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Legal Malpractice And The Bad Faith Exception To The American Rule: A Suggested Approach For Addressing Intentional Lawyer Misconduct

LEGAL MALPRACTICE AND THE BAD FAITH EXCEPTION TO THE AMERICAN RULE: A SUGGESTED APPROACH FOR ADDRESSING INTENTIONAL LAWYER MISCONDUCT

The number of legal malpractice suits has increased in recent years.[1] Courts face difficulty in defining the proper limits of recovery of consequential damages for lawyer malpractice,[2] and as legal action becomes more frequent and more expensive, courts have begun to re-examine the extent to which aggrieved clients can recover attorney's fees in legal malpractice actions.[3] Fees paid to lawyers who handle the mismanaged underlying legal matter and subsequent malpractice litigation often make up a large part of the damages flowing from an attorney's tortious behavior.[4] For example, an attorney's misconduct may force a client to hire lawyers to correct

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1. *See* STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER vii (1989) [hereinafter *Characteristics*] (indicating overall increase in total number of legal malpractice claims reported by participating insurance companies between January, 1981 and September, 1985); STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, LAWYERS' PROFESSIONAL LIABILITY UPDATE 1 (1984) (noting increase in number of insurers withdrawing from legal malpractice insurance marketplace); A. MALLEN & D. LEVIT, LEGAL MALPRACTICE v (2d ed. 1981) (indicating that total number of reported legal malpractice cases in ten years preceding publication was almost equal to total number of reported malpractice cases in all of American legal history); D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE vi (1980) (warning of changing nature of legal analysis in legal malpractice cases because of increase in malpractice litigation); D. STERN, AN ATTORNEY'S GUIDE TO MALPRACTICE LIABILITY 3 (1977) (noting increase in number of legal malpractice actions because of higher public awareness about lawyers' potential malpractice liability).

2. *See* Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L.R. 1127, 1156-58 (1988) (recognizing difficulty faced by courts when attempting to establish limits on consequential damages in legal malpractice cases); MALLEN & LEVIT, *supra*, note 1 at 360 (noting increase in consequential damage claims as part of legal malpractice actions because of increased flexibility in notions about proximate cause); MEISELMAN, *supra*, note 1 at 55-56 (indicating lack of agreement among courts about what consequential damages may be recoverable in legal malpractice actions).

3. *See* Moores v. Greenberg, 834 F.2d 1105, 1110 (1st Cir. 1987) (considering splits in modern authority on attorney's fees and legal malpractice); Foster v. Duggin, 695 S.W.2d 526, 527 (Tenn. 1985) (rejecting previous authority that supported reduction of award in legal malpractice cases by negligent lawyer's fee and awarding plaintiff's attorney's fees under consequential damage theory); Andrews v. Cain, 62 A.D.2d 612, 613, 406 N.Y.S.2d 168, 169 (N.Y. App. Div. 1978) (reversing previous authority as not in accordance with more modern legal theory).

4. *See* Bauman, *supra*, note 2 at 1150-56 (indicating that practical consequences of legal malpractice may include subsequent malpractice litigation and attorney's fees incurred to mitigate damage caused by initial lawyer's misconduct); MALLEN & LEVIT, *supra*, note 1 at 360-65 (indicating increasing frequency of claims of damages resulting from litigation with third parties, attempts at mitigating damage caused by defendant attorney, and actual malpractice litigation); MEISELMAN, *supra*, note 1 at 55 (noting problems with third party litigation as a result of legal malpractice).

damage or handle litigation with third parties resulting from the previous attorney's misconduct.[5] The aggrieved client also incurs the expense of prosecuting the ensuing legal malpractice action.

Courts generally agree that wronged clients may recover certain attorney's fees.[6] For example, most courts allow the recovery of fees incurred in mitigation of damage done by the prior attorney's misconduct, in duplication of the previous lawyer's work, and in subsequent litigation with third parties when the initial attorney's misconduct or negligence causes that litigation.[7] Courts that have examined the question of recoverability of legal fees for successful litigation of actual legal malpractice actions, however, have been unable to agree upon the proper limits of recovery.[8] Although some courts reason that these fees should be recoverable, others hold that

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5. *See* Bauman, *supra*, note 2 at 1150-51 (indicating that legal malpractice victims frequently need to hire attorneys for subsequent action or mitigation of damages); MALLEN & LEVIT, *supra*, note 1 at 360-62 (same); MEISELMAN, *supra*, note 1 at 61 (same).

6. *See infra* note 7 and accompanying text (indicating that courts have held particular legal fees recoverable for legal malpractice plaintiffs).

7. *See* Sorenson v. Fio Rito, 90 Ill. App. 3d 368, 372, 413 N.E.2d 47, 52 (1980) (holding counsel's fees recoverable by plaintiff as element of compensatory damage). In *Sorenson* the Illinois Court of Appeals considered the issue of damages arising from an attorney's negligent failure to file inheritance and estate tax returns in a timely manner, resulting in $6,409.25 in penalties and interest against the plaintiff. *Id.* at 370, 413 N.E.2d at 49-50. The plaintiff, attempting to mitigate the damage caused by the defendant attorney's negligence, paid $1,500 in legal fees to a subsequently hired lawyer who tried to obtain a refund of the penalties and interest. *Id.*, 413 N.E.2d at 50. The *Sorenson* court recognized that the American Rule bars litigants from recovering legal fees. *Id.*, 413 N.E.2d at 50. However, the court went on to find that the particular fees involved in this case were recoverable, reasoning that courts, in developing the American Rule, never intended to preclude a plaintiff from becoming fully compensated and that, like any other tortfeasor, the negligent attorney should be responsible for all the results of his wrongful acts or omissions. *Id.* at 372, 413 N.E.2d at 51-52.

Other courts almost universally hold that legal malpractice plaintiffs may recover other legal expenses caused by the defendant's misconduct, including litigation costs for actions against third parties. *See* United Fidelity Life Ins. Co. v. Law Firm of Best, Sharp, Thomas & Glass, 624 F.2d 145, 149-50 (10th Cir. 1980) (holding jury could consider whether legal fees incurred as a result of legal malpractice were recoverable as damages); Gustavson v. O'Brien, 87 Wis. 2d 193, 200, 274 N.W.2d 627, 631 (1979) (concluding that when lawyer's malpractice forces wronged client to litigate with third parties lawyer is liable for client's attorney's fees incurred in litigation with third parties); Hill v. Okay Constr. Co., 312 Minn. 324, 347, 252 N.W.2d 107, 121 (1977) (holding that trial court may award attorney's fees plaintiff paid to defend separate lawsuit resulting from attorney's wrongful actions as damages in legal malpractice action); Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 788, 269 So. 2d 239, 245 (1972) (holding that legal malpractice plaintiff was entitled to recover additional attorney's fees incurred as a result of defendant's negligence in handling an inheritance matter); Hiss v. Friedberg, 201 Va. 572, 577-79, 112 S.E.2d 871, 875-77 (1960) (holding award of attorney's fees incurred in separate action filed against third party proper as an element of damages resulting from original lawyer's negligence).

8. *Compare* Foster v. Duggin, 695 S.W.2d 526, 527 (Tenn. 1985) (holding award of attorney's fees incurred by plaintiff in successful prosecution of legal malpractice suit recoverable as element of consequential damages) *with* McGlone v. Lacey, 288 F. Supp. 662, 665 (D.S.D. 1968) (mentioning that attorney's fees incurred by plaintiff in pursuit of legal malpractice action are unrecoverable under American Rule).

the award is improper.[9] Most courts that refuse to allow the award rely on the American Rule.[10] The American Rule (the Rule) is a judicially created principle providing that absent statutory or contractual authority, neither party in a lawsuit may recover legal fees incurred in prosecuting or defending an action.[11] American courts developed the Rule in an attempt to allow open access to the legal system regardless of wealth, ease the burden on courts during post-trial proceedings, and maintain the independence of counsel during trial.[12] Most jurisdictions recognize exceptions to the Rule

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9. *See* Jenkins v. St. Paul Fire & Marine Ins. Co., 393 So. 2d 851, 858 (La. Ct. App. 1981) (holding that although plaintiff generally may not recover attorney's fees for prosecution of legal malpractice action, plaintiff may recover fees above that of the original attorney if incurred because of the original attorney's misconduct), *aff'd*, 422 So. 2d 1109 (La. 1982). In *Jenkins* the plaintiff retained the defendants to represent him in a personal injury action against a railroad for a contingency fee of one-third of the plaintiff's recovery. *Id.* at 854. The defendants failed to file suit before the statute of limitations ran, and the court dismissed the suit. *Id.* at 854-55. The plaintiff then began a legal malpractice action against the defendants, for which his new counsel charged $5,000 in addition to one-third of the recovery. *Id.* at 858. During the legal malpractice action, the trial court refused to allow the plaintiff to introduce evidence at trial showing that his legal costs for the ensuing legal malpractice suit were higher than they would have been had the defendants filed the personal injury suit in a timely manner. *Id.* The Louisiana Court of Appeals reversed, reasoning that the plaintiff could recover the additional $5,000 as an extra expense the plaintiff would not have incurred but for the defendant's negligence. *Id.* The court did not award fees in excess of the $5,000. *Id.*

Other courts also strictly apply the American Rule to legal malpractice suits, although they recognize limited exceptions. *See* Widemshek v. Fale, 17 Wis. 2d 337, 342, 117 N.W.2d 275, 277 (1962) (stating general rule that legal malpractice plaintiff may not recover attorney's fees incurred in malpractice action); *Hiss*, 201 Va. at 577, 112 S.E.2d at 875 (repeating rule that plaintiff generally may not recover attorney's fees incurred in litigating legal malpractice action); *but see Foster*, 695 S.W.2d at 527 (reasoning that attorney's fees are recoverable because they flow from lawyer's breach of contract).

10. *See* Gilchrist v. Perl, 387 N.W.2d 412, 418 (Minn. 1986) (denying plaintiffs' claims for attorney's fees incurred in bringing malpractice action based on American Rule); Whitney v. Buttrick, 376 N.W.2d 274, 281 (Minn. Ct. App. 1985) (refusing to allow plaintiff's recovery of attorney's fees without statutory or contractual authorization); McClain v. Faraone, 369 A.2d 1090, 1093-94 (Del. Super. Ct. 1977) (disallowing plaintiff's recovery of attorney's fees in malpractice action stemming from negligent title search because of American Rule); Erving's Hatcheries, Inc. v. Thompson, 204 So. 2d 188, 192 (Miss. 1967) (refusing to assess cost of previous appeal to defendant attorney in legal malpractice action); *Widemshek*, 17 Wis. 2d at 342, 117 N.W.2d at 277 (applying general proposition that aggrieved client generally may not recover expenses of litigating legal malpractice case absent statutory or contractual authority); *Hiss*, 201 Va. at 577-79, 112 S.E.2d at 875 (applying general proposition that attorney's fees are unrecoverable without statutory or contractual authority to facts of legal malpractice case).

11. *See* BLACK'S LAW DICTIONARY 82 (6th ed. 1990) (defining American Rule as judicial prohibition on award of attorney's fees to litigants without statutory or contractual authority); 32 AM. JUR. 2D *Federal Practice* § 169 (1982) (stating general rule that litigants in American courts may not recover attorney's fees absent statutory authority); *see also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975) (recognizing that American Rule precludes recovery of attorney's fees without statutory or contractual authority).

12. *See infra* notes 57-65 and accompanying text (summarizing rationales for American Rule).

in cases involving bad faith, contempt of court, and certain suits resembling class actions.[13]

Many courts strictly apply the American Rule in legal malpractice cases by refusing to allow the plaintiff to recover the attorney's fees incurred in the actual malpractice action.[14] In offset cases, however, some courts essentially will award attorney's fees to the plaintiff in an indirect manner.[15] In offset cases the defendant attorney requests that the court or jury reduce the plaintiff's damage award by the amount the plaintiff would have paid the defendant attorney for handling the underlying legal matter because the plaintiff would have owed him that amount upon successful completion of the underlying legal matter.[16] For example, if the defendant attorney in a legal malpractice action provided $4,000 worth of legal services to the plaintiff and the judgment against him for the malpractice action involving the same matter was for $10,000, the defendant might ask that the court or jury subtract his $4,000 fee from the malpractice award. According to the attorney, the offset would restore both parties to exactly the positions they would have enjoyed but for the defendant's tortious conduct.[17] Many courts refuse to reduce the award by such an offset.[18] A close look at the opinions of courts that refuse to award offsets reveals that the courts' refusals are, in effect, awards of attorney's fees to plaintiffs in violation of the American Rule.[19]

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13. *See infra* notes 104-106 and accompanying text (summarizing exceptions to American Rule).

