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7 Breach of Fiduciary Duty

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VII. Other Recurring Problems

I. [7.1] INTRODUCTION

The fiduciary duties of loyalty, confidentiality, and honesty together form the foundation of the attorney-client relationship. These deep-rooted obligations enable the client to repose trust in the attorney, to reveal confidences, and to interact with the lawyer in such a manner that the attorney can zealously and effectively represent the client's interests. Since the relationship between an attorney and his or her client is a solemn and vital one, safeguards are necessary to protect the client from overreaching and to ensure the integrity of the legal system. Violations of these fiduciary obligations may therefore lead to serious consequences for the attorney, including disqualification, disciplinary sanctions, and civil liability. This chapter deals primarily with a lawyer's civil liability for fiduciary breach; additional remedies are discussed in other chapters.

In general, a lawyer may be liable to the client in a civil action for breach of fiduciary duty when the lawyer selfishly places his or her own interests ahead of those of the client and the client suffers damages as a result. A violation of the attorney's duty of undivided loyalty occurs when the interests of the attorney become adverse to those of the client, such as a conflict of interest with another current or former client. A breach of the duty of confidentiality arises when the lawyer makes an unauthorized disclosure of the client's secrets or other privileged information. An attorney violates his or her duty of honesty by entering into unfair contracts with the client, by obtaining unwarranted gifts from the client, or by otherwise failing to exercise the highest degree of fidelity in his or her dealings with the client.

Although a fiduciary duty runs from the attorney to the client as a matter of law, not every wrong committed by an attorney rises to the level of a breach of fiduciary duty. A claim for legal malpractice may be premised on a lawyer's mere negligence; however, an action for breach of fiduciary duty must implicate one of the specific fiduciary obligations owed to the client. Once such a breach has been established, the client must meet the burden of proving causation and damages, just as in a legal malpractice case. While the ethical rules governing the legal profession may be relevant to a lawyer's standard of conduct, usually in the form of expert testimony, violations of these provisions are primarily enforced by the Attorney Registration and Disciplinary Commission and do not create substantive rights for a client to recover damages in a civil action.

A claim for breach of fiduciary duty has a number of unique features. For instance, whenever an attorney enters into a business transaction with a client after the formation of the relationship, the burden shifts to the lawyer to establish that the terms were just and the consideration was fair. Fiduciary obligations may arise from communications with a prospective client, even when the attorney declines representation. Similarly, a lawyer's duty to preserve client confidences lasts indefinitely beyond the termination of the attorney-client relationship — and even after the death of the client. An aggrieved client may be able to recover special damages in a fiduciary breach action, such as emotional distress or forfeiture of fees, which might not otherwise be available in a malpractice case. These distinctive aspects of the cause of action may provide a powerful weapon to a client who has been damaged by the conduct of his or her lawyer and may significantly increase an attorney's exposure to civil liability.

II. DEFINING THE RELATIONSHIP

A. [7.2] Necessity of an Attorney-Client Relationship

The existence of an attorney client-relationship is a necessary predicate to the formation of fiduciary obligations on the part of the lawyer. Once the relationship is formed, a fiduciary relationship exists between an attorney and his or her client as a matter of law. *In re Winthrop,* 219 Ill.2d 526, 848 N.E.2d 961, 972 – 973, 302 Ill.Dec. 397 (2006); *In re Imming,* 131 Ill.2d 239, 545 N.E.2d 715, 721, 137 Ill.Dec. 62 (1989). The attorney-client relationship gives rise to certain fiduciary duties owed by the attorney to the client, including the obligation to act with "fidelity, honesty, and good faith in both the discharge of contractual obligations to, and professional dealings with, a client." *Doe v. Roe,* 289 Ill.App.3d 116, 681 N.E.2d 640, 645, 224 Ill.Dec. 325 (1st Dist. 1997). The fiduciary relationship between the attorney and the client is a personal and confidential one, requiring the attorney to exercise the "utmost degree of fidelity, honesty and good faith." *Christison v. Jones,* 83 Ill.App.3d 334, 405 N.E.2d 8, 10, 39 Ill.Dec. 560 (3d Dist. 1980). As fidicuaries, attorneys owe their clients, "the basic obligations of agency: loyalty and obedience." *Winthrop, supra,* 848 N.E.2d at 973, quoting *Horwitz v. Holabird & Root,* 212 Ill.2d 1, 816 N.E.2d 272, 277, 287 Ill.Dec. 510 (2004).

The corollary of the rule that an attorney owes a fiduciary duty to his or her client is that the attorney almost never owes a fiduciary duty to non-clients. A fiduciary duty owed to third parties in addition to the client would interfere with the duty of undivided loyalty to the client. *Pelham v. Griesheimer,* 92 Ill.2d 13, 440 N.E.2d 96, 101, 64 Ill.Dec. 544 (1982). Thus, it has been held that the intended beneficiary of a will could not bring an action for breach of fiduciary duty against the attorneys and law firm that drafted the will. *Greene v. First National Bank of Chicago,* 162 Ill.App.3d 914, 516 N.E.2d 311, 316, 114 Ill.Dec. 156 (1st Dist. 1987). Similarly, an action alleging breach of fiduciary duty against a legal services plan premised on the referred attorney's legal malpractice failed to state a valid claim. *Gonzalzles v. American Express Credit Corp.,* 315 Ill.App.3d 199, 733 N.E.2d 345, 353, 247 Ill.Dec. 881 (1st Dist. 2000). The attorney for a partnership or closely held corporation generally does not owe a fiduciary duty to individual partners or the shareholders and officers of the corporation. *Kopka v. Kamensky & Rubenstein,* 354 Ill.App.3d 930, 821 N.E.2d 719, 727 – 728, 290 Ill.Dec. 407 (1st Dist. 2004), citing *Felty v. Hartweg,* 169 Ill.App.3d 406, 523 N.E.2d 555, 119 Ill.Dec. 799 (4th Dist. 1988).

No cause of action for legal malpractice or breach of fiduciary duty exists when a plaintiff fails to demonstrate the existence of an attorney-client relationship. *Kehoe v. Saltarelli,* 337 Ill.App.3d 669, 786 N.E.2d 605, 612, 272 Ill.Dec. 66 (1st Dist. 2003). Moreover, in order to become liable to the client, the breach of fiduciary duty must have occurred within the scope of the attorney's employment; "in Illinois, 'an attorney's duty to a client is measured by the representation sought by the client and the scope of the authority conferred.'" *Hofmann v. Fermilab NAL/URA,* 205 F.Supp.2d 900, 904 (N.D.Ill. 2002), quoting *Simon v. Wilson,* 291 Ill.App.3d 495, 684 N.E.2d 791, 801, 225 Ill.Dec. 800 (1st Dist. 1997).

B. [7.3] Duration of the Obligation

Most fiduciary obligations end with the termination of the attorney-client relationship, since "[w]ithout a fiduciary relationship, there are no fiduciary duties and no basis for a cause of action

alleging breach of fiduciary duties." *Weisblatt v. Colky,* 265 Ill.App.3d 622, 637 N.E.2d 1198, 1200, 202 Ill.Dec. 462 (1st Dist. 1994), quoting *Overby v. Illinois Farmers Insurance Co.,* 170 Ill.App.3d 594, 525 N.E.2d 1076, 1084, 121 Ill.Dec. 769 (2d Dist. 1988). Since the attorney-client relationship is consensual and may be terminated any number of ways, courts look to the circumstances in each individual case to determine whether and at what point a termination occurred. 637 N.E.2d at 1200. In one case, a client was permitted to enter into a settlement agreement that provided that the lawyer would represent the client without charge in return for a release of claims when the fiduciary relationship had terminated and the client was represented by independent counsel. *Gavery v. McMahon & Elliott,* 283 Ill.App.3d 484, 670 N.E.2d 822, 827, 219 Ill.Dec. 144 (1st Dist. 1996).

One notable exception to the general rule that fiduciary duties expire with the termination of the attorney-client relationship is that the duty of confidentiality, *i.e.,* the lawyer's obligation to preserve his or her client's secrets and other privileged information, extends indefinitely. For instance, an attorney who represented the husband in divorce proceedings was disciplined for attempting to represent the client's former wife following the client's death to collect the proceeds of the client's life insurance policy due to the possible risk of confidential communications being used against the former client. *In re Williams,* 57 Ill.2d 63, 309 N.E.2d 579, 581 (1974). The obligation of confidentiality also extends to preliminary discussions with a lawyer even though a formal attorney-client relationship is never formed. *Hughes v. Paine, Webber, Jackson & Curtis, Inc.,* 565 F.Supp. 663, 667 – 668 (N.D.Ill. 1983); *King v. King,* 52 Ill.App.3d 749, 367 N.E.2d 1358, 1360, 10 Ill.Dec. 592 (4th Dist. 1977).

It should be noted, however, that a professional relationship and its concomitant fiduciary obligations do not arise if the attorney is consulted in some capacity other than for legal advice and representation. *Westinghouse Electric Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311, 1320 (7th Cir.), *cert. denied,* 99 S.Ct. 353 (1978). *Accord Turner v. Black,* 19 Ill.2d 296, 166 N.E.2d 588, 594 (1960) (fact that plaintiff and defendant were good friends and neighbors and frequently exchanged favors did not give rise to attorney-client relationship).

III. [7.4] LOYALTY

The duty of undivided loyalty is perhaps the most fundamental obligation of the attorney-client relationship. A lawyer cannot effectively advocate on behalf of the client without first obtaining the client's complete trust and confidence. In simple terms, the attorney is required to avoid representing interests that conflict with those of the client. The conflicting and antagonistic interests can be those of another current client, a former client, or the lawyer's own interests. The last situation is discussed in §§7.12 – 7.15 below, relating to the duty of honesty.

Conflicts of interest are generally governed by the Rules of Professional Conduct (RPC). These provisions are addressed to simultaneous conflicts of interest (dual representation) and representation involving a prior client (successive representation). These rules serve several important objectives. Perhaps most importantly, they safeguard the lawyer's independent professional judgment so that he or she can advocate effectively on behalf of the client. The rules likewise protect the client's confidences and preserve the integrity of the judicial system.

The representation of conflicting interests by an attorney can lead to a claim for breach of fiduciary duty — but only when the client can satisfy the elements of a legal malpractice action, including proximate causation and damages. Illinois law does not permit recovery in a civil action for a lawyer's ethical violation that does not harm the client. The only exceptions involve business dealings with clients and disgorgement of fees, which are addressed in §§7.19, 7.27, and 7.28 below. In order to avoid a breach of fiduciary duty claim, as well as disciplinary charges or a motion for disqualification, the attorney should either obtain a written consent to any potential conflict of interest from the client after fully explaining the material risks and possible benefits, or promptly withdraw from the questionable representation.

A. [7.5] The Ethical Rules

The prohibition against simultaneous representation of clients with divergent interests in a business transaction or during the course of litigation appears in RPC 1.7, which states, in pertinent part, as follows:

> **Conflict of Interest: General Rule**
>
> **(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:**
>
> **(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and**
>
> **(2) each client consents after disclosure.**

This rule also contains a broader provision that prevents the attorney from representing a client "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." RPC 1.7(b). There is an exception when the attorney believes in good faith that representation of the client will not be detrimentally affected and the client consents after disclosure. *Id.* When dual representation of clients with potentially divergent interests in a single matter is undertaken, the lawyer is obligated to inform the clients of the implications of the common representations as well as the risks and benefits involved. RPC 1.7(c).

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✓ While the ethical rules may be relevant to a breach of fiduciary action, they do not create substantive rights and may not form the basis of a civil action. See §7.21 below.

The ethical rule governing conflicts of interest when representing a current client could potentially interfere with obligations owed to former clients appears in RPC 1.9, which provides, in pertinent part, as follows:

Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after disclosure; or

(2) use information relating to the representation to the disadvantage of the former client.

Two exceptions to RPC 1.9(a)(2) exist when disclosure of confidential information is permitted by RPC 1.6 addressed to confidentiality of information (see §7.9 below), or when the information has become generally known.

B. [7.6] Application of the Rules

Conflicts of interest are broadly condemned throughout the legal profession because of their potential to interfere with the undivided loyalty that a lawyer owes to his or her client. The representation of adverse interests can likewise quickly erode the bond of trust between the attorney and his or her client. The primary risk associated with concurrent conflicts of interest is that a lawyer will breach the obligation of loyalty by favoring one client's interest over another; in cases involving successive representation, the overriding concern is with the transmission of confidential communications. 2 Ronald E. Mallen and Jeffrey M. Smith, LEGAL MALPRACTICE §16.2 (7th ed. 2007). In either instance, the public trust and the proper administration of justice require that the attorney decline employment when there exists even a potential that his or her loyalty will be impaired or withdraw from representation once antagonistic interests become apparent.

A simultaneous conflict of interest has been held to exist when counsel, without the knowledge and consent of his or her client, is in a duplicitous position in which his or her full talents as a vigorous advocate, by all means fair and honorable, are hobbled, fettered, or restrained by commitments to others. *People v. Hope,* 96 Ill.App.3d 180, 420 N.E.2d 1171, 1174, 51 Ill.Dec. 613 (2d Dist. 1981). Counsel may proceed only when clients are advised of the potential benefits and risks of joint representation. *Guillen v. City of Chicago,* 956 F.Supp. 1416, 1422 (N.D.Ill. 1997). Thus, an attorney breached his duty to an estate when he recommended that a bank execute a stock purchase agreement when he represented both the bank and the owner of the other half of the stock. *NC Illinois Trust Co. v. First Illini Bancorp, Inc.,* 323 Ill.App.3d 254, 752 N.E.2d 1167, 1173 – 1174, 256 Ill.Dec. 925 (3d Dist. 2001).

