccessful litigant to pay the prevailing litigant's attorney's fees was like "hitting a man when he is down" because it penalizes the individual for asserting his rights.[121] Attorney-fee recovery also inhibited equal access to the courts because access could only be assured if litigants were required to pay their own costs and fees.[122]

The most common argument supporting the American Rule is that people, particularly the poor, might be unjustly discouraged from initiating a lawsuit if they have to pay attorney's fees should they lose.[123] Another argument for the American Rule is that because the outcome of a lawsuit is uncertain, litigants should not be penalized for exercising their rights to prosecute or defend a lawsuit.[124] A third argument indicates that there is an issue with trial courts determining what amount is reasonable when awarding attorney's fees because attorney's fees are highly speculative and vary depending on the attorney, client, and legal matter.[125] Requiring courts to determine what is reasonable also prolongs litigation and increases each party's expenses.[126]

Another argument in favor of the American Rule is that when litigants know the losing party pays the prevailing party's fees, there is a possibility that the parties will not make reasonable attempts to settle their case, resulting in inflated fee estimates after litigation.[127] The final argument is that the American Rule helps preserve independent advocacy because if attorneys who know that the judge controls their compensation, they might be less zealous in making certain decisions or arguing their client's case for fear of upsetting the judge.[128]

Nevertheless, there are several arguments against the American Rule. The American Rule encourages frivolous lawsuits because, by not adding the risk of paying the opposing side's attorney's fees, litigants are not otherwise deterred from continuing potentially frivolous lawsuits.[129] The

120. *Id.*

121. *Id.* (quoting Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 877 (1929)).

122. *Id.*

123. Moore, *supra* note 9, at 1151; *see also* Rose, *supra* note 116, at 513 ("[P]oor litigants . . . will be more prone to settle their claims prematurely.").

124. Moore, *supra* note 9, at 1151.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1591 (1993) (comparing arguments for and against the American Rule).

lack of incentive also encourages abusive litigation practices.[130] The plaintiff only pays his own costs and fees if he loses the case.[131] The risk of paying the prevailing litigant's attorney's fees would motivate litigating parties to stop these abusive practices and settle their cases, effectively relieving court dockets of unnecessary litigation.[132]

Similarly, the American Rule prevents litigants from defending meritorious claims because while "individuals and organizations with substantial resources . . . can afford to pay legal costs and withstand the effects of delay," a party lacking such resources cannot.[133]

Individuals with little exposure to the legal system are at a disadvantage when litigating against organizations like insurance companies and similar corporations "that have frequent contacts and ongoing relationships with the legal system" because of the disparity in knowledge of the legal system.[134] That is, organizations have an advantage when coming into litigation because of their experience, bargaining power, investment in resources that produce favorable rules, and influence over legal rules gained through lobbying.[135]

Moreover, the American Rule denies full recovery to plaintiffs.[136] For example, in tort and contract cases, the plaintiff only recovers the amount necessary to compensate for her loss.[137] Compensatory damages are meant to put the plaintiff in the position she would have been "had the defendant not harmed the plaintiff or breached the contract."[138] Generally, in tort and contract actions, plaintiffs may only recover compensatory damages.[139] The plaintiff must pay her own attorney's fees

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1596.

134. *See id.* (citing Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 99–100 (1974) (discussing how Professor Galanter distinguished legally unsophisticated litigants from their more experienced counter parts, categorizing them as "one shot players" and "repeat players," respectively)).

135. *See id.* (describing the factors that contribute to the imbalance between parties with ongoing exposure to the legal system and those parties that have little to no experience navigating the legal system).

136. *See* Moore, *supra* note 9, at 1149 (noting the criticisms of the American Rule regarding attorney's fees).

137. *See id.* (emphasizing the limitations in available recoveries under the American Rule).

138. *Id.* at 1150; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (AM. LAW INST. 1981) (outlining available judicial remedies in contract actions); RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM. LAW INST. 1979) (describing how to determine the amount of damages in tort actions).

139. Moore, *supra* note 9, at 1150.

and may instruct the attorney to take the fee from the net proceeds recovered as compensatory damages.[140] At times, punitive damages or pain and suffering damages might indirectly cover the attorney's fees in some tort cases.[141] However, courts have refused to award the fees as damages because of the American Rule.[142] As a result, plaintiffs recovering only compensatory damages are not made whole because they must pay their attorneys out of the award.[143]

IV. EXCEPTIONS TO THE AMERICAN RULE

Despite the persistence of the American Rule, American courts have awarded attorney's fees in a significant number of cases and have recognized several exceptions to the rule.[144] First, courts have allowed the shifting of attorney's fees when litigation arises as a result of a contractual dispute.[145] This is limited, however, to when contractual clauses provide for the payment of attorney's fees.[146] The clauses are only disfavored and unenforceable when they are contrary to public policy.[147] Also, this discussion focuses on unilateral fee-shifting clauses, such as those found in residential lease agreements, mortgage agreements and other standardized form contracts.[148] The existence of unilateral fee-shifting contracts raises many of the same issues as other attempts to provide a fair way to afford smaller parties the opportunity to litigate to uphold their rights without facing extreme hardship if they do not

140. *Id.*

141. *See id.* (discussing available plaintiff recovery options under the American Rule). In medical malpractice cases, for example, plaintiffs can recover pain and suffering damages and emotional distress damages, which can help to cover the cost of the attorney's fees. *See* Bruce I. McDaniel, *Recovery for Mental or Emotional Distress Resulting from Injury to, or Death of, Member of Plaintiff's Family Arising from Physician's or Hospital's Wrongful Conduct*, 77 A.L.R.3d 447 (1977) (outlining the available recovery a plaintiff can be awarded for mental or emotional distress in a medical malpractice suit).

142. *See* Moore, *supra* note 9, at 1150 ("Although courts and commentators have criticized the American Rule . . . courts have justified the rule based on countervailing policy considerations.").

143. *Id.*

144. *See id.* at 1143–44 (explaining exceptions to the American Rule some jurisdictions make).

145. *See* Vargo, *supra* note 129, at 1578 (discussing the exceptions to the American Rule regarding attorney's fees in contract cases).

146. Contractual agreements that incorporate such fee-shifting provisions include promissory notes and insurance contracts. *Id.*

147. *See id.* at 1579 (discussing when courts provide exceptions to the American Rule regarding attorney's fees in contract claims).

148. *See* Jeffrey C. Bright, *Unilateral Attorney's Fees Clauses: A Proposal to Shift to the Golden Rule*, 61 DRAKE L. REV. 85, 89 (2012) (explaining the type of adhesion contracts that often include unilateral clauses for attorney's fees).

prevail.[149] Although unilateral fee-shifting clauses are manifestly unfair, particularly when you have the traditional imbalances of bargaining power and information that accompany these types of contracts, only seven states provide that these are unlawful and require fees to be reciprocal.[150] Six states have placed some limitations on the enforceability of unilateral fee-shifting agreements.[151] Most states, however, do not regulate or restrict the use of unilateral attorney's fees clauses.[152]

A. *Contractual Agreements*

Courts have generally been willing to uphold fee-shifting provisions in contractual agreements—and indeed, many attorneys routinely include fee-shifting clauses in their agreements. The State Bar of California has a model fee-shifting provision:

> The prevailing party in any action or proceeding arising out of or to enforce any provision of this Agreement, with the exception of a fee arbitration or mediation under Business and Professions Code Sections 6200–6206, will be awarded reasonable attorneys' fees and costs incurred in that action or proceeding, or in the enforcement of any judgment or award rendered.[153]

This provision only applies in cases focusing on breach of contract, not negligence actions, and only helps if the drafter incorporates such a clause.[154]

149. *See id.* at 90 (describing the unfairness of unilateral attorney's fees clauses due to unequal bargaining power, oppressive effect against a wronged party, and public policy concerns).

