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PACKAGED AND SOLD: SUBJECTING ELDER LAW PRACTICE TO CONSUMER PROTECTION LAWS

*Donna S. Harkness**

[D]uring our Revolutionary War, certain shares of Bank of England stock stood in the name of Washington, who was in arms against the English government, yet all through that war, the dividends were regularly paid to the commander of the army of rebellious Americans. Washington was a rebel in arms against England, but the Bank of England was a commercial institution and here as always the honesty instituted by trade is far superior to any other conception of honest conduct.

— *John Maxcy Zane*¹

The marketplace idyll illustrated by the Bank of England's noble adherence to commercial obligations to General Washington provides a stark contrast with the realities of contemporary consumer practice. It has been observed that "consumer law is central to almost every problem that sends older Americans in search of legal assistance."² Indeed, "the

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¹ JOHN MAXCY ZANE, *THE STORY OF LAW* 232 (2d ed. 1998).

² Deanne Loonin, *Consumer Law and the Elderly: Using State Unfair and Deceptive Practices Statutes to Protect and Preserve the Financial Independence of Seniors*, BIFOCAL, Fall 1999, at 1 (providing an introduction to the wide range of federal and state consumer protection acts). Although consumer law *per se* is not one of the thirteen categories identified by the National Elder Law Foundation as comprising elder law practice, consumer law is a substantial component of several of those categories. See Board

Certification of the National Elder Law Foundation, Program for the Certification of Elder Law Attorneys, *available* at <http://www.nelf.org/randregs.htm> (last modified Aug. 1995) [hereinafter PROGRAM]. The thirteen categories are: 1) health and personal care planning; 2) pre-mortem legal planning; 3) fiduciary representation; 4) legal capacity counseling; 5) public benefits advice; 6) advice on insurance matters; 7) resident rights advocacy; 8) housing counseling; 9) employment and retirement advice; 10) income, estate and gift tax advice; 11) counseling about tort claims in nursing homes; 12) counseling with regard to age and/or disability discrimination; and 13) litigation and administrative advocacy, defined as “including financial or consumer fraud.” *Id.* “Consumer fraud” is enumerated in the description of “litigation and administrative advocacy,” and is an essential part of insurance counseling, housing counseling and pre-mortem legal planning, including self-dealing and misuse of powers of attorney claims. *Id.* See also William J. Brennan, Jr., *Predatory Mortgage Lending Practices Directed Against the Elderly*, BIFOCAL, Spring 1998, at 1 (citing evidence that seniors are targeted by predatory lenders because they have less access to legitimate lending sources); Julia C. Calvo, *Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly*, BIFOCAL, Winter 2002, at 1 (explaining that power of attorney documents, although inexpensive and easily executed, provide possibility for abuse); Lawrence A. Frolik, *Insurance Fraud on the Elderly*, 37 TRIAL 48 (2001) (highlighting fraudulent practices of insurance companies and agents when marketing to the elderly); Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing A Cure For The Home Equity Loss Ailing The Elderly*, 10 B.U. PUB. INT. L.J. 1 (2000); Hans A. Lapping, *License To Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 ELDER L.J. 143 (1996) (suggesting that statutes that include the authority to make gifts in general powers of attorney create a potential for fraud and abuse after a principal becomes incapacitated); Sue Seeley, *Assisted Living: Federal and State Options for Affordability, Quality of Care, and Consumer Protection*, BIFOCAL, Fall 2001, at 11 (arguing that seniors living in private assisted living have difficulty enforcing their rights because the industry is scarcely regulated and companies are reluctant to supply tenants with written contracts). Consumer law is also a component of the estate and gift tax advice category, where aggressive marketing of living trusts and investment and estate planning schemes continues to be a problem. See Lori A. Stiegel et al., *Scams in the Marketing and Sale of Living Trusts: A New Fraud for the 1990s*, 26 CLEARINGHOUSE REV. 609 (1992) (stating that living trust salespeople, sometimes traveling door-to-door, aggressively advertise their product as a means to avoid probate and guardianship and frequently use misleading or incorrect information to persuade the elderly to pay excessive amounts for preparation of trust documentation that may prove ineffective).

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market often operates at its very worst where older consumers are concerned.”³ Unfair and deceptive practices imposed upon elderly clients by the professionals to whom they turn for legal advice and assistance are perhaps the most reprehensible examples.⁴ The nature and extent of this problem in relationships between lawyers and elderly clients merits specific examination.⁵

Consider, for example, the following scenario. A Louisiana lawyer representing an elderly man⁶ with a known history of

³ Loonin, *supra* note 2, at 1. *See also* Richard A. Starnes, Note, *Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties*, 4 *ELDER L. J.* 201 (1996) (exposing the vulnerabilities of elderly consumers to consumer fraud schemes).

⁴ *See* FTC v. Canada Prepaid Legal Services, Inc. et al., CV00-2080Z (W. D. Wash. filed 12/11/2000). One recent example involves a telemarketing scam originating in Canada. Allegations in the complaint filed by the Federal Trade Commission (FTC) against Canada Prepaid Legal Services, Inc. and others posing as investment counselors indicate that elderly U.S. consumers were contacted and promised “substantial monthly payments” and continuing eligibility for entry in monthly drawings for additional cash prizes in return for purchase of “purported United Kingdom Premium Savings Bonds.” *Id.* The “bonds” were not cheap; consumers were bilked out of as much as \$5,000 for their “one-time” investment. None of the named defendants were authorized to sell premium savings bonds, and because of the “lottery feature” of the bonds, their sale in the United States is illegal. *Id.* The case was settled in December 2002; Canada Prepaid agreed to repay the victims one million U.S. dollars out and to abide by a permanent injunction against any further such sales to any U.S. citizen. *See* Press Release, Federal Trade Commission, Canadian Telemarketers Targeting Elderly Settle FTC Charges (Dec. 5, 2002), available at <http://www.ftc.gov/opa/2002/12/nagg.htm>. Canada Prepaid was also charged with placing unauthorized charges on consumers’ credit cards. *See also* B.C. Telemarketers Agree To Pay \$1 Million To Settle U.S. Charges, GUELPH MERCURY, Dec. 6, 2002, at A12 (reporting allegations that telemarketers operating under the names Canada Prepaid Legal Services and BSI Premium Bonds, had sold consumers fake lottery tickets by falsely promising elderly consumers that they would qualify for cash prizes).

⁵ For purposes of this article, “elderly” clients are those age 60 and older, in conformance with the definition of “older individual” used under the Older Americans Act for purposes of establishing eligibility for legal and other social services contemplated by the Act. 42 U.S.C. §3002(35) (Supp. 2002).

⁶ A word of clarification seems in order here, lest it appear that the

psychiatric illness negotiated a settlement of the client's case pursuant to a general durable power of attorney granted by the client.⁷ The lawyer misrepresented the amount received, overstating it by about \$6,000, and charged the client a ten

author is suggesting that elder law practitioners are prone to fraudulent or exploitative conduct. The National Elder Law Foundation, created by the Board of Directors of the National Academy of Elder Law Attorneys in 1993, has established demanding criteria for certification in the practice of elder law. See NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, CRITERIA FOR NAELA MEMBERSHIP, available at <https://www.naela.org/applications/Membership/GetType.cfm> (last visited April 26, 2003). An attorney must demonstrate "substantial involvement/experience" in elder law. An extensive application form must be completed in which the attorney lists sixty elder law matters that he or she has handled within the past three years, classifying each listed case among thirteen separate categories comprising the substantive area of "elder law." In addition, the attorney must describe the type of service provided, outcome, etc., along with a list of five attorney references, three of whom must have engaged in eight hundred hours per year of elder law practice. *Id.* Forty-five hours of continuing legal education (CLE) in the area of elder law must be documented within the three year period as well. Finally, the candidate must pass an examination covering all thirteen areas; certification lasts five years. See PROGRAM, *supra* note 2, at 5-8. It is difficult to imagine that someone who has worked to obtain certification would jeopardize it by engaging in any improper behavior, let alone the sort of overreaching and fraud generally described in consumer protection cases. In fact, elder law practitioners are least likely to take advantage of their clients—the opposite is more likely true, with the attorneys giving very generously of their time and expertise for little or no recompense. See Andrea Sachs, *Legal Advice and Care: It's Not a Lawyer Joke. A Growing Corps of Attorneys Practice a Kinder, Gentler Type of Law for Seniors*, TIME, Oct. 30, 2000 (noting that "lawyers, as a profession, are not renowned for their kindness . . . but a growing cadre of elder-law practitioners is destroying some of the stereotyping"). By directing the article to elder law practice, I do not mean to "preach to the choir." Rather, I intent to alert those who are least culpable that they may be in danger of adverse affects from the conduct of those attorneys who are not primarily engaged in elder law practice, but engage in the practice of defrauding those among their elderly clientele.