A successive conflict of interest has been found when an attorney attempted to switch sides and represent an adverse party in a substantially related matter. *Hasco, Inc. v. Roche,* 299 Ill.App.3d 118, 700 N.E.2d 768, 774 – 775, 233 Ill.Dec. 240 (1st Dist. 1998); *Kates v. Transamerica Insurance Group (In re Prairie Central Ry.),* 209 B.R. 232, 234 – 235 (Bankr. N.D.Ill. 1997). Representation of interests adverse to a former client is proscribed only if a substantial relationship to the prior representation is shown and confidences have been shared.

President Lincoln Hotel Venture v. Bank One, Springfield, 271 Ill.App.3d 1048, 649 N.E.2d 432, 440 – 441, 208 Ill.Dec. 376 (1st Dist. 1994). It is sometimes difficult, however, to determine whether the matters involved in the former and present representations are substantially related. *Schwartz v. Cortelloni*, 177 Ill.2d 166, 685 N.E.2d 871, 879 – 880, 226 Ill.Dec. 416 (1997) (Supreme Court reversed appellate court which had ruled that lawyer should have been disqualified for successive conflict of interest and dismissed plaintiff's claim as sanction).

Consent by the affected parties is the only express exception to the prohibition against an attorney's representation of conflicting or antagonistic interests. *Feng v. Sandrik*, 636 F.Supp. 77, 85 (N.D.Ill. 1986); *State Farm Mutual Automobile Insurance Co. v. Palmer*, 123 Ill.App.3d 674, 463 N.E.2d 129, 131 – 132, 78 Ill.Dec. 951 (3d Dist. 1984). RPC 1.7 and 1.9 both dictate that the lawyer disclose all of the facts and circumstances surrounding the potential conflict of interest in order to enable the client to make an informed decision concerning the attorney's representation of differing interests. While not mandated by the ethical rules, written consent is preferred since it provides the best evidence concerning the sufficiency of the lawyer's disclosure. It should be noted, however, that the most serious conflicts of interest cannot be waived given their impact on the integrity of the judicial system.

Consent may be inferred by the conduct of the parties, which demonstrates the client's acceptance of a possible conflict. *Weeks v. Samsung Heavy Industries Co.*, 909 F.Supp. 582, 584 (N.D.Ill. 1996) (delay of 24 months before seeking disqualification held to constitute waiver). *But see Ransburg Corp v. Champion Spark Plug Co.*, 648 F.Supp. 1040, 1046 (N.D.Ill. 1986) (passing conversations with client at cocktail party and in hallway were insufficient indicia of consent).

C. [7.7] Actions for Breach of the Duty

Illinois law does not recognize a cause of action for an alleged conflict of interest between an attorney and his or her client absent some independent basis for malpractice liability. In a federal decision applying Illinois law, the plaintiff's claim that the defendant attorneys possessed a conflict of interest when they represented her in a foreclosure action was dismissed for failure to state a valid claim. *Dahlin v. Jenner & Block, L.L.C.*, No. 01 C 1725, 2001 U.S.Dist. LEXIS 10512 (N.D.Ill. July 26, 2001). The *Dahlin* court reviewed the relevant caselaw on the subject and concluded that the plaintiff "has not cited, and nor has this court found, any Illinois authority which recognizes a cause of action for 'conflict of interest' against an attorney independent from a breach of fiduciary duty or legal malpractice claim." 2001 U.S.Dist. LEXIS 10512 at *23.

A similar result was reached in *Owens v. McDermott, Will & Emery*, 316 Ill.App.3d 340, 736 N.E.2d 145, 249 Ill.Dec. 303 (1st Dist. 2000), in which the plaintiff failed to state a valid claim for breach of fiduciary duty against his attorneys for allegedly violating RPC 1.9. The First District found that even if the defendants violated the ethical rule by representing a party whose interests were materially adverse to a former client, the plaintiff had failed to allege any compensable damages proximately resulting from the alleged conflict. 736 N.E.2d at 156 – 157. *Accord Lackey & Lackey, P.C. v. Prior*, 228 Ill.App.3d 397, 591 N.E.2d 998, 1001, 169 Ill.Dec. 494 (5th Dist. 1992) (attorney was entitled to recover fees from clients, despite conflict of interest, since clients made no allegation that legal services were not performed properly).

The basis for the courts' rulings in both *Dahlin* and *Owens* is that an alleged violation of the Rules of Professional Conduct does not give rise to a cause of action for civil damages. *Dahlin, supra*, 2001 U.S.Dist. LEXIS 10512 at *22; *Owens, supra*, 736 N.E.2d at 157. *Accord Universal Manufacturing Co. v. Gardner, Carton & Douglas*, 207 F.Supp.2d 830, 833 (N.D.Ill. 2002) ("breach of an ethical duty, standing alone, is insufficient to state a claim for legal malpractice"); *Hofmann v. Fermilab NAL/URA*, 205 F.Supp.2d 900, 904 (N.D.Ill. 2002) (Illinois Rules of Professional Conduct do not create private right of action); *Doe v. Roe*, 289 Ill.App.3d 116, 681 N.E.2d 640, 649, 224 Ill.Dec. 325 (1st Dist. 1997) ("mere fact that an attorney may have violated professional ethics does not, of itself, give rise to a cause of action for damages"). While the rules of legal ethics may be relevant in an action for legal malpractice, they cannot serve as "an independent font of tort liability." *Nagy v. Beckley*, 218 Ill.App.3d 875, 578 N.E.2d 1134, 1138, 161 Ill.Dec. 488 (1st Dist. 1991); *Skorek v. Przybylo*, 256 Ill.App.3d 288, 628 N.E.2d 738, 740, 195 Ill.Dec. 274 (1st Dist. 1993).

Accordingly, in order to maintain a claim against an attorney that includes allegations of a conflict of interest, the client must state a claim for malpractice or fiduciary breach, which is independent of the alleged adverse representation, including a deviation from the applicable standard of care and some damages proximately resulting from the deviation. *Universal Manufacturing, supra*, 207 F.Supp.2d at 834 (summary judgment entered in favor of defendant attorneys on breach of fiduciary duty claim grounded on allegation that lawyers labored under conflict of interest because plaintiff could not prove any recoverable damages; court held that "[e]ven if Universal could establish that Gardner had breached its ethical duties, it cannot show that the breach caused it to incur any damages [or] . . . to incur the legal fees paid to Gardner in totally unrelated actions").

By contrast, liability was found against a law firm following a jury trial when the firm's conflict of interest proximately resulted in damages to the client because the firm engaged in settlement negotiations without the consent of the client, favored the interests of the clients it had signed directly, and negotiated a large fee for itself. *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, 298 F.Supp.2d 746, 754 – 758 (N.D.Ill. 2004). Nationally recognized ethics expert Professor Ronald Rotunda testified that Ness Motley's conduct in essentially selling out some of the firm's clients in exchange for money was plainly improper, stating that "that's not a conflict. That's an outrage." 298 F.Supp.2d at 753.

IV. [7.8] CONFIDENTIALITY

The fiduciary duty of confidentiality is the cornerstone of the attorney-client relationship. It allows a client to repose trust in the attorney and to share confidences and secrets fully and candidly so that the lawyer can effectively advocate on behalf of the client. This obligation is grounded in the sound public policy that confidentiality of communications encourages people to seek legal advice and promotes the interests of justice. The integrity of the attorney-client relationship would be seriously jeopardized if the client could not freely reveal confidences without fear of disclosure. This duty is of such great magnitude that it outlives the duration of the attorney-client relationship and even the life of the client. The attorney is bound to preserve both confidences and secrets — even if the information may be discoverable through other sources. Also, it is the client who determines what information is to be held confidential or secret.

The lawyer's duty of confidentiality is a rule of ethics, while the attorney-client privilege is a rule of evidence that shields communications between a lawyer and his or her client from unauthorized disclosure. The duty of confidentiality is, therefore, much broader than the evidentiary privilege. It encompasses both "confidences," which are privileged communications, as well as "secrets," which constitute all other information gained during the course of the professional relationship that the client has requested be held inviolate. Secrets, likewise, include material that, if disclosed, might be embarrassing or detrimental to the client. Unlike the evidentiary privilege regarding attorney-client communications, the fiduciary duty of confidentiality applies not only during judicial proceedings, but also at all times. The obligation to preserve a client's secrets lasts indefinitely, even after the death of the client.

A. [7.9] The Ethical Rule

The duty of confidentiality is codified in RPC 1.6, which prohibits attorneys from using or revealing client confidences or secrets and states, in pertinent part, as follows:

> **[**A**] lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.**

There are several narrow exceptions to this rule. For instance, a lawyer must reveal confidential information when such a disclosure is necessary to prevent the client from committing a crime involving death or serious bodily harm, and the attorney may use or reveal confidences that indicate that the client intends to commit some other crime. RPC 1.6(b), 1.6(c). In addition, the attorney is permitted to disclose confidences in order to allow the lawyer to collect his or her fee, in order to defend himself or herself against a charge of wrongful conduct, or otherwise by order of court. RPC 1.6(c).

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✓ The ethical rules, such as when a lawyer may reveal confidential information, vary widely from jurisdiction to jurisdiction. If the representation does not occur exclusively in Illinois, other states' rules may have to be consulted.

B. [7.10] Application of the Rule

The evidentiary attorney-client privilege, one of the oldest privileges known to common law, protects communications between the lawyer and his or her client from unauthorized disclosure in judicial proceedings. *In re Marriage of Decker*, 153 Ill.2d 298, 606 N.E.2d 1094, 180 Ill.Dec. 17 (1992). The rationale underlying the attorney-client privilege is that a person consulting a lawyer should be able to communicate freely and openly with the attorney without any fear of compelled disclosure of information and that our adversarial system depends on the lawyer being fully informed. 606 N.E.2d at 1101.

The ethical rule concerning confidential communications is much broader since it applies at all times and extends to a client's secrets as well as confidences. 606 N.E.2d at 1102. Like the evidentiary privilege, the fiduciary obligation of confidentiality "fosters an atmosphere of trust and encourages clients to fully disclose information to their attorneys" so that attorneys can obtain critical information needed to represent their clients effectively. *Hughes v. Paine, Webber, Jackson & Curtis, Inc.*, 565 F.Supp. 663, 666 (N.D.Ill. 1983).

The duty of confidentiality attaches to preliminary discussions with a lawyer, even though a formal attorney-client relationship is never formed. 565 F.Supp. at 668; *King v. King*, 52 Ill.App.3d 749, 367 N.E.2d 1358, 1360, 10 Ill.Dec. 592 (4th Dist. 1977). In fact, an "irrebuttable presumption" arises that confidential information was transmitted during a prospective client's first meeting with an attorney such that a lawyer was disqualified from representing the opposing party in related litigation. *Herbes v. Graham*, 180 Ill.App.3d 692, 536 N.E.2d 164, 169, 129 Ill.Dec. 480 (2d Dist. 1989).

A crime-fraud exception exists to both the attorney-client privilege as well as the fiduciary duty of confidentiality. *Decker, supra*, 606 N.E.2d at 1104 – 1105. In *Decker*, the Supreme Court considered whether an attorney representing the noncustodial parent in a divorce proceeding could be compelled to reveal confidential communications regarding the client's intent to illegally remove his child from the jurisdiction, and the court held that a communication between the client and his attorney expressing the client's intention to abduct his child would not be a confidence protected by the duty of confidentiality and would be required to be disclosed upon order of the family law court. *Id.*

A lawyer may likewise reveal otherwise privileged communications in order to recover attorneys' fees, interpret provisions of the attorney-client agreement, or defend himself or herself in a legal malpractice action. The rationale for such a rule is obvious. When a client sues his or her lawyer for malpractice, the client places the lawyer's advice at issue and effectively waives the attorney-client privilege with respect to earlier communications between the now adversarial parties. *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240, 243, 244 Ill.Dec. 941 (2000). *Accord SPSS, Inc. v. Carnahan-Walsh*, 267 Ill.App.3d 586, 641 N.E.2d 984, 988, 204 Ill.Dec. 554 (1st Dist. 1994).

There are, however, limits to what confidences the attorney may reveal in opposing charges of wrongdoing, and the privilege is waived only to the extent necessary to permit the lawyer to defend himself or herself. Thus, the attorney is not free to divulge matters that are not germane to the subject matter of the lawsuit, and he or she may not damage the client unnecessarily.

