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WHEN CLIENTS SUE THEIR LAWYERS FOR FAILING TO REPORT THEIR OWN MALPRACTICE

Benjamin P. Cooper*

I. INTRODUCTION

Lawyers, like all professionals, make mistakes.¹ They blow the statute of limitations, fail to conduct appropriate factual investigations, draft inadequate documents, fail to check for and disclose conflicts, and commit many other kinds of errors.² Sometimes lawyers recognize their mistakes but fail to disclose them to their clients. If a lawyer’s mistake (missing the statute of limitations) causes damage to his client (inability to recover on a meritorious claim), the client can sue the lawyer for legal malpractice.³ What, if any, consequences are there for a lawyer who fails to disclose his error to his client?

In a previous article, I examined a lawyer’s ethical duty to report his own malpractice to his client—a topic that had previously received little attention from courts and commentators⁴—and concluded that the

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4. See generally id. Other commentators have now contributed additional analysis of the ethical dimensions of the self-reporting duty. See generally Timothy J. Pierce & Sally E. Anderson, What to Do After Making a Serious Error, WIS. LAW., Feb. 2010, at 6 (describing the lawyer’s ethical duty to report his own malpractice to his client under the Wisconsin Rules of Professional
duty is well-grounded in two rules. The first is the lawyer’s duty under Rule 1.4 of the Model Rules of Professional Conduct (“Model Rules”) to communicate with the client. The second is the lawyer’s duty to avoid conflicts of interest under Rule 1.7 of the Model Rules.

Just because a lawyer is subject to discipline for failing to report his own malpractice, however, does not mean that a client can state an independent claim against the lawyer on that ground. In a small number of reported decisions, courts have considered such claims, but those cases are divided and suffer from some of the same analytical flaws that characterize the broader area of legal malpractice law. This Article tackles that important question, which I touched on only briefly in my previous article, and argues that clients should be able to assert such a claim, separate and apart from the underlying malpractice claim based on the original error. Specifically, clients should be able to assert an independent breach of fiduciary duty claim seeking equitable remedies, including fee forfeiture, based on the lawyer’s failure to self-report his error. This Article creates a blueprint for courts and practitioners analyzing such a claim.

To create such a blueprint requires plunging into, and bringing order to, an untidy corner of legal malpractice law. When a client sues her lawyer for damages arising out of the lawyer’s representation of the client, she may assert two principal claims—one for professional negligence, and a second for breach of fiduciary duty. Plaintiffs and courts frequently lump these together as “legal malpractice” claims, . 5 6 7 8 9 10 11 12 13 14

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Conduct and offering practical tips for what lawyers should do). For an in-depth analysis of law firm malpractice disclosure disputes, see generally Alfieri, supra note 1.

5. See generally Cooper, supra note 3, at 213-14. But see 3 RONALD E. MALLEN & ALLISON MARTIN RHODES, LEGAL MALPRACTICE § 24:11 (2015 ed.) (stating that “few courts have construed civil or ethical standards to compel such disclosure in the abstract”).


7. Id. r. 1.7.


9. See infra Part VI.

10. See infra Part VI.

11. See infra Part V.C.


with little thought as to the difference.\footnote{15} A frequent tactic for aggrieved clients is to assert overlapping causes of action against attorney-defendants for professional negligence, breach of fiduciary duty, and possibly other claims (such as fraud, breach of contract, etc.) arising out of the same set of facts and seeking the same damages.\footnote{16} For their part, courts have done a poor job of sorting out these different causes of action, and, as a result, the doctrines are badly mangled.\footnote{17}

This Article joins a burgeoning consensus of commentators and courts who believe that clients should be able to assert two separate claims against their lawyers—a professional negligence claim when the lawyer has breached his duty of care to a client and a breach of fiduciary duty claim when a lawyer has violated his fiduciary duties of loyalty and communication to a client.\footnote{18} Applying this to the failure-to-self-report scenario, a client is unlikely to be able to assert a professional negligence claim because the client will typically not be able to establish any additional injury over and above the damage caused by the underlying malpractice. In other words, the client will not be able to satisfy the "case-within-the-case" requirement.

A client should, however, be able to assert a breach of fiduciary duty claim seeking fee forfeiture. Properly understood, the primary fiduciary duty that a lawyer owes to a client is the duty of loyalty, and a lawyer's failure to self-report malpractice constitutes a breach of that duty.
duty under Rule 1.7, as well as under agency principles. Further, clients should be able to recover certain equitable remedies—principally fee forfeiture—even in the absence of proof that the fiduciary breach gave rise to damages. In most cases, clients should be able to assert this claim, in addition to a claim for professional negligence, seeking compensatory damages based on the underlying malpractice.

Part II describes the lawyer’s ethical duty to inform his client of his own malpractice.19 Part III illustrates the split of authority among courts analyzing a client’s ability to bring an independent claim against her lawyer for failure to report his own malpractice.20 Parts IV and V describe the two principal claims that a client can bring against her lawyer: professional negligence and breach of fiduciary duty. As set forth in Part IV, professional negligence claims largely cover (or should cover) breaches of the lawyer’s duty of care, and most clients will not be able to assert a professional negligence claim for breach of the self-reporting duty because they will be unable to establish any additional injury over and above the damage caused by the underlying malpractice.21 As set forth in Part V, however, a breach of fiduciary duty claim should cover a lawyer’s breach of his fiduciary duties of loyalty and communication, and provide for equitable remedies not typically available for a professional negligence claim.22 Thus, when a lawyer fails to report his own malpractice, clients should be able to assert an independent breach of fiduciary duty claim seeking equitable remedies, including fee forfeiture, based on that failure. Finally, Part VI discusses other advantages of bringing an independent claim for breach of fiduciary duty.23

II. THE LAWYER’S ETHICAL DUTY TO DISCLOSE HIS OWN MALPRACTICE

In a previous article, I examined the lawyer’s ethical duty to report his own malpractice to his client and concluded that the duty is well-grounded in two rules.24 The first is the lawyer’s duty under Rule 1.4 to communicate with the client. This rule provides, in part, that “[a] lawyer shall . . . keep the client reasonably informed about the status of the matter,” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the

19. See infra Part II.
20. See infra Part III.
21. See infra Part IV.
22. See infra Part V.
23. See infra Part VI.
24. See generally Cooper, supra note 3.
representation." Although courts and commentators have debated the proper scope of the lawyer's duty to communicate, whatever the precise scope of this rule, it surely must include a requirement that a lawyer inform his client when the client may have a substantial malpractice claim against the lawyer, since this information is "necessary to permit the client to make informed decisions regarding the representation." Those decisions include (1) whether the client has a viable malpractice claim arising out of the representation and, if so, whether to pursue it now or later; and (2) whether to have the lawyer continue to represent the client in the current matter. In this situation, where the interests of the attorney and client may differ substantially, "a high degree of disclosure" is necessary.

The second rule that gives rise to the self-reporting duty is Rule 1.7, governing conflicts of interest. Rule 1.7 prohibits a lawyer from representing a client in a variety of situations including when "there is a

25. MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS’N 2013); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 20 (AM. LAW INST. 2000) ("(1) A lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer. . . . (2) A lawyer must promptly comply with a client's reasonable requests for information. (3) A lawyer must notify a client of decisions to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

26. Some courts have said that a lawyer owes a duty of "absolute and perfect candor" to the client. See, e.g., Lopez v. Munoz, Hockema & Reed, LLP, 22 S.W.3d 857, 867 (Tex. 2000); State ex rel. Okla. Bar Ass’n v. Taylor, 4 P.3d 1242, 1254 n.42 (Okla. 2000); Hefner v. State, 735 S.W.2d 608, 624 (Tex. App. 1987). But, this does not square with the language of Rule 1.4 and the Restatement, which contain a reasonableness standard. See Vincent R. Johnson, "Absolute and Perfect Candor" to Clients, 34 ST. MARY'S L.J. 737, 738-39 (2003) (arguing that such a standard “read literally and without qualification . . . cannot possibly be an accurate statement of an attorney's obligations under all circumstances” because it “would require a lawyer to convey to a client every piece of data coming into the lawyer's possession, no matter how duplicative, arcane, unreliable or insignificant”); Eli Wald, Taking Attorney-Client Communications (and Therefore Clients) Seriously, 42 U.S.F. L. REV. 747, 789-92 (2008) (arguing that the lawyer's duty to communicate should be strengthened and clarified by adding a materiality standard to Rule 1.4).