⁷ See *In re Frank P. Letellier*, II, 742 So. 2d. 544 (La. 1999) (holding that an attorney was properly disbarred for violating several of the guidelines for evaluating disciplinary matters concerning commingling and conversion of client funds and noting that the attorney took advantage of an obviously vulnerable victim).

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percent flat fee based on the overstated figure.⁸ The lawyer then placed the settlement proceeds in his law firm's bank account.⁹ Over the next four years, he used the proceeds to fund loans for a self-established corporation owned by his bookkeeper¹⁰ and billed the client \$10,800 for managing the client's funds.¹¹

This arrangement came to a halt when the New Orleans Director of Health filed a complaint with the Louisiana Office of Disciplinary Counsel.¹² The client's deplorable living conditions were the catalyst for the complaint—he was seen “wandering his neighborhood, begging for food and rummaging through trash cans . . . human excrement [was found] in every room [of his home], [with] non-working sewerage, and multiple fire code violations.”¹³

The good news is that a complaint was filed with the Office of Disciplinary Counsel for the State of Louisiana; the attorney was disbarred for commingling and conversion of client funds with his office account and failure to cooperate with the Office of Disciplinary Counsel's investigation.¹⁴ The matter was appealed to the Louisiana Supreme Court, which upheld disbarment and was particularly concerned that the attorney “took advantage of an obviously vulnerable victim.”¹⁵ The court described the client's vulnerable condition, stating “we view [the client's] age, history of psychological problems, slovenly demeanor and living conditions, and the news video footage of his home to be consistent with reports that [he] was unable to care either for

⁸ *Id.* at 544.

⁹ *Id.* at 545 (noting that the attorney “failed to segregate the funds from his own, failed to invest the funds in an interest-bearing account, made unauthorized expenditures and disbursements to the detriment of [the client], failed to furnish a proper accounting regarding the funds, and used [the client's] funds without his permission to make loans.”).

¹⁰ *Id.*

¹¹ *Id.*

¹² *In re* Frank P. Letellier, II, 742 So. 2d. 544, 545 (La. 1999).

¹³ *Id.*

¹⁴ *Id.* at 546-47.

¹⁵ *Id.* at 548.

himself or his financial affairs.”¹⁶ Disbarment was warranted, as was full restitution with interest.¹⁷

The bad news is that the Office of Disciplinary Counsel dismissed the initial complaint; it was reinstated due to the persistence of the City Health Director.¹⁸ The disciplinary board initially rejected the hearing committee’s recommendation of disbarment and contemplated a mere two year suspension before opting for harsher penalty.¹⁹ Moreover, in virtually every state, including Louisiana, disbarment is not a permanent ban from the practice of law—this lawyer could qualify for reinstatement.²⁰

¹⁶ *Id.*

¹⁷ *In re* Frank P. Letellier, II, 742 So. 2d. 544, 548 (La. 1999) (revoking the attorney’s license to practice law and ordering that he “make full restitution with legal interest [and that] all costs and expenses of these proceedings are assessed [to the attorney]”).

¹⁸ *Id.* at 545 n.1 (noting that the City Health director appealed the initial dismissal).

¹⁹ *Id.* at 547 (“The disciplinary board issued a report stating that it concurred with the majority of the findings of the hearing committee. However, the disciplinary board recommended that Respondent be suspended for a period of two years.”).

²⁰ *See, e.g.*, ALASKA R. BAR RULE 29(b)(5) (1998) (prohibiting reinstatement until the expiration of at least five years from the effective date of the disbarment); ARIZ. REV. STAT. ANN. S. CT. RULE 71(e) (2000) (prohibiting the application for reinstatement before 90 days prior to the fifth anniversary of the disbarment and prohibiting reinstatement until after the fifth anniversary of the disbarment); ARK. R. USDCT. DISC. ENF. RULE 7.C (1998) (prohibiting reinstatement for five years following the disbarment); CAL. ST. BAR P. RULE 662(c) (2002) (giving the State Bar Court discretion to impose a five year period, a ten year period, or a permanent prohibition against the filing of a reinstatement petition); COLO. STAT. LWYR. DISC. RULE 251.29; COLO. R. USDCT. D.C. COLO. L. CIV. R. 83.5.N (2002) (making attorney ineligible for reinstatement until the sixth anniversary of disbarment or suspension, readmission or reinstatement is neither automatic nor a matter of right); CONN. R. USDCT. L. CIV. R. 3(i)(2) (2002) (prohibiting reinstatement judgment for at least five years); DEL. LAWYERS R. DIC. PROC. RULE 22(c) (2002) (prohibiting the application for reinstatement for at least five years after the disbarment); D.C. R. BAR RULE 11 § 16(c) (2002) (requiring the attorney to wait for at least five years from the disbarment to apply for reinstatement); FLA. STAT. BAR RULE 3-4.3.74 (requiring an attorney to wait three to four

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In this scenario the court did not consider whether the Louisiana Unfair Trade Practices and Consumer Protection Law would have appropriately applied to redress the harm done because the issue was not raised.²¹ This article suggests that such

years from date of disbarment to apply for reinstatement); GA. R. USDCTND. CIV. LR. 83.1.F(8) (prohibiting an attorney from petitioning for reinstatement for three years after disbarment or two years after an adverse decision upon a previous petition for reinstatement); IL. STAT. S. CT. RULE 767(a) (prohibiting an attorney from petitioning for reinstatement for five years after disbarment); IND. R. USDCTND DISC. ENF. RULE VII(b) (prohibiting reinstatement for at least five years from disbarment); KAN. R. DISC. RULE 219(e) (prohibiting reinstatement for five years after disbarment); KY. ST. S. CT. RULE 3.020.5 (requiring a waiting period of five years from disbarment before filing for reinstatement); LA. ST. S. CT. DISC. RULE 19 § 24.A (prohibiting reinstatement of a lawyer for five years after the effective date of disbarment). *See also* ALA. R DISC P. RULES 8(a), 28 (2000); HAW. S. CT. Rule 2.17 (2001); ID R. BAR COMM RULE 506; IN ST ADMIS AND DISC RULE 23(4); ME R. BAR 7.3(J); MD. R. CTS J & ATTYS RULE 16-781; MI. R. DISC P MCR 9.123; MN. ST LWYRS PROF RESP RULE 18; MO. R. BAR RULE 5.28; MISS. ST. BAR DISC. R.12; MT. R. DISC. R. 20; NE. R. DISC. R. 10; NV. ST. S. CT. MISCON. R.116; N.H. R. S. CT. R. 37; N.M. R DISC. R. 17-214; N.Y. CT. R. § 603.14; N.C. BAR CH. 1, SUBCH. B., § .0125; N.D. R LWYR. DISC. R. 4.5; OKLA. ST. DISC. P. R. 11.1; PA. ST. DISC. R. 218; RI. R. S. CT. ART. III DISC. R. 16; S.C. CODE ANN. § 413(33) (Law Co-op. 2002); S.D. CODIFIED LAWS § 16-19-83 (Michie 2002); TENN. JUD. R. 9 (West 2002); TEX. GOV'T CODE ANN. § 11.02 (Vernon 2002); TEX. GOV'T CODE ANN. § 11.05 (Vernon 2002); UTAH JUD. ADMIN. R. 25 (Michie 2002); VT. ADMIN. ORDER No. 9, R. 22 (2002); 6 VA. ADMIN. CODE § 4(13) (West 2003); WASH E.L.C. R. 9.1 (West 2003); W. VA. CT. R. 3.33 (West 2002); WIS. CT. R. GEN. L.R. 83.10 (West 2002); WYO. CT. R. XXII (Michie 2002). Eight states either do not allow for reinstatement at all following disbarment (as opposed to suspension) or provide an option for permanent disbarment in cases where the wrongdoing is of sufficient magnitude to warrant such a harsh penalty. CA ST. BAR P. Rule 662; FL ST. BAR Rule 3-5(f) & (g); GA. R BAR Rule 4-220; IN ST. ADMIS AND DISC Rule 23(3)(a); IA. Rule 35.13; MA R. S. CT Rule 4.01 §18(3); N.J. R. GEN APPLICATION 1:20-10(1)(g); OH. ST. GOV'T BAR Rule 5; OR R BAR B Rule 8.1. *See also* Jennifer M. Kraus, *Attorney Discipline Systems: Improving Public Perception and Increasing Efficiency*, 84 MARQ. L. REV. 273 (2000) (examining attorney self-regulation and strategies designed to address public criticism and distrust of present systems).