14. *See* Gilchrist v. Perl, 387 N.W.2d 412, 418 (Minn. 1986) (denying plaintiffs' claims for attorney's fees incurred in bringing malpractice action based on American Rule); Whitney v. Buttrick, 376 N.W.2d 274, 281 (Minn. Ct. App. 1985) (refusing to allow plaintiff's recovery of attorney's fees without statutory or contractual authority); McClain v. Faraone, 369 A.2d 1090, 1093-94 (Del. Super. Ct. 1977) (disallowing plaintiff's recovery of attorney's fees in malpractice action stemming from negligent title search because of American Rule); Erving's Hatcheries, Inc. v. Thompson, 204 So. 2d 188, 192 (Miss. 1967) (refusing to assess cost of previous appeal to defendant attorney in legal malpractice action); Widemshek v. Fale, 17 Wis. 2d 337, 342, 117 N.W.2d 275, 277 (1962) (applying American Rule strictly to legal malpractice action); Hiss v. Friedberg, 201 Va. 572, 577, 112 S.E.2d 871, 875 (1960) (restating general rule that plaintiff in legal malpractice case may not recover litigation expenses absent statutory or contractual authority).

15. *See, e.g.*, Strauss v. Fost, 213 N.J. Super 239, 242, 517 A.2d 143, 145 (N.J. Super. Ct. App. Div. 1986) (refusing to deduct defendant attorney's fees for underlying legal matter from judgment in legal malpractice action); Andrews v. Cain, 62 A.D.2d 612, 613, 406 N.Y.S.2d 168, 169 (N.Y. App. Div. 1978) (same); Bernard v. Walkup, 272 Cal. App. 2d 595, 77 Cal. Rptr. 544, 551 (Cal. Ct. App. 1969) (same).

16. *See infra* notes 20-35 and accompanying text (showing examples of courts that deny offsets).

17. *See infra* notes 66-67 and accompanying text (explaining compensatory purpose of damage awards).

18. *See infra* notes 20-35 and accompanying text (providing examples of courts denying offsets).

19. *See infra* notes 66-70 and accompanying text (explaining that courts uphold American Rule despite fact that in operation Rule denies truly full recovery to plaintiff).

Courts that deny offset reductions in legal malpractice actions offer several grounds for their denial.[20] One prevalent view is that the negligent attorney should not profit from his own wrongful act or shoddy workmanship.[21] Courts applying this view reason that deducting a fee from a damage award rewards an attorney for his misconduct or negligence.[22] Furthermore, the courts reason that deducting the fee effectively forces a wronged client to pay for a service two times, once to the attorney who fails to perform properly, and again to the lawyer who must ultimately vindicate the client's rights through a malpractice suit.[23] Courts also note that in cases in which an attorney had one percentage set to deduct upon settlement and another higher percentage set to deduct after trial, if the attorney failed to take any action whatsoever on the suit the court cannot ascertain which percentage to apply in calculating the offset.[24] These courts reason that because the lawyer's misconduct created the need for speculation about the correct percentage, the lawyer should bear the burden of loss rather than profit from his misconduct.[25]

A second ground courts rely on for denying offsets of attorney's fees is that the fees from the subsequent malpractice action "cancel out" fees the negligent attorney would have received upon proper handling of the underlying legal matter.[26] Courts applying this view emphasize the fact that

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20. *See infra* notes 21-35 and accompanying text (explaining arguments employed by courts that refuse to award offsets to legal malpractice defendants).

21. *See* Strauss v. Fost, 213 N.J. Super. 239, 242, 517 A.2d 143, 145 (N.J. Super. Ct. App. Div. 1986) (basing decision on the proposition that negligent attorney should not recover fees for poor work); Andrews v. Cain, 62 A.D.2d 612, 613, 406 N.Y.S.2d 168, 169 (N.Y. App. Div. 1978) (noting that crediting attorney's fee against plaintiff's damages rewards lawyer's poor work); Kane, Kane & Kritzer, Inc. v. Altagen, 107 Cal. App. 3d 36, 44, 165 Cal. Rptr. 534, 538, (Cal. Ct. App. 1980) (same).

22. *See Kane*, 107 Cal. App. 3d 36, 44, 165 Cal. Rptr. 534, 538 (noting unfairness of allowing negligent lawyer to recover fee); *Andrews*, 62 A.D.2d at 613, 406 N.Y.S.2d at 169 (expressing aim of precluding negligent lawyer's recovery of fee). *But see Strauss*, 213 N.J. Super. at 243, 517 A.2d at 145 (stating that sometimes even negligent attorney might recover fees on quantum meruit basis where attorney's action, though negligent, benefitted client).

23. *See Kane*, 107 Cal. App. 3d at 44, 165 Cal. Rptr. at 538 (concluding that awarding offset forces client to pay for same service twice); *Andrews*, 62 A.D.2d at 613, 406 N.Y.S.2d at 169 (noting unfairness of effectively forcing client to pay two legal fees for one underlying matter).

24. *See Andrews*, 62 A.D.2d at 613, 406 N.Y.S.2d at 169 (noting difficulty of determining amount of hypothetical contingent fee); Bernard v. Walkup, 272 Cal. App. 2d 595, 77 Cal. Rptr. 544, 551 (Cal. Ct. App. 1969) (refusing to allow deduction of defendant's contingency fee in legal malpractice suit because of its speculative nature).

25. *See Andrews*, 62 A.D.2d at 613, 406 N.Y.S.2d at 169 (refusing to allow negligent lawyer to profit from evidentiary difficulties of his own creation); *Bernard*, 272 Cal. App. 2d at 595, 77 Cal. Rptr. at 551 (noting that law precludes party creating difficulty in assessing damage from complaining when assessment works against his interests).

26. *See, e.g.*, Togstad v. Veseley, Otto, Miller & Keefe, 291 N.W.2d 686, 696 (Minn. 1980) (accepting reasoning of courts that disallow deduction of hypothetical contingency fees based on canceling out theory); Duncan v. Lord, 409 F. Supp. 687, 691-92 (E.D. Penn. 1976) (reasoning that deducting hypothetical contingency fee results in plaintiff's incomplete com-

the defendant's misconduct forced the plaintiff to hire an additional attorney to pursue the legal malpractice action. Therefore, these courts conclude that deducting the defendant attorney's fee from the plaintiff's damage award results in less than full compensation for the plaintiff.[27]

A third approach courts take in denying offsets of fees for underlying legal matters is to treat the plaintiff's attorney's fees incurred in the legal malpractice action as part of the consequential damages stemming from the defendant's malpractice.[28] Courts espousing this view simply extend the basic common law principles of tort or contract, and reason that the plaintiff can recover fees incurred in the legal malpractice action because the fees flow from the defendant's negligent performance or failure to perform altogether.[29] After finding that the defendant is liable for the cost of the legal malpractice action, these courts credit the fees earned by the defendant for the original legal matter against the cost of the plaintiff's legal mal-

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pensation and that plaintiff's legal fees incurred in legal malpractice thus canceled out defendant attorney's offset from damage award); Christy v. Saliterman, 288 Minn. 144, 174, 179 N.W.2d 288, 307 (1970) (indicating, in dicta, that plaintiff's fees incurred in pursuit of legal malpractice suit canceled out fees plaintiff owed defendant for underlying medical malpractice claim).

27. *See Togstad*, 291 N.W.2d at 696 (noting that offset of fee improper because of additional expense to plaintiff of hiring another lawyer for legal malpractice); *Duncan*, 409 F. Supp. at 692 (determining that deducting hypothetical fee results in incomplete compensation); *Christy*, 288 Minn. at 174, 179 N.W.2d at 307 (basing assertion about non-recovery of fees on fact that defendant's tortious behavior forced plaintiff to hire attorney for legal malpractice suit).

28. *See* Foster v. Duggin, 695 S.W.2d 526, 527 (Tenn. 1985) (holding award of attorney's fees incurred by plaintiff in prosecuting legal malpractice action proper as element of consequential damages). In *Foster* the Tennessee Supreme Court considered whether an attorney found liable for malpractice may have the judgment against him offset by the amount of his fee had he handled the underlying legal matter competently. *Id.* at 526. The defendant in *Foster* failed to file a personal injury action within the one year statute of limitations for personal injury actions in Tennessee. *Id.* The court first recognized two lines of authority regarding offsets of fees against judgments in legal malpractice actions. *Id.* at 527. The first line held that the fee is deductible on the grounds that the wronged client should recover only what he would have received in the original action or legal matter. *Id.* The second line held that the attorney is estopped from claiming any fee by reason of his wrongful act. *Id.* The court then held the attorney's fees from the underlying action not deductible from the judgment because the defendant's negligence forced the plaintiffs to incur expenses in prosecuting the subsequent legal malpractice action. *Id.* The court denied that taking the subsequent litigation into account amounted to an award of attorney's fees to the plaintiff, reasoning that the "additional fees necessary to pursue this action are in the nature of incidental damages flowing from [the defendant's] breach of the contract." *Id.*

The District of Columbia Court of Appeals takes a similar approach. That court held that damages sustained by a wronged client because of a lawyer's negligence included the cost of the additional malpractice action ultimately necessary to recover on the underlying claim. Winter v. Brown, 365 A.2d 381, 386 (D.C. 1976) (holding that cost of legal malpractice action was element of consequential damages caused by lawyer's negligence).

29. *See Foster*, 695 S.W.2d at 527 (finding that defendant's negligence caused malpractice suit); *Winter*, 365 A.2d at 386 (holding that trial court did not err by refusing to reduce amount of judgment in legal malpractice action following defendant's mishandling of a medical malpractice suit because the fees incurred in the legal malpractice were recoverable as consequential damages).

practice suit.[30] Because the defendant attorney has to pay his former client's legal fees as damages, the attorney's own fees merely make up for the amount he already owes the plaintiff. Therefore, the consequential damage approach differs from the "canceling out" approach only in that the latter technically does not recognize that the fees incurred in the malpractice action are an item of recoverable damages.[31]

Finally, one court refuses to deduct the defendant attorney's fee from the plaintiff's damages for public policy reasons based on the special nature of the attorney-client relationship.[32] According to this court, the attorney-client relationship distinguishes legal malpractice from a classic contract or tort situation because the legal malpractice involves a breach of this special relationship.[33] The argument behind this theory for refusal to allow an offset centers on the idea that, without the relationship of trust, a lawyer cannot effectively act to vindicate his client's rights.[34] The court applying the public policy rationale purported to do so because of the lawyer's unique role and that role's importance in our society and thus refused to allow the negligent attorney to recover a fee because he breached the special attorney-client relationship by committing malpractice.[35]

The four approaches courts have taken with regard to the denial of offsets are inappropriate in the context of the fundamental rules of American tort and contract law. The first approach, which applies the rationale that a lawyer should not profit from his tortious conduct, is weak because it

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30. *See Foster*, 695 S.W.2d at 527 (considering plaintiff's fees incurred in legal malpractice action while denying credit to defendant for fees in underlying action); *Winter*, 365 A.2d at 386 (crediting defendant's original fee against plaintiff's costs in legal malpractice litigation).

31. *Compare Foster*, 695 S.W.2d at 527 (finding specifically that cost of legal malpractice litigation was damage flowing from defendant's breach) *with* Duncan v. Lord, 409 F. Supp. 687, 692 (E.D. Penn. 1976) (applying canceling out rationale without mentioning attorney's fees as element of damages).

32. *See* Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 44, 556 N.Y.S.2d 239, 241-42, 555 N.E.2d 611, 614 (1990) (holding that attorney defendant in legal malpractice action could not offset attorney's fees he would have received had he successfully executed the underlying legal matter because malpractice was breach of special relationship). In *Campagnola* the New York Court of Appeals rejected the "canceling out" and consequential damage rationales, while upholding an award of attorneys fees to the plaintiff on the grounds that the lawyer-client relationship is special and that legal malpractice is therefore different from other torts. *Id.* at 43-44, 556 N.Y.S.2d at 243, 555 N.E.2d at 615. In conclusion, the court reasoned:

> our decision is not premised on compensating plaintiffs for attorneys fees incurred in actions for legal malpractice. We neither authorize the recovery of legal fees in this case as consequential damages nor "shift[]" the amount of defendants' contingency fee to plaintiff as part of the value of her claim. We hold only that plaintiff's recovery is not to be diminished by the amount of defendants' unearned fee.