150. *Id.* at 89 n.12 (citing CAL. CIV. CODE § 1717 (West 2009 & Supp. 2012); FLA. STAT. ANN. § 57.105(7) (West 2006 & Supp. 2012); HAW. REV. STAT. § 607-14 (1993 & Supp. 2007); MONT. CODE ANN. § 28-3-704 (2011); OR. REV. STAT. ANN. § 20.096 (West 2003 & Supp. 2012); UTAH CODE ANN. § 78B-5-826 (LexisNexis 2008 & Supp. 2011); WASH. REV. CODE ANN. § 4.84.330 (West 2006 & Supp. 2012) (identifying statutes in California, Florida, Hawaii, Montana, Oregon, Utah, and Washington)).

151. *Id.* at 114 n.142 (citing CONN. GEN. STAT. ANN. § 42-150bb (West 2012); DEL. CODE ANN. tit. 6, §§ 4344, 7613 (2005); MASS. GEN. LAWS. ANN. ch. 186, § 20 (West 2003 & Supp. 2012); N.H. REV. STAT. ANN. § 361-C:2 (LexisNexis 2008); N.M. STAT. ANN. § 47-8-48 (LexisNexis 2011); N.Y. REAL PROP. LAW § 234 (McKinney 2006 & Supp. 2012) (discussing Connecticut, Delaware, Massachusetts, New Hampshire, New Mexico, and New York as providing limited reciprocal attorney's fees statutes on consumer, installment, and residential lease contracts)).

152. *See id.* at 114–15 (explaining thirty-one states have no restrictions on unilateral attorney's fee clauses).

153. *Optional Clauses and Disclosure Forms*, STATE BAR OF CAL. (July 24, 2015), http://www.calbar.ca.gov/Portals/0/documents/mfa/2015/2015_OptionalClausesandDisclosureForms2-0701115_r.pdf.

154. *Id.*

B. *Common Fund Doctrine*

Another exception to the American Rule, the common fund doctrine, is found where courts "award attorney's fees to litigants whose efforts create or protect a 'common fund' from which the members of a class may seek recovery."[155] The fees "are recoverable from the proceeds of the fund itself rather than an opposing party."[156] The purpose of this exception is "to prevent the unjust enrichment of those who have benefited from the litigant's efforts."[157] The common fund doctrine has been applied to several situations, including antitrust litigation and class actions.[158] For the court to properly shift the attorney's fees under the common fund doctrine: (1) a fund must already exist prior to litigation; (2) the court must be able to exert control over the fund and; (3) the beneficiaries of the fund must be identifiable.[159]

C. *Private Attorney General Doctrine*

Another common exception to the American Rule is the "private attorney general doctrine," which allows a prevailing litigant to recover attorney's fees incurred during litigation of suits that promote important public policy.[160] In California, the legislature incorporated the exception in the California Code of Civil Procedure (CCP).[161] Under CCP Section 1021.5, attorney's fees may be awarded "to a successful party . . . in any action which has resulted in the enforcement of an important right affecting the public interest," if three requirements are satisfied.[162]

Under the private attorney general doctrine, a significant benefit must have "been conferred on the general public or a large class of persons" and "the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity" make the award appropriate, and "in the interest of justice," the attorney's fees should not be paid out of the recovery.[163] In line with this policy, there

155. Rose, *supra* note 116, at 509.

156. *Id.*

157. *Id.* at 510.

158. *See* Vargo, *supra* note 129, at 1581 (explaining how federal and state courts use the common fund doctrine as an exception to the American Rule on attorney's fees).

159. *Id.*

160. Rose, *supra* note 116, at 510.

161. *See* CAL. CIV. PROC. CODE § 1021.5 (West 2015) (allowing attorney's fees to be awarded in suits concerning important public benefit).

162. *Id.*

163. *Id.*; *see also* Vargo, *supra* note 129, at 1588 (explaining fee-shifting legislation, such as section 1021.5, is intended to encourage attorneys to take on "public interest" litigation).

are hundreds of federal and state statutes that provide for shifting attorney's fees.[164] There are different purposes for each statute, including compensating the plaintiff, punishing or deterring the defendant attorney for misconduct, preventing abuse of the judicial system, or promoting public interest litigation.[165] The most notable are public interest statutes, including the Civil Rights Attorney's Fees Awards Act of 1976[166] and the Equal Access to Justice Act.[167]

D. *Civil Rights Statutes*

Federal courts and agencies award attorney's fees in accordance with differing federal fee-shifting statutes enacted to encourage private litigation in furtherance of public policy.[168] Attorney's fees awards are "often designed to help equalize contests between private individual plaintiffs and corporate or governmental defendants."[169] Thus, such award provisions are found most often in statutes concerning civil rights, consumer protection, and environmental protection.[170] The following sets forth some of the differing ways federal courts provide for attorney's fees awards.

164. *See* Vargo, *supra* note 129, at 1588 ("There are over 200 federal statutes and almost 2,000 state statutes that provide for shifting of attorney's fees.").

165. *Id.*

166. The Civil Rights Attorney's Fee Awards Act of 1976 allows the payment of reasonable attorney's fees to a prevailing party in certain civil rights cases and provides

> the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b) (2012).

167. The Equal Access to Justice Act authorizes the payment of attorney's fees to a prevailing party in an action against the United States, unless the court finds that the government's position in the litigation was substantially justified, stating in pertinent part,

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (2012).

168. *See* HENRY COHEN, CONG. RESEARCH SERV., 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 64–114 (2008) [hereinafter COHEN] (discussing different federal statutes that authorize an award of attorney's fees).

169. *Id.*

170. *Id.* at *Summary*.

E. *Unilateral Fee-Shifting*

Under the unilateral fee-shifting method, the relevant statute provides that only one party can be awarded its attorney's fees.[171] For example, the Fair Labor Standards Act fee provision is unilateral in that it provides a fee remedy only to prevailing plaintiffs, with the exclusion of fee awards to prevailing defendants.[172] There, the Fair Labor Standards Act prohibits employers, employment agencies, and labor organizations from discriminating in the amount of wages against employees on the basis of sex.[173] The attorney-fee provision states: "[The court] shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."[174]

Similarly, the Age Discrimination in Employment Act of 1967, which prohibits employers from discriminating on the basis of age against individuals who are at least forty years old,[175] authorizes the court to allow a fee award to be paid to the prevailing plaintiff by the defendant, in addition to the costs of the action.[176] Moreover, the Age Discrimination Act of 1975, which makes it unlawful to discriminate in programs or activities receiving federally financed assistance,[177] authorizes the courts to award both the costs of suit and reasonable attorney's fees to the prevailing plaintiff.[178]

Additionally, the Equal Access to Justice Act (EAJA) awards attorney's fees as against the United States in two situations. In the first situation, the United States is liable for a prevailing party's attorney's fees "in any civil action brought by or against the United States."[179] The United States is rendered liable for fees "to the same extent that any other party would be under the common law and statutory exceptions to the American

171. *See e.g.*, 29 U.S.C. § 216(b) (2012) (indicating that a losing party is not entitled to attorneys' fees).

172. *See id.* ("In addition to any judgment awarded to the plaintiff or plaintiffs, [the court shall] allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.").

173. *Id.* § 206(d).

174. *Id.* § 216(b).

175. *Id.* §§ 623, 631(a).

176. *See id.* § 626(b) (maintaining that an award for attorney's fees may be awarded upon a violation of the Age Discrimination in Employment Act).