27. Frances Patricia Solari, Malpractice and Ethical Considerations, 19 N.C. CENT. L.J. 165, 175-76 (1991) (recognizing that the North Carolina rule concerning the duty to "keep the client reasonably informed" imposes a self-reporting obligation on attorneys); Charles E. Lundberg, Self-Reporting Malpractice or Ethics Problems, BENCH & B. MINN., Sept. 2003, at 24, 24 (recognizing a self-reporting duty under Minnesota law since "the attorney is under a duty to disclose any material matters bearing upon the representation and must impart to the client any information which affects the client's interests"). But see Pennsylvania Bar Ass’n Comm. on Legal Ethics & Prof. Responsibility, Informal Op. 97-56 (1997) (concluding that a lawyer had to inform his client that her personal injury case had been dismissed for failure to prosecute and the consequences of such a dismissal, but not that the client may have a claim against him for malpractice).

28. Solari, supra note 27, at 175, 180; see Pierce & Anderson, supra note 4, at 9, 43 (reaching the same conclusion under Wisconsin Rule 1.4).

29. Johnson, supra note 26, at 773 (recognizing the self-reporting duty as one of these instances).
significant risk that the representation of one or more clients will be materially limited by... a personal interest of the lawyer." Comment [10] to Rule 1.7 further explains that “[t]he lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.” This conflict is imputed to the entire firm.

Once a lawyer’s conduct has given rise to a substantial malpractice claim by his client, his personal interests are adverse to his client’s. It may not seem, at first blush, as if the lawyer has a conflict, since both the lawyer and the client have an interest in obtaining a favorable outcome. But upon closer inspection, it is apparent that the lawyer’s interest is not necessarily aligned with the client’s. The lawyer may be preoccupied with his own problems: for example, in a litigation context, he might want to settle the litigation quickly in order to try and hide his mistake or minimize the damages available to the client in a subsequent malpractice case. Another possibility is that the lawyer might want to litigate the case to the end to prove that his (or his law firm’s) original advice was correct while the client’s interest is best served by reaching the quickest and least expensive resolution of the litigation. As I previously described this situation:

Because of his tunnel vision, the attorney is not in a position to realistically evaluate the claim asserted against the client or to give independent legal advice that is in the best interest of the client. Rather, the conflicted lawyer becomes fixated on vindicating his or his firm’s own position instead of acting in the best interests of the client.

The comments to Rule 1.7 fully support the view that a substantial mistake by the lawyer creates a conflict: “[I]f the probity of a lawyer’s
own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. In short, a lawyer who fails to disclose his malpractice to his client is subject to discipline for violating Rules 1.4 and 1.7.

One of the most challenging aspects for the lawyer is figuring out which mistakes trigger the self-reporting requirement. If a lawyer commits a clear error that causes significant harm to the client—for example, if the lawyer fails to file his client’s complaint in time to meet the statute of limitations—the lawyer must report this mistake to the client. On the other hand, certain minor mistakes—such as filing a brief containing a typo—do not require self-reporting. Similarly, if the lawyer can rectify the mistake or the mistake causes no significant consequences for the client, then the lawyer has nothing to communicate and no conflict to worry about.

The test for determining what errors to report is materiality—lawyers should report material mistakes. Materiality is a familiar concept in the law arising in such diverse contexts as fraud, criminal procedure, federal securities law, and health care law. The gist of

38. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 10 (AM. BAR ASS’N 2013); Solari, supra note 27, at 180 (“Once it has become apparent that a client may have a malpractice claim against the attorney, the attorney clearly has a stake in the outcome of the case, and the lawyer’s representation ‘may be materially limited . . . by his own interests.’”).

39. In addition, the lawyer’s failure to disclose his own malpractice may also violate Rule 8.4(c)’s prohibition on conduct involving, among other things, “dishonesty” and “deceit.” MODEL RULES OF PROF’L CONDUCT r. 8.4(c). Thank you to Susan Fortney for this suggestion.


41. Cooper, supra note 3, at 181; Colorado Bar Ass’n Ethics Comm., Formal Op. 113 (2005) (“At one end are errors that . . . will likely prejudice a client’s right or claim.”).

42. Pollock, supra note 33, at 20-21 (“Not every mistake by a lawyer, however, will create a conflict of interest. If a mistake can be corrected (e.g., Federal Rule of Civil Procedure 6(b) permits blown deadlines to be extended upon a showing of ‘excusable neglect’) or has no meaningful consequences for the client (e.g., the loss of a duplicative claim or defendant), no conflict of interest exists between lawyer and client because their interests do not diverge.” (citation omitted)); Colorado Bar Ass’n Ethics Comm., Formal Op. 113 (“At the other end of the spectrum are errors and possible errors that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to the client’s right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice.”).

43. Pollock, supra note 33, at 20-21.

44. Colorado Bar Ass’n Ethics Comm., Formal Op. 113.

45. FORTNEY & JOHNSON, supra note 40, at 110 (“Courts have repeatedly recognized that the fiduciary obligations of an attorney require disclosure of facts that are material to the representation. The implication of these expressions is that immaterial facts need not be disclosed.”); Cooper, supra note 3, at 194-98.
materiality in these different contexts is much the same, however. Drawing on the standard in these other contexts, Professor Eli Wald concludes that lawyers must “reveal all information that a reasonable client would attach importance to in determining the objectives of the representation.” In the event of mistakes, Professor Wald concludes that “the fact that a lawyer made a mistake in representing a client will ordinarily not be material,” but if the mistake “has consequences that materially affect the client’s matter, the fact of the mistake becomes material, and must be disclosed to the client.” Applying this understanding of materiality, the self-reporting duty should arise “when the error is one that a reasonable client would find significant in making decisions about (1) the lawyer-client relationship and (2) the continued representation by the lawyer or law firm.” As applied to the self-reporting duty, materiality comes down to primarily two things: how bad was the mistake and how much harm did it cause. At the end of the day, figuring out what is material for purposes of the self-reporting duty is not an easy task, and lawyers will have to make difficult judgment calls.

III. EXISTING CASE LAW ADDRESSING A LAWYER’S FAILURE TO DISCLOSE HIS OWN MALPRACTICE

There have been surprisingly few reported cases in which a client has attempted to assert a separate claim against the lawyer based on the lawyer’s failure to report his own malpractice. There are several possible reasons. First, the client has relatively little incentive to pursue this secondary claim if she stands to collect a significant damages award for the underlying malpractice. Second, the client may never learn about the malpractice because the lawyer failed to report it to her. There are many possible reasons for the lawyer’s failure to self-report. The lawyer may not believe he or his firm has committed malpractice or may otherwise be unaware that he or his firm has committed an act of malpractice.

46. Wald, supra note 26, at 781.
47. Id. at 791.
48. Cooper, supra note 3, at 214.
49. Pollock, supra note 33, at 21 (“How clear cut is it that the lawyer was negligent? Can the error be remedied without harm to the client? How severe are the potential consequences of the mistake for the client? These factors boil down to the same ultimate question: What is the likelihood of a substantial malpractice claim against the lawyer as a result of the mistake in question?”).
50. Colorado Bar Ass’n Ethics Comm., Formal Op. 113 (2005) (“In between these two ends of the spectrum are innumerable errors that do not fall neatly into either end of the spectrum and must be analyzed on a case-by-case basis.”).
51. Cooper, supra note 3, at 188 (“The lawyer’s natural (and human) inclination is to assume that his or his partner’s work was competent and was not the cause of the
may be unaware of his duty to report his malpractice. He may want to try to fix the error. A more sinister explanation is that the lawyer has decided to intentionally hide his mistake from his client.

Whatever the reason, the small number of existing decisions are divided and suffer from some of the same analytical flaws that characterize the broader area of legal malpractice law. In several cases, clients have successfully stated a claim against their lawyers for failure to self-report. An excellent example is *Bayview Loan Servicing, LLC v. Law Firm of Richard M. Squire & Associates, LLC.* In that case, the lawyer failed to file a petition to fix the fair value of the relevant property in a foreclosure action, thereby depriving the client of the opportunity to pursue a deficiency judgment. The lawyer then failed to tell the client about this error. On these facts, the court permitted the plaintiff to proceed with a claim for professional negligence, based on the lawyer’s failure to file the petition to fix the fair value, and a breach of fiduciary duty claim, based on the defendant’s alleged disloyalty for failing to disclose his errors to his client.

The court in *Deutsch v. Hoover, Bax & Slovacek, L.L.P.* also allowed the client to pursue a claim based, at least in part, on the...
The court found that the client had stated a cognizable claim for breach of fiduciary duty and that it was not a “fractured” negligence claim. Other courts in Texas, however, have found that a client could not proceed with a separate claim asserting that the lawyer failed to disclose his malpractice.