Id. at 45, 556 N.Y.S.2d at 243, 555 N.E.2d at 615.

33. *See id.* at 43, 556 N.Y.S.2d at 241-42, 555 N.E.2d at 614 (refusing to strictly apply contract principles to legal malpractice action because of special relationship).

34. *See id.* at 43, 556 N.Y.S.2d at 242, 555 N.E.2d at 614 (distinguishing legal malpractice from ordinary breach of contract because of attorney's duty toward client).

35. *Id.* at 44, 556 N.Y.S.2d at 242, 555 N.E.2d at 614.

fails to account for the fact that the primary goal of damage awards is to compensate the wronged party.[36] The first approach toward denying offsets results in the wronged client's overcompensation.[37] Absent malpractice, an attorney receives a fee upon successful completion of his work. Because the amount of the judgment in a legal malpractice action is the value of the lawyer's work upon successful completion, refusal to offset the judgment by the amount of the defendant's fee gives the wronged client a windfall in the form of the defendant's unpaid fee.[38] Furthermore, courts using this approach improperly focus on punishing the negligent lawyer by preventing the attorney from recovering his fee.[39] In most civil litigation courts will decline to punish a tortfeasor and instead focus on the plaintiff's compensation.[40] The courts employing the rationale that a negligent lawyer should not profit from his wrongdoing fail to justify this treatment by distinguishing legal malpractice from other civil wrongs.[41]

The second approach, refusal to deduct the initial attorney's fees on the grounds that the fees incurred in the subsequent malpractice action cancel out the original fees, analytically is unsound.[42] In fact, use of the "canceling out" rationale as a justification for refusing to offset attorney's fees from a plaintiff's legal malpractice judgment is tantamount to awarding attorney's fees for the legal malpractice action to the plaintiff.[43] Therefore,

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36. *See* E. FARNSWORTH, CONTRACTS 871 (1990) (stating that basic goal of contract remedy is to put injured party in same position as if defendant fully performed on contract); W. PROSSER & W. KEETON ON TORTS 20 (5th ed. 1984) (recognizing that compensation is primary function of tort remedy); RESTATEMENT (SECOND) OF CONTRACTS § 344 comment a (1981) [hereinafter Restatement of Contracts] (stating that remedial goal of contract damage award is to place wronged party is position expected upon completion of contract); RESTATEMENT (SECOND) OF TORTS § 901 comment a (1979) [hereinafter Restatement of Torts] (stating that first purpose of tort law is to compensate wronged party); C. MCCORMICK, DAMAGES 560 (1935) (stating that primary aim of tort damage award is plaintiff's compensation).

37. *See* Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 47, 556 N.Y.S.2d 239, 244, 555 N.E.2d 611, 616 (1990) (Simons, J., dissenting) (complaining that fee deduction gives plaintiff more than he would have received without malpractice); Moores v. Greenberg, 834 F.2d 1105, 1111 (1st Cir. 1987) (recognizing that absent fee deduction, legal malpractice plaintiff's net gain is greater than gain upon proper completion of underlying legal matter).

38. *See Campagnola*, 76 N.Y.2d at 47, 556 N.Y.S.2d at 244, 555 N.E.2d at 616 (Simons, J, dissenting) (criticizing effect of overcompensating legal malpractice plaintiffs when court disallows fee deduction from judgment); *Moores*, 834 F.2d at 1111 (recognizing that malpractice plaintiff receives windfall when fee not deducted).

39. *See supra* notes 21-25 and accompanying text (explaining punitive theory behind offset cases).

40. *See supra* note 36 and accompanying text (focusing on compensatory, rather than punitive, purpose of damage awards in civil actions).

41. *See supra* notes 21-25 (showing cases in which court operates on punitive theory); *see also* Moores v. Greenberg, 834 F.2d 1105, 1111 (1st Cir. 1987) (criticizing theory disallowing offset of fees for negligent attorney because theory ignores compensatory purpose of damage awards).

42. *See Moores*, 834 F.2d at 1111 (criticizing circular nature of argument in favor of "canceling out" rationale because argument "assumes what it sets out to determine: that plaintiff is entitled to recover the attorney's fees.").

43. *See id.*, 834 F.2d at 1111 (noting that use of the "canceling out" rationale is essentially a method of indirectly forcing defendant to carry cost of litigation).

in practical terms, the result of a decision based on the "canceling out" theory largely is indistinguishable from the result of an award of attorney's fees as an element of consequential damages.[44] Like decisions based on the consequential damage approach, decisions based on the "canceling out" rationale are subject to criticism because they violate the American Rule, which prohibits award of attorney's fees to parties as an element of damages.[45]

The third approach, which involves treating the attorney's fees incurred in the legal malpractice action as consequential damages,[46] is problematic in light of the American Rule.[47] American courts established the Rule, which generally requires parties to bear their own litigation costs, early in United States legal history.[48] In upholding the Rule, courts rely on a number of important policy considerations favoring the Rule, despite criticism from litigants and commentators.[49]

A popular criticism of the American Rule is that as a practical matter, the Rule operates to deny full recovery to plaintiffs.[50] For example, upon winning a lawsuit tort victims or parties wronged by breaches of contract recover only the amount necessary to compensate them for their loss.[51] The

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44. *See supra* notes 28-31 and accompanying text (outlining cases in which courts do not award offset on consequential damage theory).

45. *See infra* notes 66-70 and accompanying text (criticizing consequential damage theory in light of American Rule).

46. *See supra* notes 28-31 and accompanying text (outlining cases decided on consequential damage theory).

47. *See supra* note 11 and accompanying text (defining American Rule).

48. *See* Arcambel v. Wiseman, 1 U.S. (3 Dall.) 234 (1796) (holding counsel's fees improper as part of damage award). In *Arcambel* the Supreme Court articulated the general principal, still in effect today, that an award of attorney's fees would violate the "general practice of the United States". *Id.*

Subsequent courts have upheld the American Rule well into modern times. *See, e.g.*, Alyeska Pipeline Serv. Co v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (upholding and applying American Rule); F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 128 (1974) (same); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 719 (1967) (same).

49. *See infra* notes 57-65 and accompanying text (outlining policy considerations in favor of American Rule).

50. *See, e.g.*, McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761, 783 (1972) (criticizing American Rule's preclusion of full recovery for indigent plaintiffs); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966) (criticizing American Rule as precluding full compensation); Ehrenzweig, *Reimbursement of Counsel Fees and The Great Society*, 54 CALIF. L. REV. 792, 793 (1966) (emphasizing American Rule's tendency to work hardship on indigent persons because it precludes full compensation and deters attorneys from working for indigent persons); Judicial Council of Massachusetts, *First Report*, 11 MASS. L.Q. 1, 64 (1925) [hereinafter First Report] (complaining that American Rule precludes full compensation for plaintiffs); *see also* F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 128 (1974) (noting appellate court's reasoning that failure to award attorney's fees results in inadequate compensation for plaintiff in action under Miller Act, 40 U.S.C. § 270).

51. *See supra* note 36 and accompanying text (noting compensatory purpose of damage awards).

goal of these compensatory damages is to put the plaintiff in the same position he would enjoy had the defendant not harmed the plaintiff or breached the contract.[52] In tort and contract cases compensatory damages generally are the only amounts awarded the plaintiff.[53] The plaintiff must pay attorney 's fees out of his own pocket or have the attorney deduct the attorney's fee from the amount recovered as compensatory damages.[54] Although occasionally punitive damages indirectly cover the plaintiff's attorney's fees in tort cases,[55] courts generally refuse to award such fees as an item of damages because of the American Rule.[56] Thus, a successful plaintiff recovering only compensatory damages is not in fact whole because he must pay his lawyer out of the award.

Although courts and commentators have criticized the American Rule because of its failure to compensate the plaintiff fully, courts have justified the rule based on countervailing policy considerations.[57] First, courts argue

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52. *Id.*

53. *Id.*

54. *See* McLaughlin, *supra*, note 50 at 783 (noting that American Rule fails to account for fact that plaintiff must pay lawyer); Stoebuck, *supra*, note 50 at 202 (noting compensation problem arising from operation of American Rule because plaintiff must pay lawyer); Ehrenzweig, *supra*, note 50 at 793 (same); First Report, *supra*, note 50 at 64 (criticizing American Rule as unjust in tort cases because attorney's fees are expense to plaintiff, just as doctor's bills are).

55. *See* Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 230-31 (1872) (noting that punitive damages *may* indirectly cover legal fees, but that courts generally do not award fees); *see also* O'Leary v. Industrial Park Corp., 211 Conn. 648, 560 A.2d 968, 969 (1989) (recognizing court's or jury's power to award attorney's fees as part of punitive damages); Markey v. Santangelo, 195 Conn. 76, 485 A.2d 1305, 1308 (1985) (upholding award of attorney's fees as punitive damages); Aetna Casualty & Sur. Co. v. Steele, 373 So. 2d 797, 801 (Miss. 1979) (recognizing attorney's fee awards as proper part of punitive damage award).

56. *See* Moores v. Greenberg, 834 F.2d 1105, 1110 (1st Cir. 1987) (noting general application of American Rule in legal malpractice actions); Jenkins v. St. Paul Fire & Marine Ins. Co., 393 So. 2d 851, 859 (La. Ct. App. 1981) (holding that American Rule bars plaintiff's recovery of attorney's fees in legal malpractice action), *aff'd*, 422 So.2d 1109 (La. 1982); Widemshek v. Fale, 17 Wis. 2d 337, 342, 117 N.W.2d 275, 277 (1962) (stating general rule that legal malpractice plaintiff may not recover attorney's fees); Hiss v. Friedberg, 201 Va. 572, 577, 112 S.E.2d 871, 875 (1960) (recognizing general rule that attorney's fees are unrecoverable for legal malpractice plaintiff).

57. *See, e.g.*, McLaughlin, *supra*, note 50 at 783 (criticizing American Rule); Stoebuck, *supra*, note 50 at 202 (criticizing American Rule as precluding full compensation); Ehrenzweig, *supra*, note 50 at 793 (same); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 81 (1963) (criticizing American Rule as outdated because modern policy of law encourages settlement rather than litigation); First Report, *supra*, note 50 at 64 (complaining that American Rule precludes full compensation for plaintiffs); *see also* F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 128 (1974) (noting appellate court's reasoning that failure to award attorney's fees results in inadequate compensation for plaintiff in an action under Miller Act, 40 U.S.C. § 270).

The United States Supreme Court has defended the American Rule on several occasions despite criticism from other courts and commentators. *See F.D. Rich*, 417 U.S. at 128 (rejecting appellate court's award of attorney's fees based on concerns about inadequate compensation because court "merely restat[ed] one of the oft-repeated criticisms of the American Rule.");

that because the outcome of any litigation is uncertain, a litigant should not have to suffer a penalty for exercising his basic right to access the judicial system by either prosecuting or defending a lawsuit.[58] Additionally, a rule allowing a successful litigant to recover attorney's fees might discourage indigent persons from bringing meritorious suits because of a fear of losing and having to pay the opposing party's attorney's fees.[59]

In further support of the American Rule, courts have noted that requiring a trial court to determine what amount is "reasonable" when considering an award of attorney's fees is problematic.[60] Because counsel's fees may vary depending on the lawyer, the client, and the legal matter involved, fees are highly speculative.[61] Also, parties' knowledge that the losing side will pay the winner's fees creates the possibility that litigants will not make reasonable efforts to settle cases and will inflate fee estimates after litigation.[62] Lastly, requiring the court to determine what amount constitutes "reasonable" legal fees prolongs litigation and imposes a heavy burden on the court and the parties involved in terms of time and further expense.[63] Therefore, the American Rule eases the administrative burden on the courts and expedites litigation.

A final rationale for the American Rule is that any relaxation of the Rule could interfere with lawyers' independent representation.[64] If lawyers know that the judge in a case will control their compensation, the lawyers may be less zealous in arguing their client's case or making certain tactical maneuvers for fear of irritating the judge.[65] Accordingly, the American Rule also helps preserve independent advocacy.

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 719 (1967) (noting authority in support of American Rule, despite criticism); Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 237 (1964) (Goldberg, J., concurring) (defending American Rule because of possible hardship to poor litigants).

58. *See Fleischmann*, 386 U.S. at 718 (recognizing uncertainty of outcome in litigation and importance of allowing unfettered access to courts).

59. *See id.* at 718 (noting importance of keeping courts open to poor); *Farmer*, 379 U.S. at 236-37 (holding that courts should closely scrutinize any litigation costs held out by winning party as item of damages because to hold otherwise would discourage litigants from bringing meritorious suits).