C. [7.11] Actions for Breach of the Duty

Civil actions for unauthorized disclosure of confidences are not common, largely because attorneys infrequently divulge client confidences and such disclosures are unlikely to cause serious injury to the client. Accordingly, actions for breach of the duty of confidentiality most often occur in conjunction with violations of other fiduciary duties. 2 Ronald E. Mallen and Jeffrey M. Smith, LEGAL MALPRACTICE §14.6 (7th ed. 2007). For example, disclosure of

client confidences is one of the greatest risks of adverse representation of another client, and usurpation of a client's business opportunity is most likely to be accomplished by exploiting confidential information. *Id.*

In *Profit Management Development, Inc. v. Jacobson, Brandvik & Anderson*, 309 Ill.App.3d 289, 721 N.E.2d 826, 242 Ill.Dec. 547 (2d Dist. 1999), the plaintiffs sued their attorneys for negligent representation in connection with an employment dispute between the plaintiffs and their employee. During the course of the malpractice litigation, the defense counsel turned over a letter written by the plaintiffs to the defendant lawyer and one of the plaintiffs' deposition transcripts to the lawyer for the employee suing the plaintiffs in a related federal court action, and the plaintiffs sought leave to amend their complaint to add a count for improperly revealing confidential documents protected by the attorney-client privilege. 721 N.E.2d at 832 – 833. The court concluded that the plaintiff waived the attorney-client privilege by giving a deposition in the malpractice action in which he testified about advice received from his attorney and referred to the letter, so the materials were no longer confidential. 721 N.E.2d at 835.

In another instance, it was held that an attorney motivated by revenge could be held liable for revealing his or her client's confidences to the Internal Revenue Service. *Sherman v. Klopfer*, 32 Ill.App.3d 519, 336 N.E.2d 219, 232 (1st Dist. 1975). *But see Flynn v. Dyzwilewski*, 644 F.Supp. 769, 774 n.2 (N.D.Ill. 1986) (cause of action for violating attorney-client privilege "does not look particularly promising"). Liability against a law firm was likewise found following a jury trial when the firm violated an express provision in the retainer agreement requiring it to "keep all documents and information provided to it by [the client] in confidence" and then breached its fiduciary duty by using the confidential material to the client's detriment while negotiating a large fee for itself. *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, 298 F.Supp.2d 746, 750, 754 – 758 (N.D.Ill. 2004).

V. [7.12] HONESTY

The duty of honesty requires the attorney to exercise the utmost fidelity in all of his or her dealings with the client. The lawyer can never obtain a personal advantage at the expense of the client. Simply put, the attorney is obligated always to put the interests of the client first. The duty of honesty is most commonly implicated when the lawyer engages in business dealings with the client after the formation of the attorney-client relationship, including the acquisition of property or a gift from the client, a joint venture with the client, or an investment in the client's business. The most significant risk of the attorney's business relationship is of overreaching on the part of the fiduciary due to the fact that the client is likely to rely on the advice of the attorney with respect to the transaction. In order to avoid a claim for fiduciary breach, the attorney should insist that his or her client obtain independent legal advice.

As with the fiduciary obligation of loyalty, the ethical rules governing a lawyer's business transactions with his or her client seek to safeguard the lawyer's independent, professional judgment from competing financial or other personal interests that could adversely affect the quality of representation. Given the significant risk of overreaching, business dealings with the client after the formation of the attorney-client relationship are subject to the strictest scrutiny,

and the burden shifts to the lawyer to demonstrate the objective fairness to the client. See §7.19 below. The attorney's personal interests that could have an adverse effect also include pursuing a sexual relationship with the client, which is discussed in §7.31 below. The duty of honesty is also implicated in disputes over the reasonableness of attorneys' fees, which are addressed in §7.32 below.

A. [7.13] The Ethical Rule

Rule of Professional Conduct 1.8 addresses prohibited business transactions between an attorney and a client and states, in pertinent part, as follows:

> **Conflict of Interest: Prohibited Transactions**
>
> **(a) Unless the client has consented after disclosure, a lawyer shall not enter into a business transaction with the client if:**
>
> **(1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or**
>
> **(2) the client expects the lawyer to exercise the lawyer's professional judgment for the protection of the client.**

This ethical rule likewise forbids a lawyer from preparing an instrument giving the lawyer a substantial gift from the client. RPC 1.8(c). An attorney representing a client in litigation is prohibited from providing financial assistance other than advancing litigation and other related expenses. RPC 1.8(d). A lawyer may not settle a claim with an unrepresented client or former client without advising that person, in writing, that independent representation is appropriate. RPC 1.8(g).

B. [7.14] Application of the Rule

A fiduciary relationship exists as a matter of law between an attorney and his or her client, and it is incumbent on the attorney to exercise the utmost good faith and fairness in dealing with the client. *Lustig v. Horn*, 315 Ill.App.3d 319, 732 N.E.2d 613, 619, 247 Ill.Dec. 558 (1st Dist. 2000), citing *Coughlin v. SeRine*, 154 Ill.App.3d 510, 507 N.E.2d 505, 107 Ill.Dec. 592 (1st Dist. 1987). All transactions growing out of the fiduciary relationship, including contracts for payment of attorneys' fees, are subject to the strictest scrutiny. *Durr v. Beatty*, 142 Ill.App.3d 443, 491 N.E.2d 902, 906, 96 Ill.Dec. 623 (5th Dist. 1986). "Courts of equity will scrutinize with jealous vigilance transactions between parties occupying fiduciary relations toward each other." *McFail v. Braden*, 19 Ill.2d 108, 166 N.E.2d 46, 52 (1960).

A presumption of undue influence arises when an attorney enters into a transaction with his or her client during the existence of the fiduciary relationship. *Lustig, supra*, citing *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 448 N.E.2d 872, 876, 69 Ill.Dec. 960 (1983). As a matter of public policy, once raised, a presumption of undue influence must be rebutted by the attorney by "clear and convincing" evidence. 448 N.E.2d at 877. These evidentiary rules

create a formidable hurdle for the attorney to overcome in demonstrating that a transaction was fair to the client. However, this hurdle is not insurmountable, and it remains possible to demonstrate that the business transaction was fair and equitable for the client. 448 N.E.2d at 878 (presumption was rebutted even though attorney drafted will that provided him with substantial benefit).

Not all business dealings between the attorney and his or her client once the relationship has been formed are prohibited — only those that are unfair to the client. Thus, it has been held that a lawyer may enter into a business transaction with his or her client provided that the contract is open, fair, and honest. *McFail, supra,* 166 N.E.2d at 52. The factors to be considered in determining whether the transaction is fair include a showing by the attorney (1) that he or she made of full and frank disclosure of all the relevant information that he or she had, (2) that the consideration was adequate, and (3) that the principal had independent legal advice before completing the transaction. *In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 1247, 180 Ill.Dec. 729 (1992); *McFail, supra.* Of these factors, it will be easiest for the attorney to overcome the presumption of invalidity by demonstrating that the client was represented in the transaction by independent counsel or at least had the opportunity to consult with another attorney.

Contracts made or changed after establishing the attorney-client relationship are subject to particular scrutiny. *Durr, supra,* 491 N.E.2d at 906, citing *Corti v. Fleisher,* 93 Ill.App.3d 517, 417 N.E.2d 764, 768, 49 Ill.Dec. 74 (1st Dist. 1981). For instance, if the attorney's fee agreement is modified during the pendency of the relationship, the lawyer occupies a position of trust and may have gained knowledge of the client's financial condition "so as to be able to gauge exactly how big a fee the client is likely to accept before being willing to hazard the extra costs, delays and uncertainties of switching counsel." *Pagano, supra,* 607 N.E.2d at 1247. *Accord Rufolo v. Midwest Marine Contractor, Inc.,* 912 F.Supp. 344, 351 (N.D.Ill. 1995) (second and third contingency fee agreements entered into with client during course of representation were held to be invalid when attorney was already required to perform services).

C. [7.15] Actions for Breach of the Duty

The vast majority of actions for an attorney's breach of the duty of honesty involve business transactions with clients. These decisions are also discussed in §7.19 below in conjunction with the shifting burden of proof. Civil actions by clients against their attorneys for excessive or unearned fees are addressed in §7.32 below on attorneys' fees.

The presumption of undue influence and the shifting burden of proof make it quite onerous for an attorney engaged in a business transaction with a client to demonstrate that there was compliance with the requisite fiduciary obligations. Accordingly, Illinois lawyers have been held liable to their clients for damages in a variety of contexts:

Entering into contracts with clients. *Niccum v. Meyer,* 171 B.R. 828, 832 – 834 (N.D.Ill. 1994) (lawyer found to be liable as matter of law when he purchased client's property worth $12 million for $4.5 million). *But see Jacobsen v. National Bank of Austin,* 65 Ill.App.3d 455, 382 N.E.2d 277, 281 – 282, 21 Ill.Dec. 913 (1st Dist. 1978).

Obtaining bequests from clients. *Klaskin v. Klepak,* 126 Ill.2d 376, 534 N.E.2d 971, 976, 128 Ill.Dec. 526 (1989) (attorney who represented client in transaction to purchase condominium was found to have exercised undue influence by naming herself as contingent beneficiary). *But see Franciscan Sisters Health Care Corp. v. Dean,* 95 Ill.2d 452, 448 N.E.2d 872, 878, 69 Ill.Dec. 960 (1983).

Joint ventures with clients. *Monco v. Janus,* 222 Ill.App.3d 280, 583 N.E.2d 575, 582 – 583, 164 Ill.Dec. 659 (1st Dist. 1991) (patent lawyer who was 50-percent shareholder in corporation whose sole asset was ownership of patent failed to rebut presumption of undue influence). *But see Automatic Liquid Packaging, Inc. v. Dominik,* 909 F.2d 1001, 1005 – 1006 (7th Cir. 1990).

Usurping the clients' business opportunities. *National Bank of Monticello v. Doss,* 141 Ill.App.3d 1065, 491 N.E.2d 106, 111 – 112, 96 Ill.Dec. 292 (4th Dist. 1986) (obtaining real property that was subject of lawyer's retention from ward with limited mental capacity and reselling it at great profit); *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole,* 298 F.Supp.2d 746, 754 – 758 (N.D.Ill. 2004) (law firm was retained to bring class action on behalf of victims of criminal network, and jury found that Ness Motley breached its fiduciary duty by excluding client from settlement that limited defendant's exposure to client's claims and negotiating $2 million fee for itself).

Investments in the client's business (*e.g.*, stock in lieu of fees). This practice became increasingly common with start-up technology companies in the mid-1990s. While there is no per se rule against such business relationships, they can pose dangers for the lawyer. The attorney has a responsibility to explain the potential consequences of the transaction and to recommend that the client obtain independent legal advice.

VI. [7.16] CAUSES OF ACTION

A cause of action for breach of fiduciary duty generally arises in situations in which the lawyer places his or her own interests ahead of those of the client. "A fiduciary relationship imposes a general duty on the fiduciary to refrain from 'seeking a selfish benefit during the relationship.' " *Neade v. Portes,* 193 Ill.2d 433, 739 N.E.2d 496, 737, 250 Ill.Dec. 733 (2000), quoting *Kurtz v. Solomon,* 275 Ill.App.3d 643, 656 N.E.2d 184, 191, 212 Ill.Dec. 31 (1st Dist. 1995). The breach of fiduciary duty by a lawyer gives rise to an action on behalf of the client for proximately resulting damages. *Bauer v. Hubbard,* 228 Ill.App.3d 780, 593 N.E.2d 569, 572, 170 Ill.Dec. 680 (1st Dist. 1992).

Unlike a malpractice action involving the lawyer's alleged negligence, the fiduciary breach claim must invoke one of the recognized fiduciary obligations outlined above. The burden of proof rests with the client to establish the existence of a fiduciary relationship and the breach of that obligation. *Zych v. Jones,* 84 Ill.App.3d 647, 406 N.E.2d 70, 74, 40 Ill.Dec. 369 (1st Dist. 1980). In order to recover in a civil action, the client still must meet the burden of establishing proximate cause and damages. *Metrick v. Chatz,* 266 Ill.App.3d 649, 639 N.E.2d 198, 202, 203 Ill.Dec. 159 (1st Dist. 1994).

A. [7.17] Pleading Requirements

The elements of an action for legal malpractice and breach of fiduciary duty against an attorney are essentially identical. *Arena Football League, Inc. v. Roemer,* 9 F.Supp.2d 889, 896 – 897 (N.D.Ill. 1998). The plaintiff must plead and prove the following elements: (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *Romanek v. Connelly,* 324 Ill.App.3d 393, 753 N.E.2d 1062, 1072, 257 Ill.Dec. 436 (1st Dist. 2001), citing *Neade v. Portes,* 193 Ill.2d 433, 793 N.E.2d 496, 502, 250 Ill.Dec. 733 (2000). The only exceptions involve an action premised on the attorney's improper business dealings with the client and disgorgement of fees, which are addressed in §§7.19 and 7.28 below.

In *Metrick v. Chatz,* 266 Ill.App.3d 649, 639 N.E.2d 198, 200, 202, 203 Ill.Dec. 159 (1st Dist. 1994), the plaintiffs alleged that their attorneys committed legal malpractice and breached certain fiduciary duties in the course of their representation. The breach of fiduciary duty claims against the lawyers was found to have been properly dismissed for failure to plead specific facts from which a breach of fiduciary duty could be inferred. The court stated:

> **No facts are alleged which infer that the defendants were unfaithful to the plaintiffs, that they were dishonest, that they acted in bad faith, that they had a conflict of interest, or that they engaged in self-dealing**. 639 N.E.2d at 203.

Accordingly, the breach of fiduciary duty allegations in the pleading did not "even remotely suggest that the defendants breached their fiduciary duties to the plaintiffs." *Id.* A similar result was reached in *Seyfarth, Shaw, Fairweather & Geraldson v. Wintz,* No. 99 C 1536, 1999 U.S.Dist. LEXIS 19233 at *28 (N.D.Ill. Dec. 6, 1999) (bare allegation of conflict of interest unsupported by facts fails to support claim for breach of duty of loyalty).