The Louisiana courts are similarly divided. In one case, the court permitted a client to proceed with a claim—albeit denominated as a “legal malpractice” claim—based on her lawyer’s failure to notify her that the medical review panel concluded that the statute of limitations had run. The court permitted her claim for emotional damages even in the absence of other damages. Subsequent Louisiana decisions have not followed this decision, however.

The New York courts have definitively rejected claims asserting an independent claim based on an attorney’s failure to disclose his own malpractice. In most of those cases, clients have attempted to state a claim for fraud, but as one representative New York court stated: “Plaintiff’s fraud claim was properly dismissed, as an attorney’s failure to disclose malpractice does not give rise to a fraud claim separate from the customary malpractice action.”

61. Id. at 187.
62. Id. at 189-91; see also Riverwalk CY Hotel Partners, Ltd. v. Akin Gump Strauss Hauer & Feld, LLP 391 S.W.3d 229, 237-39 (Tex. App. 2012) (finding the client’s claims that the lawyer intentionally failed to tender the defense to the insurance carrier and charged excessive fees stated a claim for breach of fiduciary duty and were not fractured negligence claims).
63. See, e.g., Brescia v. Slack & Davis, LLP, No. 03-09-00042, 2010 WL 4670322, at *12 (Tex. App. 2010) (affirming dismissal of the client’s cause of action for breach of fiduciary duty because the client’s claims that the law firm failed to “properly advise, inform and communicate” about the case constituted claims for professional negligence); Kahlig v. Boyd, 980 S.W.2d 685, 689 (Tex. App. 1998) (finding the client’s claim that his lawyer’s affair with his current wife during a child custody dispute with his ex-wife created a conflict of interest the lawyer was required to disclose was really a “disguised malpractice claim[]” because the client was really claiming that, once the affair started, the lawyer was not representing the client to the best of his abilities).
65. Id. at 1097.
Similarly, a New York state trial court relied on the same line of cases to dismiss a breach of fiduciary duty claim alleging a failure to disclose malpractice. In that case, the Supreme Court of New York County said:

The claim for breach of fiduciary duty is based on the same operative facts that formed the basis of the malpractice cause of action. Specifically, both claims are based upon Pryor Cashman’s alleged failure to properly identify the risk of common-law copyright infringement, and based upon Pryor Cashman’s purportedly affirmative advice that there was no copyright protection. Thus, both claims allege defects in Pryor Cashman’s professional conduct and claim the same injury. Therefore, the claim for breach of fiduciary duty is duplicative of the malpractice claim.

In another case, a federal district court in New York also dismissed a breach of fiduciary duty claim based on a failure to disclose malpractice. The U.S. District Court for the Southern District of New York found as follows: “Because Plaintiff’s breach of fiduciary duty claim is premised on the same conduct and seeks the same relief as its 2004 malpractice claim, it is barred under New York law.”

IV. PROFESSIONAL NEGLIGENCE CLAIMS AGAINST LAWYERS

When a client sues her lawyer for damages arising out of the lawyer’s representation of the client, she may assert two principal claims—one for professional negligence and a second for breach of fiduciary duty. Plaintiffs and courts frequently lump these together as “legal malpractice” claims with little thought as to the difference. A leading legal malpractice treatise also concludes:

[T]here is no civil cause of action for a lawyer’s failure to confess legal malpractice, which consists simply of nondisclosure of prior negligent conduct, unless there was an independent tort or risk of additional injury. Typically, the damage is caused by the original negligence and not contributed to or enhanced by the nondisclosure.
frequent tactic for aggrieved clients is to assert overlapping causes of action against attorney-defendants for professional negligence, breach of fiduciary duty, and possibly other claims (such as fraud, breach of contract, and others) arising out of the same set of facts and seeking the same damages. For their part, courts have done a poor job of sorting out these different causes of action, and, as a result, the doctrines are badly mangled. This Part sets forth the law governing professional negligence claims and demonstrates that most clients will not be able to assert a professional negligence claim for breach of the self-reporting duty because they will not be able to establish any additional injury over and above the damage caused by the underlying malpractice. In other words, the client will not be able to satisfy the “case-within-the-case” requirement.

Professional negligence is the dominant cause of action asserted by aggrieved clients. Although there remain doctrinal areas of “controversy and imperfections,” the professional negligence action is “relatively well accepted by lawyers . . . as both a necessary concomitant of professional practice and a relatively workable and fair method of allocating the risks and consequences of lawyers’ failures to act competently in representing their clients.”

The law of negligence “provides a remedy for plaintiffs who have sustained a compensable injury caused by a defendant’s failure to use due care.” In other words, clients can generally sue lawyers for failing to act as the reasonably prudent lawyer would under the circumstances. In order to establish a claim for professional negligence, a client must generally establish (1) the existence of an attorney-client relationship

74. See supra note 15.
75. See Buhai, supra note 15, at 585-88.
76. See supra note 17.
77. See infra notes 78-95 and accompanying text.
78. Wolfram, supra note 2, at 696 (“The doctrinal glue that holds that litigational enterprise together and tests a client’s right to recover is the branch of the law of non-intentional economic injury commonly referred to as legal malpractice.”).
79. Id. at 699.
80. Duncan, supra note 12, at 1141.
81. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52(1) (AM. LAW INST. 2000) (“A lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.”); FORTNEY & JOHNSON, supra note 40, at 101 (“A plaintiff must prove that the defendant lawyer failed to do what every ordinary, reasonable, prudent lawyer must do, or did what such a lawyer may not do.”); Anderson & Steele, supra note 14, at 245 (“When the attorney’s performance falls short of that expected of an ordinary, reasonably prudent lawyer, the attorney is guilty of the tort of malpractice.”); Wolfram, supra note 2, at 696-97 (“Legal malpractice basically, and in many details, embodies the now traditional professional negligence claim in this instance, liability for failure to conduct oneself as would a lawyer of ordinary care and prudence in the same or similar circumstances.”).
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(duty); (2) a failure of the attorney to exercise reasonable skill, knowledge, and diligence of a similarly situated lawyer (breach); (3) that the attorney's negligence proximately caused injury to the client (causation); and (4) damages.⁸²

If a client sues her lawyer for failing to report his own malpractice, the client should be able to establish the first two elements of a professional negligence claim in most jurisdictions, but is unlikely to be able to establish causation and damages. A lawyer obviously has a duty to her client because of the attorney-client relationship. In establishing a breach of duty, clients can look to a lawyer's violation of the applicable rules of professional conduct. Although the Model Rules state that a "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor ... create any presumption in such a case that a legal duty has been breached," they go on to provide that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."⁸³ Most jurisdictions "treat as actionable negligence any claim that a lawyer caused harm to the client through a breach of almost all of the provisions of the applicable lawyer code governing the lawyer's conduct."⁸⁴ In other words, client-plaintiffs, in most jurisdictions, are allowed to present evidence that the attorney-defendant breached the applicable lawyer code,⁸⁵ usually through expert testimony.⁸⁶ The scope

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⁸². W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (W. Page Keeton ed., 5th ed. 1984) (stating that the traditional elements of a negligence claim are "(1) a duty [] recognized by the law, requiring the person to conform to a certain standard of conduct ... []; (2) a breach of the duty ... []; (3) a reasonably close causal connection between the conduct and the resulting injury ... []; and (4) actual loss or damage to the interests of another"); see also Hughes v. Consol-Pa. Coal Co., 945 F.2d 594, 616-17 (3d Cir. 1991) ("To establish legal malpractice under Pennsylvania law, plaintiffs must show three elements: (1) employment of the attorney or other basis for a duty owed to the client; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) the attorney's negligence proximately caused damage to the client."); DePape v. Trinity Health Sys., Inc., 242 F. Supp. 2d 585, 608 (N.D. Iowa 2003) ("In a legal malpractice case, the plaintiff must demonstrate: (1) the existence of an attorney-client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, violated or breached that duty, (3) the attorney's breach of duty proximately caused injury to the client, and, (4) the client sustained actual injury, loss, or damage.").


⁸⁴. Wolfram, supra note 2, at 699-700; see RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52 cmt. f (AM. LAW INST. 2000); Douglas R. Richmond, Law Firm Partners as Their Brothers' Keepers, 96 KY. L.J. 231, 235 (2007) ("In suits against lawyers, plaintiffs and courts may rely on ethics rules to establish the standard of care, rendering irrelevant any perceived distinction between law firm partners' supervisory duties as 'ethical' rather than 'legal.'").