²¹ *See* LA. REV. STAT. ANN. §§ 51-1401 (West 2002) (declaring unlawful

consideration is both enlightening and merited in the context of elder law. Part I reviews the development of state consumer protection statutes addressing fraudulent consumer practices. Part II explores the rationale for applying consumer protection concepts to the practice of law. Part III examines the legal and philosophical barriers to such application. Part IV determines whether these concerns can be reconciled by applying consumer laws exclusively to elder law practice, where clients are often vulnerable or disabled. This article concludes that employing consumer protection statutes to regulate lawyers serving elderly clients and practicing elder law would enhance trust between the elderly and their legal counsel. Such reform would also provide greater protection and opportunities for redress than existing mechanisms of attorney discipline and malpractice lawsuits.

I. DEVELOPMENT OF STATE CONSUMER PROTECTION STATUTES

Consumer protection is a relatively recent concept and represents a significant shift from the laissez-faire philosophy pervading English common law, expressed by the doctrine *caveat emptor*.²² This “buyer beware” approach was first eroded in food and drug law. The need to regulate food preparation and distribution arose at the beginning of the twentieth century in the wake of scandals in the meat packing industry.²³ Widespread

methods of competition and unfair or deceptive acts in the conduct of any trade or commerce). There is reason to believe that the Louisiana courts might have been receptive to such a claim. *See Reed v. Allison & Perrone*, 376 So. 2d 1067, 1068-69 (La. Ct. App. 1979) (holding that attorneys could be held liable under the state’s consumer protection act for unfair and deceptive advertising in certain circumstances).

²² *See* William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 726-27 (1972) (noting that before the turn of the twentieth century sellers were forced to be fair to buyers not because of regulatory scheme, but because their business reputations in small communities depended on fair practice and honest dealing).

²³ *Id.* at 728 (identifying two waves of consumer protection regulation in the first half of the twentieth century). According to Lovett, the first wave of consumer protection laws responded to scandals identified by authors such as

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marketing of useless, and potentially harmful, substances as miracle cure-alls manifested the need for federal oversight of the manufacture, production and sale of products designed “for use in the diagnosis, cure, mitigation, treatment or prevention of disease.”²⁴ Congress passed the first pure food and drug legislation in 1906.²⁵ Congress also enacted the Federal Trade Commission Act (FTCA) in 1914, but the Act was limited to unfair methods of competition and did not address unfair and deceptive practices regarding consumers.²⁶

Federal legislation did not reflect concern for unfair trade practices affecting individual consumers until Congress amended the FTCA in 1938.²⁷ This amendment declared “unfair or deceptive acts or practices” unlawful and eliminated the requirement that acts result in injury to competition to constitute a violation.²⁸ The FTCA did not provide a private cause of

Upton Sinclair in *The Jungle*. *Id.* The second wave was during the 1930s, which was marked by additional legislation broadening consumer protection at the federal level. *Id.*

²⁴ See Federal Food, Drug, & Cosmetic Act, 21 U.S.C. §321(g)(1) (1997 & Supp. 2001) (defining food as an “article . . . used for food or drink for man or other animals,” including chewing gum and “any components of any such article”).

²⁵ See Federal Food & Drug Acts, ch. 3915, 34 Stat. 768 (1906) (“[P]reventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.”).

²⁶ Federal Trade Commission Act, ch. 31, § 5, 38 Stat. 719 (1914) *as amended*, 15 U.S.C. §45 (1997 & Supp. 2001); *see also* Gary Oberst, *Shysters, Sharks, and Ambulance Chasers Beware Attorney Liability Under CUTPA*, 11 U. BRIDGEPORT L. REV. 97, 98 (1990) (noting that state statutes subsequently extended protection to consumers by creating a private right of action against unfair practices).

²⁷ See 15 U.S.C. § 45(a)(1) (2003), *amended by* Act of Mar. 21, 1938 (inserting “and unfair or deceptive acts or practices in commerce”); *see also* Randall Scott Hetrick, *Unfair Trade Practice Acts Applied to Attorney Conduct: A National Review*, 18 J. LEGAL PROF. 329 (1993).

²⁸ *Id.*; *see also* Hetrick, *supra* note 27, at 329 (noting that the expansion of the consumer protection law is a result of the “impersonal nature of the marketplace,” and a general dissatisfaction with the established remedies available for abuses by large scale businesses).

action, however, and the Federal Trade Commission (FTC) was neither staffed nor funded sufficiently to enforce the Act at a local level.²⁹ The FTC recommended that states enact legislation regulating unfair and deceptive practices to address this gap.³⁰ By the mid-1980s all states had passed consumer legislation, often called “little FTC Acts,” acknowledging the federal legislation as a catalyst.³¹ Many of these state statutes prohibit unfair and

²⁹ See Hetrick, *supra* note 27 at 329-30 (noting that “the FTC enforcement effort was not sufficient to provide manpower to police unfair practices in local areas”); Lovett, *supra* note 22, at 729 (noting that the federal FTCA did not provide for private enforcement).

³⁰ See Lovett, *supra* note 22, at 730. Lovett outlines model legislation first drafted in 1967—the “Unfair Trade Practices and Consumer Protection Act”—and notes that this actually “provides much broader and more effective in its remedial provisions” than the federal FTCA. *Id.* at 730. This act, along with the model Uniform Deceptive Trade Practices Act, 7A U.L.A. 274 (1984 & Supp. 1993), provided the basis for virtually all state consumer protection statutes. See Lovett, *supra* note 22, at 730; see also Amy Algiers Anderson, *State Deceptive Trade Practices and Consumer Protection Acts: Should Wisconsin Lawyers Be Susceptible to Liability Under Section 100.20?*, 83 MARQ. L. REV. 497, 498 (1999) (noting that the Wisconsin legislature followed the Uniform Deceptive Trade Practices Act when enacting consumer protection laws in 1921).

³¹ See Hetrick, *supra* note 27, at 329-30. The current state statutes are: ALA. CODE §§ 8-19-1 to 18-19-15 (2001); ALASKA STAT. §§ 45.50.471 to 45.50.561 (Michie 2001); ARIZ. REV. STAT. ANN. §§ 44-1521 to 44-1534 (West 2001); ARK. CODE ANN. §§ 4-88-101 to 4-88-207 (Michie 2001); CAL. CIV. CODE §§ 1750 to 1784 (West 1998 & Supp. 2002) and CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 1997 & Supp. 2002); COLO. REV. STAT. §§ 6-1-101 to 6-1-115 (2001); CONN. GEN. STAT. ANN. §§ 42-110a to 42-110aa (West 2000 & Supp. 2002); DEL. CODE ANN. tit. 6, §§ 2501 to 2536 (1999 & Supp. 2000); D.C. CODE ANN. §§ 28-3901 to 28-3911 (2001); FLA. STAT. ANN. §§ 501.201 to 501.213 (West 1997 & Supp. 2002); GA. CODE ANN. §§ 10-1-370 to 10-1-427 (2000 & Supp. 2001); HAW. REV. STAT. §§ 481A-1 to 481A-5 (1998 & Supp. 2001); IDAHO CODE §§ 48-601 to 48-619 (Michie 1997 & Supp. 2001); 815 ILL. COMP. STAT. ANN. 510/1 to 510/7 (West 1993 & Supp. 2002); IND. CODE ANN. §§ 24-5-0.5-1 to 24-5-0.5-12 (Michie 1996 & Supp. 2001); IOWA CODE ANN. § 714.16 (West 1993 & Supp. 2002); KAN. STAT. ANN. § 50-623 (1994 & Supp. 2001); KAN. STAT. ANN. § 12-22 (2000); KY. REV. STAT. ANN. §§ 367.110 to 367.370 (Michie 2002); LA. REV. STAT. ANN. tit. 51, §§ 1401 to 1420 (West 1987 & Supp.