177. *See* 42 U.S.C. § 6101 (2012) ("It is the purpose of this chapter to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance.").

178. *See id.* § 6104 (authorizing reasonable attorney's fees to be paid to a prevailing plaintiff by the defendant in addition to any costs of the action).

179. *See* 28 U.S.C. § 2412(b) (2012) (establishing a court may award attorney's fees and reasonable costs incurred in any civil action to the prevailing party "brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action").

[R]ule, including the statutory exceptions that do not specifically authorize fee awards against the United States."[180] In the second situation, the United States is liable for attorney's fees of prevailing parties for specified agency adjudications and all civil actions brought by or against the United States.[181] This is limited, however, to the finding that the United States was not substantially justified in its position or that special circumstances would not have otherwise rendered an award unjust.[182] In addition, there must be a fee cap of $125 per hour, unless the court or agency determines special circumstances justify a higher fee.[183]

Title III of the Civil Rights Act of 1964 allows the Attorney General to bring civil actions on behalf of any person who is unable to initiate legal proceedings on his own and who claims he was deprived of the equal protection of the laws on account of his race, color, religion, or national origin.[184] The fee-shifting provision provides that the United States is liable for costs, including a reasonable attorney's fee to a prevailing plaintiff.[185]

F. *Reciprocal Fee-Shifting*

Nevertheless, a number of federal and state statutes provide for reciprocal fee-shifting, where an equal standard is employed for both prevailing plaintiffs and prevailing defendants. For example, the Equal Credit Opportunity Act prohibits any person, business, or governmental agency that extends credit from discriminating against any credit applicant,

180. COHEN, *supra* note 168, at 6. Unlike the remaining provisions of the EAJA, this provision does not limit a fee award by the number of employees or assets of parties eligible for recovery. 28 U.S.C. § 2412. In addition, there are no maximum hourly rates for fee awards. *Id.*

181. *See* 28 U.S.C. § 2412(d)(1)(A) (excluding tort and tax cases, "a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action, including proceedings for judicial review of agency action, brought by or against the United States").

182. "Substantially justified" has been interpreted by the Supreme Court as "reasonableness in law and fact." H.R. REP. NO. 96-1434, at 22 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 5003, 5011.

183. The fee-shifting provision is further limited—fees are not to be awarded to an individual whose net worth is in excess of $2 million or to businesses or organizations (including local governments) with a net worth exceeding $7 million or employing more than 500 employees with two exceptions. 5 U.S.C. § 504(b)(1)(B) (2012). The two exceptions include tax-exempt organizations and agricultural cooperatives; these entities may recover fees regardless of their net worth but apparently may not recover fees if they have more than 500 employees. 28 U.S.C. § 2412(d)(2)(B); *see also* Unification Church v. INS, 762 F.2d 1077, 1086 (D.C. Cir. 1985) (reading the statute to make the "500-employee limit" applicable to tax exempt organizations).

184. *See* 42 U.S.C. § 2000b(a) (2012) (authorizing the Attorney General to institute a civil action for or in the name of the United States).

185. *See id.* § 2000b-1 ("In any action or proceeding under this subchapter the United States shall be liable for costs, including a reasonable attorney's fee, the same as a private person.").

in part, on the basis of race, color, religion, national origin, sex, marital status, or age.[186] Costs of the action in conjunction with reasonable attorney's fees, as determined by the court, are added to any damages award to either prevailing party.[187]

Similarly, the Supreme Court interpreted the phrase "prevailing party" in the Copyright Act,[188] as treating a prevailing plaintiff the same as a prevailing defendant in determining the appropriateness of a fee award.[189] Under the Copyright Act, it is unlawful to copy a work of authorship without authorization.[190] The fee-shifting provision reads in relevant part: "[T]he court may . . . award a reasonable attorney's fee to the prevailing party as part of the costs."[191]

The Internal Revenue Code (IRC) also contains reciprocal fee-shifting provisions. For example, much like the EAJA, Section 7430 of the Internal Revenue Code authorizes the Internal Revenue Service and federal courts to award attorney's fees of up to $125 an hour in tax cases in which the United States fails to establish that its position in the proceedings was substantially justified.[192] However, it is different from the EAJA because Section 7430 does preclude the government from paying a fee award where special circumstances would make an award unjust.[193] Another provision in the IRC allows the Tax Court to impose upon taxpayers, whose attorneys "unreasonably and vexatiously" multiply the proceedings in any case, to personally pay the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.[194] If

186. 15 U.S.C. § 1691(a) (2012).

187. *See id.* § 1691e(d) ("In the case of any successful action . . . of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court . . . .").

188. 17 U.S.C. § 505 (2012).

189. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994) ("Prevailing plaintiffs and prevailing defendants are to be treated alike . . . .").

190. *See* 17 U.S.C. § 501 (2012) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author, as the case may be.").

191. *Id.* § 505.

192. *See* I.R.C. § 7430(c)(1)(B)(iii) (2012) (determining "such fees shall not be in excess of $125 per hour unless the court determines that a special factor . . . justifies a higher rate").

193. *See id.* § 7430(b) (placing limits in which litigation costs will be awarded, including that a prevailing party exhaust the administrative remedies available and costs must be allocable to only the United States, and the prevailing party must not unreasonably protract from the proceeding).

194. *Id.* § 6673(a)(2)(A) ("Whenever it appears to the Tax Court that any attorney or other person admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, the Tax Court may require that such attorney or other person pay personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct . . . .").

such attorney represents the IRS, then the United States must pay the amount awarded.[195]

In addition to the federally enacted fee-shifting statutes, seven states have enacted reciprocal attorney's fees statutes.[196] These statutes are triggered when parties form contracts containing unilateral attorney's fees clauses that favor one party. The statutes reform the contract to mandate a reciprocal attorney's fee clause to favor either party that prevails, not just the named party in the contract.[197] That is, these statutes reform unilateral attorney's fees clauses to apply reciprocally toward both parties. In addition, six other states provide reciprocal attorney's fees by statutes that are applicable in a more limited context, specific to certain types of contracts: consumer contracts, installment contracts, and residential leases.[198]

G. *The Dual Fee-Shifting Standard*

Although the fee-shifting provisions of a majority of civil rights statutes are seemingly reciprocal, the Supreme Court applies a dual standard in determining the appropriateness of fee awards.[199] That is, in the face of otherwise facially neutral civil rights statutes, the Court treats the appropriateness of fee awards to prevailing plaintiffs differently than it does to prevailing defendants.[200] For example, the majority of federal fee-

Id.

195. *See id.* § 6673(a)(2)(B) ("[I]f such attorney is appearing on behalf of the Commissioner of Internal Revenue, that the United States pay such excess costs, expenses, and attorneys' fees in the same manner as such an award by a district court.").

196. *See supra* note 152 and accompanying text.

197. *Id.*

198. *See supra* note 153 and accompanying text.

199. *See generally* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417–21 (1978) (suggesting Congress intended a dual standard should be applied when determining the appropriateness of fee awards to prevailing plaintiffs and prevailing defendants).