⁸⁵. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52 cmt. g. But see Hizey v. Carpenter, 830 P.2d 646, 654 (Wash. 1992) (en banc) (holding that an expert could rely on lawyer codes in giving testimony, but the expert could not mention reliance on lawyer code to the jury).

⁸⁶. Wolfram, supra note 2, at 697 ("[I]t has now become quite well settled—apparently in
of the duty is broad and can even include claims "that lawyers caused harm because of a wrongful conflict of interest."

Applying this analysis to the lawyer's failure to report his own malpractice, there is a breach of duty based on the lawyer's violation of Rule 1.4 or Rule 1.7 or both, as described in the previous section. Even in jurisdictions that decline to permit evidence that the lawyer breached the jurisdiction's rules of professional conduct, the client should still be able to establish that the lawyer breached professional duties of communication and loyalty since those duties predate the rules of professional conduct.

The problem the client will face with her negligence claim is that she will be unable to satisfy the elements of causation and damages. A client can only win a negligence claim if she can prove actual harm. Negligence law "does not provide a remedy for the violation of a technical right without supporting damages." This is a "notoriously" difficult element for malpractice plaintiffs to satisfy because they typically must prove that they "would have been successful in the underlying case but for the attorney's lack of care." Courts and commentators frequently refer to this as proving the "case within-the-case." Although the client might be able to prove compensable injury in her underlying malpractice claim, in most cases, the lawyer's failure to report his own malpractice is unlikely to have caused any additional injury over and above the damage caused by the underlying malpractice. For that reason, the client is unlikely to

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87. Id. at 698 ("The scope of the grounds that a client might invoke to prove breach of duty in a negligence claim is vast, encompassing most of the duties of lawyers spelled out in the lawyer codes and as generally understood and practiced by those mythical lawyers of ordinary care and prudence whose activities supposedly set the standard for negligence.").
88. Id. at 699.
89. See supra Part II.
90. Jurisdictions differ on the standard for causation. The majority of jurisdictions require that the client prove the lawyer's professional negligence was a "substantial factor" in causing the client's loss. Wolfram, supra note 2, at 697-98. Some states impose a "strict test" under which clients must establish that "but for the professional negligence of the defending lawyer, the client would have been measurably better off." Id. at 697.
91. Duncan, supra note 12, at 1145 ("The plaintiff may only recover compensation for actual loss suffered.").
92. Id. at 1145; see also id. ("A lack of injury is fatal to any negligence claim.").
93. Id. at 1143-44.
94. Id. at 1144.
95. See supra note 71.
succeed with a professional negligence claim arising out of the failure to
self-report malpractice.

V. BREACH OF FIDUCIARY DUTY CLAIMS AGAINST LAWYERS

The other claim that an aggrieved client is likely to bring against her lawyer is for breach of fiduciary duty. The breach of fiduciary duty claim, which originated in the courts of equity, has a decidedly different historical pedigree than professional negligence, which is an action at law. While professional negligence claims against lawyers only gained prominence in the last half-century or so, breach of fiduciary duty claims are much older. This “accident of legal history” is arguably to blame for the perplexing state of the law.

Although the breach of fiduciary duty doctrine lacks the clarity of professional negligence doctrine, a client suing her lawyer for failing to self-report his malpractice should be able to state a claim for breach of fiduciary duty. This Part first discusses the consensus view that lawyers are fiduciaries before turning to the indeterminate doctrine concerning the ability of a client to sue a lawyer for breach of fiduciary duty. I then argue that clients should be able to assert two separate claims against their lawyers—a professional negligence claim when the lawyer has breached his duty of care to the client, and a breach of fiduciary duty claim when the lawyer has violated his fiduciary duties of loyalty and communication to the client. Thus, when a lawyer fails to report his own malpractice, clients should be able to assert an independent breach of fiduciary claim seeking equitable remedies based on that failure.

A. Lawyer as Fiduciary

Although courts and commentators dispute whether and under what circumstances clients should be able to bring breach of fiduciary claims against their lawyers, everybody agrees that lawyers are fiduciaries.

96. Duncan, supra note 12, at 1148; Wolfram, supra note 2, at 704-05 (discussing the history of fiduciary claims against lawyers); see also Buhai, supra note 15, at 555-60 (discussing the history of fiduciary law and lawyers as fiduciaries).


100. Id. at 706 (stating that the “fiduciary breach doctrine lacks coherence and is far from settled”).

101. See infra Part V.A–B.

102. See infra Part V.C.

103. See infra Part V.C.
A comment to the section of the Restatement of the Law Governing Lawyers (or "Restatement") that describes the lawyer's duties to a client even begins with the statement: "A lawyer is a fiduciary." The fiduciary concept originated in the English chancery courts in the laws of trust and agency. As stated by Marc A. Rodwin: "The law defines a fiduciary as a person entrusted with power or property to be used for the benefit of another and legally held to the highest standard of conduct." A lawyer, like all fiduciaries, "must exercise the utmost good faith in his dealings with [the client], make full and honest disclosure of material facts and refrain from taking any advantage of that party." In the specific context of the attorney-client relationship, a leading casebook describes lawyers as owing the client the "5C" fiduciary duties—"client control [over the representation], communication, competence, confidentiality, and conflict of interest resolution," all of which are memorialized in the Model Rules. The law imposes these fiduciary duties—and the "highest standard of conduct"—on lawyers because of their special training, knowledge, and expertise.

104. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1 (1986) ("[T]he designation of 'fiduciary' . . . surely attaches to the [attorney-client] relationship."); Lester Brickman, The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5, 2003 U. ILL. L. REV. 1181, 1191 (describing the lawyer as the "quintessential fiduciary"); Duncan, supra note 12, at 1153 ("It is without question that lawyers are fiduciaries to their clients.").

105. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 16 cmt. b (AM. LAW INST. 2000).


108. Brickman, supra note 104, at 1184.

109. SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 75 (2d ed. 2008); see also In re Cooperman, 633 N.E.2d 1069, 1071 (N.Y. 1994) (stating that lawyers have the "duty to deal fairly, honestly and with undivided loyalty [that] superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the client’s interests over the lawyer’s" (citations omitted)); Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers Revisited, 72 N.C. L. REV. 1, 6 n.21 (1993) (noting lawyers’ fiduciary duties to clients include "maintaining confidentiality; maintaining undivided loyalty; avoiding conflicts of interest; operating competently; presenting information and advice honestly and freely; acting fairly; and safeguarding client property").

110. See MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.2, 1.4, 1.6, 1.7, 1.8 (AM. BAR ASS'N 2013).

111. WOLFRAM, supra note 104, at 145-46 (discussing lawyers’ "special skills and knowledge not generally shared by people and which it would be uneconomic for most people who are not themselves lawyers to attempt to acquire"); Rodwin, supra note 106, at 243; Wolfram, supra note 2, at 705 ("Agents, such as lawyers, who are subject to fiduciary duties are at least generally identifiable as those persons who have undertaken to protect important interests of the principal
expertise puts lawyers “in a position to exert undue power and influence” over clients.\textsuperscript{112}

Courts use soaring rhetoric (sometimes in Latin) in talking about the fiduciary duties of lawyers. The relationship “between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to the most conscientious fidelity—\textit{uberrima fides}.”\textsuperscript{113} One court described \textit{uberrima fides} as meaning the “‘most abundant good faith,’ requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.”\textsuperscript{114} As a result of this soaring language, clients see a distinct tactical advantage in trying to assert a breach of fiduciary duty claim against their lawyer.\textsuperscript{115}

\section*{B. The Incoherent Doctrine}

Although courts and commentators agree that lawyers are in a fiduciary relationship with clients, the courts are divided over whether clients can assert a cause of action for breach of fiduciary duty against their lawyers,\textsuperscript{116} and they take a wide variety of approaches in addressing this issue.\textsuperscript{117} The case law is decidedly “sloppy”\textsuperscript{118} and suffers from a number of analytical flaws.\textsuperscript{119} when the circumstances of the relationship indicate that the principal is vulnerable to abuse by the agent because the undertaking confers significant discretion on the agent and, hence, power over the principal’s property or other valuable resources.”

\textsuperscript{112} Brickman, \textit{supra} note 104, at 1185.

\textsuperscript{113} David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 341 (Ct. App. 1998); \textit{see also} Matza v. Matza, 627 A.2d 414, 423 (Conn. 1993) (“The relationship between an attorney and his client is highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith.”); Tante v. Herring, 439 S.E.2d 5, 10 (Ga. Ct. App. 1993) (the fiduciary duties of a lawyer entail “applying his best skill, zeal, and diligence . . . and [acting] solely for [the client’s] benefit”).