60. *See Fleischmann*, 386 U.S. at 718 (noting difficulty of determining what counsel's fees are reasonable); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 231 (1872) (noting wide variation in amount of fees because of varying competence levels among practitioners).

61. *See Fleischmann*, 386 U.S. at 718 (noting speculative nature of legal fees); *Oelrichs*, 82 U.S. (15 Wall.) at 231 (same).

62. *See Fleischmann*, 386 U.S. at 718 (expressing concern over abuse by counsel if fees awarded to winning litigants); *Oelrichs*, 82 U.S. (15 Wall.) at 231 (same).

63. *See Fleischmann*, 386 U.S. at 718 (justifying American Rule as easing judicial administration); *Oelrichs*, 82 U.S. (15 Wall.) at 231 (expressing desire to ease burden on court and litigants).

64. *See* F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. at 129 (noting problem with court determining attorney's fees at close of case because "the earnings of the attorney [would] flow from the pen of the judge before whom he argues.").

65. *See id.* (noting that American Rule helps preserve independent advocacy).

The American Rule, despite its benefits, operates contrary to common law principles concerning consequential damages.[66] Courts award consequential damages to compensate victims for damage from the consequences of misbehavior.[67] Because litigation is generally a foreseeable consequence of all tortious behavior, a plaintiff should recover litigation expenses under strict application of consequential damage principles.[68] However, courts that have dealt with the American Rule acknowledge the arguments against the Rule based on the consequential damage theory and reject those arguments because of the countervailing benefits of the Rule.[69] Thus, the Rule reflects a policy choice made by courts that the considerations favoring the Rule outweigh any problems parties may experience because of the Rule's preclusion of full compensation.[70] If courts ignore the Rule and base attorney's fee awards in legal malpractice suits entirely on the consequential damage theory, courts should award attorney's fees in all civil litigation. Successful plaintiffs in most civil litigation could base their claims for attorney's fees on the fact that absent the defendant's misconduct they would not have incurred the expense of a lawsuit.

The opinions of courts that have dealt with the American Rule demonstrate that courts follow the Rule *despite* the fact that it precludes the plaintiff's full compensation.[71] Because legal malpractice actions are grounded in common law tort and contract principles they are indistinguishable from many other forms of wrongful conduct. Therefore, by awarding attorney's fees as part of consequential damages in legal malpractice actions courts unnecessarily erode the American Rule.[72] Moreover, awarding attorney's fees to successful plaintiffs in legal malpractice suits undercuts one of the most important policies behind the Rule because the award penalizes the

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66. *See* FARNSWORTH, *supra*, note 36 at 915-16 (asserting that party breaching contract is liable only for reasonably foreseeable damages resulting from breach); PROSSER & KEETON, *supra*, note 36 at 169-70 (asserting that tortfeasor is responsible only for reasonably foreseeable results of tortious conduct); Restatement of Contracts, *supra*, note 36 at § 351 comment a (finding that party breaching contract is liable only for foreseeable consequences of breach); *but see* Restatement of Torts, *supra*, note 36 at § 917 comment d (asserting that tortfeasor is responsible for all consequences of tortious behavior whether foreseeable or not); *see also supra* note 36 and accompanying text (noting that primary purpose of damage awards is compensatory).

67. *See supra* note 36 and accompanying text (discussing purpose of tort and contract damages as plaintiff's compensation); *supra* note 66 and accompanying text (explaining consequential damage theories).

68. *See supra* note 66 and accompanying text (discussing principles of foreseeability in consequential damage awards and compensatory purpose of such awards).

69. *See* F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 129 (1974) (striking balance of interests in favor of American Rule despite argument that litigation costs actually are part of damages).

70. *Id.*

71. *See supra* notes 57-65 and accompanying text (noting courts' acceptance of American Rule despite problems caused by incomplete compensation of plaintiffs).

72. *Id.*

lawyer for merely defending himself in court.[73] Until courts eliminate the Rule altogether or find some valid ground on which to expand lawyer liability for consequential damages in legal malpractice suits exposing lawyers to more liability than other tortfeasors is unfair.

The fourth rationale employed in refusing to deduct attorney's fees from legal malpractice damage awards, based on the public policy objective of deterring breaches of the attorney-client relationship,[74] also is an inappropriate blanket exception to the American Rule.[75] Like the rationale that disallows the offset because of the defendant attorney's negligence, the use of the public policy approach also overcompensates plaintiffs.[76] Furthermore, the public policy exception punishes lawyers solely because of their status as lawyers.[77] Although some legal malpractice involves an egregious breach of trust or an ethical violation, no reason exists to justify a *per se* rule barring all legal malpractice defendants from offsetting fees from the judgments against them. Although the court employing the public policy exception posited that the special nature of the lawyer-client relationship and the lawyer's unique role in the vindication of client rights justify this differing treatment,[78] the court does not apply this exception to other situations involving breaches of trust or even to other professionals.[79] Moreover, if the purpose of the public policy theory is to deter breaches of the lawyer-client relationship, a blanket application is inappropriate because nothing can deter malpractice that merely is negligent or unintentional.[80]

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73. *See supra* note 58 and accompanying text (emphasizing courts' desire not to penalize litigants).

74. *See supra* notes 32-35 and accompanying text (outlining public policy rationale for court's refusal to offset defendant attorney's fees from damages in legal malpractice cases).

75. *See* Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 48, 556 N.Y.S.2d 239, 245, 555 N.E.2d 611, 617 (1990) (Simons, J., dissenting) (complaining that practical effect of refusal to offset fees on the public policy rationale is to make lawyer's malpractice liability far above that of other professionals).

76. *See id.* at 48, 556 N.Y.S.2d at 245, 555 N.E.2d at 617 (criticizing court's refusal to award offset of defendant's fees for underlying legal matter because refusal resulted in plaintiff's overcompensation); *see also supra* notes 36-38 and accompanying text (criticizing refusal to offset defendant attorney's fees for underlying legal matter because refusal results in plaintiff's overcompensation).

77. *See Campagnola*, 76 N.Y.2d at 48, 556 N.Y.S.2d at 245, 555 N.E.2d at 616 (noting that public policy exception to American Rule treats legal malpractice differently from other torts).

78. *See id.* at 48, 556 N.Y.S.2d at 245, 555 N.E.2d at 614 (recognizing that lawyer's unique role justifies treating legal malpractice differently from other torts).

79. *See id.* at 48, 556 N.Y.S.2d at 245, 555 N.E.2d at 617 (Simons, J., dissenting) (noting that court, in refusing to allow defendant attorney to offset fees from damage award, treats lawyers differently from other professionals); *cf.* STERN, AN ACCOUNTANT'S GUIDE TO MALPRACTICE LIABILITY 73-75 (1979) (noting that normal tort and contract principles apply in accounting malpractice); J. DAVIES, CPA LIABILITY: A MANUAL FOR PRACTITIONERS 165 (1983) (commenting that courts treat accounting malpractice as common law tort or contract problem).

80. *See* PROSSER & KEETON, *supra*, note 36 at 9 (recognizing that although primary purpose of tort law is compensation, deterrence is valid goal in limited instances); Restatement

Courts apply the four rationales for refusing to award offsets to defendants in legal malpractice actions despite the rationales' analytical weaknesses.[81] Additionally, the courts provide little reasoning to clarify their refusal to award offsets.[82] Some courts and commentators speculate that the decisions in which courts refuse to credit offsets to legal malpractice defendants reflects an undercurrent of increased sympathy for aggrieved clients as opposed to other plaintiffs.[83] Other courts either imply or openly state that the real reason underlying the refusal is the need to punish lawyer misconduct.[84] Interestingly, some of the courts that purport to apply the American Rule strictly in legal malpractice actions will find another basis for awarding the fees.[85]

Courts' frustration with lawyer incompetence and unethical behavior is understandable. Refusal to award offsets to legal malpractice defendants, however, is an ineffective way to address negligent malpractice because negligence in a specific situation cannot be deterred.[86] Although awards of attorney's fees might act as an institutional deterrent by encouraging a generally higher standard of care in the legal profession, compensatory damages probably suffice for that purpose.[87] Moreover, because the primary

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of Torts, *supra* note 36 at § 901 comment c (stating that secondary purpose of tort law is deterrence).

81. *See supra* notes 36-79 and accompanying text (explaining weaknesses of four approaches courts take toward offsets).

82. *See Campagnola*, 76 N.Y.2d at 47-48, 555 N.E.2d at 616 (Simons, J., dissenting) (criticizing logical consistency of public policy exception); Moores v. Greenberg, 834 F.2d 1105, 1110-11 (1st Cir. 1987) (questioning logic of "canceling out" and negligent lawyer justifications and specifically refusing to determine validity of the consequential damage approach).

83. *See Moores*, 834 F.2d at 1110 (citing other offset cases to stand for proposition that "one victimized by legal malpractice should be more generously treated."); MEISELMAN, *supra* note 1 at 59 (suggesting that some courts refusing to award offset to defendant do so out of sympathy because wronged client had to vindicate rights through two lawsuits).

84. *See supra* notes 32-35 and accompanying text (outlining public policy for courts refusal to award offset to legal malpractice defendants); *supra* notes 21-25 and accompanying text (outlining cases in which courts attempt to punish negligent attorney by refusing to award fee).

85. *See* Jenkins v. St. Paul Fire & Marine Ins. Co., 393 So. 2d 851, 859 (La. Ct. App. 1981) (holding that although plaintiff generally may not recover attorney's fees for prosecution of legal malpractice action, plaintiff may recover fees above those of the original attorney if incurred because of the original attorney's misconduct), *aff'd*, 422 So. 2d 1109 (La. 1982); Koffler, *Legal Malpractice Damages in a Trial Within a Trial—A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40, 43-44 n.24 (1989) (noting that although *Jenkins* court claimed that it was not violating rule against recovery of attorney's fees, court's reasoning for awarding $5,000 excess legal fees to plaintiff may have been attempt at disguising the real reason for its action).

86. *See supra* notes 21-25 and accompanying text (outlining cases based on punishing negligent attorney).

87. *See* Moores v. Greenberg, 834 F.2d 1105, 1114 (1st Cir. 1987) (noting that compensatory damage awards, in concert with possibility of other damages in appropriate cases, is adequate to deter malpractice).

purpose of tort law is compensation,[88] courts should reserve use of attorney's fee awards to deter intentional bad faith conduct.[89] Absent bad faith conduct that falls under that specific exception to the American Rule, courts should not punish lawyers in a civil suit.[90]

Other adequate means besides use of attorney's fee awards exist to address courts' general concerns about retribution for unethical conduct.[91] Although a lawyer's conduct in the events underlying a malpractice suit may be unethical under a state's code of professional ethics, the proper place for retributive punishment is before the bar disciplinary committee, not before a court in a post trial proceeding.[92] The courts' use of an ethical standard for awarding attorney's fees is inappropriate in the context of a tort or contract case unless the plaintiff can show that the defendant's violation of that standard constituted bad faith.[93] When the plaintiff shows an ethical breach that constituted bad faith conduct, however, the court properly may award attorney's fees as part of a punitive measure to deter that conduct in the future.[94]

Admittedly, courts should punish certain ethical rule violations that are related to legal malpractice to provide a deterrent effect. Although simple negligence accounts for some malpractice suits,[95] other suits involve intentional misconduct[96] such as representation of clients despite conflicts of interest.[97] Much of the misconduct involved in malpractice suits violates the

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88. *See supra* note 36 and accompanying text (noting compensatory purpose behind damage awards).

89. *See infra* notes 101-28 and accompanying text (discussing cases that address bad faith exception).

90. *See supra* note 36 and accompanying text (indicating that primary purpose of damage awards is to compensate, rather than punish).

91. *See* Weston, *Court-Ordered Sanctions of Attorneys: A Concept That Duplicates the Role of Attorney Disciplinary Procedures*, 94 DICK. L. REV. 897, 927 (1990) (asserting that bar disciplinary committees are proper place for lawyer discipline, rather than proceedings in which courts award attorney's fees as sanctions).

92. *See id.* (submitting that courts, in ordering more sanctions, step into role better assumed by bar disciplinary committees).

93. *See infra* notes 143-66 and accompanying text (establishing connection between ethical breaches and bad faith).

94. *See infra* notes 129-31 and accompanying text (establishing deterrence rationale for bad faith exception).