200. *See id.* at 418 ("[T]here are at least two strong equitable considerations counseling an attorney's fee award to a prevailing . . . plaintiff that are wholly absent in the case of a prevailing . . . defendant."). When the Supreme Court interprets an attorney's fees provision of one civil rights statute, it applies the same interpretation to attorney's fees provisions of all civil rights statutes because they are all generally based on the fee-shifting provisions of the Civil Rights Act of 1964. *See id.* at 415–18 (noting the statute on its face provides "no indication whatever of the circumstances under which either a plaintiff or defendant should be entitled to attorney's fees"). The Court notes similar language in a fee-shifting statute is a "'strong indication' they are to be interpreted alike." Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989) (quoting Northcross v. Memphis Bd. of Educ., 412 U.S. 427, 428 (1973)). For example, the Court in *Albemarle Paper Co. v. Moody* held the standard of awarding attorneys' fees in *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968), which dealt with Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), was equally applicable under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k). *See* Albemarle

shifting provisions allow courts to award attorneys' fees to the "prevailing party," the "substantially prevailing party," or to the "successful" party.[201] Although facially neutral, the Court ordinarily awards attorney's fees to prevailing plaintiffs in such cases, with the minor limitation excluding an award where the circumstances otherwise render the award unjust.[202] A prevailing defendant, on the other hand, can only recover where the plaintiff brought a suit that was vexatious, frivolous, or intended to harass or embarrass the defendant.[203]

The Court holds strong equitable considerations counsel a dual standard in assessing fee awards for either prevailing party because "[a]warding fees to prevailing plaintiffs in the ordinary case will encourage suits to vindicate the public interest, but awarding fees to defendants in the ordinary case might have a chilling effect on the institution of such suits. Awarding fees to defendants in frivolous cases, however, may discourage such suits."[204] In addition to civil rights statutes, the Court's dual standard is also applied in federal environmental statutes as well as under the Truth in Lending Act, although it is seemingly "more difficult for an environmental plaintiff than a civil rights plaintiff to recover an attorney fee."[205]

The following are facially neutral statutes that are nevertheless held to the dual standard. Title II of the Civil Rights Act of 1964 (Act) prohibits segregation and discrimination based on color, race, religion, or national origin in places of public accommodation whose operations affect interstate commerce.[206] Such places include, but are not limited to, hotels, restaurants, gas stations, and exhibitions of entertainment.[207] The fee award provision provides: "[T]he court, in its discretion, may allow the

Paper Co. v. Moody, 422 U.S. 405, 415 (1975) (holding the *Piggie Park* standard of awarding attorney's fees to a prevailing plaintiff is equally applicable under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k)).

201. Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983).

202. *See Christiansburg Garment Co.*, 434 U.S. at 421 (suggesting a prevailing plaintiff should recover attorney's fees unless circumstances would render an award unfair).

203. *See id.* (asserting that prevailing defendants should recover only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith").

204. COHEN, *supra* note 168, at 13.

205. *See id.* at 14 (attributing this fact to the Supreme Court's decision in *Ruckelshaus* (citing MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES 8–9 (Matthew Bender ed., 1997))).

206. 42 U.S.C. § 2000a (2012) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.").

207. *See id.* (listing which establishments are affected by the legislation).

prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[208] In addition, Title VII of the Act prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.[209] The fee-shifting provision reads: "In any action or proceeding under this subchapter the court, in its discretion, may allow the *prevailing party* . . . a reasonable attorney's fee . . . as part of the costs."[210] Similarly, Title VIII of the Civil Rights (Fair Housing) Act of 1968, which prohibits discrimination based on "race, color, religion, sex, familial status, or national origin in the sale or rental of housing,"[211] has a similar attorney's fee provision where "the prevailing party, other than the United States, [may recover] a reasonable attorney's fee and costs," with the United States liable for such fees and costs to the same extent as a private person.[212]

Finally, the Civil Rights Attorney's Fees Awards Act of 1976, provides:

> In any action or proceeding to enforce a provision of sections 1981,[213] . . . 1982,[214] 1983,[215] 1985,[216] and 1986[217] of this title, title IX of Public Law 92-318 . . . ,[218] the Religious Freedom Restoration Act of

208. *Id.* § 2000a-3(b).

209. *See id.* § 2000e-3 ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . based on race, color, religion, sex, or national origin . . . .").

210. *Id.* § 2000e-5(k) (emphasis added).

211. *Id.* § 3604.

212. *Id.* § 3614(d)(2).

213. *Id.* § 1981 ("[The right] to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.").

214. *Id.* § 1982 ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

215. 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or imunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.").

216. *Id.* § 1985 (allowing an injured or deprived party to recover damages if two or more people conspire to interfere with that party's civil rights).

217. *Id.* § 1986.("Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented.").

218. *See generally* 20 U.S.C. §§ 1681–88 (2012) (codifying a portion of Title IX).

> 1993 . . . ,[219] title VI of the Civil Rights Act of 1964 . . . ,[220] or [Section 40302 of the Violence Against Women Act of 1994],[221] the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs.[222]

H. *Bad Faith Exception*

Lastly, under the "bad faith exception," a court "may assess attorney's fees . . . when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"[223] Unless forbidden by Congress, exceptions of this nature "are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations."[224] Although the exception originated as a means for compensating plaintiffs, courts have also evoked it to compensate defendants.[225]

1. History of the Bad Faith Doctrine

Federal courts first used the exception "to award costs, including attorneys' fees, to trustees who incurred those costs by litigating on behalf of a trust."[226] In *Trustees v. Greenough*,[227] the Supreme Court held these awards to trustees were not prohibited, explaining

> [t]he fee-bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its

219. 42 U.S.C. § 2000bb(b) (2012) (preventing the enforcement of laws that substantially burden a person's free exercise of religion).

220. *See id.* § 2000d (prohibiting discrimination on the basis "of race, color, or national origin" in programs or activities that receive financial assistance from the federal government).

221. *See id.* § 13981 (promulgating a federal civil remedy for victims of violence motivated by gender, based on Congress's authority under Article I, Section 8 and Section 5 of the Fourteenth Amendment to the Constitution). Section 40302 of the Violence Against Women Act of 1994 was held unconstitutional in *United States v. Morrison*, 529 U.S. 598 (2000).

222. 42 U.S.C. § 1988(b) (2012) (emphasis added).

223. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245, 258–59 (1975) (quoting F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974) (describing factors a court will consider when allowing attorney's fees)), *superseded by statute*, Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976).

224. *Id.* at 259.

225. *See id.* at 247 n.18, 264 n.37 (explaining the historical origins of the American Rule from English common law); *see also* M. Brinkley Morse, Note, *Attorneys' Fees*—Nemeroff v. Abelson *and the Bad Faith Exception to the American Rule*, 58 TUL. L. REV. 1519, 1524 (1984) (stating the court's ability to award attorney's fees to defendants, despite the fees originally being reserved for plaintiffs only).

226. Morse, *supra* note 225, at 1523.

227. Trustees v. Greenough, 105 U.S. 527 (1881).

> control, to make such allowance to the parties out of the fund as justice and equity may require.[228]

In *Vaughan v. Atkinson*,[229] the Court held the plaintiff was entitled to reasonable attorney's fees because of the shipowner's bad faith.[230] The plaintiff, a sailor, sued the defendant shipowner for maintenance and cure and for damages resulting from the shipowner's failure to pay maintenance and cure.[231] After serving on the shipowner's vessel, the plaintiff spent three months in a U.S. Public Health Service Hospital and two years as an outpatient undergoing treatment for tuberculosis.[232] The shipowner ignored the plaintiff's request for maintenance as an outpatient.[233] As a result, the plaintiff was forced to hire an attorney and agreed to pay a 50% contingency fee.[234] The Court declared that an ill seaman was entitled to maintenance and cure.[235] The plaintiff was therefore entitled to reasonable attorney's fees because the shipowner had acted in bad faith.[236]

The bad faith exception reflects the *Vaughan* Court's adept judgment—that malfeasant behavior warrants punishment, and victims deserve full compensation.[237] Therefore, courts should not hinder the victim's full recovery by applying the American Rule mechanically.[238]

In *Hall v. Cole*,[239] a union member was expelled after presenting resolutions that violated a union rule.[240] The union member sued, and the district court permanently reinstated him in the union, granting him attorney's fees.[241] The Court held—although the American Rule does not traditionally allow awards of attorney's fees unless there is a statute or

228. *Id.* at 535.