\textsuperscript{114} Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App. 1991); \textit{see also} Singleton v. Foreman, 435 F.2d 962, 970 (5th Cir. 1970) (stating that lawyers must act with the highest “degree of honesty, forthrightness, loyalty and fidelity”).

\textsuperscript{115} 2 \textsc{Mallen & Rhodes}, \textit{supra} note 5, § 15:3 (“A breach of loyalty sounds more ‘wrongful’ than a breach of the standard of care.”); Wolfram, \textit{supra} note 2, at 706.


\textsuperscript{117} \textit{See} 2 \textsc{Mallen & Rhodes}, \textit{supra} note 5, § 15:3.

\textsuperscript{118} Duncan, \textit{supra} note 12, at 1139.

\textsuperscript{119} Wolfram, \textit{supra} note 2, at 710 (“[T]here is no general agreement about which lawyer activities are included within the scope of fiduciary breach and which are not, or about why included activities are not adequately addressed by the theory of negligence. The authorities are redolent with the notion that the fiduciary breach theory is more limited than the action for negligence, but offer little meaningful guidance beyond that.”).
One major area of disagreement among the courts is whether a client can assert a breach of fiduciary duty claim arising out of the same set of facts as the client’s professional negligence claim. Some courts allow these essentially duplicative claims, but other courts refuse to allow clients to proceed with a claim for breach of fiduciary duty where the “operative facts” are the same as those underlying the client’s claim for professional negligence. This latter group seems hesitant to “unleash fiduciary breach” and reasons that “when the basis for a claim of fiduciary breach arises from the same facts and seeks the same relief as a negligence claim, such a claim becomes redundant and therefore it should be dismissed.”

The Texas courts have even developed a special term for such a claim: a “fractured professional negligence claim.” One court describes the doctrine as follows: “The anti-fracturing rule prevents plaintiffs from converting what are actually professional negligence claims against an attorney into other claims, such as fraud, breach of contract, breach of fiduciary duty, or violations of the Texas Deceptive Trade Practices Act.” When the breach of fiduciary duty claim arises out of different facts, however, these courts generally permit a distinct breach of fiduciary duty claim.

120. Id. at 699 (“[T]he allowable areas of allowable client recovery through the negligence action encompass almost all (but not quite all) claims that courts also allow clients to assert under the fiduciary breach theory.”); see id. at 690 (describing the breach of fiduciary duty doctrine as standing on “equal and firm merits as a basis for recovery,” permitting “a legal-malpractice plaintiff” to “enjoy the option of pursuing either theory . . . or both theories simultaneously”).

121. See, e.g., Pippen v. Pederson & Houpt, 986 N.E.2d 697, 704-05 (Ill. App. Ct. 2013); Klemme v. Best, 941 S.W.2d 493, 496 (Mo. 1997) (“If the alleged breach can be characterized as both a breach of the standard of care (legal malpractice based on negligence) and a breach of a fiduciary obligation (constructive fraud), then the sole claim is legal malpractice.”); Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 780 N.Y.S.2d 593, 596 (App. Div. 2004) (“As to the claim for breach of fiduciary duty, we have consistently held that such a claim, premised on the same facts and seeking the identical relief sought in the legal malpractice cause of action, is redundant and should be dismissed.”); Murphy v. Gruber, 241 S.W.3d 689, 693 (Tex. App. 2007) (“Texas courts do not allow plaintiffs to convert what are really negligence claims into claims for . . . breach of fiduciary duty.”).

122. Wolfram, supra note 2, at 704 (attributing the courts’ hesitation to fiduciary duty’s “broad rhetorical sweep, its indeterminate application as doctrine, its forensic volatility, and its overall potential to extend lawyer liability far beyond what otherwise well-settled legal-malpractice theory and practice would support”).

123. 2 MALLEN & RHODES, supra note 5, § 15:3; see Michael L. Shakman et al., Why Claims Against Lawyers for Breach of Fiduciary Duty Are Becoming Extinct, CBA REC., Jan. 2012, at 28, 29 (analyzing recent Illinois cases in which the courts dismissed duplicative fiduciary duty claims).


125. Id. at *4.

126. 2 MALLEN & RHODES, supra note 5, § 15:3. But see Beare v. Yarbrough, 941 S.W.2d 552, 557 (Mo. Ct. App. 1997) (refusing to allow a breach of fiduciary duty claim based on a different set of facts where plaintiff alleged no additional injury).
In addition to this split on whether clients should be able to assert "duplicative" breach of fiduciary duty claims, the opinions themselves contain a number of analytical flaws. First, some courts simply do not bother to engage in a careful analysis of whether a claim is for professional negligence or breach of fiduciary duty. For instance, in Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & Von Gontard, P.C., the Seventh Circuit failed to distinguish whether the claim was for breach of fiduciary duty or professional negligence and was content, instead, to describe the claim as one for "legal malpractice." Second, some courts simply describe the lawyer's fiduciary obligations as part of the standard of care in a claim denominated as a "negligence" or "legal malpractice" claim. Third, courts often "discuss a cause of action for breach of 'fiduciary duty' without specifying the components of the cause of action or the fiduciary obligations involved." Fourth, courts sometimes state that negligence involves a breach of the standard of "care," while breach of fiduciary duty claims involve a breach of a standard of "conduct," but do not offer much practical explanation as to what this distinction means.

C. Toward a Coherent Doctrine

Although the case law remains jumbled, commentators have attempted to clean up that mess, and some courts have followed this approach. As set forth in this subpart, a sound approach is to recognize a breach of fiduciary duty claim against lawyers in at least some limited number of situations, including circumstances where the lawyer acts disloyally to the client and the client seeks traditional equitable remedies (that is, not compensatory damages).

Professor Charles Wolfram wrote a leading article on the subject in which he distinguished between two branches of the fiduciary breach doctrine: (1) claims that "stand[] as a companion theory to negligence," which he describes as the "equal claims' application of fiduciary breach theory;" and (2) claims that seek equitable remedies, such as fee

127. Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & Von Gontard, P.C., 385 F.3d 737, 744 (7th Cir. 2004) ("An attorney's throwing one client to the wolves to save the other is malpractice[. . . whatever the plaintiff chooses to call it."]).

128. Smith v. First Cmty. Bancshares, Inc., 575 S.E.2d 419, 432 (W. Va. 2002) (approving a jury instruction stating that "the duty to exercise reasonable care that [the lawyers owed to the client] included a duty of loyalty and a duty of candor"); 2 MALLEN & RHODES, supra note 5, § 15:3 ("In defining the tort of legal malpractice, one approach is to include the fiduciary obligations within the standard of care.").

129. 2 MALLEN & RHODES, supra note 5, § 15:3.

disgorgement and imposition of a constructive trust. With respect to the “equal claims” version of the fiduciary breach doctrine, Professor Wolfram made the compelling case that courts should do away with this “companion theory to negligence” because it “produces a needless proliferation of theories of recovery.” In Professor Wolfram’s view, such theory proliferation adds nothing and should be resisted in all areas of law, but particularly in this doctrinal area where allowing clients to assert a duplicative fiduciary duty is unfairly prejudicial to defendants because of the soaring rhetoric of fiduciary law.

Professor Wolfram would, however, allow breach of fiduciary duty claims in certain “areas in which the fiduciary breach theory has become well-accepted by traditional and now routine application.” These areas include claims for disgorgement of profits that a lawyer gained from an impermissible business transaction with a client, situations where the lawyer has misused the client’s confidential information to benefit himself, and intentional acts that inflict harm on clients.

Professor Wolfram also would permit breach of fiduciary duty claims in two emerging areas: (1) former-client conflict claims; and (2) claims against lawyers who enter into a sexual relationship with a client during the representation.

In a thoughtful blog post, Professor David McGowan largely endorsed Professor Wolfram’s view and offered this simple formula:

1. Fiduciary duties are duties that only fiduciaries owe.
   (a) Duties that non-fiduciaries owe but which fiduciaries owe as well are not “fiduciary” duties.
2. Many people (perhaps most) owe duties to act carefully in doing different things.