Just as in a legal malpractice action, a plaintiff alleging breach of fiduciary duty must plead sufficient predicate facts to demonstrate that "but for" the attorney's malpractice, the client would have been successful in the undertaking that the attorney was retained to perform. *Owens v. McDermott, Will & Emery,* 316 Ill.App.3d 340, 736 N.E.2d 145, 155, 249 Ill.Dec. 303 (1st Dist. 2000). *Accord Metrick, supra,* 639 N.E.2d at 202; *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd,* 328 Ill.App.3d 784, 767 N.E.2d 470, 475 – 476, 263 Ill.Dec. 19 (1st Dist. 2002) ("relevant inquiry is not whether alternate theories [of recovery] were available in the underlying litigation, but whether [the plaintiff] sufficiently [pled] that but for defendants' negligence, these theories would have been successful").

For instance, in *Universal Manufacturing Co. v. Gardner, Carton & Douglas,* 207 F.Supp.2d 830 (N.D.Ill. 2002), Gardner had previously acted as local counsel for Universal in a trademark suit against Douglas, a competitor, and later represented Douglas in patent infringement suits against third parties while it continued to represent Universal in non-intellectual property matters. The plaintiff commenced an action for professional negligence, breach of contract, and breach of fiduciary duty and sought disgorgement of all fees paid to Gardner during the time that it allegedly labored under a conflict of interest. 207 F.Supp.2d at 832. The district court entered summary judgement in favor of the defendant on the basis that the plaintiff was unable to prove

any damages that proximately resulted from the claimed breach of fiduciary duty. "Even if Universal could establish that Gardner had breached its ethical duties, it cannot show that the breach caused it to incur any damages [or] . . . to incur the legal fees paid to Gardner in totally unrelated actions." 207 F.Supp.2d at 834, citing *Neade, supra*, 739 N.E.2d at 502.

B. [7.18] Compared to Legal Malpractice

A claim for breach of fiduciary duty is separate and distinct from an action for legal malpractice. The attorney has a duty to provide competent representation to his or her client, and a deviation from the standard of care to possess the knowledge and exercise the skill of a reasonably diligent lawyer may result in the lawyer's liability for malpractice to the client for proximately resulting damages. Similarly, the lawyer has an independent obligation to comply with the fiduciary duties of loyalty, confidentiality, and honesty. A violation of these standards of professional conduct may likewise lead to liability for an injury sustained by the client. Thus, both the theory of recovery supporting the breach of fiduciary duty claim and the damages sought are different from those in a legal malpractice case.

Although a fiduciary relationship exists as a matter of law between an attorney and his or her client, every wrong committed by a lawyer does not constitute a fiduciary breach. Negligence on the part of an attorney does not automatically rise to the level of breach of fiduciary duty, and "mere negligence is a far cry from a breach of fiduciary duty." *Metrick v. Chatz*, 266 Ill.App.3d 649, 639 N.E.2d 198, 203, 203 Ill.Dec. 159 (1st Dist. 1994). Thus, a claim against an attorney generally falls under the rubric of professional malpractice. *Hanumadass v. Coffield, Ungaretti & Harris*, 311 Ill.App.3d 94, 724 N.E.2d 14, 18, 243 Ill.Dec. 705 (1st Dist. 1999). A claim for legal malpractice and breach of fiduciary duty may nevertheless be pled in the alternative. *Collins v. Reynard*, 154 Ill.2d 48, 607 N.E.2d 1185, 1186, 180 Ill.Dec. 672 (1992).

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✓ A breach of fiduciary duty claim that is premised on the same operative facts as a legal malpractice action will be dismissed as duplicative.

A breach of fiduciary duty claim that is premised on the same operative facts as a legal malpractice action, however, should be dismissed as duplicative. *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill.App.3d 784, 767 N.E.2d 470, 476 – 477, 263 Ill.Dec. 19 (1st Dist. 2002); *Neade v. Portes*, 193 Ill.2d 433, 739 N.E.2d 496, 500 – 501, 250 Ill.Dec. 733 (2000), citing *Majumdar v. Lurie*, 274 Ill.App.3d 267, 653 N.E.2d 915, 920 – 921, 210 Ill.Dec. 720 (1st Dist. 1995). *Accord Kirkland & Ellis v. CMI Corp.*, No. 95 C 7457, 1996 U.S.Dist. LEXIS 14346 at *25 (N.D.Ill. Sept. 29, 1996). In determining whether the breach of fiduciary duty claim is essentially the same, the court must consider "*the operative facts together with the injury*" claimed to determine whether the counts are duplicative. [Emphasis in original.] *Neade, supra*, 739 N.E.2d at 502. The relevant inquiry is whether the breach of fiduciary duty claim alleges anything that is not in the malpractice claim. *Kirkland & Ellis, supra*, 1996 U.S.Dist. LEXIS 14346 at **27 – 28. Thus, when the plaintiff alleges the same operative facts and the identical injury, the breach of fiduciary duty count should properly be dismissed as duplicative.

It remains possible to plead separate, non-duplicative counts for professional negligence and breach of fiduciary duty in the same complaint. *Pavilion Hotel Corp. v. Koch,* No. 99 C 6269, 2000 U.S.Dist. LEXIS 378 at *4 (N.D.Ill. Jan. 14, 2000). *Accord Dahlin v. Jenner & Block, L.L.C.,* No. 01 C 1725, 2001 U.S.Dist. LEXIS 10512 at **28 – 29 (N.D.Ill. July 26, 2001), citing *Calhoun v. Rane,* 234 Ill.App.3d 90, 599 N.E.2d 1318, 1321, 175 Ill.Dec. 304 (1st Dist. 1992). In doing so, the plaintiff must identify one or more of the fiduciary duties owed to him or her by the attorney, plead facts describing how it was breached, and allege the damages that were proximately caused by that breach. The operative facts as well as the damages sought should be separate and distinct from those contained in the count for professional negligence in order to survive dismissal at the pleadings stage.

C. [7.19] Shifting Burden of Proof

Business dealings between an attorney and the client after the formation of the fiduciary relationship are subject to the strictest scrutiny because such transactions implicate the integrity of the entire legal profession. The potential for overreaching is deemed to be so great that the burden of proof rests with the lawyer to establish the fairness of the contract or the adequacy of consideration. In fact, "[i]t is presumed that the attorney exercised undue influence where a transaction is entered into between an attorney and his client during the existence of that relationship and where the attorney benefits from the transaction." *Malkin v. Malkin,* 301 Ill.App.3d 303, 703 N.E.2d 460, 466, 234 Ill.Dec. 599 (1st Dist. 1998), citing *In re Marriage of Pagano,* 181 Ill.App.3d 547, 537 N.E.2d 398, 405, 130 Ill.Dec. 331 (2d Dist. 1989).

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✓ The shifting burden of proof applies only when the client challenges the fairness of a business transaction with the lawyer after the formation of the attorney-client relationship.

In *Malkin,* the court discussed the mechanics for applying the shifting burden of proof given the presumption of undue influence on the part of the lawyer and stated:

> **Although the burden of persuasion is upon contestant [sic] (the client) to establish undue influence, the burden is upon the attorney to come forward with clear and convincing evidence that [**such**] contract was fair, equitable, just, and did not come about from undue influence. It must also be shown that the client had a full understanding of the facts and their legal consequences. In the absence of clear and convincing evidence to rebut the presumption, the presumption of undue influence prevails. However, where clear and convincing proof is presented, the presumption vanishes, and it is then for the trier of fact to determine whether there actually was undue influence. [**Citations omitted.**]** 703 N.E.2d at 466, quoting *Pagano, supra,* 537 N.E.2d at 405.

The *Malkin* court ruled that friendship between an attorney and a client, even when feigned or exaggerated, is not the equivalent of undue influence. 703 N.E.2d at 467. However, the presumption of invalidity applies even if the business transaction initially appears to be fair to the client. *Sherman v. Klopfer,* 32 Ill.App.3d 519, 336 N.E.2d 219, 231 (1st Dist. 1975) (presumption of voidability applies whenever lawyer gains advantage, and it need not be unfair advantage).

In considering whether the presumption has been rebutted, the court may consider a number of factors in determining whether a transaction is fair, including a showing by the fiduciary that (1) he or she made a full and frank disclosure of all relevant information that he or she had, (2) the consideration was adequate, and (3) the principal had independent advice before completing the transaction. *Klaskin v. Klepak,* 126 Ill.2d 376, 534 N.E.2d 971, 975, 128 Ill.Dec. 526 (1989), citing *McFail v. Braden,* 19 Ill.2d 108, 166 N.E.2d 46, 52 (1960). It is important to remember that the strength of the presumption and the amount of proof necessary to overcome it are not determined by any fixed rule and instead depend on the individual circumstances in each case. *McCracken & McCracken, P.C. v. Haegele,* 248 Ill.App.3d 553, 618 N.E.2d 577, 581, 188 Ill.Dec. 577 (1st Dist. 1993), citing *Franciscan Sisters Health Care Corp. v. Dean,* 95 Ill.2d 452, 448 N.E.2d 872, 877, 69 Ill.Dec. 960 (1983).

As a practical matter, the most advantageous means of rebutting the presumption of invalidity is for the client to have access to independent counsel prior to entering into the business transaction with his or her attorney. Independent legal advice, however, is not a strict requirement, and a lawyer may rebut the presumption in other ways. *In re Schuyler,* 91 Ill.2d 6, 434 N.E.2d 1137, 1142, 61 Ill.Dec. 540 (1982) ("[w]hile independent legal advice to the client, or advising the client to secure independent legal advice, may be a very compelling means of rebutting the presumption of undue influence, it is not necessarily an indispensable means").

The presumption of undue influence has no application to the initial negotiation between the attorney and the client or after the fiduciary relationship has terminated. *In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 1247, 180 Ill.Dec. 729 (1992). Thus, it was held that a lawyer need not explain the specific terms of a retainer agreement to a prospective client. *Maksym v. Loesch,* 937 F.2d 1237, 1242 (7th Cir. 1991) ("[f]iduciary law does not send the dark cloud of presumptive impropriety over the contract that establishes the fiduciary relationship in the first place and fixes the terms of compensation for it"). The rationale behind such a rule is that the parties are presumed to be able to bargain at arm's length. Similarly, there is no prohibition against a lawyer suing a former client in order to recover his or her fees.

However, when an attorney settles a claim made by a client, the lawyer is required to advise the client in writing that it is appropriate to have independent legal counsel. RPC 1.8(g) ("[a] lawyer shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith"). The attorney's fiduciary duty to his or her client likewise mandates full disclosure of material facts when obtaining a settlement and obtaining a release. *Golden v. McDermott, Will & Emery,* 299 Ill.App.3d 982, 702 N.E.2d 581, 585, 234 Ill.Dec. 241 (1st Dist. 1998).

D. [7.20] Tort or Contract

Historically, breach of fiduciary duty evolved from principles of contract and agency law even though the cause of action shares many characteristics of a tort. Illinois courts have held that "[a]n action for breach of fiduciary duty is not a tort; rather it is governed by the substantive law of contracts." *Kling v. Landry,* 292 Ill.App.3d 329, 686 N.E.2d 33, 39, 226 Ill.Dec. 684 (2d Dist. 1997), citing *Kinzer v. City of Chicago,* 128 Ill.2d 437, 539 N.E.2d 1216, 1220, 132 Ill.Dec. 140 (1989). *Accord American Environmental, Inc. v. 3-J Co.,* 222 Ill.App.3d 242, 583 N.E.2d 649, 653, 164 Ill.Dec. 733 (2d Dist. 1991) ("such an action is controlled by the substantive laws of agency, contract, and equity"). Notably, this interpretation is contrary to THE RESTATEMENT (SECOND) OF TORTS §874 (1979), which considers breach of fiduciary duty to be a tort.

As a practical matter, however, this is largely a distinction without a difference. The elements of a breach of fiduciary claim are identical to an action for attorney negligence. *Arena Football League, Inc. v. Roemer,* 9 F.Supp.2d 889, 896 – 897 (N.D.Ill. 1998). Further, the statute of limitations for a cause of action against an attorney arising from the rendition of legal services is the same, regardless of whether the claim is grounded in tort or contract. 735 ILCS 5/13-214.3. In fact, the only areas in which the tort versus contract distinction appears to make a difference is in the type of damages that may be recovered in a breach of fiduciary duty action (see §7.29 below) and possibly the defenses available for the attorney (see §7.30 below). Also, a party is not entitled to seek contribution in a breach of fiduciary action. *American Environmental, supra,* 583 N.E.2d at 653.

E. [7.21] Effect of Rules of Professional Conduct

A violation of the rules of professional responsibility does not give rise to a cause of action for civil damages. *Owens v. McDermott, Will & Emery,* 316 Ill.App.3d 340, 736 N.E.2d 145, 157, 249 Ill.Dec. 303 (1st Dist. 2000). *Accord Doe v. Roe,* 289 Ill.App.3d 116, 681 N.E.2d 640, 649, 224 Ill.Dec. 325 (1st Dist. 1997) ("the mere fact that an attorney may have violated professional ethics does not, of itself, give rise to a cause of action for damages"). While the rules of legal ethics may be relevant to the standard of care in an action for legal malpractice or breach of fiduciary duty, usually in the form of expert testimony, they cannot serve as "an independent font of tort liability." *Nagy v. Beckley,* 218 Ill.App.3d 875, 578 N.E.2d 1134, 1138, 161 Ill.Dec. 488 (1st Dist. 1991); *Skorek v. Przybylo,* 256 Ill.App.3d 288, 628 N.E.2d 738, 740, 195 Ill.Dec. 274 (1st Dist. 1993). Accordingly, in order to state a valid claim, a complaint must allege some independent basis for professional negligence or fiduciary breach. *Dahlin v. Jenner & Block, L.L.C.,* No. 01 C 1725, 2001 U.S.Dist. LEXIS 10512 (N.D.Ill. July 26, 2001).