229. Vaughan v. Atkinson, 369 U.S. 527 (1962).

230. *See id.* at 530–31 (recognizing the defendant–shipowner willingly breached its duty to pay maintenance and cure owed to a formerly employed sailor). Maintenance and cure is a right afforded to seamen, "designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery." *Id.* at 529, 531.

231. *See id.* at 527–28 (describing the seaman's cause of action and remedy sought).

232. *See id.* at 528 (detailing the plaintiff's medical treatment from 1957–59).

233. *Id.* at 528–29.

234. *Id.* at 529.

235. *Id.* at 531.

236. *See id.* at 530–31 (awarding damages because the shipowner's "callous" failure to pay maintenance was "willful and persistent").

237. *See* Moore, *supra* note 9, at 1160 (arguing for a "bad faith" application to attorney malfeasance).

238. *See id.* (contending a mechanistic application of the bad faith exception potentially deprives victims of full and just recovery).

239. Hall v. Cole, 412 U.S. 1 (1973).

240. *Id.* at 3.

241. *Id.*

contract authorizing the same—federal courts may exercise their equitable powers and "award attorneys' fees when the interests of justice so require."[242]

2. Categories of Bad Faith Exception

Bad faith cases fall into two general categories.[243] The first category involves breach of a "well-defined duty."[244] The second category involves "intentional deprivation of a well-established right."[245] In focusing on the merits of the claims presented, courts have previously awarded fees to plaintiffs: who have had to litigate to enforce legal rights the defendant unreasonably refused to acknowledge; where a party's conduct during litigation was intentionally vexatious; and where parties have been forced to defend against groundless claims.[246]

3. Purposes for and Problems with the Exception

The bad faith exception has several purposes.[247] First, it is punitive because it deters certain types of misconduct.[248] Courts recognize certain behavior is "so reprehensible that the award of attorney's fees . . . is necessary to deter the conduct."[249] Second, the bad faith exception is compensatory because the wronged party receives compensation for the damages caused by the offending party's bad faith conduct.[250] Thus, victims of bad faith behavior not only receive compensatory damages directly related to the malfeasance but also attorney's fees incurred through the course of subsequent litigation are reimbursed as well.[251]

Lastly, this exception strengthens the integrity of the judicial system through punishment, deterrence, and compensation. In *Hall*, the Court stated: "In this class of cases, the underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful

242. *Id.* at 4–5.

243. *See* Moore, *supra* note 9, at 1159 (introducing the two types of bad faith cases).

244. *Id.* at 1159–60.

245. *Id.* at 1159.

246. Morse, *supra* note 225 at 1524.

247. *See* Moore, *supra* note 9, at 1161 (expanding on the three goals of the bad faith exception).

248. *See id.* (stating the punitive nature of awarding attorney's fees for acting in bad faith toward opposing counsel).

249. *See id.* (elaborating on the bad faith exception's intent to discourage parties from engaging in misconduct so as to avoid being penalized with attorney's fees).

250. *See id.* (explaining the compensatory nature of awarding attorney's fees to victims of bad faith conduct).

251. *Id.*

litigant."[252]

Applying the exception is problematic, however, because "bad faith is a difficult term to define."[253] Even more problematic is adopting a uniform standard by which courts may award attorney's fees.[254] As it stands, courts have discretion to (and must) make fee award decisions on a case-by-case basis.[255]

Federal Rule of Civil Procedure 11 (Rule 11) is similar to the bad faith exception.[256] Under Rule 11, if the court determines that the rule has been violated, then "the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation."[257] Similar to the bad faith exception, Rule 11 provides a court with discretion to sanction a party who files frivolous pleadings by awarding attorney's fees to the other side.[258] Additionally, Rule 11 and the bad faith exception are both intended to deter attorney misconduct by punishing frivolous pleadings and compensating parties who are forced to appear in court to answer those pleadings.[259] Rule 11 is more narrowly tailored, however, because acts that degrade the judicial system are not sanctionable under the Federal Rules of Civil Procedure.[260] In addition, Rule 11 only applies to "pleading, written motion, and other paper," whereas the bad faith exception applies to all conduct during litigation.[261]

In *Chambers v. NASCO, Inc.*,[262] the Supreme Court upheld an assessment of nearly $1 million in attorney's fees, along with disbarment of

252. Hall v. Cole, 412 U.S. 1, 5 (1973).

253. *See* Moore, *supra* note 9, at 1161 (stating the standards for identifying bad faith behavior can be ambiguous).

254. *See id.* at 1161–62 (noting the struggle trial courts have when trying to determine the correct standard to apply for the bad faith exception).

255. *See id.* (explaining the judicial discretion and individualized analysis required to determine whether to award attorney's fees because of attorney misconduct); *see also Hall*, 412 U.S. at 5 (discussing federal courts' ability to award attorney's fees when the need arises "in a particular situation" (quoting Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939)).

256. *See* Moore, *supra* note 9, at 1162 (comparing the bad faith exception to Rule 11 of the Federal Rules of Civil Procedure).

257. FED. R. CIV. P. 11(c).

258. *See* Moore, *supra* note 9, at 1162 (discussing the deterrent effect Rule 11 has on attorney misconduct).

259. *See* FED. R. CIV. P. 11(c)(2), (4) (granting courts authority and discretion to award attorney's fees); *see also* Moore, *supra* note 9, at 1162 (discussing similar goals of the bad faith exception and Rule 11 of the Federal Rules of Civil Procedure).

260. *See* Jacob Singer, Note, *Bad Faith Fee-Shifting in Federal Courts: What Conduct Qualifies*, 84 ST. JOHN'S L. REV. 693, 699 (2010) (comparing FED. R. CIV. P. 11 and the bad faith exception).

261. *See id.* (quoting FED. R. CIV. P. 11).

262. Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

the attorneys involved.[263] Chambers was the director and sole shareholder of a company that managed a television station in Louisiana.[264] He agreed to sell the station's facilities and broadcast license to NASCO, Inc. for $18 million.[265] A condition of the sale was that both parties submit the required documents to the Federal Communications Commission (FCC) because the sale was subject to FCC approval.[266] However, before the sale was completed, Chambers changed his mind and tried to convince NASCO not to go through with the sale.[267] NASCO refused, and Chambers responded by "inform[ing] NASCO that he would not file the necessary papers with the FCC."[268] NASCO sued Chambers for specific performance and was granted a temporary restraining order (TRO) to prevent the sale or encumbrance of the property.[269] Chambers "determined that if the properties were sold to a third party and . . . deeds recorded before the issuance of a TRO, the District Court would lack jurisdiction."[270] As a result, Chambers attempted to place the property beyond the jurisdiction of the court by selling the property to a trust created with his sister as trustee and his children as beneficiaries.[271] After Chambers recorded the transfer of his business to his sister, the judge called A.J. Gray III—Chambers' attorney—to make sure the property would remain unencumbered until the hearing.[272] Gray withheld information about the sale and recordation.[273] After the deeds were recorded and the trust documents signed, Chambers admitted to intentionally withholding the information from the court.[274] Consequently, the trial judge warned Chambers that his conduct had been unethical.[275] Nevertheless, Chambers "continued to abuse the judicial process," proceeding with "a series of meritless motions and pleadings" intended to delay litigation.[276]