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deceptive acts or practices affecting trade or commerce involving some transaction for personal, family or other consumer use.³²

Unlike the federal statute, however, all states except Iowa either explicitly codified a private cause of action or have

2002); ME. REV. STAT. ANN. tit. 5, §§ 205A to 214 (West 2002); MD. CODE ANN., COM. LAW I §§ 13-101 to 13-501 (Michie 2000 & Supp. 2001); MASS. GEN. LAWS ANN. ch. 93A, §§ 1-11 (West 1997 & Supp. 2002); MICH. COMP. LAWS ANN. §§ 445.901-445.921 (West 1989 & Supp. 2002); MINN. STAT. ANN. § 8.31 (West 1997 & Supp. 2002) and §§ 325D.43-325D.48 (West 1995 & Supp. 2002); MISS. CODE ANN. §§ 75-24-1 to 75-24-27 (Michie 200 & Supp. 2001); MO. ANN. STAT. §§ 407.010-407.307 (West 2001 & Supp. 2002); MONT. CODE ANN. §§ 30-14-101 to 30-14-142 (2001); NEB. REV. STAT. §§ 59-1601 to 59-1623 (1998 & Supp. 2000) and §§ 87-301 to 87-306 (1999 & Supp. 2001); NEV. REV. STAT. ANN. § 41.600 (Michie 2002) and §§ 598.0903-598.0999 (Michie 1999); N.H. REV. STAT. ANN. §§ 358-A:1 to 358-A:13 (1995 & Supp. 2000); N.J. STAT. ANN. §§ 56:8-1 to 56:8-109 (West 2001 & Supp. 2002); N.M. STAT. ANN. §§ 57-12-1 to 57-12-22 (Michie 2000); N.Y. EXEC. LAW § 63(12) (McKinney 2001 & Supp. 2002) and N.Y. GEN. BUS. LAW §§ 349-350e (McKinney 1998 & Supp. 2002); N.C. GEN. STAT. §§ 75-1 to 75-35 (2001); N.D. CENT. CODE §§ 51-15-01 to 51-15-11 (1999 & Supp. 2001); OHIO REV. CODE ANN. §§ 1345.01-1345.13 (2002); OKLA. STAT. ANN. tit. 15, §§ 751-763 (West 1993 & Supp. 2002); OKLA. STAT. ANN. tit. 78 §§ 51-55 (West 1993); OR. REV. STAT. §§ 646.605-646.656 (2001); PA. STAT. ANN. tit. 73 §§ 201-1 to 201.9.2 (West 1993 & Supp. 2002); R.I. GEN. LAWS §§ 6-13.1 to 6-13.3-4 (2001); S.C. CODE ANN. §§ 39-5-10 to 39-5-160 (1985 & Supp. 2002); S.D. CODIFIED LAWS §§ 37-24-1 to 37-24-35 (Michie 2000); TENN. CODE ANN. §§ 47-18-101 to 47-18-125 (2001); TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (1987 & Supp. 2002); UTAH CODE ANN. §§ 13-2-1 to 13-2-8 (2001 & Supp. 2002); VT. STAT. ANN. tit. 9, §§ 2451-2463 (1993 & Supp. 2002); VA. CODE ANN. §§ 59.1-196 to 59.1-207 (Michie 1998 & Supp. 2002); WASH. REV. CODE ANN. §§ 19.86.010-19.86.090 (West 1999 & Supp. 2003); W. VA. CODE ANN. §§ 46A-6-101 to 46A-6-110 (Michie 1999 & Supp. 2002); Wis. Stat. Ann. § 100.20 (West 1997 & Supp. 2002); WYO. STAT. ANN. §§ 40-12-101 to 40-12-114 (2001).

³² See JONATHAN SHELDON ET AL., NAT'L CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 12-16 (5th ed. 2001) (describing and compiling federal and state statutes, case law and relevant practice guidelines to aid attorneys litigating unfair or deceptive practice claims).

construed their statutes to do so.³³ In many states, prevailing consumers can recover attorneys' fees, minimum statutory damages regardless of actual loss and punitive or treble damages.³⁴ Several state consumer laws provide private remedies and/or enhanced damages where elderly consumers are

³³ *Id.* at 538-39 (documenting that Iowa courts have declined to extend a cause of action unless the conduct rises to the level of a criminal offense, but may allow a party to raise consumer protection issues defensively). *See also supra* note 31 (citing to state statutes); CAL. BUS. & PROF. CODE §§ 17200-17581 (West 2003); HAW. REV. STAT. ANN. §§ 480-1 to 480-24 (Michie 2002); KAN. STAT. ANN. §§ 50-623 to 50-640 (2002); ME. REV. STAT. ANN. tit. 10, §§ 1211-1216 (West 2002); MICH. COMP. LAWS ANN. § 445.922 (West 2002); MINN. STAT. ANN. §§ 325F.67 to 325F.70 (West 2002); OHIO REV. CODE ANN. §§ 4165.01 to 4165.04 (West 2003); PA. STAT. ANN. tit. 73, § 201-9.3 (West 2002); UTAH CODE ANN. §§ 13-2-9 to 13-5-1, 13-11-1 to 13-11-23 (2003); VT. STAT. ANN. tit. 9, §§ 2464 to 2480g (2003); WASH. REV. CODE ANN. §§ 19.86.090-19.86.920 (West 2003); WIS. STAT. ANN. §§ 100.18, 100.20-100.264 (West 2002).

³⁴ *See* COLO. REV. STAT. § 6-1-113(2)(1)(4) (1999) (adding bad faith as a precondition to treble damages and awarding costs and attorney fees to the attorney general or a district attorney in all actions where the attorney general or the district attorney successfully enforces this article); DEL. CODE ANN. tit. 6, § 2533(b) (2002) (attorney fees awarded only in "exceptional cases"); MASS. GEN. LAWS ANN. ch. 93A, § 9(3) (West 2002) (giving the defendant a right to make a reasonable settlement offer and limiting attorneys' fees awards to those incurred prior to the offer if the consumer rejects a reasonable offer and prevails at trial); N.C. GEN. STAT. § 75 E-5 (2002) (attorneys fees awarded only if conduct is willful and there is an unwarranted refusal to settle); OHIO REV. CODE ANN. § 1345.11 (2002) (attorney fees authorized only if the seller knowingly violates the statute); OR. REV. STAT. § 18.540 (2002) (punitive damage awards first pay the consumer's attorney); TEX. BUS. & COM. CODE ANN. § 17.50 (2002) (amended in 1995 to provide for recovery of treble the consumer's economic damages only if the defendant acted knowingly, and treble the consumer's economic damages and mental anguish damages only if the defendant acted intentionally). *See also* Peres v. Anderson, 98 B.R. 189 (E.D. Pa. 1989) (statutory damages awarded despite no actual damages); Jones v. General Motors Corp., 953 P.2d 1104 (N.M. App. 1998) (statutory damages allowed even if no actual damage shown). *But see* Shurtliff v. Northwest Pools, Inc., 815 P.2d 461 (Idaho Ct. App. 1991) (no statutory damages where no actual damages).

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involved.³⁵ For example, in California an elderly or disabled person who suffers damage or injury has a cause of action to recover actual damages, statutory damages, restitution, punitive damages, and reasonable attorneys' fees.³⁶ This recognition of the elderly as a uniquely vulnerable population in need of extraordinary protection arguably represents legislative effort to bring elder law practice within the purview of consumer protection regulation.³⁷

On the other hand, core concepts defining the scope and application of state consumer protection statutes vary. For example, the requirement that acts affect "trade or commerce" is generally broad, but render the laws inapplicable in instances of isolated transactions, such as the sale of a home or car by a nonmerchant.³⁸ Whether the practice of law falls within the purview of such statutes may be addressed by judicial

³⁵ See CAL. CIV. CODE § 1780(b) (West 1998 & Supp. 2002); CAL BUS. & PROF. CODE § 17206.1 (West 1997 & Supp. 2002). California led the way by enacting a minimum damages provision for elderly and handicapped consumers, allowing up to \$5,000 in statutory damages in cases where it is determined that the consumer "has suffered substantial physical, emotional or economic damage," and the perpetrator either knew or should have known that the victim was elderly or disabled or that the perpetrator's conduct resulted in loss of an elderly or disabled victim's home, retirement or primary source of income or that the conduct was such that age, poor health or disability would make a person more vulnerable to damage. *Id.* Other states have since followed California's lead. See ARK. CODE ANN. §4-88-202 (2001); FLA. STAT. ANN. §501.2077 (West 1997 & Supp. 2002); GA. CODE ANN. §10-1-854 (2000 & Supp. 2001); IND. CODE ANN. §24-5-0.5-4 (1996 & Supp. 2001); IOWA CODE ANN. §714.16A (1993 & Supp. 2000); NEV. REV. STAT. §§ 598.0975, 599B.290 (1999); TENN. CODE ANN. §47-18-125; WIS. STAT. ANN. §§ 100.264, 134.95 (West 1997 & Supp. 2001).