F. [7.22] Aiding and Abetting Breach of Fiduciary Duty

In a case of first impression, the First District held that an attorney may become liable to a non-client when it was alleged that a law firm "aided and abetted" its client's breach of fiduciary duty to a former partner of the client. *Thornwood, Inc. v. Jenner & Block,* 344 Ill.App.3d 15, 799 N.E.2d 756, 768 – 769, 278 Ill.Dec. 891 (1st Dist. 2003). A golf course developer claimed that the defendant substantially assisted his former partner in committing a breach of fiduciary duty by

drafting a buy-out agreement on behalf of its client that failed to disclose a plan by the PGA to become involved with the project. An aggravating factor in the court's decision was that Jenner had apparently negotiated with the developer to obtain a release of claims against the law firm. 799 N.E.2d at 763.

The *Thornwood* court ruled that the plaintiff had stated a valid claim against Jenner & Block for aiding and abetting its client's breach of fiduciary duty to a former partner, stating that "we see no reason to impose a per se bar that prevents imposing liability upon attorneys who knowingly and substantially assist their clients in causing another party's injury." 799 N.E.2d at 768. The elements of such a claim are as follows: "(1) the party whom the defendant aids must perform a wrongful act which causes an injury; (2) the defendant must be regularly aware of his role as part of the overall or tortious activity at the time that he provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation." 799 N.E.2d at 767 – 768, quoting *Wolf v. Liberis,* 153 Ill.App.3d 488, 505 N.E.2d 1202, 1208, 106 Ill.Dec. 411 (1st Dist. 1987).

Thornwood potentially represents a significant expansion of attorneys' liability exposure to non-clients. In particular, there is a risk that merely by asserting such a claim a non-client may be entitled to discover confidential attorney-client communications. Notably, the opinion failed to reconcile the recognition of a cause of action for aiding and abetting breach of fiduciary duty with the lawyers' duty to maintain client's confidences under RPC 1.6 (which could have exposed Jenner to a claim from its own client). See §§7.8 – 7.11 above. Such a result also appears to be at odds with a lawyer's good-faith privilege to advise his or her client — even advice to breach a contract. *Schott v. Glover,* 109 Ill.App.3d 230, 440 N.E.2d 376, 379, 64 Ill.Dec. 824 (1st Dist. 1982) ("Public policy requires that an attorney, when acting in his professional capacity, be free to advise his client without fear of personal liability to third persons if the advice later proves to be incorrect."). However, the First District subsequently rejected the argument that *Thornwood* broadened the scope of an attorney's liability to persons who are neither in privity with nor intended third-party beneficiaries of the attorney-client relationship. *Kopka v. Kamensky & Rubenstein,* 354 Ill.App.3d 930, 821 N.E.2d 719, 725, 290 Ill.Dec. 407 (1st Dist. 2004).

G. [7.23] Requirement of Expert Testimony

Just as in a legal malpractice action, expert testimony is required in a fiduciary breach case to establish the standard of conduct and that the defendant's conduct fell below that standard. *Barth v. Reagan,* 139 Ill.2d 399, 564 N.E.2d 1196, 1199 – 1200, 151 Ill.Dec. 534 (1990) ("standard of care against which the attorney defendant's conduct will be measured must generally be established through expert testimony"); *Hoagland v. Sandberg, Phoenix & Von Gontard, P.C.,* 385 F.3d 737, 744 (7th Cir. 2004) (fact that plaintiff characterized claim as breach of fiduciary duty caused by defendant's conflict of interest did not excuse requirement that plaintiff produce expert testimony to prove his case); *Harris v. Harris,* 196 Ill.App.3d 815, 555 N.E.2d 10, 19, 144 Ill.Dec. 113 (1st Dist. 1990) ("[g]enerally, unless the conflict is so clear as to be undisputed, expert testimony is necessary"); *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.,* 90 Ill.App.3d 817, 413 N.E.2d 1299, 1311, 46 Ill.Dec. 186 (1st Dist. 1980) (expert testimony required to prove conflict of interest).

H. [7.24] Non-Assignability

Public policy dictates that, given the personal and confidential nature of the relationship between the attorney and the client, breach of fiduciary duty claims, like those for legal malpractice, are not assignable. *Wilson v. Coronet Insurance Co.*, 293 Ill.App.3d 992, 689 N.E.2d 1157, 1159, 228 Ill.Dec. 736 (1st Dist. 1997). *Accord Gonzales v. Profile Sanding Equipment, Inc.*, 333 Ill.App.3d 680, 776 N.E.2d 667, 682, 267 Ill.Dec. 295 (1st Dist. 2002) ("sound public policy prohibits the assignment of these claims [for legal malpractice and breach of fiduciary duty] since an assignee would be a stranger to the attorney-client relationship, who was owed no duty by the attorney and who suffered no injury from the attorney's actions"), citing *Clement v. Prestwich*, 114 Ill.App.3d 479, 448 N.E.2d 1039, 1041 – 1042, 70 Ill.Dec. 161 (2d Dist. 1983). However, an action for professional negligence or breach of fiduciary duty does not abate upon the death of the client and may be pursued by the administrator of his or her estate. 776 N.E.2d at 682.

I. [7.25] Limitations

A claim for breach of fiduciary duty is governed by the statute of limitations and the statute of repose for actions against attorneys as outlined in the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.* These statutes require that any claim against a lawyer arising out of the performance of professional services must be commenced within two years from the date it is discovered and within six years of the date of the act or omission giving rise to the claim and states, in pertinent part, as follows:

> **(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services . . . must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.**
>
> **(c) Except as provided in subsection (d) [**regarding injuries arising from estate planning representation**], an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.** 735 ILCS 5/13-214.3.

Since the 1995 amendments to this statute were held to be unconstitutional in their entirety by the Illinois Supreme Court in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057, 228 Ill.Dec. 636 (1997), the 1991 version remains in effect.

These provisions apply to claims against an attorney for breach of fiduciary duty, rather than the five-year residual statute of limitations set forth in 735 ILCS 5/13-205, which generally governs other breach of fiduciary claims. *Morris v. Margulis*, 197 Ill.2d 28, 754 N.E.2d 314, 318, 257 Ill.Dec. 656 (2001). Thus, the limitations period for a breach of fiduciary duty claim begins to run "when the plaintiff 'knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused.' " *Id.*, quoting *Witherell v. Weimer*, 85

Ill.2d 146, 421 N.E.2d 869, 874, 52 Ill.Dec. 6 (1981). The accrual date normally presents a question of fact unless it is apparent from the undisputed facts that only one conclusion can be drawn. 754 N.E.2d 318.

The limitations period may be tolled in accordance with 735 ILCS 5/13-215 when the attorney takes steps to fraudulently conceal the cause of action. 754 N.E.2d at 319. *Accord Lewis v. Herman,* 775 F.Supp. 1137, 1148 (N.D.Ill. 1991) ("[w]hen a fiduciary with a duty to disclose engages in active concealment to hide wrongdoing, the running of the limitations period will be tolled until the time of discovery"). However, 735 ILCS 5/13-215 has no application when the plaintiff discovers the fraudulent concealment and a reasonable time remains within the statute of limitations for claims against attorneys. *Morris, supra,* 754 N.E.2d at 319. Further, the silence of a fiduciary does not itself constitute concealment, and a plaintiff must show that the defendant took additional steps after the fraud to keep it concealed. *Lewis, supra.*

Similarly, fraudulent concealment by an attorney may toll the six-year statute of repose. *DeLuna v. Burciaga,* 223 Ill.2d 49, 857 N.E.2d 229, 248 – 249, 306 Ill.Dec. 136 (2006) (allegation that lawyer assured non-English speaking plaintiffs as deadline for legal malpractice statute of repose approached that their case was "going very well" was sufficient to support claim for fraudulent concealment); *Rajcan v. Donald Garvey & Associates, Ltd.,* 347 Ill.App.3d 403, 807 N.E.2d 725, 729, 283 Ill.Dec. 120 (2d Dist. 2004) (allegation that lawyer repeatedly failed to provide copy of trust agreement to beneficiaries notwithstanding false assurances that he would do so was sufficient to defeat motion to dismiss on basis of statute of repose).

J. [7.26] Damages Recoverable

The damage in a legal malpractice or a breach of fiduciary duty case is not a personal injury or the attorney's negligent act itself, but rather is a pecuniary injury to an intangible property interest cased by the lawyer's negligent act or omission. *Northern Illinois Emergency Physicans v. Landau, Omahana & Kopka, Ltd.,* 216 Ill.2d 294, 837 N.E.2d 99, 106 – 107, 297 Ill.Dec. 319 (2005). This tortured verbiage is, at least in part, attributable to the *Moorman* doctrine, which generally prohibits a plaintiff from recovering in tort for a purely economic loss. *See Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982). The Illinois Supreme Court has unequivocally stated that legal malpractice claims are excepted from the economic loss doctrine given the fact that such claims possess characteristics of both tort and contract. *Collins v. Reynard,* 154 Ill.2d 48, 607 N.E.2d 1185, 1187, 180 Ill.Dec. 672 (1992).

A client's claim for legal malpractice or breach of fiduciary duty cannot succeed unless he or she can demonstrate that he or she sustained a monetary loss as the result of some negligent act or omission by the attorney. *Northern Illinois Emergency Physicians supra,* 837 N.E.2d at 107. Accordingly, the client can be in no better position by bringing suit against the attorney than if the underlying action had been successfully prosecuted or defended. *Sterling Radio Stations, Inc. v. Weinstine,* 328 Ill.App.3d 58, 765 N.E.2d 56, 62, 262 Ill.Dec. 230 (1st Dist. 2002).

Given that a breach of fiduciary duty claim has its historical roots in agency and contract law, courts have had to go to great lengths to justify awarding damages for emotional distress. For

instance, in *Doe v. Roe*, 289 Ill.App.3d 116, 681 N.E.2d 640, 650, 224 Ill.Dec. 325 (1st Dist. 1997), the First District had to reach all the way back to the commonlaw case *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng.Rep. 145 (1854), for the proposition that such damages are recoverable in a breach of contract action when they flow naturally from the breach.

1. [7.27] Emotional Distress

Claimed damages for emotional distress arising from an attorney's breach of fiduciary duty are recoverable only in narrowly prescribed circumstances. In *Hanumadass v. Coffield, Ungaretti & Harris*, 311 Ill.App.3d 94, 724 N.E.2d 14, 20, 243 Ill.Dec. 705 (1st Dist. 1999), the plaintiff, a physician whom the defendant lawyers had represented in a medical malpractice action that was settled without his knowledge, was not permitted to recover damages for "loss of reputation, embarrassment, health and state of mind." The First District based its ruling on the historical prohibition against the recovery of emotional damages in breach of contract actions and a number of prior decisions that had denied such damages in legal malpractice cases. 724 N.E.2d at 18, citing *Maere v. Churchill*, 116 Ill.App.3d 939, 452 N.E.2d 694, 697 – 698, 72 Ill.Dec. 441 (3d Dist. 1983).

In *Doe v. Roe*, 289 Ill.App.3d 116, 681 N.E.2d 640, 224 Ill.Dec. 325 (1st Dist. 1997), the plaintiff brought suit against her divorce lawyer claiming that he breached his fiduciary duty to her by coercing her into a sexual relationship. The First District noted that the essential purpose of the attorney-client relationship is the provision of competent legal services and not the improvement of a client's mental or emotional well-being. 681 N.E.2d at 649. *Accord Suppressed v. Suppressed*, 206 Ill.App.3d 918, 565 N.E.2d 101, 105, 151 Ill.Dec. 830 (1st Dist. 1990). The *Doe* court, however, ruled that a lawyer's breach of fiduciary duty can support a claim for mental suffering if the defendant had reason to know that his or her actions were likely to cause emotional distress to the plaintiff. 681 N.E.2d at 646. The plaintiff stated a valid claim for emotional distress when she pled facts to the effect that the defendant used his position as her attorney and his knowledge of her dependence on him to gain sexual favors. The *Doe* court also noted that certain types of engagements, such as actions for dissolution of marriage, adoption, and termination of parental rights, are likely to involve emotionally charged issues. 681 N.E.2d at 650, citing *In re Marriage of Pagano,*154 Ill.2d 174, 607 N.E.2d 1242, 1247, 180 Ill.Dec. 729 (1992).

2. [7.28] Forfeiture of Fees

An attorney who commits a breach of fiduciary duty may be required to forfeit or disgorge all or at least some portion of his or her compensation. The rationales underlying such a rule are that a lawyer does not deserve to be paid for services that violate his or her fundamental obligations to the client, representation under such circumstances is unlikely to benefit the client, and in order to deter misconduct in the future. These reasons likewise justify a relaxation of the proximate cause and damage requirements in a disgorgement case. While a lawyer's negligence may result in malpractice liability for proximately caused damages, the forfeiture of fees addresses a different injury — harm to the attorney-client relationship — that, therefore, justifies forfeiture of the attorney's compensation.