263. *Id.* at 40, 58.
264. *Id.* at 35.
265. *Id.* at 35–36.
266. *Id.* at 36.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 36–37.
271. *Id.* at 37.
272. Chambers v. NASCO, Inc., 501 U.S. 32, 37 (1991).
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at 38. Specifically, Chambers (1) refused to allow NASCO to inspect the business records pursuant to an injunction, (2) appealed twice but was denied each time for lack of a final judgment, (3) filed a series of meritless motions and was warned on each occasion, and (4) attempted

The district court eventually found that attempting to "deprive th[e] [c]ourt of jurisdiction by acts of fraud, nearly all of which were performed outside the confines of th[e] [c]ourt" and attempting "by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance" did not reach Rule 11 because Rule 11 only governs documents filed with the court.[277] In addition, "fil[ing] false and frivolous pleadings" did not reach Rule 11 because "the falsity of the pleadings at issue did not become apparent until after the trial on the merits, so it would have been impossible to assess sanctions at the time the papers were filed."[278] Therefore, the trial court deemed Rule 11 was insufficient as a basis for imposing bad faith sanctions against Chambers.[279]

The Supreme Court agreed with the trial court, but ultimately concluded Rule 11 could have been used as grounds "to sanction Chambers for filing 'false and frivolous pleadings,'" further adding that some of the other bad conduct "might have reached to other Rules."[280] However, much of Chambers' bad faith conduct was beyond the scope of the rules.[281] Chambers' "entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address."[282] Moreover, the Court explained:

> In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves.[283]

Therefore, the Court held that the trial court properly exercised its inherent power to sanction Chambers' bad faith conduct, stating "that power is both broader and narrower than other means of imposing sanctions."[284] The Court further explained: "[W]hereas each of the other

to relocate the equipment and begin a new business with FCC. *Id.* at 38–39.

277. *Id.* at 41.

278. *Id.*

279. *Id.*

280. *Id.* at 50.

281. *Id.*

282. Chambers v. NASCO, Inc., 501 U.S. 32, 51 (1991).

283. *Id.*

284. *Id.* at 46.

mechanisms reaches only certain individuals or conduct, the inherent power [of a trial court] extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices."[285]

V. CURRENT STATE TREATMENT OF ATTORNEY'S FEES IN LEGAL MALPRACTICE CASES

There is a great divide amongst the states of this nation as to whether or not to adopt the American Rule with regard to fee shifting in legal malpractice cases. This divide reflects two main differing policy considerations behind the rule's implementation or lack thereof. On one hand, in states that follow the American Rule, courts lack inherent authority to shift attorney's fees to the losing party absent express authority delegated by contract or statute. On the other hand, the states that do not follow the American Rule generally find that the courts have inherent authority to weigh differing policy considerations on a case-by-case basis, to determine whether or not fee-shifting would be in the best interest of justice. Set forth are the different policies adopted by each state within this country.

In the portion of the country that follows the American Rule in legal malpractice actions, the courts award attorney's fees to the prevailing party only when there is an express contractual agreement between the parties, or when a specific state statute endows the court with authority to shift litigation fees to the losing party.[286] Where a state has no stance on awarding attorney's fees in legal malpractice cases, a determination as to whether the state applies the American Rule in other contexts will generally shed light on whether it might do so in the future.[287] In Idaho, for example, there is no specific rule on legal malpractice, but because the state follows the American Rule more generally, it may apply it to legal malpractice suits as well.[288]

285. *Id.*

286. Oregon and Tennessee follow this approach. *See* Rivera-Martinez v. Vu, 263 P.3d 1078, 1082 (Or. Ct. App. 2011) (stating Oregon follows the general rule requiring a contractual agreement or statute authorizing awards of attorney's fees); *see also* John Kohl & Co. v. Dearborn & Ewing, 977 S.W.2d 528, 534–35 (Tenn. 1998) (noting Tennessee follows the well-established American rule that no attorney's fees are awarded absent a contractual agreement or statute authorizing the award).

287. *See* Akers v. Mortensen, 320 P.3d 418, 427 (Idaho 2014) (finding an Idaho statute authorized the awarding of attorney's fees in a trespass action).

288. Similarly, Arkansas, Florida, Hawaii, Illinois, Kansas, Maryland, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, and Wyoming generally uphold the American Rule. S.D. CODIFIED LAWS § 15-6-54(d) (West, Westlaw through 2015 Reg. Sess.); First

States that follow the American Rule generally adopt the well-established bad faith exception.[289] Not limited to legal malpractice actions, this exception provides that fees may be shifted to the losing party when the underlying litigation was executed in bad faith, and the attorney breached a well-defined duty, or intentionally deprived her client of a well-established right.[290]

Some states have codified the bad faith exception by statute. For example, Michigan's state statute gives the courts authority to award a prevailing party the costs and fees incurred by that party in connection with a civil action if the court finds a pleaded action or defense was made frivolously.[291] Similarly, Pennsylvania's statute provides reasonable attorney's fees when the "conduct of another party in commencing the matter or otherwise was arbitrary, vexatious, or in bad faith."[292] Georgia's state statute authorizes fee shifting where the attorney acted in bad faith,

State Bank v. Metro Dist. Condos. Prop. Owners' Ass'n, 2014 Ark. 48, at 9, 432 S.W.3d 1, 6; Dade Cty. v. Pena, 664 So. 2d 959, 960 (Fla. 1995); Taomae v. Lingle, 132 P.3d 1238, 1242 (Haw. 2006); City of Champaign v. Madigan, 2013 IL App (4th) 120662, ¶ 55, 992 N.E.2d 629, 641; Gannon v. State, 319 P.3d 1196, 1250 (Kan. 2014); Meyr v. Meyr, 7 A.3d 125, 142 (Md. Ct. Spec. App. 2010); Martinez v. Martinez, 678 P.2d 1163, 1168 (N.M. 1984); Crutchfield v. Marine Power Engine Co., 2009 OK 27, ¶ 26, 209 P.3d 295, 304; Pearson v. Pearson, 11 A.3d 103, 108–09 (R.I. 2011); Blumberg v. Nealco, Inc., 427 S.E.2d 659, 660 (S.C. 1993); Eagle Ridge Estates Homeowners Ass'n v. Anderson, 2013 SD 21, ¶ 38, 827 N.W.2d 859, 870; Dowling v. Rowan, 621 S.E.2d 397, 402 (Va. 2005);Bonanno v. Verizon Bus. Network Sys., 2014 VT 24 ,¶ 18, 96 Vt. 62, 70, 93 A.3d 146, 153; Dave v. Valdez, 2012 WY 59, ¶ 6, 275 P.3d 485, 487.

289. Courts in Minnesota, Ohio, Texas, and West Virginia have ruled under the bad-faith exception. Nevertheless, such cases have not dealt with the bad faith exception in legal malpractice issues. *See* State *ex rel.* Crockett v. Robinson, 423 N.E.2d 1099 (Ohio 1981) (concluding that respondents did not act in bad faith in a claim against them for back pay); State *ex rel.* Bronson v. Wilkes, 607 S.E.2d 399, 403 (W. Va. 2004) (indicating a prevailing litigant may recover attorney fees when the losing party has acted in bad faith); *see also* First Constr. Credit, Inc. v. Simonson Lumber of Waite Park, Inc., 663 N.W.2d 14, 19–20 (Minn. Ct. App. 2003) (determining whether the bad faith exception would apply to the facts of a specific *lis pendens* action); Thomas v. Prudential Secs., Inc., 921 S.W.2d 847, 851 (Tex. App.—Austin 1996, no writ) (affirming an arbitration panel's award of attorney fees against a litigant who was found to have brought a suit in bad faith against Prudential for fraud). Maine has a similar exception that awards attorney's fees for extraordinary or egregious conduct. *See* Cimenian v. Lumb, 2008 ME 107, ¶ 11, 951 A.2d 817, 820 (holding dishonest testimony is an example of bad faith and constitutes an extraordinary circumstance justifying the award of attorney's fees); Soley v. Karll, 2004 ME 89, ¶ 11, 853 A.2d 755, 758–59 (discussing whether delaying trial proceedings by filing a voluntary bankruptcy petition rises to the level required by the standard of egregious conduct).