131. Wolfram, supra note 2, at 692-93.
132. Id. at 728; see id. at 692 (“[F]iduciary breach claims are problematic precisely because of their almost complete and useless overlap with available claims of negligence.”). But see Buhai, supra note 15, at 554 (arguing that “the lawyer’s role as fiduciary has been inappropriately deemphasized”).
133. Wolfram, supra note 2, at 728-29.
134. Id. at 729-30.
135. Id. at 732.
136. Id.
137. Id. at 733-37; see also Shakman et al., supra note 123, at 31 (arguing in support of a separate breach of fiduciary duty claim when lawyers “misappropriate client funds, commit torts against clients (other than professional negligence) or take advantage of trust and confidence to establish sexual relations with clients”).
3. The duty of care is not a "fiduciary duty," though fiduciaries must act carefully[.]

From this, Professor McGowan concluded: "[C]arelessness and incompetence are not fiduciary breaches, though fiduciaries may act carelessly and be held liable for doing so. The true 'fiduciary' duty is the duty of loyalty." Accordingly, "the breach of fiduciary duty cause of action should lie for disloyal acts, such as profiting from client information, self-dealing with clients, taking client business opportunities, etc." To put it another way, it is best to think of clients as being able to assert two separate claims—a professional negligence claim when the lawyer has breached his duty of care to the client and a breach of fiduciary duty claim when the lawyer has violated his duty of loyalty to the client.

The Restatement, for which Professor Wolfram served as Chief Reporter, offers a similar view. It allows a breach of fiduciary duty claim in only three situations, two of which Professor Wolfram identified in his article (a conflict of interest and a situation in which the lawyer takes unfair advantage of a client), and also in the case of a breach of confidentiality. The Restatement specifically does not permit a client to bring a claim for a breach of fiduciary duty where the client alleges a breach of the duty of competence, such as failing to file a complaint within the limitations period. According to the Restatement's view, a client could only bring a professional negligence claim for such an error.

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139. Id.; see also Fortney & Johnson, supra note 40, at 102 ("Only some kinds of attorney default—generally misconduct involving a betrayal of trust and disloyalty—are properly viewed as breaches of fiduciary duty.").
140. McGowan, supra note 14; see also Fortney & Johnson, supra note 40, at 102-03 ("[C]onflicts of interest, misuse of confidential information, lack of candor, mishandling of client funds or property, overbilling, and failing to follow instructions frequently involve some form of disloyalty. Thus, those types of conduct are often treated as breaches of fiduciary duty."); Anderson & Steele, supra note 14, at 249 ("As a fiduciary, an attorney has a duty 'to represent the client with undivided loyalty, to preserve the client's confidences, and to disclose any material matters bearing upon the representation of the client.'").
142. Id. § 49 cmt. b. Professor Paula Schaefer previously noted this discrepancy. Schaefer, supra note 116, at 289 n.222.
143. See Restatement (Third) of Law Governing Lawyers §§ 48, 52. Professor Sande Buhai reaches a similar conclusion in her recent article:

As a cause of action, "[a] breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interests to his own, retaining the client's funds, using the client's confidence's improperly, taking advantage of the client's trust, engaging in self-dealing, or making misrepresentations." A legal malpractice claim, on the other hand, focuses on...
Although the case law remains muddled, some courts have begun to draw these distinctions. These courts recognize that clients should be able to assert claims for breach of fiduciary duty against lawyers who breach their duty of loyalty to their client. Moreover, clients should not be able to assert a breach of fiduciary duty claim based on allegations of mere negligence.

Commentators also largely agree that clients should be able to pursue traditional equitable remedies for breach of fiduciary duty even in the absence of other harm. Thus, Professor Wolfram fully supports the continued vitality of the “equitable remedies” branch of fiduciary duty law, under which clients can obtain unique equitable remedies when the lawyer has acted disloyally. While a professional negligence claim typically only provides clients with compensation for economic harm, clients can obtain other remedies under a breach of fiduciary duty theory. The two most common equitable remedies are fee forfeiture (also known as fee disgorgement) and imposition of a constructive

the quality of the representation provided by the attorney to her client, as it requires demonstrating negligence—a showing that the attorney provided legal services at unacceptable levels of competence.

Buhai, supra note 15, at 586; see also id. at 556 ("[T]he core of fiduciary duty, after all, is loyalty.").

144. See, e.g., Bronzich v. Persels & Assoc., LLC, No. CV-10-0364-EFS, 2011 WL 2119372, at *10 (E.D. Wash. May 27, 2011) (breach of fiduciary duty claims focus on “the loyalty owed by the attorney to the client,” while a “legal malpractice claim focuses on the attorney’s negligent performance”); Estate of St. Martin v. Hixson, 145 So. 3d 1124, 1128-29 (Miss. 2014) ("Generally, attorneys owe to their clients duties falling into three broad categories. First[,] he owes a duty of care consistent with the level of expertise he holds himself out as possessing. This duty of care imports not only skill or expertise, but diligence as well. Second[,] he owes his client a duty of loyalty and fidelity, which includes duties of confidentiality, candor and disclosure. Third, he owes any duties created by his contract with his client."); see also Wolfram, supra note 2, at 714 ("[C]ourts occasionally suggest that only loyalty offenses are included within the concept of fiduciary breach.").

145. See, e.g., Bronzich, 2011 WL 2119372, at *10; Estate of St. Martin, 145 So. 3d at 1128.

146. 2 MALLEN & RHODES, supra note 5, § 15:3 ("Although the attorney-client relationship imposes fiduciary obligations, negligent conduct alone does not implicate a breach of those obligations."); see, e.g., Cammarota v. Guerrera, 87 A.3d 1134, 1143 (Conn. App. Ct. 2014) ("Negligence alone is insufficient to support a claim of a breach of fiduciary duty.").

147. Buhai, supra note 15, at 591 ("The law governing lawyers should . . . limit[] an attorney’s liability for incompetence or lack of diligence to situations in which his conduct fails to meet ordinary negligence standards and limiting recovery, in most situations, to compensatory damages. The law governing lawyers should not, however, so limit causes of action for breaches of duties of loyalty."); d.mcgowan, supra note 14 ("The remedies for disloyalty should be disgorgement of profits, including fees, earned from disloyal acts. There should be no need for showing causation of damages to clients, as there is in the negligence context, because the purpose of the claim is to remove the incentive for disloyal conduct by confiscating the profits of that conduct, not to restore the client to their position ex ante by compensating their losses.").

148. Wolfram, supra note 2, at 700-01.

149. Id.
trust. The Restatement of the Law of Agency and the Restatement of the Law Governing Lawyers both provide for such remedies in the event that lawyers engage in disloyal acts, and the majority of courts have followed the views of these Restatements.

Critically, most courts permit clients to recover these equitable remedies even in the absence of proof that the violation of the fiduciary duty caused the client other harm. Professor Wolfram stated: "Fee forfeiture, in the absence of harm to the client, obviously provides a remedy with a substantive element quite different from what would otherwise be available by means of an action for either negligence or fiduciary breach." The theory behind this remedy is that the client is paying the lawyer to be her loyal agent and fiduciary; if the lawyer breaches a fiduciary duty of loyalty to the client—for example, if he fails in his role as fiduciary—he does not deserve to be compensated even if the client has otherwise benefited from the lawyer's work. Moreover, fee forfeiture is meant to deter disloyal behavior "by depriving the lawyer of any gain related to the wrongdoing."

150. Id. at 700-04.
151. RESTATEMENT (SECOND) OF AGENCY § 469 (AM. LAW INST. 1958) (stating that an agent is not entitled to compensation when he acts disobediently or disloyally).
152. Id. §§ 403, 469; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §§ 6, 37, 49 (AM. LAW INST. 2000); see, e.g., Crist v. Loyacono, 65 So. 3d 837, 842-43 (Miss. 2011) (distinguishing a professional negligence claim from a breach of fiduciary duty and permitting plaintiff to proceed with a claim for breach of fiduciary duty claim even without proving that she would have won the underlying case).
153. See Wolfram, supra note 2, at 701-02 ("[C]ourts have not required a client seeking fee forfeiture to show that the lawyer's wrongful conduct caused the client harm . . . .").
154. Id. at 702; see also Maritans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1285 (Pa. 1992) ("Courts throughout the country have ordered the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients by engaging in impermissible conflicts of interests."); Burrow v. Arce, 997 S.W.2d 229, 240, 245 (Tex. 1999) (holding that clients could recover all or part of the lawyer's fees regardless of whether the clients suffered actual damages as a result of the breach of fiduciary duty); Duncan, supra note 12, at 1156 ("[P]laintiff [in a fiduciary duty action] may recover any profit realized by the fiduciary through acts inconsistent with the fiduciary's obligation of fidelity. This policy provides the plaintiff with the potential to recover part or all of any fee that the fiduciary received for his fiduciary services . . . ."); Pollock, supra note 33, at 23 ("Another very real danger for a lawyer who mishandles her obligations to the client following a mistake is fee forfeiture or disgorgement.").
155. Duncan, supra note 12, at 1156-57.
156. Duncan, supra note 12, at 1157 (stating that the remedy of fee forfeiture serves as a deterrent "to remove any incentive for the fiduciary to breach his duty of loyalty"); Wolfram, supra note 2, at 702.
VI. CLIENTS SHOULD BE ABLE TO ASSERT A BREACH OF FIDUCIARY DUTY CLAIM BASED ON A LAWYER’S FAILURE TO REPORT HIS OWN MALPRACTICE