³⁶ CAL. CIV. CODE § 1780 (West 1998 & Supp. 2002).

³⁷ See *infra* Part II (arguing that consumer protection laws, as opposed to traditional disciplinary boards, should regulate lawyer client relationships, especially when the client is elderly), Part IV (noting that due to the vulnerability of elderly clients, it is both constitutional and sensible to apply consumer protection laws to attorney client relations).

³⁸ See SHELDON, *supra* note 32, at 32 (noting that state consumer protection laws, modeled after the FTCA, prohibit unfair and deceptive trade practices but generally do not cover isolated real estate sale by non-merchant).

interpretation of terms such as “trade or commerce,” “services” or “consumer.”³⁹ Only Maryland and Ohio expressly exclude attorney conduct from consumer protection regulation.⁴⁰

II. APPLYING CONSUMER PROTECTION CONCEPTS TO THE PRACTICE OF LAW

Prior to the consumer protection movement, consumers had very limited means to redress their grievances.⁴¹ State consumer protection laws responded to consumer dissatisfaction with markets that required negotiating with unfamiliar, impersonal sellers for goods of an increasingly sophisticated technological nature.⁴²

These same factors pertain to the lawyer-client relationship. Most individuals rarely consult lawyers; many do so only when faced with stressful situations such as accidents, divorce or criminal prosecution.⁴³ These consumers are unfamiliar with

³⁹ *Id.* at 29-35.

⁴⁰ *See* MD. CODE ANN., COM. LAW, § 13-104(1) (2000 & Supp. 2001); OH. REV. CODE ANN. § 1345.01(A) (West 1993 & Supp. 2001). Maryland’s statute states “[t]his title does not apply to: (1) The professional services of a . . . lawyer.” MD CODE ANN., COM. LAW, § 13-104(1) (2000 & Supp. 2001). Arguably, this statute could be interpreted to exempt only the actual “practice of law” and not entrepreneurial activities like advertising and billing. *Id.* Ohio’s exemption is more broadly worded, stating that “[c]onsumer transaction” does not include transactions between . . .attorneys. . .and their clients” and could include a wide variety of an attorney’s conduct such as advertising and other client services, as well as the practice of law. OH. REV. CODE ANN. §1345.01(A). *See also* Hetrick, *supra* note 27, at 330.

⁴¹ *See* Lovett, *supra* note 22, at 728 (setting forth the classic example of the meat packing industry at the beginning of the twentieth century, where lack of quality control meant that consumers were unable to detect adulterated products prior to purchase and had no adequate redress after purchase).

⁴² Hetrick, *supra* note 27, at 329-30 (“Two essential factors contributing to the modern growth of consumer protection legislation and litigation are the increasingly impersonal nature of the marketplace and consumer dissatisfaction with the traditional commercial law remedies for mistreatment by large-scale business organizations.”).

⁴³ *See* Steven K. Berenson, *Is It Time For Lawyer Profiles?*, 70 FORDHAM

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lawyers and do not how to rationally select an attorney.⁴⁴ This problem is exacerbated by age, which is often accompanied by isolation, physical debilities and mental vulnerability.⁴⁵

L. REV. 645, 648-49 (2001) (concluding based on the results of a Martindale-Hubbell survey, that those who seek out legal services are not able to determine the quality of services they receive and noting that people who seek legal services are intimidated, confused or unable to adequately compare information); Roy C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 542 (1994) (finding that most people who need to seek legal services do because of lack of knowledge and information about their legal needs and how to find the right lawyer, as well as a lack of funds and trust in lawyers and legal proceedings).

⁴⁴ Linda Morton, *Finding A Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283, 284 (1992) (noting that lack of experience and knowledge in finding a lawyer makes the process difficult, from the question of where to find a lawyer to knowing which one is competent, trustworthy and can handle the issue at hand).

⁴⁵ See Nina Keilin, *Client Outreach 101: Solicitation of Elderly Clients By Seminar Under the Model Rules of Professional Conduct*, 62 FORDHAM L. REV. 1547, 1551-54 (1994) (discussing that because the elderly can be more vulnerable to high-pressure sales tactics, elder law attorneys should take special care in soliciting older clients and suggesting changes to the model professional ethics code that would help guide elder law attorneys in the proper ways to find clients). Keilin, of Legal Services of the Elderly in New York City, observes that increased use of "low-cost educational seminars" conducted by lawyers and aimed primarily at the elderly may result in the exploitation and abuse that such seminars should be designed to prevent. *Id.* at 1546-47. According to Keilin, low-cost or even free "seminars" are offered by attorneys "to tap into the expanding base of elderly clients." *Id.* at 1547. Unfortunately, if seniors "really are more susceptible to persuasive salesmanship, the use of seminars . . . is potentially misleading or coercive." *Id.* at 1548. She further notes that many of the tactics employed by those engaged in consumer scams are evident at such seminars, with "the force of the attorney's personality . . . sexual attractiveness or personal charisma" being more important than any real need the client may have for the service offered. *Id.* at 1554. As an extreme example of this vulnerability, she cites the following excerpt from *Bennett v. Bailey*, 597 S.W.2d 532 (Tex. 1980):

In this astonishing case, the plaintiff, a widow of undisclosed age, purchased more than \$29,000 worth of dance lessons from flattering young male instructors. Upon her refusal to 'upgrade' to a \$49,000 contract or to add a \$9,000 contract, the 'affections' of these

In addition, the law may seem extremely complex, arcane, and untrustworthy to the average lay person.⁴⁶ Clients generally

instructors were withdrawn; one instructor stepped on plaintiff's toe, disabling her for eleven weeks. Surprisingly, she returned to the studio to resume her lessons. The same instructor twirled plaintiff in the air, and she sustained two broken ribs. Plaintiff received treble damages.

Id. at 1552 n.27. That this practice remains a part of the sales techniques used by unscrupulous dance studios is demonstrated by the experience of two seniors in Spring Hill, Florida, who bought over \$100,000 worth of dance lessons in the late 1990s due to a strategy of gift-giving and flattery on the part of instructors termed the "Love Technique." See Jamie Malernee, *Hernando County Dance Studio Settles Lawsuits*, ST. PETERSBURG TIMES, Nov. 24, 2000, available at 2000 WL 26337524 (reporting that a 68-year old woman settled her lawsuit with Dance Tonight in which she alleged the instructors wooed clients into dance lesson contracts but expressing disappointment that the studio did not have to admit wrongdoing even though they previously settled similar suits). See also Stiegel et al., *supra* note 2, at 609 (noting that, in addition to being lonely, seniors are often "unfamiliar with or fearful about probate and guardianship"). Flattery and expressions of concern are often combined with high pressure sales tactics designed to exacerbate these fears in marketing living trusts to the elderly. *Id.* at 612.

⁴⁶ See Alan Reifman, et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 539 (1992). The impact of this on jury trials has been discussed in a number of articles, suggesting that despite a rise in the percentage of the population that is college educated, the complexity of legal issues has generated a situation where studies indicate that "jurors understand fewer than half of the instructions they receive at trial." *Id.* at 539. See also Joe S Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 751 (1991) (examining the difficulties jurors face in understanding different types of civil trials); Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 191 (1990) (arguing that the structure of the jury system may lead to unjust results because jurors who do not understand complex legal principles are forced to use their own interpretations of legal standards and law); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 70-72 (2001). Although this may be attributable in part to deliberate jury selection procedures designed to retain only those who are "comparatively less informed, less skilled, or less educated than the pool of potential jurors," the fact remains that the same people who cannot follow a judge's instructions in the jury box may be unable to follow what their attorney tells them. See Lilly, *supra*, at 65. These findings reiterate the

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do not understand what their lawyer does and cannot assess the quality of performance until it is too late. Professor Michael Asimow noted in a provocative article that the trend toward a “business” or “commercial” perspective among those who practice law has engendered public perception of law firms as the virtual “embodiment of evil.”⁴⁷ To the lay person, the bar associations and disciplinary boards intended to police attorneys may seem composed of lawyers that want to protect members of their own profession.⁴⁸ This undermines the public’s faith in complaint procedures, continuing legal education requirements and bar disciplinary systems.⁴⁹ Additionally, the few available legal remedies require a victimized client to bear the burden of proof to establish technical elements, often necessitating expert

extreme disadvantage that an elderly person would have in assessing his or her lawyer’s performance.