95. *See* CHARACTERISTICS, *supra* note 1 at 581 (indicating that forty percent of malpractice claims reported in study occurred because of administrative errors, such as failure to file or client relation errors, such as failure to follow instructions); J. SMITH, PREVENTING LEGAL MALPRACTICE 2-13 (1981) (asserting that common negligence is a leading cause of malpractice actions); MEISELMAN, *supra* note 1 at 339-42 (same).

96. *See* CHARACTERISTICS, *supra* note 1 at 581 (indicating that intentional wrongs and substantive errors (both of which categories include professional misconduct) accounted for over fifty percent of all malpractice claims reported for study); MALLEN & LEVIT, *supra* note 1 at 271-72 (establishing connection between legal malpractice and ethical violation); MEISELMAN, *supra* note 1 at 285 (same).

97. *See* Hazard, *Conflicts Are Often Key in Malpractice*, 12 NATIONAL L.J. 13, 14 (Sept. 10, 1990) (indicating that conflict of interest may create presumption that actions giving rise

states' codes of professional ethics.[98] However, courts do not need to deny offsets to legal malpractice defendants to deter these ethical violations.[99] Instead, courts may award attorney's fees as damages to successful legal malpractice plaintiffs under the bad faith exception to the American Rule.[100] Intentional lawyer misconduct in violation of ethical standards fits under this exception.[101] Using the bad faith exception courts can punish the attorney, thereby deterring future misconduct while still complying with the basic common law rules stressing compensation[102] and the principles underlying the American Rule.[103]

Despite general acceptance of the American Rule, both federal and state courts recognize exceptions to the Rule that allow courts to award fees in limited instances.[104] These exceptions to the Rule involve either the inherent

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to malpractice suit were designed to protect conflicting interests of other client); MALLEN & LEVIT, *supra* note 1 at 238-40 (asserting that conflicts of interest are leading cause of ethically based malpractice suits); MEISELMAN, *supra* note 1 at 285 (same).

98. *See supra* notes 96-97 and accompanying text (indicating connection between ethical misconduct and legal malpractice).

99. *See supra* notes 21-35 and accompanying text (outlining offset cases).

100. *See infra* notes 143-66 and accompanying text (establishing connection between ethical misconduct and bad faith).

101. *Id.*

102. *See supra* note 36 and accompanying text (establishing compensation as primary purpose for damage awards).

103. *See supra* notes 57-65 and accompanying text (outlining policies behind American Rule).

104. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-59 (1975) (reiterating exceptions to rule, including bad faith exception); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718-21 (1967) (clarifying exceptions to American Rule while holding award of attorney's fees improper in trademark infringement suit under Lanham Act, 15 U.S.C.A. § 1117). In *Fleischmann* the United States Supreme Court considered the question of whether a plaintiff could recover attorney's fees as separate damages in situations where a statute specifies the compensatory remedies. 386 U.S. at 714-15. After discussion of the historic justification for the American Rule, the Court recognized four limited exceptions to the general rule prohibiting awards of attorney's fees, derived from the historic powers of courts sitting in equity to manage their internal affairs and correct situations of manifest injustice. *Id.* at 718-19. However, the Court found that the exceptions were not developed to supplement statutory remedies passed by legislatures. *Id.* at 719. Accordingly, the Court held that the attorney's fees were unrecoverable. *Id.* at 721.

The first exception the *Fleischmann* Court recognized occurs in cases involving bad faith or wanton conduct on the part of the losing party. *Id.* at 718. The second exception covers awards for damages resulting from a party's willful failure to abide by court orders. *Id.* The third exception addressed by the Court in *Fleischmann* applies to "common fund" cases in which a plaintiff has, through litigation at his own expense, created a situation from which many others in a given class will benefit, making it inequitable for that plaintiff to bear the cost alone. *Id.* The fourth exception, similar to the third, comes into effect when a plaintiff unintentionally creates a "common fund" situation by instituting a suit which, by effect of the court's judgment, will benefit others in a given class. *Id.*

The Supreme Court consistently has reaffirmed the exceptions it enumerated in *Fleischmann*. *See, e.g.*, *Alyeska Pipeline*, 421 U.S. at 257-258 (recognizing exceptions, but finding that none applied in case); F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 129-30 (1974) (enumerating exceptions and refusing to apply them); Hall v. Cole,

equitable powers of the court[105] or statutory grants of authority, such as state and federal rules of civil procedure.[106] One well-recognized exception is that of "bad faith" or "obdurate behavior."[107] Under the bad faith

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412 U.S. 1, 5-7 (1973) (listing exceptions while upholding trial court's award).

State courts also recognize exceptions to the American Rule based on the historical power of equity courts. *See* Guay v. Brotherhood Bld'g Assoc., 87 N.H. 216, 177 A. 409, 413 (1935) (denying defendant's claim for attorney's fees because situation did not fit into exceptions to American Rule). *Guay* revolved around the plaintiff's testatrix' premature foreclosure on the defendant's property. The New Hampshire Supreme Court held that although the foreclosure was illegal, the defendant was not entitled to counsel costs because the case did not fit into the exceptions to the American Rule recognized in New Hampshire. *Id.* at 216, 177 A. at 413. Like the United States Supreme Court, the New Hampshire court cast its exceptions almost entirely in terms of the court's authority to enforce the court's decisions and do justice where equity requires. *Id.*, 177 A. at 413.

State courts most commonly allow attorney's fees in situations in which the award is either necessary for the court to run properly, as in the example of punishment for wilful disobedience of a court order, or as a condition for the grant of a new trial. *See Guay* at 413 (noting exception). On other occasions the award is motivated by equitable considerations, such as cases in which a contract provides for such damages, "common fund" situations and domestic relations cases. *See id.* (noting common fund and domestic relations exceptions); Fittipaldi v. Legassie, 18 A.D.2d 331, 239 N.Y.S.2d 792, 799-800 (1963) (holding award of attorney's fees to wrongfully expelled union members out of union fund proper because their actions benefitted all union members); C M & M Group, Inc. v. Carroll, 453 A.2d 788, 795-96 (Del. 1982) (recognizing and applying common fund exception); Gilbert v. Hoisting & Portable Engineers, 237 Or. 130, 141, 390 P.2d 320 (1964) (recognizing and applying common benefit exception); Turnipseed v. Turnipseed, 158 So. 2d 808, 812-13 (Fla. Dist. Ct. App. 1963) (recognizing exception in divorce case, but refusing to apply); Barber v. Barber, 234 Miss. 89, 92, 105 So.2d 630, 631-32 (1958) (recognizing and applying exception in domestic relations case).

105. *See* Vaughn v. Atkinson, 369 U.S. 527, 530 (recognizing inherent powers of court to grant attorney's fee awards), *reh'g denied*, 370 U.S. 965 (1962).

106. *See* Western United Realty v. Issacs, 679 P.2d 1063, 1064-65 (Colo. 1984) (recognizing grant of power to award fees under state rule of civil procedure).

107. *See Vaughn*, 369 U.S. at 530 (holding award of attorney's fees to injured sailor for non payment of cure and maintenance proper as part of compensatory damages). Later courts cited *Vaughn* to stand for the proposition that federal courts had the inherent power to award attorney's fees in cases involving bad faith. *See, e.g*, Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) (citing *Vaughn* and reaffirming court's inherent authority to award fees in bad faith cases while remanding to District Court for a finding of whether party's actions constituted bad faith); *Aleyska Pipeline*, 421 U.S. at 258 (citing *Vaughn* while noting bad faith exception); *F.D. Rich*, 417 U.S. at 129 (*citing* Vaughn to stand for recognition of bad faith exception).

Most state courts also recognize the bad faith exception to the American Rule. *See, e.g.*, *Western United Realty*, 679 P.2d at 1065 (stating that, when bad faith or frivolousness is present, rationale for awarding attorney's fees under Colorado Rule of Civil Procedure § 13-17-101 becomes even stronger than usual); Jackson v. Brinegar, Inc., 165 Ga. App. 432, 436, 301 S.E.2d 493, 497-98 (1983) (holding instruction allowing jury to award attorney's fees proper where suit involves possibility of bad faith behavior); Shanks v. Williams, 455 A.2d 450, 452 (Md. App. 1983) (upholding award of attorney's fees on other grounds, but recognizing that bad faith exception also applied to case); Payne v. Foley, 102 Id. 760, 761-62, 639 P.2d 1126, 1127-28 (1982) (recognizing bad faith exception but refusing to apply it); Cox v. Ubik, 424 N.E.2d 127, 129 (Ind. App. 1981) (upholding equitable power of court to award attorney's fees in bad faith cases); Colonial Carpets, Inc. v. Carpet Fair, Inc., 374 A.2d 419, 424-25

exception a court properly may award the fees incurred during litigation of a suit or motion based on bad faith behavior to the victims of that behavior.[108]

The bad faith exception to the American Rule provides a legitimate justification for an award of attorney's fees to a successful plaintiff in legal malpractice actions involving intentional or wanton misconduct. In federal courts the bad faith exception to the American Rule allows a trial court to assess attorney's fees against a party who "has acted in bad faith, vexatiously, wantonly or for oppressive reasons,"[109] either in the actions underlying the litigation or during the conduct of the lawsuit.[110] A problem with applying the bad faith exception, however, is that bad faith is an extremely difficult term to define and is even harder to apply as a standard for awarding attorney's fees.[111] The definition of bad faith is problematic because the definition suggests that any intentional tort a party commits involves bad faith. The fact that courts often disagree on the issue of whether a party acted in bad faith when considering an award of attorney's fees underscores the definitional difficulty.[112] Despite this shortcoming, courts use the bad faith exception to justify awards of attorney's fees in a wide variety of cases.[113]

(Md. Ct. Spec. App. 1977) (finding justification for award in bad faith cases under Md. Civ. Pro. 64(b)); Sorin v. Board of Educ., 46 Ohio St. 2d 177, 180, 347 N.E.2d 527, 530-31 (Ohio 1976) (recognizing bad faith exception but refusing to apply to facts of case); New Jersey Turnpike Auth. v. Bayonne Barrel & Drum Co., 110 N.J. Super. 506, 514, 266 A.2d 164, 167-68 (1970) (finding that bad faith is applicable for use against state in appeals from condemnation proceedings); Cooper v. Weissblatt, 154 Misc. 522, 528-30, 277 N.Y.S. 709, 717-18 (1935) (holding counsel's fees recoverable for plaintiff in fraud case on compensatory damage theory because of bad faith inherent in defendant's fraudulent conduct); Carhart v. Wainman, 114 Ga. 632, 633, 40 S.E. 781, 782 (1902) (authorizing jury's award of attorney's fees upon finding of bad faith).

108. *See Vaughn*, 369 U.S. at 527 (recognizing connection between bad faith and compensation).

109. *See Roadway Express*, 447 U.S. at 766 (quoting 6 J. MOORE, FEDERAL PRACTICE, at 1709 (2d ed. 1972)) (quoting requirements for attorney's fee award under bad faith exception); *F.D. Rich*, 417 U.S. at 129 (reviewing exceptions to American Rule).

110. *See Hall*, 412 U.S. at 15 (holding that court may find bad faith either in conduct leading to litigation or in actions during lawsuit).

111. *See Black's Law Dictionary* 139 (6th ed. 1990) (defining bad faith as "[t]he opposite of 'good faith'" and further clarifying by adding that term, "bad faith", implies "the conscious doing of a wrong because of dishonest purpose or moral obliquity"). Courts often disagree about what action constitutes bad faith. *See* Bell v. School Board, 321 F.2d 494, 500 (4th Cir. 1963) (holding, over two justices' dissents, attorney's fees awardable to successful plaintiffs in school desegregation case under bad faith exception to American Rule where defendant school board showed long pattern of racially discriminatory practices and deliberately placed administrative obstacles in plaintiffs' path during attempt to desegregate schools); Vaughn v. Atkinson, 369 U.S. 527, 534 (1962) (Stewart, J., dissenting) (contending that court should remand case to trial court because shipowner's failure to provide cure and maintenance did not automatically constitute bad faith).

112. *See supra* note 111 and accompanying text (indicating difficulty in defining bad faith).