Factors to be considered by the court in evaluating forfeiture as a sanction include (a) whether the fiduciary breach was willful or intentional, (b) whether it involved repeated misconduct rather than a single incident, and (c) the availability of other remedies. The sanction imposed should also be proportionate to the gravity of the violation. Depending on the severity, timing, and consequences to the client of the fiduciary breach, the attorney may still recover the reasonable value of the legal services rendered on quantum meruit theory notwithstanding his or her fiduciary breach. A complete forfeiture of compensation earned by the attorney for an inadvertent transgression would most likely result in a windfall to the client.

Some jurisdictions permit forfeiture of legal fees for unprofessional conduct when the client has not been harmed. *See, e.g., Burrow v. Arce*, 997 S.W.2d 229, 238 – 240 (Tex. 1999). By contrast, Illinois courts apply a fact-specific inquiry and have generally determined that forfeiture is warranted only in the most severe cases in which the fiduciary breach has resulted in tangible damage to the client. Specifically, in *In re Marriage of Pagano*, 154 Ill.2d 174, 607 N.E.2d 1242, 1249 – 1250, 180 Ill.Dec. 729 (1992), the Supreme Court stated:

> **[**W**]hen one breaches a fiduciary duty to a principal the appropriate remedy is within the equitable jurisdiction of the court. While the breach may be so egregious as to require the forfeiture of compensation by the fiduciary as a matter of public policy . . . , such will not always be the case. [**Citation omitted.**]**

The *Pagano* court found that complete forfeiture of fees is within the discretion of the trial court when the violation of trust is severe or willfulness is shown. 607 N.E.2d at 1250. It concluded that the lawyer in a dissolution action had not breached his fiduciary duty to his client by obtaining a waiver of her right to a hearing on attorneys' fees during the course of the relationship, and that even if the lawyer had failed to rebut the presumption of undue influence, the violation did not warrant a forfeiture of fees. *Id.*

In *King v. King*, 52 Ill.App.3d 749, 367 N.E.2d 1358, 1360, 10 Ill.Dec. 592 (4th Dist. 1977), an award of attorneys' fees in favor of the wife in a dissolution proceeding was reversed when the evidence revealed that the husband had initially consulted with the attorney about representing his interests in the divorce, and the court ruled that "[a]n attorney cannot recover from the party that he has wronged for legal services where he has represented adverse, conflicting, and antagonistic interests in the same litigation." *Id.* A similar result was reached in *American Home Assurance Co. v. Golomb*, 239 Ill.App.3d 37, 606 N.E.2d 793, 797, 179 Ill.Dec. 961 (4th Dist. 1992), when the court ruled that a lawyer who exceeded the statutory cap on attorneys' fees in a medical malpractice action was required to forfeit all fees earned because the contract memorializing the fee agreement expressly and intentionally violated the statute and, thus, was illegal from its inception.

In *Owens v. McDermott, Will & Emery*, 316 Ill.App.3d 340, 736 N.E.2d 145, 156 – 157, 249 Ill.Dec. 303 (1st Dist. 2000), the First District ruled that the plaintiff was not entitled to have his attorneys disgorge legal fees when he was unable to establish that a conflict of interest in violation of RPC 1.9 proximately caused him to suffer any damages. *Accord Universal Manufacturing Co. v. Gardner, Carton & Douglas*, 207 F.Supp.2d 830, 834 (N.D.Ill. 2002) (summary judgment entered on client's claim for disgorgement of fees premised on attorneys'

alleged conflict of interest because plaintiff could not prove any recoverable damages; court stated that "[e]ven if Universal could establish that Gardner had breached its ethical duties, it cannot show that the breach caused it to incur any damages [or] to incur the legal fees paid to Gardner in totally unrelated actions").

3. [7.29] Punitive Damages

Punitive damages are generally prohibited in legal malpractice and breach of fiduciary duty claims against lawyers by 735 ILCS 5/2-1115, which states, in its entirety, as follows:

> **In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed.**

The plain language of the statute appears to suggest that it applies to all claims arising from the rendition of professional services by the defendant attorney, including those involving intentional conduct. Indeed, punitive damages are almost always limited to circumstances in which the conduct at issue was intentional or willful and wanton. There is a split of authority, however, on the question of whether there is a so-called "fraud exception" to 735 ILCS 5/2-1115. A number of cases have carved out several additional exceptions that have further eroded the prohibition against punitive damages in claims against attorneys, particularly when the lawyers' misconduct has been egregious.

In *Calhoun v. Rane,* 234 Ill.App.3d 90, 599 N.E.2d 1318, 1322, 175 Ill.Dec. 304 (1st Dist. 1992), a client alleged that his attorney had committed malpractice and then deliberately lied to the client in an attempt to cover up his negligence. The First District ruled that §2-1115 prevented the plaintiff from seeking punitive damages. 599 N.E.2d at 1323 ("we must find that the section 2-1115 prohibition of punitive damages in legal malpractice cases also applies to intentional fraud arising from the provision of legal services").

A contrary result was reached by the Third District in *Cripe v. Leiter,* 291 Ill.App.3d 155, 683 N.E.2d 516, 520, 225 Ill.Dec. 348 (3d Dist. 1997). The *Cripe* court reasoned that fraud by an attorney is separate and distinct from legal malpractice. 683 N.E.2d at 519. The Third District justified its fraud exception to §2-1115 on broad public policy considerations:

> **Since those who utilize legal services place a great deal of trust in the hands of their attorney, the attorney-client relationship presents a significant potential for abuse. For this reason, punitive damages are particularly appropriate in cases involving allegations that an attorney defrauded his client.** 683 N.E.2d at 520.

In *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole,* 298 F.Supp.2d 746, 758 – 761 (N.D.Ill. 2004), the district court ruled that §2-1115 was not a bar to the plaintiff recovering a $27.2 million punitive damage award imposed by a jury, stating that the applicability of the statutory bar to punitive damages "depends on whether plaintiffs' breach of fiduciary duty claim falls within 'the rubric of [legal] malpractice.' " Quoting *Brush v. Gilsdorf,* 335 Ill.App.3d 356, 783 N.E.2d 77, 80 – 81, 270 Ill.Dec. 502 (3d Dist. 2003) (client not entitled to recover punitive damages when complaint articulated nothing more than claim for legal malpractice).

This decision was undoubtedly influenced by the severity of the misconduct of the Ness Motley attorneys, which included using the client's confidential material to the client's detriment, conducting unauthorized settlement negotiations that favored the interests of the clients that the lawyers had signed up directly, and negotiating a $2 million fee for Ness Motley itself. The district court reasoned that the retainer agreement that Ness Motley signed with the client stated that the law of South Carolina, which has no equivalent to §2-1115, governed the relationship between the parties and rejected the defendant's public policy arguments to the effect that South Carolina attorneys should not be subjected to a punitive damage award in Illinois.

In a case of first impression, the Illinois Supreme Court held that punitive damages sought by a client in an underlying fraud action that were allegedly lost as a result of the attorneys' negligence could not be recovered as compensatory damages in a subsequent claim for legal malpractice. *Tri-G, Inc. v. Burke, Bosselman & Weaver* 222 Ill.2d 218, 856 N.E.2d 389, 417 – 418, 305 Ill.Dec. 584 (2006).

K. [7.30] Defenses

The best defense to a breach of fiduciary duty claim is that the attorney made a full and appropriate disclosure, preferably in writing, and explained all pertinent matters. Malpractice and fiduciary breach claims are rarely asserted when such full and open communications have taken place. 2 Ronald E. Mallen and Jeffrey M. Smith, LEGAL MALPRACTICE §14.20 (7th ed. 2007). No cause of action exists unless there was a valid attorney-client relationship. *Schwartz v. Cortelloni*, 177 Ill.2d 166, 685 N.E.2d 871, 875, 226 Ill.Dec. 416 (1997) ("[a]s a general rule, an attorney owes a duty only to one who is the client of the attorney"); *Kehoe v. Saltarelli*, 337 Ill.App.3d 669, 786 N.E.2d 605, 612, 272 Ill.Dec. 66 (1st Dist. 2003). Consent is a defense to a conflict of interest as well as a disclosure of client confidences, and it will obviously be easier to assert if there is a written waiver from the client. If an attorney intends to enter into a business transaction with the client, he or she should insist that the client consult independent counsel in order to rebut the presumption of overreaching.

If avoiding the problem is not possible, the same defenses that apply to legal malpractice claims are generally available in actions for fiduciary breach. Thus, the lawyer may properly raise failure to mitigate damages, unclean hands, or expiration of the statute of limitations. See §7.25 above. Breach of fiduciary duty claims are frequently stricken as duplicative of legal malpractice actions. See §7.18 above. A lawyer may also raise the defense that he or she reasonably believed that his or her action or inaction was required by law, court order, or the Rules of Professional Conduct. For instance, an attorney cannot be held liable for damages in a civil action when the attorney revealed client confidences in order to prevent the client from committing a crime involving death or serious bodily harm. See RPC 1.6(b).

The doctrine of res judicata may bar an action for breach of fiduciary duty when there was a prior adjudication involving the same operative facts. *Purmal v. Robert N. Wadington & Associates*, 354 Ill.App.3d 715, 820 N.E.2d 86, 96 – 97, 289 Ill.Dec. 578 (1st Dist. 2004) (trial court's decision in underlying defamation claim that attorneys were properly entitled to their contingency fees barred subsequent claim for legal malpractice and breach of fiduciary duty founded on allegation that attorneys had fraudulently obtained attorneys' fees). Similarly, a client

may be equitably estopped from asserting a claim for breach of fiduciary duty when the client has assumed a contrary position in the underlying case. *Larson v. O'Donnell*, 361 Ill.App.3d 388, 836 N.E.2d 863, 871, 297 Ill.Dec. 132 (1st Dist. 2005) (client who gave sworn testimony that he understood his obligations under marital settlement agreement could not maintain that attorney did not sufficiently explain its terms).

Contributory negligence is generally not considered to be a valid defense to an action for breach of fiduciary duty given the client's reliance on his or her attorney's obligations of loyalty, confidentiality, and honesty. Indeed, the unequal bargaining position between the lawyer and the client is one of the principal rationales underlying the imposition of fiduciary duties on the lawyer in the first instance. However, this rationale has no application when the client either contributes to or benefits from the attorney's fiduciary breach, and at least one Illinois court has recognized ratification of the attorney's conduct as a possible defense. *Monco v. Janus,* 222 Ill.App.3d 280, 583 N.E.2d 575, 583, 164 Ill.Dec. 659 (1st Dist. 1991).

In a breach of fiduciary duty claim by a criminal defendant, it is incumbent upon the client to prove his or her acutal innocence before he or she may recover from the criminal defense attorney. *Paulsen v. Cochran,* 356 Ill.App.3d 354, 826 N.E.2d 526, 530, 292 Ill.Dec. 385 (1st Dist. 2005). However, an exception has been recognized when an attorney willfully or intentionally breaches the fiduciary duties owed to a criminal defense client. 826 N.E.2d at 531, citing *Morris v. Margulis,* 307 Ill.App.3d 1024, 718 N.E.2d 709, 720 – 721, 241 Ill.Dec. 138 (5th Dist. 1999), *rev'd on other grounds,* 197 Ill.2d 28 (2001).

Finally, attorneys should be aware that legal malpractice and breach of fiduciary duty claims are frequently asserted as counterclaims in actions brought to recover legal fees. The cautious practitioner should also be cognizant that a cause of action otherwise barred by the statute of limitations for claims against attorneys may in effect be revived and brought as a counterclaim in a lawsuit to collect past-due legal fees. See 735 ILCS 5/13-207.

VII. OTHER RECURRING PROBLEMS

A. [7.31] Sexual Relations with Client

One of the most rapidly evolving areas of the law concerning breach of fiduciary duty arises from the lawyer's sexual involvement with a client under circumstances in which the client's case could be undermined, the attorney might exploit the client's dependence, or there is a risk that the lawyer's independent judgment will be affected. Some types of representation present a greater risk of harm due to the emotional vulnerability of the client, including divorce, adoption, and termination of parental rights. By contrast, overreaching is less likely to occur in corporate or governmental settings when the attorney and client are on more of an even footing. It is, nevertheless, preferable for the lawyer to avoid circumstances in which his or her professional judgment may be called into question as a result of an intimate relationship with a client.

The first case in Illinois to address a breach of fiduciary duty claim stemming from a lawyer's sexual relationship with a client was *Suppressed v. Suppressed,* 206 Ill.App.3d 918, 565 N.E.2d 101, 151 Ill.Dec. 830 (1st Dist. 1990). In *Suppressed,* the plaintiff claimed that her lawyer

seduced her into having sexual relations with him while representing her in a divorce action. The First District Appellate Court held that these allegations did not state a valid claim because the breach of fiduciary duty was not sufficiently linked to the lawyer's representation. The court held:

> [W]**e do not believe that the higher standard of care required of a fiduciary should extend to an attorney's personal relationships with his clients, unless there is tangible evidence that the attorney actually made his professional services contingent upon the sexual involvement or that his legal representation of the client was, in fact, adversely affected.** 565 N.E.2d at 105.