⁴⁷ Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 U.C.L.A. L. REV. 1339 (2001) (positing that the unfavorable portrayal of large law firms in films, as supported by general anti-business sentiment, is essentially an accurate representation of the current culture of large firms).

⁴⁸ See, e.g., Dennis Chaptman, *Court Backs Changes in Lawyer Discipline System*, MILWAUKEE J. & SENTINEL, Jan. 22, 2000, available at 2000 WL 3841113 (discussing the Wisconsin Supreme Court’s decision to increase the percentage of non-lawyers on bar disciplinary board to insure “greater public involvement” and “dispel the notion that the disciplinary process is too lawyer-friendly”).

⁴⁹ See, e.g., David Armstrong, *Disbarred Massachusetts Lawyers Skirt Discipline System Despite Sanctions, Many Are Reinstated, Some Offend Again*, BOSTON GLOBE, Sept. 17, 2000, available at 2000 WL 3343172 (discussing several instances where reinstated lawyers again defrauded clients, including the case of attorney Thomas J. Moriarty, who misappropriated client funds belonging to elderly patients in a Veteran’s medical center); Patrik Jonsson, *Would the Learned Counsel Please Stop Screaming?*, CHRISTIAN SCI. MONITOR, July 17, 2001, available at 2001 WL 3736676 (reporting on the negative impact that attorney incivility has had on the public’s perception of lawyers); Bruce Schultz, *Louisiana’s Lawyer Discipline System Gets Tougher*, BATON ROUGE ADVOCATE, Nov. 19, 2000, available at 2000 WL 4506587 (reporting on the new Louisiana lawyer disciplinary system which includes members of the non-lawyer public on its Disciplinary Board). Statistics also suggest that ninety percent of all complaints filed are dismissed, and that only five percent actually result in discipline. See Kraus, *supra* note 20, at 285-86.

testimony.⁵⁰

In contrast, because consumer protection statutes are remedial in nature they can be liberally construed to promote fair dealing and effectuate the underlying consumer oriented public policy.⁵¹

⁵⁰ See generally Ray Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235 (1994) (citing the general requirement of expert testimony when accusing an attorney of malpractice). Professors Anderson and Steele delineate three potential causes of action that a client may assert—breach of fiduciary duty, breach of contract and the tort of malpractice. *Id.* at 235. There is much confusion in the courts with respect to differentiation among the three causes of action, with varying results for the unfortunate clients involved. *Id.* at 236-37. To prevail in an action for malpractice, the client has the burden to show breach by the attorney of the duty owed to the client and that the breach was the proximate cause of the injury or loss suffered by the client. 7 AM. JUR. 2d *Attorneys at Law* § 212 (1997 & Supp. 2001). It has been held that the client must “not only establish that he or she would have succeeded in the underlying action and that any judgment would be collectible, but must also show that his or her former attorney was negligent and that plaintiff would have succeeded in the first action but for the attorney’s malpractice.” *Id.*

⁵¹ See, e.g., *Hall v. Walter*, 969 P.2d 224, 230-35 (Colo. 1998) (noting that in prior cases the court had given the state’s consumer protection statute “a liberal construction” and holding that the statute gave standing to nonconsumer landowners who sustained actual damages as a result of a real estate developer’s misrepresentations to buyers); *Price v. Long Realty, Inc.*, 502 N.W.2d 337, 342-43 (Mich. Ct. App. 1993) (holding that because Michigan’s consumer protection act is a “remedial statute designed to prohibit unfair practices in trade or commerce it must be liberally construed to achieve its intended goals,” thus the law applied to the conduct of a “licensed real estate broker” where the conduct involved—namely, perpetration of a fraud—was not authorized under the broker’s license); *Blatterfein v. Larken Assocs.*, 732 A.2d 555, 559-64 (N.J. Super. Ct. App. Div. 1999) (finding that the purpose of New Jersey’s consumer protection statute was to “eliminate sharp practices and dealings” and that the statute was “to be liberally construed in favor of consumers” so that an architect was held liable under the consumer protection statute for misrepresentations concerning the quality of building materials used in new homes he had designed); *Elder v. Fischer*, 717 N.E.2d 730, 734-37 (Ohio App. 1998) (finding that the purpose of Ohio’s consumer protection act is to “protect consumers from ‘unscrupulous suppliers’ in a manner not afforded under the common law” and holding that a residential nursing care facility’s billing practices constituted a “consumer transaction”); *Iadanza v. Mather*, 820 F. Supp. 1371, 1377-81 (D. Utah 1993) (“[I]t is the

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Thus, a client consumer could potentially recover for “immoral, unethical, oppressive or unscrupulous” activities that do not rise to the level of a tort or malpractice claim.⁵²

The attorney disciplinary procedures currently in place may be inadequate to deter unfair and deceptive practices or compensate victimized clients for their losses. Disciplinary boards are generally authorized to impose sanctions these as censure, suspension and disbarment.⁵³ The basic purpose of these

court’s duty [under Utah law] to accord effect to a statutory provision requiring the statute to be construed liberally with a view to achieving statute’s object” and finding that residential real property was included under the Utah consumer protection act’s definition of “consumer transaction”).

⁵² See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5, (1972) (delineating the FTC’s factors for determining whether a practice that is neither deceptive nor a violation of antitrust law is nevertheless unfair). Courts often look to FTC regulations and advisory opinions as a source of authority to determine whether a practice is unfair or deceptive for purposes of a consumer protection statute. In a recent case construing the concept for purposes of the Connecticut Trade Practices Act (CUTPA), the Connecticut court stated:

It is well settled that in determining whether a practice violates CUTPA [Connecticut courts] have adopted the criteria set out in the ‘cigarette rule’ by the federal trade commission for determining when a practice is unfair: (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.

Day v. Yale Univ. School of Drama, 2000 U.S. Dist. LEXIS 658, at *20-21 (Conn. Super. Mar. 7, 2000) (denying motion to strike plaintiff’s breach of contract claim for violation of CUTPA), quoting *Hartford Elec. Supply Co. v. Allen-Bradley Co., Inc.*, 736 A.2d 824 (Conn. 1999) (affirming that a termination of a franchise agreement without good cause was a violation of CUTPA).

⁵³ 7 AM. JUR. 2D *Attorneys at Law* § 30 (2002) (noting that disciplinary measures can only be used against an attorney for good cause shown in a

sanctions is to correct future attorney behavior and, when necessary, “remove from the profession a person whose misconduct has proved such person unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney.”⁵⁴ Disciplinary proceedings protect the public interest; they do not rectify harm done to individuals victimized by an attorney’s conduct.⁵⁵ Admittedly, the majority of bar disciplinary codes contain express provisions that allow conditioning an attorney’s reinstatement upon payment of restitution.⁵⁶ Even if

judicial proceeding).

⁵⁴ *Id.* at § 32.

⁵⁵ *See, e.g.*, N.H. R. PROF. COND. CMTTEE. § 2.10 (2002). In New Hampshire, although restitution is not an affirmative requirement in the state attorney disciplinary scheme, the rules provide that restitution is not enough to “justify abatement of an investigation into the conduct of an attorney or the deferral or termination of proceedings” under the disciplinary rules, demonstrating that the regulation has goals beyond restitution. *Id.* (explaining that whether the complainant settles, receives restitution, or simply does not prosecute a charge, none of those factors alone cause an investigation into the conduct of an attorney to be deferred or terminated under the professional conduct rules of New Hampshire).