113. *See* McEnteggart v. Cataldo, 451 F.2d 1109, 1112 (1st Cir. 1971) (holding award of

The bad faith cases fall into two basic classes: cases involving breach of a well-defined duty and cases involving intentional deprivation of a well-established right.[114] The first group consists of cases in which the defendant owed a clearly established duty to the plaintiff and neglected that duty in a wanton manner.[115] *Vaughn v. Atkinson*,[116] the first case in which the United States Supreme Court openly recognized the bad faith exception to the American Rule, falls into this category. The defendant shipowner in *Vaughn* had a well-established duty towards the plaintiff to provide "cure and maintenance" in the event of injury.[117] When the plaintiff, a sailor, attempted to collect the cure and maintenance after becoming ill the shipowner made no effort to determine the validity of the plaintiff's claim.[118] The shipowner's inaction forced the plaintiff to hire a lawyer to litigate the plaintiff's claim.[119] The United States Supreme Court held that the shipowner's failure to begin an investigation into the sailor's claim constituted bad faith sufficient to justify an award of attorney's fees.[120] Furthermore,

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attorney's fees justified when plaintiff, discharged college professor, had to litigate to obtain statement of reasons for nonrenewal of his employment contract with defendant state college). In *McEnteggart*, the plaintiff filed suit in the United States District Court for the District of Massachusetts alleging arbitrary and capricious nonrenewal of his employment contract, and demanding a statement of reasons for the nonrenewal. *Id.* at 1110. The United States Court of Appeals for the First Circuit found that the nonrenewal was justified and affirmed the trial court's dismissal of the action. *Id.* at 1111-12. However, the court also found that plaintiff was constitutionally entitled to a statement of reasons under a previous decision and awarded attorney's fees on the ground that the school had failed to provide that statement after several requests. *Id.* at 1112.

Plaintiffs in race discrimination suits also used the bad faith exception with particular success. *See Bell*, 321 F.2d at 500 (applying bad faith exception to allow award of attorney's fees to plaintiffs in school desegregation case); Rolax v. Atlantic Coast Line R.R. Co., 186 F.2d 473, 481 (4th Cir. 1951) (refusing to disturb lower court's award of lawyer's fees to successful plaintiffs in race discrimination suit against union and railroad).

114. *See infra* notes 115-28 and accompanying text (explaining two classes of bad faith cases).

115. *See infra* 116-23 and accompanying text (describing cases in which court infers bad faith through breach of clearly established duty).

116. *See* Vaughn v. Atkinson, 369 U.S. 527, 530 (holding award of attorney's fees to injured sailor for nonpayment of cure and maintenance proper as part of compensatory damages), *reh'g denied*, 370 U.S. 965 (1962). The plaintiff in *Vaughn*, an injured seaman, attempted to obtain cure and maintenance from his ship's owner after showing symptoms of tuberculosis. *Id.* at 528. The owner made no attempt to investigate the validity of the claim and circumstances eventually forced the plaintiff to hire an attorney for a fifty percent contingency fee to recover the cure and maintenance. *Id.*. The Court first recognized that an award of attorney's fees was allowable under the traditional equity jurisdiction of admiralty courts because the employer clearly acted in bad faith. *Id.* at 530. However, the Court went on to hold that the fees were recoverable in this case as a normal element of compensatory damages, reasoning that but for the shipowner's refusal to give the required maintenance and cure the seaman would not have been forced to hire an attorney. *Id.* at 530.

117. *Id.* at 528.

118. *Id.*

119. *Id.*

120. *Id.* at 530.

the Court added that the award of attorney's fees was proper as an element of consequential damages *caused by* the shipowner's bad faith.[121] Thus, the bad faith exception reflects the Court's judgment not only that obdurate behavior warrants punishment, but also that victims of bad faith behavior deserve full compensation and that courts should not hinder victim's full recovery by mechanically applying the American Rule. Lower federal and state courts have recognized this aspect of the bad faith exception as part of the fabric of the American common law[122] and apply the exception in cases when a party's failure to perform an unambiguous, legally imposed duty forces the opposing party to hire counsel and resort to legal action to force the obliged party to perform that duty.[123]

The second category of bad faith cases involves intentional conduct that deprives someone of a right to which that person clearly is entitled.[124] *Bell v. School Board*[125] and *Rolax v. Atlantic Coast Line R.R.*[126] fall into the second category. Both cases involved overt acts of race discrimination in

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121. *Id.*

122. Cinciarelli v. Reagan, 556 F. Supp. 99, 100 (D.D.C. 1983) (stating that bad faith exception is part of "American Common Law"), *aff'd in pertinent part, rev'd in part*, 729 F.2d 801, 804-10 (D.C. Cir. 1984) (granting fees to successful plaintiff on statutory grounds); Cox v. Ubik, 424 N.E.2d 127, 129 (Ind. App. 1981) (finding power to award fees under traditional equitable principles).

123. *See Cinciarelli*, 556 F. Supp. at 100 (specifying standard for applying American Rule). In *Cinciarelli*, the court found that the bad faith exception to the American Rule applied when "a party, confronted with a clear statutory duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake unnecessary litigation to vindicate plain legal rights." *Id.* (quoting Fitzgerald v. Hampton, 545 F. Supp. 53, 57 (D.D.C. 1982).

124. *See infra* notes 125-28 and accompanying text (explaining class of cases in which court infers bad faith from intentional deprivation of right).

125. 321 F.2d 494, 500 (4th Cir. 1963) (ordering award of attorney's fees to plaintiffs in school desegregation case). In *Bell* the United States Court of Appeals for the Fourth Circuit considered the issue of whether plaintiffs in a school desegregation case were entitled to recover attorney's fees under the bad faith exception to the American Rule. *Id.* The county school board in *Bell* effectively forced the plaintiffs to sue for desegregation of the county school by forcing the plaintiffs to go through unnecessary application processes and threatening to close down certain county schools. *Id.* at 495-97. The Fourth Circuit found that these actions clearly constituted bad faith. *Id.* at 500. Accordingly, the Fourth Circuit reversed the district court's refusal to award attorney's fees to the successful plaintiffs. *Id.*

126. 186 F.2d 473, 481 (4th Cir. 1951) (holding award of attorney's fees to plaintiffs in race discrimination suit alleging discrimination against blacks in collective bargaining process appropriate under bad faith exception to American Rule). In *Rolax* the United States Court of Appeals for the Fourth Circuit considered the question whether plaintiffs in a race discrimination suit could properly recover attorney's fees incurred in that action. *Id.* The defendants in *Rolax*, a union and a railroad company, entered into a collective bargaining agreement that sacrificed the seniority rights of the black workers to those of white workers. *Id.* at 475-77. Although the railroad and union attempted to justify this action by pointing to a need for more qualified firemen on trains who could be promoted to engineers, the court said that the defendants' actions were merely a facade for a racially discriminatory system of employment. *Id.* at 477. Consequently, the court found that the lower court's assessment of attorney's fees against the defendant was appropriate. *Id.* at 481.

the face of clearly defined constitutional prohibitions.[127] The courts in these cases awarded attorney's fees because of the overt conduct on the part of the defendants in the face of clear legal prohibitions that deprived the respective plaintiffs of rights that courts clearly defined in previous race discrimination cases.[128]

These two classes of cases demonstrate that the bad faith exception has two aspects. First, the bad faith exception is punitive, but only in that its intent is to deter certain types of misconduct.[129] The purpose of an award under the bad faith exception is not to punish a party for the sake of exacting retribution.[130] If the bad faith exception is retributive in nature, then courts could award attorney's fees in any intentional tort case. This exception recognizes that certain types of behavior are so reprehensible that the award of attorney's fees to a prevailing party is necessary to deter that conduct.[131] Additionally, the bad faith exception has a compensatory element.[132] The court awards the attorney's fees to compensate the wronged party because of the damage caused by his opponent's bad faith conduct. Thus, the compensatory aspect of the bad faith exception reflects the court's decision that victims of bad faith behavior deserve not only the usual compensation, but also reimbursement for attorney's fees incurred as a result of the bad faith behavior.[133]

Because the standards for what constitutes bad faith behavior set out previously are not always clear,[134] trial courts may have a difficult time applying those standards. Whether bad faith exists in a case depends on the specific facts of that case. Accordingly, the power to award attorney's

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127. *See Bell*, 321 F.2d at 498-99 (finding clear constitutional violation on part of school board); *Rolax*, 186 F.2d at 480 (finding constitutional violation on part of union and railroad).

128. *See Bell*, 321 F.2d at 499. The *Bell* court defined bad faith conduct in the context of intentional behavior as conduct which "would in any other context be instantly recognized as discreditable". *Id.* The court added that the equitable remedy "would be far from complete, and justice would not be contained, if counsel fees were not awarded in a case so extreme." *Id.*

129. *See* Cox v. Ubik, 424 N.E.2d 127, 129 (Ind. App. 1981) (recognizing two-fold punitive and compensatory nature of rule); Hall v. Cole, 412 U.S. 1, 5 (1973) (stating that underlying rationale of rule coming from "bad faith" class of cases is punitive, to deter certain types of conduct).

130. *See Hall*, 412 U.S. at 5 (stressing importance of bad faith exception as deterrent to future misconduct); *Cox*, 424 N.E.2d at 129 (same).

131. *See Hall*, 412 U.S. at 5 (recognizing deterrent effect of bad faith exception); *Cox*, 424 N.E.2d at 129 (same).

132. *See Cox*, 424 N.E.2d at 129 (stressing compensatory aspect of bad faith exception); Bell v. School Board, 321 F.2d 494, 500 (4th Cir. 1963) (recognizing that attorney's fees are necessary to fully compensate victims of bad faith racial discrimination); Vaughn v. Atkinson, 369 U.S. 527, 530 (1962) (awarding attorney's fees as damages to compensate for bad faith conduct); Rolax v. Atlantic Coast Line R.R, 186 F.2d 473, 481 (4th Cir. 1951) (recognizing that remedy would be incomplete in bad faith case without attorney's fee award).

133. *See supra* notes 129-32 and accompanying text (noting compensatory aspect of bad faith exception).

134. *See supra* notes 110-12 and accompanying text (suggesting definitional difficulties in determining bad faith).

fees is vested in the discretion of the trial court.[135] A reviewing court will overturn a trial court's attorney's fee award only if an abuse of discretion existed in the trial court.[136] The policy of deference to the trial court's award of attorney's fees leaves the trial court free to make decisions about whether to award attorney's fees on a case by case basis.

Because of its deterrent and compensatory aspects, as well as the fact that courts administer it with wide discretion, the bad faith exception is similar to Federal Rule of Civil Procedure 11 (Rule 11), which provides for sanctions in the form of attorney's fees against parties filing frivolous pleadings.[137] Although Rule 11 is a statutory rather than inherent base of power, it serves the same purpose as the bad faith exception.[138] First, Rule 11 deters attorney misconduct by punishing frivolous pleadings.[139] Also, Rule 11 compensates those parties forced to come to court to answer those pleadings.[140] The bad faith exception has the same dual purpose. First, the bad faith exception deters certain types of behavior.[141] Also, the exception compensates the victims of that behavior as part of the punitive transaction.[142] An understanding of the dual nature of the bad faith exception is necessary to apply that standard in legal malpractice actions.

Certain types of legal malpractice fit into the bad faith exception because they constitute violations of the ethical codes that govern the legal profes-

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135. *See* C M & M Group, Inc. v. Carroll, 453 A.2d 788, 795-96 (Del. 1982) (noting that award of attorney's fees is soundly in discretion of trial court); LaSalle Nat'l Bk. v. Brodsky, 51 Ill. App. 2d 260, 201 N.E.2d 208, 208-09 (1964) (deferring to trial court on issue of whether to award attorney's fees); Gilbert v. Hoisting & Portable Engineers, 237 Or. 130, 141, 390 P.2d 320, 321 (1964) (same); Turnipseed v. Turnipseed, 158 So. 2d 808, 812-13 (Fla. Dist. Ct. App. 1963) (same); Barber v. Barber, 234 Miss. 89, 92, 105 So. 2d 630, 631-32 (1958) (same).

136. *See C,M & M Group*, 453 A.2d at 796 (refusing to overturn trial court's award of attorney's fees absent abuse of discretion); *Turnipseed*, 158 So.2d at 813 (holding that, absent abuse of discretion, appellate court would not overturn award of attorney's fees); *Barber*, 234 Miss. at 92, 105 So.2d at 632 (same).

137. *See* FED. R. CIV. P. 11. Rule 11 of the Federal Rules of Civil Procedure states:

> []If a pleading, motion, or other paper is signed in violation of this rule [requiring that the signer have made a good faith investigation into the facts and law to ensure their accuracy and truth and that the signer not file motions to harass or delay], the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id.

138. *See* FED. R. CIV. P. 11 advisory committee's notes (recognizing purpose of Rule 11 as discouraging frivolous pleadings).

139. *Id.*

140. *Id.* (indicating intent to provide compensation for those forced to answer frivolous pleadings).