Although (as discussed earlier) a client asserting a claim against her attorney for failing to self-report his malpractice is unlikely to be able to assert a cause of action for professional negligence, as I will describe in this Part, the client should be able to successfully assert a claim for breach of fiduciary duty.157

Not surprisingly, given the jumbled case law, “defining a cause of action for ‘fiduciary breach’ continues to be the subject of judicial examination.”158 Typically, a plaintiff in a breach of fiduciary duty claim must establish “(1) the existence of a fiduciary relationship; (2) a breach of a duty owed by the fiduciary to the beneficiary; (3) causation of a cognizable injury from the breach; and (4) damages [suffered by the client].”159

The attorney-client relationship creates the fiduciary duty.160 Properly understood, the primary fiduciary duty that a lawyer owes to the client is the duty of loyalty.161 The lawyer’s failure to self-report malpractice constitutes a breach of the duty of loyalty. The analysis of whether a breach of the duty of loyalty is almost identical to the analysis of whether the lawyer breached the duty of care in a professional negligence claim.162 The client should be able to establish—most likely through expert testimony163—a breach of the duty of loyalty. In some jurisdictions, the client will be able to rely on a breach of Rules 1.7 and 1.4,164 while in other jurisdictions, the client will simply have to rely on a breach of the lawyer’s common law duties of loyalty and communication.165 The argument that the lawyer has breached his

157. See infra notes 158–75 and accompanying text.
158. 2 MALLEN & RHODES, supra note 5, § 15:4.
159. Id.
160. See supra Part V.A.
161. See supra notes 139–40 and accompanying text; see also 2 MALLEN & RHODES, supra note 5, § 15:4 (stating that a client should be able to state a claim for breach of fiduciary duty under “circumstances that create adversity to the client’s interest [and] imperil the duty of undivided loyalty” and that “[t]hese circumstances may consist of an existing, personal adverse interest of the attorney, an interest of a prior or subsequent client, or conflicting interests of present and multiple clients”).
162. See supra Part IV.
163. 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33:16 (2006 ed.). But see Duncan, supra note 12, at 1158 (noting that expert testimony may not always be required for breach of fiduciary duty claims).
164. See supra Part II.
fiduciary duties follows the same argument concerning the lawyer's ethical duty:166 once the lawyer's conduct has given rise to a substantial malpractice claim by his client, his personal interests are adverse to his client's, and he has a conflict of interest.167 Moreover, the lawyer's lack of candor in failing to disclose the mistake is also a breach of fiduciary duty.168

The key area that distinguishes a breach of fiduciary duty claim from a professional negligence claim is the client's ability to recover certain equitable remedies—principally fee forfeiture—even in the absence of proof that the violation of the fiduciary duty gave rise to damages: "[C]ourts have not required a client seeking fee forfeiture to show that the lawyer's wrongful conduct caused the client harm ...."169 In other words, these equitable remedies are available to the client without the need to meet the difficult case-within-a-case requirement.170 Although there remain some jurisdictional variations,171 "courts throughout the country have ordered the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached

rule of professional conduct to support a breach of fiduciary duty claim, just as plaintiffs in Washington State may not rely on a violation of the Model Rules in establishing a professional negligence claim.

166. See supra Part II.
167. See supra notes 33-39 and accompanying text.
168. FORTNEY & JOHNSON, supra note 40, at 102-03 ("[C]onflicts of interest, misuse of confidential information, lack of candor, mishandling of client funds or property, overbilling, and failing to follow instructions frequently involve some form of disloyalty. Thus, those types of conduct are often treated as breaches of fiduciary duty."); Anderson & Steele, supra note 14, at 249 ("As a fiduciary, an attorney has a duty 'to represent the client with undivided loyalty, to preserve the client's confidences, and to disclose any material matters bearing upon the representation of the client.'").
169. Wolfram, supra note 2, at 701-02; see also Anderson & Steele, supra note 14, at 255-56 ("Since breach of a fiduciary obligation is a tort, the normal tort damage remedies are available to the aggrieved client. However, the client is also entitled to certain extraordinary relief. For example, an attorney who violates his fiduciary duty is not entitled to any compensation for services rendered to the client under the retainer contract. Further, an attorney who profits through a breach of his fiduciary obligation will be held accountable to his client for that profit regardless of whether the breach caused the client a loss or was in any way at the expense of the client. Extraordinary equitable remedies such as constructive trust, equitable lien, and rules of tracing are available to the client to disgorge the profit from the hands of the attorney."); Duncan, supra note 12, at 1156 (stating that these equitable remedies "are available without regard to whether the entrustor has been injured by the fiduciary's actions").
170. Duncan, supra note 12, at 1156-57; see also 2 MALLEN & RHODES, supra note 5, § 15:5 ("Thus in frequent circumstances, such as seeking return or forfeiture of legal fees, wrongs involving a breach of the duty of loyalty may render irrelevant the merits of the underlying action and the need for the trial-within-a-trial methodology.").
171. 2 MALLEN & RHODES, supra note 5, § 15:5.
their fiduciary duties to their clients by engaging in impermissible conflicts of interests.\(^{172}\)

The cases that reject an independent claim against lawyers for failing to self-report malpractice contain a critical analytical error. The New York cases discussed above, for example, reject the failure to self-report claims because they are “premised on the same conduct” or “arise out of the same facts,” as the underlying malpractice claim,\(^{173}\) but that is not true. The underlying malpractice claim is based on one set of facts: the lawyer missing the statute of limitations, drafting an inadequate legal instrument, failing to conduct appropriate factual research, or other error. The failure to report the error to the client is a distinct set of facts.

The New York courts also offer another reason for rejecting an independent claim—that the client is seeking the same damages for both the underlying malpractice claim and the secondary failure-to-disclose claim.\(^{174}\) To the extent that the client is seeking the exact same damages, those decisions are perhaps justified since the claims are then completely duplicative,\(^{175}\) but the savvy client should seek compensatory damages arising out of the lawyer’s underlying malpractice and fee forfeiture (and possibly other equitable remedies) for the lawyer’s disloyalty in failing to disclose his own error.

VII. OTHER ADVANTAGES OF BRINGING A CLAIM FOR A BREACH OF THE DUTY TO SELF-REPORT

In addition to the ability to assert an independent claim for breach of fiduciary duty seeking disgorgement of fees (and possibly other equitable remedies), even without causation, there are several other reasons that a client should pursue a claim for breach of the duty to self-report.

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172. Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1285 (Pa. 1992). The leading case on fee disgorgement even in the absence of harm is Burrow v. Arce, which holds that a client could recover all or part of lawyer’s fees regardless of whether the client suffered actual damages as a result of the breach of fiduciary duty. 997 S.W.2d 229, 240 (Tex. 1999); see also Pollock, supra note 33, at 23 ("Another very real danger for a lawyer who mishandles her obligations to the client following a mistake is fee forfeiture or disgorgement.").


174. See, e.g., id.

175. See Wolfram, supra note 2, at 723.
A. Punitive and Emotional Damages

First, a claim asserting a failure-to-self-report malpractice will enhance the client’s chances of recovering punitive damages. Most jurisdictions allow legal malpractice plaintiffs to recover punitive damages, but courts typically require the plaintiff prove that the defendant had an “improper intent, typically fraud, malice or oppression.” A failure to self-report may open a lawyer to a claim for punitive damages because of the lawyer’s dishonesty in hiding (or at least failing to disclose) his malpractice, and some courts have awarded punitive damages based on the lawyer’s attempt to conceal his misconduct.

In the Bayview case, for example, the court permitted plaintiffs to proceed with their punitive damages claim based on the allegations that “defendants subsequently engaged in a pattern of deliberate conduct that concealed and exacerbated that original mistake.” Similarly, in Young v. Becker & Poliakoff, P.A., the Florida District Court of Appeal found a $2 million punitive damages award was appropriate after the lawyer failed to take corrective action or tell his client that he had erred

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176. The possibility of punitive damages is particularly significant since many malpractice insurers do not cover punitive damages. Pollock, supra note 33, at 22.