⁵⁶ Virtually every jurisdiction has incorporated restitution as a possible condition of reinstatement, either through explicit provisions in the jurisdiction’s bar disciplinary rules, establishment of a client reimbursement fund (to which the lawyer must submit repayment) or case law. *See* ALA. R. DISC. 8(i); COLO. C.P.R. 251.29; D.C. BAR R. 11; FLA. BAR R. 3-7.10(f)(3)(F); IDAHO BAR R. 506(h); ILL. SUP. CT. R. 767(e); MD. CT. R. 16-760(h)(4); MD. ATT’Y R. 5; MASS. SUP. CT. R. 4:01 (4)(c),(d); MISS. R. DISC. 12.7; MO. BAR R. 5.28(b)(2); MONT. DISC. R. 7(6); NEV. SUP. CT. R. 116(6); N.J. R. GEN. APPLICATION 1:20-21(f)(11); N.M. R. DISC. 17-203(e); N.Y. CT. R. 603.14 (m); N.Y. CT. R. 691,11(d); N.C. BAR R. ch. 1 subch. B § .0125(a)(3)(M); N.D. R. DISC. 4.5(h)(2); OHIO BAR R. 5(10)(e)(1); PA. R. DISC. 531; R.I. SUP. CT. R. DISC. art. III 3(d); TENN. SUP. CT. R. 9 § 19.7; TEX. R. DISC. 11:02(d); UTAH R. DISC. 2.9(a); W. VA. R. DISC. 3.15; WIS. SUP. CT. C.P.R. 22.10; WYO. R. DISC. 4(e)(12). The following states provide a client reimbursement fund. *See* DEL. SUP. CT. R. 66; HAW. SUP. CT. R. 10.19; IDAHO BAR R. 601; IOWA CT. R. 39.3(4)(c); KAN. R. DISC. 227; KAN. L.F.C.P.R. 16; KY. SUP. CT. R. 3.820(3)(c); ME. LAW. FUND CLIENT PROT. R. 3(b); MICH. R. DISC. 9.123(b)(9); OKLA. R. DISC. 11.1(b); N.C. BAR R. ch. 1 subch. B. § .0125(a)(3)(L); VA. SUP. CT R. pt. 6 § 4 para. 11.1(b); WASH. A.P.R. 15. In addition, case law in a number of

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repayment of funds to an injured client is ordered, however, such requirements are generally limited to funds wrongfully converted by the lawyer.⁵⁷ In fact, some courts have found ordering client restitution beyond the province of a disciplinary proceeding.⁵⁸ Consumer protection actions provide greater recompense, allowing recovery of all damages incurred and treble or punitive damages where appropriate.⁵⁹

Although the number of disciplinary proceedings has not grown remarkably in the past decade, public perception of lawyers is increasingly negative and reports of lawyers taking advantage of elderly clients remain especially troubling.⁶⁰ This

jurisdictions has upheld restitution as a condition of reinstatement. *See In re Feeley* 814 P.2d. 777, 780 (Ariz. 1991) (ordering restitution); *In re Caputi*, 676 N.E. 2d. 1058, 1062 (Ind. 1997) (providing for reinstatement following suspension and satisfaction of costs); *In re Caver*, 733 So.2d. 1208, 1212 (La. 1999) (ordering full restitution); *In re Disciplinary Action Against Hendrickson*, 462 N.W.2d. 594, 594 (Minn. 1990) (conditioning reinstatement on restitution of funds); *In re Disciplinary Proceedings Against O'Keefe*, 613 N.W.2d. 890, 893 (Wis. 2000) (ordering restitution).

⁵⁷ *See supra* note 56 (setting forth state statutes providing for restitution).

⁵⁸ *See In re Scott*, 979 P.2d 572, 574 (Colo. 1999) (disbarring attorney but refusing to order restitution where it "is neither appropriate nor possible" to assess the portion of client's damages resulting from the attorney's neglect); *In re Ackerman*, 330 N.E.2d 322, 324 (Ind. 1975) (suspending attorney for violating his oath as an attorney, but refusing restitution because, among other reasons, money damages "cannot constitutionally be determined in a disciplinary proceeding, in that to do so would deny the attorney the right to trial by jury"); *In re Disciplinary Proceedings Against Harman*, 403 N.W.2d 459, 460 (Wis. 1987) (reprimanding attorney publicly for unprofessional conduct but refusing restitution where monetary amounts had not been ascertained and would be disputed absent the attorney's agreement). *See also* Patricia Jean Lamkin, Annotation, *Power of Court to Order Restitution in Disciplinary Proceeding Against Attorney*, 75 A.L.R.3d 302 (1977) (setting forth the parameters of a court's power to order restitution).

⁵⁹ *See* SHELDON, *supra* note 32, at 623-27 (describing the remedies available under consumer protection laws).

⁶⁰ The author undertook an informal telephone survey of state bar disciplinary authorities in all 50 states in the summer of 2002. This survey yielded responses from 40 states regarding recent changes in the volume of complaints received. Ten states reported static numbers: Arizona, Delaware,

Florida, Massachusetts, Nebraska, Ohio, Pennsylvania, South Dakota, Texas, and Utah. Eleven states reported increasing numbers: Alabama, Colorado (dramatic increase in 1999, probably due to institution of more user friendly intake system), New Jersey, Virginia (increased over the last five years, but decreased a bit last year, so may be leveling off), Washington (although total number of complaints increased, number of complaints as a percentage of the number of attorneys hovered around 15% for the last decade, the 2000 year jumped slightly to 18%, but this was not deemed indicative of any significant trend), Connecticut (increasing over last five years but leveling off), Michigan (increasing slightly), Missouri, Montana (increasing as of 2000, but down somewhat in 2001), South Carolina (possibly due to change of rules and structure mid-1990s), Wisconsin (possibly due to institution of a more "user" friendly intake system). Seven states reported decreasing numbers: North Dakota (slight decrease recently but fluctuates from year to year), Georgia (probably due to better screening by new Client Assistance Program; no clear trend), Maine (decreasing to static), Maryland, New York (attributed in part to greater efficiency on the part of disciplinary agencies), Rhode Island (decreasing since 1993, possibly due to better screening of complaints), Tennessee (possibly due to implementation of a new consumer assistance program). Five states reported ambiguous trends: Minnesota (variable with possible significant increase in 2001), Mississippi (slight increase this year, but numbers had been down for past few years), North Carolina (with some higher than average years in the late 1990s, but a significant drop in 2000, possibly indicating a leveling off), Oregon (variable from year to year, with slight downward trend within past several years), Wyoming (variable from year to year with no clear trend, this year appearing to be an all time low, for example, with last year relatively high). Two states responded that their numbers were not available: California (disciplinary system overhauled dramatically in 1999 with backlog of 2,200 cases; comparison statistics not available) and Vermont (have instituted totally new program of bar discipline, so no comparable statistics available). *See also* ASIMOW, *supra* note 47, at 1341-42 (arguing the public's perception of the legal profession is largely shaped by the profession's depiction in popular culture and that current films have depicted the legal profession in a negative light; highlighting the shift from a professional model to a business model, billing improprieties, hardball litigation tactics and ethical improprieties). *See also* David Armstrong, *Disbarred Mass. Lawyers Skirt Discipline System Despite Sanctions, Many are Reinstated; Some Offend Again*, BOSTON GLOBE, Sept. 17, 2000, at A1, available at 2000 WL 3343172 (noting the propensity of many of the offenders to victimize those who are elderly); Lou Kilzer & Sue Lindsay, *The Probate Pit Busted System, Broken Lives*, ROCKY MTN NEWS, Apr. 7, 2001, at 21A, available at 2001 WL 7369135 (discussing examples of overreaching

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problem is not new. A case from 1972, *Columbus Bar Association v. Ramey*, is an instructive paradigm.⁶¹

Ramey, a licensed practitioner in Ohio, represented an elderly woman with a history of institutionalization for psychiatric problems.⁶² An ailing colleague, the client's recently deceased attorney, referred her to him. The colleague was responsible for securing the client's release from a mental hospital approximately and she retained him to help with her finances, despite having moved to Arkansas after her release.⁶³ The client trusted her former attorney and Ramey benefited from this—at least initially.

After her former attorney's death, the client traveled to Ohio and executed an irrevocable trust at Ramey's suggestion.⁶⁴ She named Ramey trustee and remainder beneficiary by reference to a simultaneously executed will, leaving everything to Ramey.⁶⁵ Ramey drafted both documents and advised the client that she could revoke both the trust and the will whenever she liked.⁶⁶ Language in the trust suggested, however, that Ramey's appointment as remainder beneficiary vested immediately and may survive revocation of the will.⁶⁷ In his account of the

and excessive attorneys' fees in the probate court system in cases involving elderly, incompetent clients); Mary Mitchell, *Man Losing Home Needs Our Humanity, Not Pity*, CHI. SUN-TIMES, Aug. 31, 2001, at 14, available at 2001 WL 7245374 (expressing outrage at aggressive collection of attorney's fees by 82 year old man's former attorney, resulting in loss of the client's home); *Legislature Needs to Act*, S. FLA. SUN-SENTINEL, Dec. 21, 2000, at 26A, available at 2000 WL 28997028 (discussing ambulance chasing and the deleterious effects on the elderly of fraudulent practices in connection with personal injury cases).