141. *See supra* notes 129-31 and accompanying text (stressing deterrent effect of bad faith exception).

142. *See supra* notes 132-33 and accompanying text (stressing compensatory aspect of bad faith exception).

sion.[143] A lawyer enters the profession on notice that he is subject to an ethical code.[144] The two major ethical codes, along with courts' interpretive decisions, define a lawyer's duty of loyalty toward his client.[145] Courts can analogize a lawyer's duty to a client to duties owed by parties in other bad faith cases.[146] For example, the defendant's duty in *Vaughn v. Atkinson*[147] to at least investigate the validity of the plaintiff's claim for cure and maintenance was unequivocal.[148] In the same way, a lawyer has a duty to represent a client within the bounds of the governing ethical code.[149] Given the context of the attorney-client relationship, certain breaches of the ethical codes should constitute bad faith conduct under that exception to the American Rule.[150] The attorney's role with regard to the client is multifaceted—he may act as an agent, fiduciary, and trustee as well as a number of other roles implicating ethical standards.[151] The major elements of this relationship are confidence and loyalty on the part of the lawyer.[152] When deciding whether to treat legal malpractice as bad faith, courts must distinguish between the type of legal malpractice that may warrant award of attorney's fees to successful plaintiffs and the type of malpractice that would not warrant such treatment.

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143. *See generally* MODEL RULES OF PROFESSIONAL CONDUCT (1990); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1989). The American Bar Association promulgated the Model Rules and Model Code to provide a standard for states to set for lawyer conduct. Model Rules, Introduction at 12. The legislatures or courts of all fifty states have adopted the Model Code or Model Rules as their standard for lawyer conduct. Model Rules, Introduction at 14.

144. *See* G. HAZARD & S. KONIAK, THE LAW AND ETHICS OF LAWYERING at xxi (1989) (recognizing that law schools must require law students to take a course in Professional Responsibility to gain American Bar Association accreditation).

145. *See generally* MODEL RULES OF PROFESSIONAL CONDUCT (1990); MODEL RULES OF PROFESSIONAL RESPONSIBILITY (1981).

146. *See supra* notes 114-123 and accompanying text (defining requirement of duty for finding of bad faith upon breach).

147. *See* Vaughn v. Atkinson, 369 U.S. 527, 528, *reh'g denied*, 370 U.S. 965 (1962). In *Vaughn* the United States Supreme Court recognized that the defendant, a shipowner, had a clear and unequivocal duty to investigate the claim of the plaintiff, a sailor, for cure and maintenance. *Id.* The Court held that failure to make this investigation constituted bad faith. *Id.* at 530.

148. *See id.* at 528 (indicating that defendant's duty toward plaintiff was well-established).

149. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (1990) (asserting lawyer's high duty towards client); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2 (1981) (same).

150. *See supra* notes 115-28 and accompanying text (outlining requirements for bad faith exception to apply).

151. *See* Fielding v. Brebbia, 399 F.2d 1003, 1005 (D.C. Cir. 1968) (holding that attorney has fiduciary duty toward client). Yanchor v. Kagan, 22 Cal. App. 3d 544, 99 Cal. Rptr. 367, 369 (1971) (holding client is bound by attorney's agreement because attorney acts as client's agent); In Re Adams, 737 S.W.2d 714, 717 (Mo. 1987) (applying trustee principles to attorney-client relationship); Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 43-44, 556 N.Y.S.2d 239, 243, 555 N.E.2d 611, 614 (1990) (espousing general confidential nature of attorney-client relationship).

152. *See Campagnola*, 76 N.Y.2d at 43-44, 556 N.Y.S.2d at 243, 555 N.E.2d at 614 (stressing importance of lawyer's loyalty and client's confidence in attorney).

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.[153] The lawyer-client relationship involves representation in legal matters about which a client may have little knowledge and over which the client may have little or no control. The lawyer-client relationship, therefore, involves a higher duty of confidence and trust on the part of the attorney with regard to the client than other relationships from which causes of action spring.[154] Both ethical codes for lawyers underscore the special nature of this relationship.[155] A client should not have to litigate to enjoy those rights inherent in the attorney-client relationship that the ethical codes reflect. When a lawyer commits malpractice by intentionally breaching an ethical provision that protects the client, the lawyer acts in bad faith because he violates a well-defined standard.[156] An effective way to deter bad faith breaches of ethical standards and fully compensate its victims is to award attorney's fees to successful legal malpractice plaintiffs.[157]

Courts can make a proper analogy between legal malpractice and other types of bad faith behavior such as that described in *Bell v. School Board*[158] and *Rolax v. Atlantic Coast Line R.R.*.[159] The *Rolax* court applied the bad faith exception when a union entered into a racially discriminatory contract with a railroad against constitutional prohibitions and the *Bell* court similarly was willing to apply the bad faith exception when the defendant school board, by placing administrative obstacles in the path of the plaintiffs, attempted to evade compliance with the United States Supreme Court's

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153. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.7-1.8 (1990) (imposing duty on lawyer to avoid conflicts of interest); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1981) (same).

154. *See Campagnola*, 76 N.Y.2d at 43, 556 N.Y.S.2d at 241-42, 555 N.E.2d at 614. The *Campagnola* court stated:

> [t]he unique relationship between an attorney and client, 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, remains one of the most sensitive and confidential relationships in our society.

Id. (quoting Demov, Morris, Levin & Shein v. Glantz, 53 N.Y.2d 553, 556, 444 N.Y.S.2d 55, 428 N.E.2d 387 (1981)).

155. *See id.* (relying on ethical code to underscore special nature of attorney-client relationship).

156. *See supra* notes 115-23 and accompanying text (establishing breach of well defined duty as bad faith).

157. *See supra* notes 129-33 and accompanying text (explaining dual deterrent and compensatory rationales for bad faith exception).

158. *See* Bell v. School Board, 321 F.2d 484, 491 (4th Cir. 1963) In *Bell* the United States Court of Appeals for the Fourth Circuit held that the defendant's attempts to thwart the plaintiffs' progress toward a racially integrated school system constituted bad faith and accordingly ordered an award of attorney's fees to the plaintiffs. *Id.*

159. 186 F.2d 473, 481 (4th Cir. 1951) (holding award of attorney's fees to plaintiffs in race discrimination case proper under bad faith exception to American Rule). In *Rolax* the United States Court of Appeals for the Fourth Circuit held that formation of a racially discriminatory contract between a union and a railroad constituted bad faith and upheld the trial court's award of fees under the bad faith exception to the American Rule. *Id.*

constitutional dictates in the school desegregation decisions.[160] If noncompliance with court rulings that involve unclear constitutional issues constitutes bad faith behavior, then courts should also consider a failure to comply with a fairly clear set of rules that outline a standard of conduct for professionals to constitute bad faith conduct. Although ethical codes are not completely clear, they are at least as clear as a series of courts' constitutional decisions. Accordingly, intentional violation of ethical codes should constitute bad faith conduct for the purpose of awarding attorney's fees to victims of ethical code violations.[161]

The lawyer's ethical duty makes legal malpractice stemming from ethical violations different from other torts.[162] Courts often recognize the special nature of the lawyer-client relationship in many contexts other than legal malpractice actions. For example, most jurisdictions do not allow lawyers to limit their liability for malpractice in employment contracts.[163] Furthermore, many courts will not allow lawyers in a professional corporation to take advantage of the corporate veil to evade responsibility for the tortious actions of other corporation members.[164] In the same way, a lawyer has a

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160. *See Bell*, 321 F.2d at 500 (applying bad faith exception to facts of school desegregation suit); *Rolax*, 186 F.2d at 481 (applying bad faith exception in union discrimination suit).

161. *See supra* notes 129-33 and accompanying text (noting dual compensatory and punitive aspects of bad faith exception).

162. *See supra* notes 143-61 and accompanying text (establishing lawyer's duty toward client as defined by ethical codes).

163. *See* MODEL CODE OF PROFESSIONAL CONDUCT D.R. 6-102(A) (1981) (stating that attorney may not limit malpractice liability in employment contract); MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.8(h) (1990) (stating that attorney may limit malpractice liability in employment contract only if potential client is represented by independent counsel).

164. *See generally* Annotation, *Liability of Professional Corporation of Lawyers, or Individual Members Thereof, for Malpractice or Other Tort of Another Member*, 39 A.L.R.4th 556 (1985) (indicating courts' disagreement over whether individual members of professional corporations for practice of law may be held liable for the tortious actions of other member).

Many states will not allow lawyers in firms to limit liability for malpractice committed by another partner by using a corporate form for the firm. *See* First Bank & Trust Co. v. Zagoria, 250 Ga. 844, 302 S.E.2d 674, 676 (1983) (holding lawyer in professional corporation liable for professional misconduct of another lawyer in firm). In *First Bank & Trust*, defendant Zagoria, the only fellow shareholder in defendant Stoner's professional corporation, issued checks to clients in a real estate closing which were dishonored because of insufficient funds in the corporation's checking account. *Id.* at 675. Stoner contended that he was not liable for Zagoria's negligence because he was only a shareholder in the corporation, rather than Zagoria's partner. *Id.* In reversing the Georgia Court of Appeals, the Georgia Supreme Court refused to apply normal corporation law to the case and instead based its decision on the court's authority to regulate the practice of law, also noting that law is a profession rather than a commercial enterprise. *Id.* The court reasoned that because of the special considerations present in a lawyer's relationship with clients and other lawyers in a firm "[i]t is inappropriate for the lawyer to be able to play hide-and-seek in the folds of the corporate veil and thus escape the responsibilities of professionalism." *Id.* Thus, the court held that a lawyer is liable for the professional misconduct of other firms members regardless of whether the firm is a partnership or a professional corporation. *Id.* at 676.

Some states have adopted rules about law firm incorporation similar to that of Georgia. *See* Petition of the Bar Assoc. of Hawaii, 55 Haw. 121, 122, 516 P.2d 1267, 1268-70 (1973)

higher duty of care to fulfill in his professional undertakings because of the ethical rules.[165] Hence, the lawyer involved in legal malpractice revolving around a violation of ethical rules is in a different position from that of a person who breaches a contract or runs someone down with an automobile because the lawyer had notice that society expects an even higher standard of care from lawyers than from citizens at large.[166]

One might argue that this use of the bad faith exception is indistinguishable from the previously discussed public policy approach towards the award of attorney's fees.[167] However, this approach differs from the public policy exception in two respects. First, use of the bad faith exception allows the court to find and punish the lawyer for his *conduct* in light of his status as a professional rather than for his status alone. Also, application of the bad faith standard, because it punishes conduct and serves to deter, punishes only intentional or wanton misconduct.[168] The public policy exception, which punishes the lawyer for his status, is overbroad.[169] Moreover, the public policy exception is inequitable because it punishes all tortious behavior, including negligence.[170] The bad faith exception, however, punishes only intentional misconduct.[171]

When applying the bad faith exception in legal malpractice cases, courts must remember the crucial connection between intentional breaches of ethical duties and bad faith.[172] The ethical codes do not purport to give rise to causes of action upon their violation.[173] The standards nonetheless are useful

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(adopting rule allowing law firms to incorporate, but specifying that incorporation would not limit individual lawyers' liability for associates' malpractice); Street v. Sugerman, 202 So. 2d 749, 751 (Fla. 1967) (noting that "[t]he privilege of incorporation was . . . not created . . . in order that those availing themselves of the benefits could be cloaked with an immunity inimical to legal order and public interest."); In Re The Florida Bar, 133 So. 2d 554, 557-59 (Fla. 1961) (granting State Bar's petition to allow law firms to operate as corporations, but refusing to limit liability of lawyers in such corporations for professional misconduct of corporations' other members). *But see* In Re Rhode Island Bar Assoc., 106 R.I. 752, 760, 263 A.2d 692, 696-97 (1970) (adopting rule making members of legal professional corporations not liable for associates' malpractice, although the corporate entity would be liable to the extent of its assets).

165. *See supra* notes 143-61 and accompanying text (asserting that ethical standards impose duty on attorney).

166. *See supra* note 144 and accompanying text (establishing that lawyers have notice of duty).

167. *See supra* notes 74-79 and accompanying text (outlining public policy arguments for not awarding offsets).

168. *See supra* notes 124-28 and accompanying text (establishing bad faith exception in cases involving intentional behavior).

169. *See supra* notes 32-35 and accompanying text (outlining public policy exception).

170. *See supra* notes 74-79 and accompanying text (criticizing public policy exception).

171. *See supra* notes 115-28 and accompanying text (explaining that bad faith exception punishes only intentional conduct).