Accord Kling v. Landry, 292 Ill.App.3d 329, 686 N.E.2d 33, 38, 226 Ill.Dec. 684 (2d Dist. 1997) ("the mere existence of a sexual relationship is not sufficient to state a cause of action for legal malpractice"). Even assuming that an attorney breached his or her duty of care by engaging in sexual relations with a client, the *Suppressed* court concluded that dismissal of the plaintiff's complaint was still appropriate because the client had not alleged any actual damages stemming from a loss in the underlying divorce action. 565 N.E.2d at 106. *Accord Doe v. Roe*, 289 Ill.App.3d 116, 681 N.E.2d 640, 650, 224 Ill.Dec. 325 (1st Dist. 1997) (even if attorney breached fiduciary duty to client by engaging in sexual relationship, plaintiff would still be required to show some compensable damage).

The restrictive rule in *Suppressed* limiting the recovery to pecuniary damages in a breach of fiduciary duty case by a client against her lawyer arising from allegedly improper physical contact was expanded by the First District in *Doe* to allow for emotional distress damages, but only when the defendant obtained information during the course of the attorney-client relationship that suggested that the plaintiff was unusually vulnerable to a suggestion of sexual involvement and the defendant used this information to seduce the plaintiff. 681 N.E.2d at 643. The *Doe* court was careful to emphasize that not all sexual relations between attorneys and their clients constitutes a breach of fiduciary duty, but rather only those relationships that may involve undue influence or abuse of confidential information on the part of the lawyer. 681 N.E.2d at 651.

Therefore, there are three ways in which an attorney may become liable for breach of fiduciary duty arising from sexual involvement with a client: (1) making his or her professional services contingent on physical relations; (2) compromising the client's legal interests as a result of the sexual involvement; or (3) using information obtained in the course of legal representation that suggests that the client might be vulnerable to the suggestion of physical relations. *Kling, supra*, 686 N.E.2d at 40; *Doe, supra*, 681 N.E.2d at 649 – 650. A plaintiff may further be entitled to recover damages for emotional distress if the defendant knew that his or her actions were likely to cause emotional distress to the plaintiff for reasons other than pecuniary loss. *Doe, supra,* 681 N.E.2d at 646.

B. [7.32] Attorneys' Fees

Disputes between attorneys and their clients concerning fees implicate the duty of honesty, much like business transactions with clients. However, the rules governing attorneys' fees are somewhat different given that the lawyer does not owe a fiduciary duty to a prospective client when negotiating the terms of representation. See §7.2 above. The parties can, therefore, bargain

at arm's length without the risk of overreaching by the attorney, provided that there is no fraud and the agreement reached is not illegal or unconscionable.

An attorney's compensation is generally governed by RPC 1.5(a), which requires, above all else, that a lawyer's fee be reasonable. The ethical provision of RPC 1.5(a) lists the factors to be considered by a court to determine whether a counsel's fee is reasonable:

> **(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:**
>
> **(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
>
> **(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
>
> **(3) the fee customarily charged in the locality for similar legal services;**
>
> **(4) the amount involved and the results obtained;**
>
> **(5) the time limitations imposed by the client or by the circumstances;**
>
> **(6) the nature and length of the professional relationship with the client;**
>
> **(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and**
>
> **(8) whether the fee is fixed or contingent.**

If an attorney has not regularly represented a client, it is advisable for the parties to have a written agreement. RPC 1.5(b). A written contract is required when the lawyer is to be paid a contingent fee. RPC 1.5(c).

No exact formula exists for determining a proper amount of attorneys' fees. While each factor is relevant, no single factor is conclusive or dispositive. *In re Estate of Andernovics*, 197 Ill.2d 500, 759 N.E.2d 501, 508, 259 Ill.Dec. 721 (2001); *Mobil Oil Corp. v. Maryland Casualty Co.*, 288 Ill.App.3d 743, 681 N.E.2d 552, 563, 224 Ill.Dec. 237 (1st Dist. 1997).

An attorney owes a duty to his or her client not to overcharge for legal services, and charging excessive or fraudulent fees can give rise to a cause of action for legal malpractice. *Coughlin v. SeRine*, 154 Ill.App.3d 510, 507 N.E.2d 505, 508 – 509, 107 Ill.Dec. 592 (1st Dist. 1987) (cause of action stated against lawyer who charged more hours than typically should have been required); *Winniczek v. Nagelberg*, 394 F.3d 505, 508 (7th Cir. 2005) ("actual innocence" rule, which prevents guilty criminal defendant from asserting legal malpractice claim, has no application in case in which client claims that he was overcharged for legal services provided).

Overbilling on the part of an attorney can likewise constitute a breach of fiduciary duty. *Schweihs v. Davis, Friedman, Zavett, Kane & MacRae,* 344 Ill.App.3d 493, 800 N.E.2d 448, 455, 279 Ill.Dec. 380 (1st Dist. 2003) (lawyers who failed to file non-meritorious appeal could be held liable for return of fees paid by client for appeal; court stated that "[a]n unfiled appeal, even if attorneys worked long hours preparing appellate briefs, is much like a pool that holds no water"); *Cripe v. Leiter,* 291 Ill.App.3d 155, 683 N.E.2d 516, 520, 225 Ill.Dec. 348 (3d Dist. 1997) (punitive damages warranted for submitting false billing statements based on public policy that "those who utilize legal services place a great deal of trust in the hands of their attorney, [and] the attorney-client relationship presents a significant potential for abuse").

In *Lustig v. Horn,* 315 Ill.App.3d 319, 732 N.E.2d 613, 620, 247 Ill.Dec. 558 (1st Dist. 2000), the First District ruled that a provision in an attorney's retainer agreement allowing for attorneys' fees incurred in the collection of unpaid attorneys' fees was "unfair and potentially violative of the Rules of Professional Conduct" because it created a situation in which the lawyer's representation might be limited by the attorney's own interests. The *Lustig* court, nevertheless, permitted the attorney to recover his reasonable fees and costs for his able representation on a quantum meruit basis. 732 N.E.2d at 620 – 621.

A fee agreement that is changed during the course of the attorney-client relationship is subject to all of the fiduciary obligations, including the prohibition against business transactions with existing clients. *Durr v. Beatty,* 142 Ill.App.3d 443, 491 N.E.2d 902, 906 – 907, 96 Ill.Dec. 623 (5th Dist. 1986). Such an agreement is presumed to have resulted from undue influence, and the lawyer must rebut the presumption by "clear and convincing" evidence. *Id. Accord Rufolo v. Midwest Marine Contractor, Inc.*, 912 F.Supp. 344, 351 (N.D.Ill. 1995) (personal injury lawyer's second and third contingency fees entered into with client found to be invalid when attorney failed to demonstrate reasonableness, there was no consideration, and lawyer was already required to perform services).

A lawyer's fee agreement with his or her client, like any other contract, cannot be illegal. Thus, a lawyer who knowingly signed a contingent fee agreement with a client for a sum in excess of the amount provided by statute was compelled to forfeit his entire fee since the contract was found to be illegal from its inception. *American Home Assurance Co. v. Golomb,* 239 Ill.App.3d 37, 606 N.E.2d 793, 797, 179 Ill.Dec. 961 (4th Dist. 1992). Similar penalties may be imposed when the lawyer fails to turn over money belonging to the client promptly or wrongfully retains the client's property in order to collect his or her fee.

Not surprisingly, much of the litigation over attorneys' fees has consisted of one attorney suing another to recover a share of attorneys' fees. Although the question of when an attorney may become civilly liable to another attorney for breach of fiduciary duty is outside of the scope of this chapter, several important propositions emerge from these cases. The interest of the client in receiving competent representation and paying a reasonable fee is fundamental. Illinois courts have long recognized that the client retains the ultimate decision as to who will be his or her attorney, notwithstanding agreements among lawyers to the contrary. *Corti v. Fleisher,* 93 Ill.App.3d 517, 417 N.E.2d 764, 769, 49 Ill.Dec. 74 (1st Dist. 1981) ("[a] contrary decision would allow clients to be unknowingly treated like objects of commerce, to be bargained for and traded by merchant-attorneys like beans and potatoes").

Similarly, there has been significantly less attention paid to which attorney is entitled to receive compensation, usually in the form of contingency fee. In *Holstein v. Grossman*, 246 Ill.App.3d 719, 616 N.E.2d 1224, 1236, 186 Ill.Dec. 592 (1st Dist. 1993), the First District ruled that an agreement between attorneys to share fees from a personal injury case was void as against public policy because the client never consented in writing, stating "[o]ur paramount concern must be the effect of these fee-sharing agreements have on the clients, not on the attorneys involved. 'It does not matter whose ox is gored.' " Quoting *Schniederjon v. Krupa*, 162 Ill.App.3d 192, 514 N.E.2d 1200, 1202, 113 Ill.Dec. 189 (5th Dist. 1987).

7S Breach of Fiduciary Duty

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II. DEFINING THE RELATIONSHIP

A. [7S.2] Necessity of an Attorney-Client Relationship

In the sentence following the Christison *citation near the end of the first paragraph,* "fidicuaries" *should read* "fiduciaries."

The last paragraph is revised:

No cause of action for legal malpractice or breach of fiduciary duty exists where a plaintiff fails to demonstrate the existence of an attorney-client relationship. *Kehoe v. Saltarelli*, 337 Ill.App.3d 669, 786 N.E.2d 605, 612, 272 Ill.Dec. 66 (1st Dist. 2003). Moreover, in order to become liable to the client, the breach of fiduciary duty must have occurred within the scope of the attorney's employment; "[a]n attorney's duty to a client is measured by the representation sought by the client and the scope of the authority conferred." *Wildey v. Paulsen*, 385 Ill.App.3d 305, 894 N.E.2d 862, 868, 323 Ill.Dec. 836 (1st Dist. 2008), quoting *Simon v. Wilson*, 291 Ill.App.3d 495, 684 N.E.2d 791, 801, 225 Ill.Dec. 800 (1st Dist. 1997).

B. [7S.3] Duration of the Obligation

Add at the end of the carryover paragraph at the top of p. 7-6:

Any doubt as to whether the attorney-client relationship has been terminated should be clarified by the lawyer so that the client does not mistakenly believe that the attorney is looking after his or her interests when the lawyer has ceased to do so. *Board of Managers of Eleventh Street Loftominium Ass'n v. Wabash Loftominium, L.L.C.*, 376 Ill.App.3d 185, 876 N.E.2d 65, 74, 315 Ill.Dec. 65 (1st Dist. 2007).

The first full paragraph on p. 7-6 is replaced:

One notable exception to the general rule that fiduciary duties expire with the termination of the attorney-client relationship is that the duty of confidentiality, *i.e.*, the lawyer's obligation not to reveal "information relating to the representation of a client" pursuant to Rule 1.6 of the Rules of Professional Conduct of 2010 (RPC), extends indefinitely. For instance, an attorney who represented the husband in divorce proceedings was disciplined for attempting to represent the client's former wife following the client's death in her attempt to collect the proceeds of the client's life insurance policy due to the possible risk of confidential communications being used against the former client. *In re Williams,* 57 Ill.2d 63, 309 N.E.2d 579, 581 (1974).

The duty of confidentiality also extends to preliminary discussions with a lawyer even though a formal attorney-client relationship is never formed. RPC 1.18(b), which is addressed to duties to prospective clients, states that "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation," and the rule requires that the attorney treat the potential client as a former client for purposes of analyzing conflicts of interest. *Accord Hughes v. Paine, Webber, Jackson & Curtis Inc.,* 565 F.Supp. 663, 667 – 668 (N.D.Ill. 1983); *King v. King*, 52 Ill.App.3d 749, 367 N.E.2d 1358, 1360, 10 Ill.Dec. 592 (4th Dist. 1977).

III. [7S.4] LOYALTY

The second sentence in the second paragraph is revised:

These provisions are addressed to concurrent conflicts of interest (dual representation) and duties to former clients (successive representation).

A. [7S.5] The Ethical Rules

The section is revised:

RPC 1.7, as amended effective January 1, 2010, addresses the prohibition against concurrent representation of clients with divergent interests in a business transaction or during the course of litigation and states, in pertinent part:

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

There is an exception when the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client. RPC 1.7(b)(1). However, an attorney is prohibited from representing one client in asserting a claim against another client in litigation before the same tribunal. RPC 1.7(b)(3).

When concurrent representation of clients with potentially divergent interests in a single matter is undertaken, each client must give informed consent. RPC 1.7(b)(4). Informed consent requires that the attorney communicate adequate information and explain the material risks and reasonably available alternatives. RPC 1.0(e). The information that a lawyer must provide depends on the nature of the conflict and the risks involved. Comment [18], RPC 1.7.

The Comments to RPC 1.7 provide useful guidance regarding conflict situations that may be encountered frequently, including the implications of representing multiple clients, how to seek waiver of conflicts that may arise in the future, and the representation of constituents and affiliates of organizations.

PRACTICE POINTER

✓ While the ethical rules may be relevant to a breach of fiduciary action, they do not create substantive rights and may not form the basis of a civil action. See §7.21 below.

The ethical rule governing conflicts of interest when representing a current client could potentially interfere with obligations owed to former clients appears in RPC 1.9(a), which provides, in pertinent part:

> **A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.**

Two exceptions to RPC 1.9(a) exist — when disclosure of confidential information is permitted by RPC 1.6 regarding confidentiality of information (see §7S.9 below), and when the information has become generally known. RPC 1.9(c)(1). The Comments to RPC 1.9 are useful in determining when a representation involves "the same or a substantially related matter" as a prior representation. Comments [2] & [3], RPC 1.9.