290. *See Cimenian*, 951 A.2d at 820, ¶ 13 (affirming the award of attorney's fees where the case was commenced in bad faith).

291. *In re* Costs & Attorney Fees, 645 N.W.2d 697, 705, 708 (Mich. Ct. App. 2002) (awarding attorney's fees to prevailing party for frivolous defense brought by party's attorney (citing MICH. COMP. LAWS ANN. § 2.625(A)(2)(2001))).

292. 42 PA. STAT. AND CONS. STAT. ANN. § 2503(9) (West 2010).

was "stubbornly litigious," or has caused the plaintiff "unnecessary trouble and expense."[293] Nevada's statute provides for a similar exception, awarding attorney's fees where the attorney pleaded claims that are frivolous or intended to harass the opposing party.[294] However, Nevada's statute also provides for an additional method the courts can use to award attorney's fees—namely, where "the prevailing party has not recovered more than $20,000."[295]

Several states following the American Rule have carved out equitable exceptions. For example, in Washington, the state's highest court held it would recognize an exception to the American Rule on equitable grounds, even though it would not recognize one where an attorney breached a fiduciary duty.[296] The court stated that "[a]n equitable ground exists 'when the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others.'"[297] However, Washington courts have continued to uphold the American Rule, finding while a legal malpractice action to recover damages is a traditional legal remedy, it is not one which the state of Washington recognizes as a viable means for recovering attorney's fees.[298] Additionally, some states have shifted the burden of paying attorney's fees to the losing party when the efforts of the attorney created a fund from which fees were to be paid.[299]

The final common exception adopted by states following the American Rule is observed where fee shifting is provided for either by the common law or state rule of court. For example, in Delaware, a litigant cannot recover attorney's fees unless recovery is authorized by common law or statute.[300] Massachusetts allows for fee shifting where its rules of

293. GA. CODE ANN. § 13-6-11 (West 2010). In Georgia, to be awarded attorney's fees, the plaintiff must have specially pleaded and made prayer for the award. *Id.* A Georgia court further indicated that while pleadings and affidavits may show negligence, "mere negligence will not support an award of attorney fees based on bad faith." Duncan v. Klein, 720 S.E.2d 341, 347 (Ga. Ct. App. 2011).

294. NEV. REV. STAT. ANN. § 18.010 (West 2010).

295. *Id.* The statute notes that any express or implied agreement would trump the aforementioned law. *Id.*

296. Shoemake v. Ferrer, 182 P.3d 992, 998 (Wash. Ct. App. 2008), *aff'd sub nom.* Shoemake *ex rel.* Guardian v. Ferrer, 225 P.3d 990, 998 (Wash. 2010).

297. *Id.* (quoting Flint v. Hart, 917 P.2d 550 (Wash. Ct. App. 1996)).

298. Kelly v. Foster, 813 P.2d 598, 600–01 (Wash. Ct. App. 1991).

299. Alabama provides for such an exception. Bell v. Birmingham News Co., 576 So. 2d 669, 670 (Ala. Civ. App. 1991). Also, Indiana ruled that a court in equity may allow attorney's fees to be paid out from a fund under its control. State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657, 659 (Ind. 2001).

300. Began v. Dixon, 547 A.2d 620, 624 (Del. Super. Ct. 1988).

courtroom procedures authorize it to do so.[301] Similarly, in Nebraska, the court allows for fee shifting where there is a recognized uniform course of procedure to allow recovery.[302]

The final line of states that follow the American Rule recognize uncommonly held exceptions.[303] In Mississippi, for example, in addition to situations where there is contractual or statutory authority permitting fee shifting, courts are also given discretion to shift fees in cases where punitive damages may be properly awarded.[304] Missouri, like Washington, follows the American Rule with the exception that a wronged party may only recover damages incurred in the course of collateral litigation.[305]

Some states have been statutorily delegated the authority to award fees to a prevailing party. Alaska, for example, does not follow the American Rule and awards attorney's fees to the winner, but state statute "permits a court to reduce or deny attorney's fees to a prevailing party 'if a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts.'"[306] Kentucky's state statute authorizes the court to consider the financial ability of the parties to order a reasonable amount for legal services, which includes fees for legal services as well as "costs incurred prior to the commencement of the proceeding or after entry of judgment."[307]

In the other portion of the nation, courts are not bound to upholding the American Rule. Even in the absence of statute or contractual agreements, courts in these states have inherent authority to shift fees in

301. *Cf.* K.G.M. Custom Homes, Inc. v. Prosky, 10 N.E.3d 117, 126 (Mass. 2014) (determining there was no statute or court rule authorizing courts to award attorney's fees in actions based on breach of contract).

302. *See* Parkert v. Lindquist, 693 N.W.2d 529, 531 (Neb. 2005) (stating the general rule that recovery of attorney's fees is not allowed unless provided for by statute or uniform course of procedure).

303. In Wisconsin, the state follows the American Rule with an exception for discrimination in employment cases under the Wisconsin Fair Employment Act (WFEA), which was enacted to discourage discriminatory employment practices. Glamann v. St. Paul Fire & Marine Ins. Co., 424 N.W.2d 924, 927 (Wis. 1988).

304. Indus. & Mech. Contrs. of Memphis, Inc. v. Tim Mote Plumbing, LLC, 962 So. 2d 632, 638 (Miss. Ct. App. 2007).

305. Brown v. Mercantile Bank of Poplar Bluff, 820 S.W.2d 327, 340 (Mo. Ct. App. 1991). North Dakota holds a similar rule, finding attorney fees are awardable where "the wrongful act has forced the aggrieved person into litigation with a third party (as a result of the defendant's wrongful act)." Olson v. Fraase, 421 N.W.2d 820, 828–29 (N.D. 1988).

306. Monzingo v. Alaska Air Grp., Inc., 112 P.3d 655, 665 (Alaska 2005) (quoting ALASKA R. CIV. P. 82(b)(3)(I)). In *Monzingo*, the court made clear the award is "not intended to penalize a party for litigating a good-faith claim," but rather to compensate a prevailing party for winning a case. *Id.*

307. KY. REV. STAT. ANN. § 403.220 (West, Westlaw through 2015 Reg. Sess.).

the interest of justice.[308] In Colorado, attorney's fees may be recovered in an action for breach of a fiduciary duty.[309] Utah courts have "inherent equitable power to award reasonable attorneys' fees when doing so would be appropriate in the interest of justice and equity."[310] Consequently, much like in Colorado, Utah courts have come to recognize breach of a fiduciary duty as an established exception to the rule against awarding attorney's fees.[311]

New Jersey maintains an attorney is responsible, as part of consequential damages, for legal expenses and attorney's fees that a client incurs "in prosecuting the legal malpractice action."[312] In Iowa, awarding attorney's fees is discretionary and depends upon the party's ability to pay.[313] In Indiana, the court held that attorneys who commit malpractice may be liable for increased appellate attorney fees if they were a "natural, probable, and foreseeable consequence of [their] negligence."[314] The Supreme Court of Louisiana held a plaintiff is entitled to recovery so as to compensate him for the additional cost of attorney's fees associated with the underlying action that the defendant attorney negligently handled.[315]

Ultimately, few states expressly permit an award of attorney's fees for a legal malpractice action. But, more states have left the door open for an award of attorney's fees when prosecuting a legal malpractice action by

308. New Hampshire courts create exceptions to the American rule when "justice . . . may require." *See* Shelton v. Tamposi, 62 A.3d 741, 751 (N.H. 2013) (citation omitted) (allowing court to award attorney's fees in a case involving the administration of a trust); Bd. of Water Comm'rs v. Mooney, 660 A.2d 1121, 1127 (N.H. 1995) (allowing a Superior Court to award attorney's fees when the party has "conferred a 'substantial benefit' upon the community at large").