177. 3 MALLEN & SMITH, supra note 163, § 20:16.

178. Id.; see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 53 cmt. h (AM. LAW INST. 2000) (“Punitive damages are generally permitted only on a showing of intentional or reckless misconduct by a defendant.”); Duncan, supra note 12, at 1147-48 (noting that courts typically require plaintiffs to prove some form of intentional or reckless conduct in order to obtain punitive damages). A few jurisdictions prohibit the recovery of punitive damages in legal malpractice cases. 3 MALLEN & SMITH, supra note 163, § 20:16.

179. Lundberg, supra note 27, at 24-25; Pollock, supra note 33, at 22 (“[A]n ordinary negligence based malpractice action is generally not going to subject an attorney to punitive damages. If a plaintiff, however, can pile on allegations that the lawyer breached his fiduciary duties and in particular concealed his wrongdoing, punitive damages become more likely.”).

180. 3 MALLEN & SMITH, supra note 163, § 20:16 (“Sometimes, the allegation is concealment of misconduct. The lawyer may have failed to inform the client of an error or may have concealed the error.”); see, e.g., Asphalt Eng’rs, Inc. v. Galusha, 770 P.2d 1180, 1183 (Ariz. Ct. App. 1989) (permitting client to obtain punitive damages where “[t]he record also supports an inference that the attorney] attempted to cover up his misconduct”); Houston v. Surratt, 474 S.E.2d 39, 41 (Ga. Ct. App. 1996) (“[A]n attorney’s concealment and misrepresentation of matters affecting his client’s case will give rise to a claim for punitive damages . . . .”); Metcalfe v. Waters, 970 S.W.2d 448, 452 (Tenn. 1998) (stating that an “attorney’s concealment of wrongdoing and/or misrepresentations” are relevant to the punitive damages issue).


by failing to attach the right-to-sue letter to the plaintiff’s Title VII complaint, leading to dismissal of the complaint.183

Second, a claim asserting a failure-to-self-report malpractice may enhance the client’s chances of recovering emotional damages. In considering whether to permit clients to recover emotional damages in legal malpractice cases, jurisdictions generally apply the same rules that they apply in all other cases. The Restatement asserts: “In general, such damages are inappropriate in types of cases in which emotional distress is unforeseeable.”184 As with punitive damages, some courts have permitted clients to recover emotional damages in cases where lawyers failed to report their malpractice to their clients.185 In one case, the court permitted a client to proceed with a claim—albeit denominated as a “legal malpractice” claim—based on her lawyer’s failure to notify her that the medical review panel concluded that the statute of limitations had run.186 The court permitted her claim for emotional damages even in the absence of other damages.187

B. Statute of Limitations

Asserting a breach of fiduciary duty claim based on a lawyer’s failure to disclose his own malpractice also has two potential impacts with respect to the statute of limitations. First, in some jurisdictions, the statute of limitations is longer for breach of fiduciary duty claims than it is for professional negligence claims.188 If the client brings suit after the limitations period has run on the professional negligence claim, but before it has run on the breach of fiduciary duty claim, the client, at least, can obtain whatever remedies are available under that jurisdiction’s breach of fiduciary duty law.189

183. Id. at 1099-10.
184. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 53 cmt. g (AM. LAW INST. 2000); see DePape v. Trinity Health Sys., Inc. 242 F. Supp. 2d 585, 616-17 (N.D. Iowa 2003) (permitting recovery for emotional damages).
187. Id. at 1097 (permitting a claim for emotional damages even in the absence of other damages); McAlister, 658 A.2d at 660 (involving a situation where the lawyer made intentional misrepresentations concerning the status of his case and holding that the client was permitted to recover punitive and emotional damages).
188. Duncan, supra note 12, at 1155 (“[S]tatutes of limitations defenses are typically longer for fiduciary claims than for negligence claims.”).
189. 2 MALLEN & RHODES, supra note 5, § 15:3 (“If the statutes of limitations are not the same for the causes of action, the fiduciary breach claim may be essential if a negligence claim is time barred.”).
Second, an allegation that the lawyer failed to disclose his own malpractice to his client may toll the statute of limitations on all claims in the case. Although some jurisdictions only permit tolling of the statute of limitations when an attorney “fraudulently concealed” facts “by affirmative misrepresentations,” many jurisdictions do not require fraud or conclude that an attorney’s failure to disclose his errors is tantamount to fraud because of the nature of the fiduciary relationship between the lawyer and client. Some courts have concluded that “because an attorney is a fiduciary, mere nondisclosure coupled with knowledge of the cause of action is sufficient to toll the statute.”

C. Strategic Advantage

Finally, and perhaps most significantly, the failure of the lawyer to self-report is likely to make the lawyer and law firm look bad in front of the ultimate decision-maker in the malpractice trial and make the firm more likely to lose the underlying malpractice case. As strong as the law firm’s defense of the underlying malpractice might be, a jury may be influenced by the lawyer’s lack of candor in failing to self-report.

190. 3 MALLEN & RHODES, supra note 5, § 23:53; see, e.g., Hunter, MacLean, Exley & Dunn, P.C. v. Frame, 507 S.E.2d 411, 413, 416 (Ga. 1998); Bennet v. Hill-Boren P.C., 52 So. 3d 364, 372-73 (Miss. 2011).

191. 3 MALLEN & RHODES, supra note 5, § 23:53; see also id. (“A duty of disclosure exists when the attorney’s representation continues, and the client’s interests can be adversely affected by nondisclosure. Then, nondisclosure is a breach of a fiduciary obligation, also known as constructive fraud, which can toll the statute of limitations.”); see, e.g., Beal Bank, SSB v. Arter & Hadden, LLP, 167 P.3d 666, 673 (Cal. 2007) (“[A]ttorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice. . . . To the extent current counsel do breach that obligation, it will do nothing to reduce their own liability, as their ongoing representation will continue to toll the limitations period on claims against them. . . . [This] creates an additional incentive for counsel to fulfill their fiduciary duties.” (citation omitted)).

192. Pollock, supra note 33, at 22-23 (“In the end, all these possible ramifications may be overshadowed by the simple effect that the lawyer’s actions will have on a jury.”); see, e.g., Estate of Re v. Kornstein Veisz & Wexler, 958 F. Supp. 907, 927-28 (S.D.N.Y. 1997) (“Viewed through the lens of a potential conflict of interest, defendants’ otherwise defensible tactical decisions take on a more troubling gloss, and suggest at least the possibility that defendants’ divided loyalties substantially contributed to [their clients’] defeat . . . .”).

193. Shakman et al., supra note 123, at 31 (“[T]he reference to a ‘breach of fiduciary duty’ has automatic negative connotations for jurors. The mere fact that a plaintiff has alleged two claims (breach of fiduciary duty and legal malpractice) instead of one (legal malpractice) may lead jurors erroneously to believe that the lawyer’s conduct is more serious or that the lawyer is more likely to have acted improperly. The mere assertion of a claim for conduct that is largely the same as that covered by the standard malpractice claim should not tip the playing field unfairly.”).
VIII. CONCLUSION

This Article has argued that clients should be able to assert two separate claims against their lawyers—a professional negligence claim when the lawyer has breached his duty of care to the client and a breach of fiduciary duty claim when the lawyer has violated his fiduciary duties of loyalty and communication to the client. Applying this to the failure-to-self-report scenario, clients should be able to assert an independent claim for breach of fiduciary duty separate from the underlying malpractice claim, and the client should be able to seek equitable remedies including fee forfeiture, even in the absence of other damages. These doctrinal developments hold important practical implications for lawyers. First, the fear of an independent claim based on the failure to self-report should make lawyers think more carefully about their self-reporting obligations and, in the appropriate circumstances, report their errors to their clients. The recognition of an independent breach of fiduciary duty claim may have the salutary effect of causing lawyers to err on the side of disclosing potentially actionable mistakes to their clients, thereby improving communication between lawyers and their clients.

Second, the recognition of separate breach of fiduciary duty claims should shape legal malpractice litigation. In representing clients in legal malpractice claims, lawyers will want to cast the defendant’s bad acts as disloyal, thereby opening up the possibility of fee forfeiture and other equitable remedies. Lawyers on the defense side, on the other hand, will want to portray legal malpractice claims as ordinary negligence cases, thereby limiting the lawyer’s exposure to equitable remedies.

194. See supra Parts IV–V.
195. See supra Part VI.