A concurrent or successive conflict of interest by one attorney is imputed to other attorneys in the same law firm. RPC 1.10.

B. [7S.6] Application of the Rules

The first sentence in the second paragraph is revised:

A concurrent conflict of interest exists when counsel, without the knowledge and consent of his or her client, is in a duplicitous position in which his or her full talents as a vigorous advocate, by all means fair and honorable, are hobbled, fettered, or restrained by commitments to others.

Add at the end of the carryover paragraph at the top of p. 7-9:

The Comments to RPC 1.9 offer practical examples to for an attorney to evaluate whether a representation involves "the same or a substantially related matter" as a prior representation. Comments [2] & [3], RPC 1.9.

The first full paragraph on p. 7-9 is replaced:

Consent by the affected parties is the only express exception to the prohibition against an attorney's representation of conflicting or antagonistic interests. *Feng v. Sandrik*, 636 F.Supp. 77, 85 (N.D.Ill. 1986); *State Farm Mutual Automobile Insurance Co. v. Palmer*, 123 Ill.App.3d 674, 463 N.E.2d 129, 131 – 132, 78 Ill.Dec. 951 (3d Dist. 1984). RPC 1.7 and 1.9 both mandate that each client give informed consent. Informed consent requires that the attorney communicate adequate information and explain the material risks and reasonably available alternatives. RPC 1.0(e).

Unlike the ABA Model Rules of Professional Conduct, Illinois law does not require that the client's consent to a conflict of interest be confirmed in writing. However, written consent is preferred since it provides the best evidence concerning the sufficiency of the lawyer's disclosure.

It should be noted that the most serious conflicts of interest cannot be waived given their impact on the integrity of the judicial system, *e.g.*, representation of one client against another client in the same litigation. RPC 1.7(b)(3).

IV. [7S.8] CONFIDENTIALITY

The section is revised:

The duty of confidentiality is the cornerstone of the attorney-client relationship. It allows a client to repose trust in the attorney and to share confidences and secrets fully and candidly so that the lawyer can effectively advocate on behalf of the client. This obligation is grounded in the sound public policy that confidentiality of communications encourages people to seek legal advice and promotes the interests of justice. The integrity of the attorney-client relationship would be seriously jeopardized if the client could not freely reveal confidences without fear of disclosure. This duty is of such great magnitude that it outlives the attorney-client relationship and even the life of the client.

RPC 1.6 regarding confidential information was amended effective January 1, 2010, and changed in several respects. For instance, the distinction between client confidences and secrets was eliminated, and the duty of confidentiality now encompasses all "information relating to the representation of a client," whatever the source, which is a much broader standard. RPC 1.6(a). The circumstances under which an attorney may reveal protected information have also been expanded, *e.g.*, when a client has used the lawyer's services in furtherance of a fraud. RPC 1.6(b)(2). The rationale, in the wake of Enron and other corporate scandals, is that an attorney should be able to prevent, mitigate, or rectify a fraud committed by his or her client.

A. [7S.9] The Ethical Rule

The section is revised:

The ethical rule governing confidentiality was significantly changed effective January 1, 2010. Specifically, the new language in RPC 1.6 broadens the scope of the information protected and includes several new exceptions that permit an attorney to reveal confidential information under certain circumstances. Revised RPC 1.6(a) provides:

> **A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent**

The newly adopted Comments to this rule clarify that it protects a broad body of information, including "all information relating to the representation [of a client], whatever its source." Comment [3], RPC 1.6. The Comments further provide that the prohibition against disclosing confidential information extends to material that "could reasonably lead to the discovery" of confidential information relating to the representation of the client. Comment [4], RPC 1.6.

There are several exceptions to this rule pertaining to the circumstances in which an attorney is required or permitted to disclose confidential information. For instance, a lawyer must reveal confidential information "necessary to prevent reasonably certain death or substantial bodily harm." RPC 1.6(c). According to the Comments, the death or serious bodily harm can be the result of the actions taken by anyone and not just the client. Comment [6], RPC 1.6.

The attorney is permitted to disclose confidential information necessary to establish a claim or defense in a controversy with a client, to establish a defense against a criminal charge or civil claim based on conduct in which the client was involved, and to respond to allegations in any proceeding concerning the attorney's representation of the client. RPC 1.6(b)(5). A lawyer may also reveal confidences as required by law or court order. RPC 1.6(b)(6).

A lawyer may likewise reveal confidential information to prevent a client from committing a crime as well as to prevent, mitigate, or rectify a fraud that is reasonably certain to result in a substantial injury to the financial interests or property of another when the client has used the lawyer's services to perpetrate the fraud. RPC 1.6(b)(1), 1.6(b)(2). Moreover, an attorney may disclose confidential information even after the client's fraud has occurred if it is possible to mitigate or rectify the victim's loss. RPC 1.6(b)(3).

Finally, RPC 1.6 permits a lawyer to disclose confidential information that is reasonably necessary to obtain legal advice pertaining to the attorney's compliance with the Rules of Professional Conduct of 2010. RPC 1.6(b)(4). The Comments are helpful in providing guidance to an attorney when encountering a specific situation, *e.g.,* what he or she should do when ordered by a court to disclose confidential information.

PRACTICE POINTER

✓ When the Illinois Rules of Professional Conduct 2010 were adopted effective January 1, 2010, Illinois largely adopted the ABA Model Rules along with their Comments that help to interpret the ethical rules and provide practical examples of how to apply them to particular situations.

B. [7S.10] Application of the Rule

The first paragraph on p. 7-12 is revised:

The ethical rule concerning confidential communications is much broader since it applies to "all information relating to the representation [of a client], whatever its source." Comment [3], RPC 1.6. Like the evidentiary privilege, the fiduciary duty of confidentiality "foster[s] an atmosphere of trust and encourage[s] clients to fully disclose information to their attorneys" so that attorneys can obtain critical information needed to represent their clients effectively. *Hughes v. Paine, Webber, Jackson & Curtis Inc.*, 565 F.Supp. 663, 666 – 667 (N.D.Ill. 1983).

Add after the King *citation in the second paragraph on p. 7-12:*

"Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation," and the attorney should treat the potential client as a former client for purposes of analyzing conflicts of interest. RPC 1.18(b).

The first sentence in the next-to-last paragraph is revised and the following citation is added:

A lawyer may likewise reveal otherwise privileged "information relating to the representation of a client" in order to recover attorneys' fees, interpret provisions of the attorney-client agreement, or defend himself or herself in a legal malpractice action. RPC 1.6(b)(5).

V. [7S.12] HONESTY

The last sentence in the first paragraph and the first sentence in the second paragraph are deleted.

A. [7S.13] The Ethical Rule

The section is revised:

RPC 1.8, which was amended effective January 1, 2010, addresses prohibited business transactions between an attorney and a client and requires broader warnings and written consent when the lawyer enters into a business transaction with his or her client. The ethical rule states, in pertinent part:

> **A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:**
>
> > **(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;**
> >
> > **(2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and**
> >
> > **(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.** RPC 1.8(a).

This ethical rule sets very specific requirements for business transactions between an attorney and his or her client, including that the terms of such transactions be "fair and reasonable," that the client be informed of his or her right to seek independent counsel, and that the client give informed consent in a writing signed by the client. *Id.*

RPC 1.8 likewise prohibits a lawyer from using information to the client's detriment. RPC 1.8(b). However, this rule does not prohibit uses that do not disadvantage the client. Comment [5], RPC 1.8. An attorney shall not solicit a substantial gift from a client. RPC 1.8(c). But a lawyer may accept a gift from a client provided that the transaction meets general standards of fairness. Comment [6], RPC 1.8.

An attorney representing a client in litigation is prohibited from providing financial assistance other than advancing litigation costs and other related expenses. RPC 1.8(e). The rationale for this rule is not to encourage clients to pursue lawsuits that might otherwise not be brought and not to give the lawyer too great a financial stake in the litigation. Comment [10], RPC 1.8.

A lawyer may not settle a claim with an unrepresented client or former client without advising that person, in writing, that independent representation is appropriate. RPC 1.8(h)(2).

Finally, an attorney may not have a sexual relationship with a client unless a consensual sexual relationship existed between them at the time the attorney-client relationship was formed. RPC 1.8(j). See also §7.31 below.

B. [7S.14] Application of the Rule

The first two sentences in the first full paragraph on p. 7-15 are replaced:

A lawyer may still enter into a business transaction with his or her client provided that the contract is open, fair, and honest.

VI. CAUSES OF ACTION

B. [7S.18] Compared to Legal Malpractice

Add after the Kirkland & Ellis *citation in the paragraph following the Practice Pointer:*

Accord Nettleton v. Stogsdill, 387 Ill.App.3d 743, 899 N.E.2d 1252, 1267, 326 Ill.Dec. 601 (2d Dist. 2008).

C. [7S.19] Shifting Burden of Proof

The last paragraph is revised:

However, a lawyer may not settle a claim with an unrepresented client or former client without advising that person, in writing, that independent representation is appropriate. RPC 1.8(h)(2). The attorney's fiduciary duty to his or her client likewise mandates full disclosure of material facts when obtaining a settlement and obtaining a release. *Golden v. McDermott, Will & Emery*, 299 Ill.App.3d 982, 702 N.E.2d 581, 585, 234 Ill.Dec. 241 (1st Dist. 1998).

F. [7S.22] Aiding and Abetting Breach of Fiduciary Duty

Add at the end of the last paragraph:

Further, a federal court, applying Illinois law, entered summary judgment in favor of the defendants when their conduct was "passive and indirect, [which] is not enough to sustain an aiding and abetting breach of fiduciary duty claim." *Premier Capital Management, LLC v. Cohen*, No. 02 C 5368, 2008 WL 4378313 at *6 (N.D.Ill. Mar. 24, 2008). The district court emphasized that the *Thornwood* court cautioned against expanding aiding and abetting liability "to parties who were simply doing their jobs and performing tasks that they typically performed in the course of business." *Id.*

H. [7S.24] Non-Assignability

The section is revised:

Public policy dictates that, given the personal and confidential nature of the relationship between the attorney and the client, breach of fiduciary duty claims, like those for legal malpractice, are not assignable. *Wilson v. Coronet Insurance Co.*, 293 Ill.App.3d 992, 689 N.E.2d 1157, 1159, 228 Ill.Dec. 736 (1st Dist. 1997). *Accord Gonzalez v. Profile Sanding Equipment, Inc.*, 333 Ill.App.3d 680, 776 N.E.2d 667, 682, 267 Ill.Dec. 295 (1st Dist. 2002) (quoting *Clement v. Prestwich*, 114 Ill.App.3d 479, 448 N.E.2d 1039, 1041, 70 Ill.Dec. 161 (2d Dist. 1983), for proposition that "sound public policy prohibits the assignment of these claims [for legal malpractice and breach of fiduciary duty] since an assignee would be a stranger to the attorney-client relationship, who was owed no duty by the attorney and who suffered no injury from the attorney's actions").

The appropriate remedy for the assignment of a claim for breach of fiduciary duty or legal malpractice is dismissal of the entire cause of action. *Grimes v. Saikley*, 388 Ill.App.3d 802, 904 N.E.2d 183, 194 – 196, 328 Ill.Dec. 421 (4th Dist. 2009) ("the trial court correctly dismissed count I against Saikley because . . . legal-malpractice claims cannot be assigned in Illinois"). However, an action for professional negligence or breach of fiduciary duty does not abate upon the death of the client and may be pursued by the administrator of his or her estate. *Gonzalez, supra*,776 N.E.2d at 682.

J. [7S.26] Damages Recoverable

In the first citation in the first paragraph, "Physicans" should read "Physicians."

The Northern Illinois Emergency Physicians *citation in the second paragraph is revised:*

Northern Illinois Emergency Physicians, supra, 837 N.E.2d at 107 ("Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client.").

K. [7S.30] Defenses

In the first sentence in the next-to-last paragraph, "acutal" *should read* "actual."

VII. OTHER RECURRING PROBLEMS

A. [7S.31] Sexual Relations with Client

Add after the first paragraph:

Under the Rules of Professional Conduct of 2010, effective January 1, 2010, an attorney may not have a sexual relationship with a client unless a consensual sexual relationship existed between them at the time the attorney-client relationship was formed. RPC 1.8(j). The rationale for this rule is obvious, as a sexual relationship between a lawyer and client may unfairly exploit the attorney's fiduciary role and impair the lawyer's independent professional judgment. Comment [17], RPC 1.8. Those concerns are diminished when the sexual relationship preceded the attorney-client relationship. Comment [18], RPC 1.8.

B. [7S.32] Attorneys' Fees

The first full paragraph on p. 7-31 is revised:

An attorney's compensation is generally governed by RPC 1.5(a), which requires, above all else, that a lawyer's fee be reasonable. The ethical provision of RPC 1.5(a) lists the factors to be considered by a court to determine whether a lawyer's fee is reasonable:

> **A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:**
>
> > **(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
> >
> > **(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

The scope of the lawyer's representation and the basis for the fees and expenses must be communicated to the client, preferably in writing, at the commencement of the attorney-client relationship. RPC 1.5(b). However, when an attorney's fee is contingent on the outcome of a case, a written agreement signed by the client is required that sets forth how the fees and expenses will be calculated. RPC 1.5(c).