172. *See supra* notes 131-54 and accompanying text (establishing connection between ethical violation and bad faith showing).

173. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (1990) (stating that violation of ethical standard does not give rise to a cause of action).

guides for defining bad faith in malpractice actions because they define the extent of a lawyer's duty to his client.[174] Moreover, the violation of or even a conviction under the ethical code does not constitute the basis for the malpractice action. Instead, the conduct that gave rise to the violation is being used to establish that malpractice occurred. The conduct that gave rise to a violation of the disciplinary rule also gave rise to the violation of the bad faith standard for an award of attorney 's fees. Therefore, that conduct is grounds for an award of attorney's fees under the bad faith exception to the American Rule.[175]

However, because the basis upon which the court may award attorneys fees in legal malpractice actions is that of bad faith conduct, courts should not award attorney's fees in situations involving simple negligence, such as missing a statute of limitations or a filing deadline.[176] Rather, the courts should concentrate on award of attorneys fees in situations involving a lawyer's intentional or wantonly negligent breach of his duties of professional responsibility such as adverse representation,[177] breach of confidentiality,[178] or intentional mishandling of money in client's accounts.[179] In the context of the attorney-client relationship, intentional breaches of these codes constitute bad faith conduct, or at the very least, wanton negligence.[180] These types of breaches of the various ethical codes constitute reasons for awards of attorney's fees under the bad faith exception to the American Rule.[181] Moreover, application of a standard requiring intentional behavior or wanton negligence to these conflict of interest situations falls squarely within the bad faith exception to the American Rule.[182]

When analyzing the possible uses of the bad faith exception in legal malpractice suits, one might argue that penalizing an attorney for unwittingly allowing a conflict to arise,[183] breaching confidentiality[184] or commingling a

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174. *See supra* notes 144-53 and accompanying text (establishing in which ethical rules establish duty toward client).

175. *See supra* notes 143-66 and accompanying text (establishing connection between breach of ethical code and bad faith).

176. *See supra* notes 124-28 and accompanying text (establishing bad faith exception in cases involving intentional behavior).

177. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.7-1.9 (1990) (prohibiting conflicts of interest); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 5-501—5-106 (same).

178. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6 (imposing duty to maintain client confidences); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 4-101 (same).

179. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1990) (requiring separate maintenance of client's funds); MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 9-102 (1981) (same).

180. *See supra* notes 143-166 and accompanying text (establishing connection between ethical violation and bad faith).

181. *See supra* notes 143-66 and accompanying text (establishing connection between ethical violations and bad faith).

182. *See supra* notes 143-66 and accompanying text (establishing connection between ethical violations and bad faith).

183. *See supra* note 177 and accompanying text (discussing lawyer's duty with regard to conflicts of interest).

184. *See supra* note 178 and accompanying text (discussing lawyer's duty of confidenti-

client's funds with those of the attorney[185] is unfair. The complicated nature of the modern legal world makes situations that could give rise to ethical breaches increasingly difficult to monitor. For example, the increase in the number of large law firms has added to a rise in the number of conflicts cases because conflicts have become more difficult to detect.[186] Large firms now find themselves in the position of representing clients on both sides of business transactions and litigation.[187] Furthermore, involvement of law firms in business deals with clients creates many possible conflicts.[188] Additionally, lawsuits against clients motivated by business concerns, unpaid legal fees, or other conflicts of interest are becoming increasingly common.[189] These situations also have potential malpractice implications.[190] From a practical standpoint, however, the lawyer is more often than not in the best position to ascertain whether or not a conflict of interest exists, prevent a breach of confidentiality, or simply exercise enough discipline over himself and the members of his firm to prevent the occurrence of problems with client's funds. The client certainly is unable to help himself. Conflicts admittedly are hard to detect sometimes.[191] However, means exist by which attorneys may discover conflicts.[192] Furthermore, if one must choose between two innocent parties the burden logically should fall on the attorney, who has the knowledge and means at his disposal to avoid or remedy the problem, rather than the innocent client. Thus, it is reasonable to hold attorneys liable for the problems resulting from intentional professional misconduct.

To ensure equitable operation of the bad faith exception in legal malpractice cases, courts also could create a rebuttable presumption of bad

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184. *See supra* note 178 and accompanying text (discussing lawyer's duty of confidentiality).

185. *See supra* note 179 and accompanying text (discussing lawyer's duty to keep clients' funds separate from those of firm).

186. *See* O'Malley, *Preventing Legal Malpractice in Large Law Firms*, 39 DEF. L.J. 25, 29-42 (1990) (noticing increasing trend toward lawyers in large firms entering business dealings with clients, resulting in increased potential malpractice liability); MEISELMAN, *supra* note 1, at 289 (recognizing that large law firms create special malpractice problems).

187. *See* O'Malley, *supra* note 186, at 29 (noting increased tendency by firms to engage in adverse representation, even if unwittingly); Glaberson, "A Question of Integrity at Blue-chip Law Firms", 293 BUS. WK., April 7, 1986 at 76. (expressing concern over firms' tendency to take clients despite conflicts); MEISELMAN, *supra* note 1, at 231 (same).

188. *See* O'Malley, *supra* note 186, at 29 (warning about malpractice implications of dealing with clients); MALLEN & LEVIT, *supra* note 1, at 229 (noting presumptive conflict that arises upon dealing with client); MEISELMAN, *supra* note 1, at 340 (warning about engaging in business dealings with clients).

189. *See* O 'Malley, *supra* note 186, at 29 (noting potential malpractice implications of suing clients); Smith, *supra* note 95, at 20 (same).

190. *See supra* note 189 and accompanying text (noting malpractice implications of suing client).

191. *See* O'Malley, *supra* note 186, at 29. (conceding difficulty in detecting some conflicts of interest); Smith, *supra* note 95, at 33 (same).

192. *See* O 'Malley, *supra* note 186, at 51 (stating that large firms should have comprehensive conflict of interest data bases to avoid malpractice); Smith, *supra* note 95, at 33-39 (suggesting possible conflict of interest detection and protection system).

faith that would arise upon a showing that an ethical violation occurred that gave rise to the malpractice action. This rebuttable presumption would give attorneys an opportunity to defend themselves against charges of bad faith during post-trial hearings on attorney's fees. The defendant attorney could rebut the bad faith presumption with a positive showing that he took due care to avoid the problems arising from the misconduct by making disclosure to the client,[193] constructing "Chinese Walls"[194] between firm members where appropriate, or making a showing of due diligence or proper office procedures in the case of commingled funds.[195] Courts engage in this type of burden-shifting in cases in which the party to which the burden shifts is in the best position to come forward with evidence to rebut the presumption which arises.[196] For example, in most jurisdictions a contract between attorney and client is presumptively voidable and the burden is on the lawyer to overcome this presumption.[197] Furthermore, when an attorney benefits from taking a position antagonistic to the interests of a client, the burden is on the lawyer to prove good faith rather than on the client to prove lack of good faith.[198] Accordingly, the reasoning behind placing the burden on the lawyer to come forward with evidence rebutting the presumption is that the lawyer is in the best position to know whether a conflict exists. This burden-shifting allows for courts' equitable application of the bad faith exception to the American Rule in legal malpractice cases.

The offset cases show how courts refusing to offset attorney's fees for matters underlying malpractice judgments effectively award the attorney's fees incurred in litigating the actual malpractice suit to plaintiffs in legal malpractice actions.[199] These indirect awards of attorney's fees operate against basic common law principles of tort and contract and the American Rule.[200] Use of the bad faith standard, however, is consistent with tort and contract principles of compensation as well as the American Rule.[201] Fur-

193. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.8 (1990) (allowing representation despite conflict if client consents after consultation and agreement in which independent counsel represents client).

194. *See* O'Malley, *supra* note 186, at 52 (describing Chinese Wall procedures).

195. *See* O'Malley, *supra* note 186, at 55 (describing process for keeping client's funds separate from those of firm); Smith, *supra* note 95 at 19 (describing steps to be taken in ensuring maintenance of fiduciary obligations).

196. *See* Fielding v. Brebbia, 130 U.S. App. D.C. 270, 399 F.2d 1003, 1005 (1968) (noting that attorney more appropriately bears some burdens in litigation than client because he is in best position to rebut presumptions); McFail v. Braden, 19 Ill. 2d 108, 166 N.E.2d 46, 51 (1960) (same); Kukla v. Perry, 361 Mich. 311, 105 N.W.2d 176, 178 (1960) (same).

197. *See Fielding*, 130 U.S. App. D.C. at 273, 399 F.2d at 1005 (shifting burden lack of contract between attorney and client to attorney because attorney entered into contract with client).

198. *See id.* at 1003 (shifting burden to attorney).

199. *See supra* notes 20-84 and accompanying text (describing and criticizing offset cases).

200. *See supra* notes 36-41 and accompanying text (describing compensatory purpose of damage awards); *supra* notes 47-65 (explaining purpose of American Rule).

201. *See supra* notes 36-41 and accompanying text (describing compensatory purpose of tort and contract remedies); *supra* notes 47-65 (describing policies behind American Rule).

thermore, use of the bad faith standard in legal malpractice actions is compatible with the policies behind the American Rule because it does not cause many of the problems that arise when courts assess attorney's fees to the losing litigant.[202] This standard does not penalize the lawyer for defending his suit,[203] rather, it penalizes the attorney for his bad faith conduct underlying the litigation.[204] Any potential problems with an advocate's independence and drawing out the litigation process are minimal.[205] Although litigation over bad faith and attorney's fees would lengthen the trial slightly, courts must already address the problems of fees in cases that presently fall under the bad faith exception.[206] The added burden to the court would be insubstantial.

Use of the bad faith exception in legal malpractice cases also promotes a higher ethical standard for attorneys because it deters unethical conduct.[207] The exception operates fairly as an ethical standard because it does not punish lawyers who are negligent or overcompensate legal malpractice plaintiffs.[208] Furthermore, because the power to award attorney's fees is exercised soundly in the trial court's discretion viewing all the circumstances involved, the power allows the court to make the kind of fact specific determinations necessary to determine bad faith conduct.[209] The trial court's determinations, however, would be subject to appellate review to ensure that they met the general guidelines previously set forth.[210] The definition of bad faith defines the limits of the court's power to award fees.[211] Consequently, when a court exercises its power to award attorney's fees in bad faith legal malpractice cases, that exercise has minimal erosive effect on the American Rule.

Because the bad faith exception's basis is squarely in the court's inherent equitable power, and because it addresses only bad faith situations, it

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202. *See supra* 47-65 and accompanying text (discussing policies favoring American Rule).

203. *See supra* note 58 and accompanying text (discussing policy of not penalizing litigants for exercising right of access to judicial system).

204. *See supra* notes 143-71 and accompanying text (establishing connection between ethical rules and bad faith conduct).

205. *See supra* notes 46-65 and accompanying text (outlining policies behind American Rule).

206. *See supra* note 57 and accompanying text (justifying American Rule because of eased burden on courts).

207. *See supra* notes 129-31 and accompanying text (discussing deterrent effect of sanctions).

208. *See supra* notes 36-41 and accompanying text (noting overcompensation problems in offset cases).

209. *See* Bell v. School Board, 321 F.2d 494, 500 (4th Cir. 1963) (reaffirming idea that determination of bad faith is soundly in discretion of trial court, with appellate review restricted to whether abuse of discretion occurred); *see also supra* notes 134-36 and accompanying text (describing flexibility of bad faith standard because it is an exercise of equitable power).

210. *See supra* notes 134-36 and accompanying text (noting that trial court's review is limited to abuse of discretion).

211. *See supra* notes 115-28 and accompanying text (defining bad faith).

punishes only those lawyers who are culpable.[212] It also appropriately serves the purpose of compensating the plaintiff for having to sue because of breach of a duty that is based on a relationship.[213] Finally, use of the bad faith standard allows courts to address properly attorney misconduct without engaging in elaborate construction of theories that allow a plaintiff to recover indirectly his attorney's fees for the malpractice action.[214] Thus, the bad faith exception enables courts to address a lawyer's egregious conduct on a case by case basis within a set of flexible guidelines.[215]

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212. *See supra* notes 134-36 and accompanying text (recognizing trial court's wide discretion in applying bad faith exception).

213. *See supra* notes 132-33 and accompanying text (noting compensatory aspect of bad faith exception).

214. *See supra* notes 20-84 and accompanying text (describing and criticizing offset cases).

215. *See supra* notes 134-136 and accompanying text (recognizing flexibility inherent in use of bad faith exception).