309. *See* Smith v. Mehaffy, 30 P.3d 727, 732–33 (Colo. Ct. App. 2000) (stating when a party brings a suit against a fiduciary for breach of trust, an exception exists to allow for the awarding of attorney's fees). In Connecticut, the state supreme court turned to a ruling by the Supreme Court of Colorado, which held attorney's fees may be awarded under the fiduciary duty exception. *See* Mangiante v. Niemiec, 910 A.2d 235, 240–41 (Conn. App. Ct. 2006) (deciding a minor beneficiary in a trust action cannot be made whole without awarding attorney's fees (citing Buder v. Sartore, 774 P.2d 1383, 1391 (Colo. 1989))).

310. Utahns for Better Dental Health-Davis, Inc. v. Davis Cnty. Comm'n, 2005 UT App 347, ¶ 6, 121 P.3d 39, 41, *abrogated by* Culbertson v. Bd. of Cty. Comm'rs, 2008 UT App 22, 177 P.3d 621.

311. Kealamakia, Inc. v. Kealamakia, 2009 UT App 148, ¶ 17, 213 P.3d 13, 15. Montana has a similar exception called the Foy exception, where a district court may award attorney's fees to make an injured party whole under its equity powers. Erker v. Kester, 1999 MT 231, ¶ 44, 296 Mont. 123, 988 P.2d 1221, 1228.

312. Saffer v. Willoughby, 670 A.2d 527, 534 (N.J. 1996).

313. *Cf. In re* Marriage of Kimbro, 826 N.W.2d 696, 704 (Iowa 2013) (determining each party had the ability to pay its respective attorney's fees in a divorce proceeding).

314. Hedrick v. Tabbert, 722 N.E.2d 1269, 1273 (Ind. Ct. App. 2000).

315. Jenkins v. St. Paul Fire & Marine Ins. Co., 393 So. 2d 851, 859 (La. Ct. App. 1981) (citing Ramp v. St. Paul Fire & Marine Ins. Co., 269 So. 2d 239 (La. 1972) (recognizing attorney's fees as damages that can be recovered in legal malpractice cases)), *aff'd*, 422 So. 2d 1109 (La. 1982).

giving courts equitable powers to award fees.

VI. LEGAL MALPRACTICE SUITS SHOULD BE AN ADDITIONAL EXCEPTION TO THE AMERICAN RULE IN ALL JURISDICTIONS

The difference between legal malpractice cases and other causes of actions is explained in *Rice v. Perl*.[316] Rice hired Perl to represent her in a personal injury action against a drug manufacturer. Perl settled the case with the insurance adjuster, who worked part-time for Perl's law firm and had been a good friend of Perl's for several years. After negotiating a settlement with the insurance adjuster, Rice sued Perl after she discovered he failed to disclose the nature of his relationship with the claims adjuster.[317] Rice sued Perl alleging he breached his fiduciary obligation of full disclosure by not informing her of Perl's business relationship with the adjuster. However, Rice was not dissatisfied with the settlement amount Perl had obtained for her.[318]

Customarily, the application of legal rules would favor the defendant attorney because the attorney's wrong did not cause an injury to any of the plaintiff's interests.[319] The plaintiff did not suffer damages in tort or contract and was not worse off financially than if full disclosure had been made.[320] Further, the plaintiff did not rely on the defendant attorney's nondisclosure to her detriment, nor was the attorney unjustly enriched by the failure to disclose.[321] On balance, however, in light of the policy considerations requiring strict fidelity between an attorney and his client, the court determined the interests were weighted in favor of the plaintiff.[322] In the end, the attorney was required to forfeit his right to compensation and refund all legal fees to the client.[323]

Courts have also recognized the special nature of the attorney–client relationship in contexts outside legal malpractice actions.[324] In fact, most jurisdictions do not allow attorneys to limit their malpractice liability for

316. Rice v. Perl, 320 N.W.2d 407 (Minn. 1982) (affirming summary judgment against attorney for breach of fiduciary duty and forfeiture of attorney's fees).

317. *Id.* at 410.

318. *Id.*

319. Anderson & Steele, Jr., *supra* note 65, at 239.

320. *Id.*

321. *Id.*

322. *Rice*, 320 N.W.2d at 411 (quoting *In re* Estate of Lee, 214 Minn. 448, 460, 9 N.W.2d 245, 251 (1943)).

323. *Id.*

324. Moore, *supra* note 9, at 1165.

this reason.[325] In California, for example, an attorney cannot "contract with a client prospectively limiting the [attorney's] liability to the client for . . . professional malpractice."[326]

Allowing for the recovery of attorney's fees by plaintiffs in legal malpractice or breach of fiduciary duty cases would align with the policies behind many of the current exceptions. As demonstrated in many of the contract clause cases, clients stand at a great disadvantage when facing their attorneys because of the unequal bargaining power and access to information inuring to the lawyer's benefit. Like the civil rights statutes, society benefits from allowing injured clients to sue their lawyers.

Attorney's fees should be awarded in all breach of fiduciary duty and attorney negligence cases. Lawyers need to make their clients whole if they are injured due to the lawyer's conduct. Whether the attorney intentionally or negligently committed malpractice or breach of fiduciary duty should not be the deciding factor. "Did the attorney intentionally accept the case from the new client knowing that there was a conflict, but wanting the extra fees, he accepted the case anyway . . . or was he just negligent in failing to perform a competent conflicts check?" Indeed, it might be quite difficult to prove the state of mind of the attorney.

Instead, the analysis should focus on the special nature of the attorney–client relationship and, in particular, on the imbalance of power and lack of opportunity for the client to access all the information that the lawyer possesses. As an example, assume a defendant has been sued for nonpayment of a bill. The defendant has an excellent—indeed a perfect—defense: the goods were non-conforming. Unfortunately, the lawyer hired by the defendant failed to answer the complaint in a timely manner and a default judgment is entered against the defendant for $75,000. The lawyer attempts to set aside the default but does not prevail and the defendant now has to pay the judgment. Our former defendant now becomes a plaintiff in a legal malpractice action against his former lawyer. As explained above, prevailing on a legal malpractice claim is not easy and the

325. *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(h)(2) (AM. BAR ASS'N 2013) (reiterating the same principle set forth in California's Rules of Professional Conduct).

326. CAL. RULES OF PROF'L CONDUCT r. 3-400 (2004). The California Rules of Professional Conduct provide

> [an attorney shall not] . . . . settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Id.

client will have to pay a new lawyer at least one-third of any recovery. With this hypothetical, he may be able to find a lawyer to take his case, but what if the amount of damages were smaller or the case was not such a clear winner?

Clients have the right to expect their lawyer will protect their interests. Lawyers are the conduits through which people access the justice system. It is necessary that lawyers assume the burden to make their clients whole when they are the cause of the harm to their clients—whether the damage was caused intentionally or not.

VII. CONCLUSION

Clients need lawyers to make the commitment to act as the true fiduciaries they are. Be it through amending the ethics rules to require lawyers pay the attorney's fees of their clients in the case of legal malpractice or breach of fiduciary duty, or through judges ordering the payment of attorney's fees within their discretion, this is the necessary result for our clients and the legal profession.