⁶¹ 290 N.E.2d 831 (Ohio 1972) (holding that attorney's conduct in assuming the role of trustee and beneficiary of trust and failing to fully disclose the potential legal significance of the instruments prepared constituted conduct contrary to standards prescribed by legal ethics canons).

⁶² *Id.* at 832.

⁶³ *Id.*

⁶⁴ *Id.* at 833.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Columbus Bar Ass'n v. Ramey*, 290 N.E.2d 831, 833 (Ohio 1972). The trust stated, "[u]pon the death of the grantor, the balance remaining in the

interview before the Ohio Board of Commissioners on Grievances and Discipline, Ramey admitted that the client was “trembling” when she told him she was apprehensive about possible recommitment to a mental hospital.⁶⁸ He acknowledged “spend[ing] several hours that afternoon trying to quiet her nerves.”⁶⁹

The client returned to Arkansas and consulted a local attorney regarding what had transpired in Ohio. She was “living in a state of near-poverty” and needed money to relocate.⁷⁰ The Arkansas attorney contacted Ramey, advised him of the client’s need, and requested an accounting and immediate delivery of the trust funds.⁷¹ In response, Ramey called the client, who refused to speak with him and referred him to the Arkansas attorney.⁷² No accounting was rendered and the trust funds were not delivered, whereupon the Arkansas lawyer filed for declaratory judgment in federal district court.⁷³ This resulted in nullification of both the trust and the will.⁷⁴ Ramey filed the requested accounting as part of his answer, which apparently revealed no mismanagement of the client’s funds.⁷⁵ Although counts of fraud and undue influence were raised, the court issued no specific finding as to these allegations.⁷⁶ The Columbus Bar Association initiated disciplinary proceedings against Ramey and he received a public reprimand for “creation of a conflict of interest and a failure to fully disclose the potential legal significance” of the documents he

trust, after caring for pets and covering other expenses, was to . . . pass to the legatee named in the will executed simultaneously with this agreement.” *Id.*

⁶⁸ *Id.* at 833.

⁶⁹ *Id.*

⁷⁰ *Id.* at 835.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Columbus Bar Ass’n v. Ramey, 290 N.E.2d 831, 835 (Ohio 1972).

⁷⁴ Columbus Bar Ass’n v. Ramey, 290 N.E.2d 831, 835 (Ohio 1972).

⁷⁵ *Id.* at 834 (indicating that Ramey entered an appearance in the case by mail and filed the requested accounting).

⁷⁶ *Id.* at 834 (“No specific finding was made as to the allegations of fraud and undue influence.”).

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prepared.⁷⁷ Ultimately, the client recovered only the money placed in the trust, with no compensation for the lost use of her funds or for the money expended to initiate the lawsuit.⁷⁸ In addition, Ramey was paid for drafting the objectionable documents and continued to receive a fee until the trust was nullified.⁷⁹

Given that both documents were nullified, it is difficult to discern any benefit that the client received from the services Ramey rendered. Although the situation seems to constitute malpractice under Ohio law,⁸⁰ the damages recoverable in a malpractice suit would be limited to those proximately caused by Ramey's breach.⁸¹ After repayment of the trust funds, this might be limited to reimbursement of the fees charged by the Arkansas lawyer and interest on the funds held in the trust. Because both the trust and will were effective, malpractice in this case would focus on Ramey's statement that the documents were revocable.⁸²

⁷⁷ *Id.* at 837.

⁷⁸ *Id.*

⁷⁹ *Id.* 836.

⁸⁰ For an example of Ohio case law examining a cause of action for malpractice, *see, e.g.*, *Krahn v. Kinney*, 538 N.E.2d 1058, 1060 (Ohio 1989). The elements to establish a cause of action for malpractice in Ohio are as follows: 1) existence of an attorney/client relationship giving rise to a duty; 2) breach of that duty; and 3) damages proximately caused by the breach. *Id.* Construing the element of proximate cause, Ohio requires only that the plaintiff show a "causal connection" between the alleged malpractice and the resulting injury to the plaintiff and not that the injury would not have been sustained "but for" the attorney's action. *Id.* *See also Vahlia v. Hall*, 674 N.E.2d 1164 (Ohio 1997) (stating that a standard of proof requiring a plaintiff to prove that, "but for" the defendant's negligence, the plaintiff would have prevailed in the underlying action effectively immunizes most negligent attorneys from liability); *Robinson v. Calig & Handleman*, 694 N.E.2d 557 (Ohio App. 1997) (reversing a trial court's holding that "but for" was the appropriate test for determining proximate cause in a legal malpractice action because the judgment was rendered before *Vahlia v. Hall*).

⁸¹ *See Harrell v. Crystal*, 611 N.E.2d 908, 916 (Ohio Ct. App. 1992) (holding that the "[t]he only thing recoverable are the damages that resulted from negligent advice").

⁸² *Columbus Bar Ass'n v. Ramey*, 290 N.E.2d 831, 833 (Ohio 1972).

Although the court did not address potential malpractice, the court found no actual mismanagement of the trust, implying that Ramey was entitled to payment for his professional services.⁸³ Accordingly, any damages for malpractice would have been limited to the client's inability to effectively revoke the documents without resorting to litigation. Furthermore, it appears that the one year statute of limitations would have barred any such cause of action.⁸⁴

On the other hand, if consumer protection laws applied to the practice of law, suit for rescission for unfair and deceptive practices would provide recovery of all fees paid and damages suffered, plus a potential award of treble damages if willful and knowing fraud were proven.⁸⁵ This result more closely approximates justice and is more likely to discourage such conduct than the mere slap on the wrist issued in *Ramey*.⁸⁶ In addition, the statute of limitations under Ohio law does not expire until two years after the event that constitutes the violation.⁸⁷

In contrast to the static volume of disciplinary complaints, the

⁸³ *Id.* at 836-37.

⁸⁴ OHIO REV. CODE ANN. § 2305.11(A) (Anderson1953). The client executed both trust and the will on June 21, 1969. *See Ramey*, 290 N.E.2d at 833. The client had copies of the trust document and the will in her possession as of August 19, 1969 and consulted an independent Arkansas attorney on September 4, 1969. *Id.* at 834. As of September 4, 1969, she knew or should have known that malpractice was committed. *Id.* at 834. The facts indicate that the client would not allow the Arkansas attorney to contact Ramey due to her fear that he would have her re-committed to a mental institution. *Id.* The Arkansas attorney was not able to make a formal demand until October 30, 1970, which was almost two months after the statute of limitations expired. *Id.*

⁸⁵ *See* OHIO REV. CODE ANN. §§1345.01-1345.13, 4165.01 to 4165.04 (West 2003).

⁸⁶ Columbus Bar Ass'n v. Ramey, 290 N.E.2d 831, 836 (Ohio 1972).

⁸⁷ OHIO REV. CODE ANN. § 1345.10 (West 2001). Recent case law suggests that Ohio courts would interpret any other possible applicable statute of limitations that might arise within the context of a consumer protection case in a manner favorable to the consumer plaintiff. *See Cattano v. High Touch Homes, Inc.*, 2002 WL 1290411 (Ohio App. 2002) (upholding a breach of contract claim and finding that the plaintiff had met the contract's statute of limitations clause where a homeowner's estate sued a modular home seller).

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number of attorney malpractice suits has increased dramatically over the past decade.⁸⁸ When the elderly are concerned, however, malpractice litigation often falls short of adequate relief.⁸⁹ Plaintiffs in malpractice actions must prove that an attorney's negligent or wrongful conduct proximately caused their loss.⁹⁰ Even in states where proof of causation need not meet the "but for" standard the threshold requirements of a duty of professional care and breach of that duty must be proven, which may

⁸⁸ See Anderson & Steele, *supra* note 50, at 235 ("The ever increasing number of lawsuits against lawyers over the past decade has resulted in increased thinking about the law of attorney malpractice and has resulted in dramatic changes and developments in the practice of law and in attitudes about law practice."); Jennifer BJORHUS, *Wronged Legal Clients Are Finding That Suits Work Both Ways*, SEATTLE TIMES, Dec. 19, 1995 at A1, available at 1995 WL 11228373 (documenting an increasing number of malpractice suits in Seattle and a twenty percent increase in legal malpractice cases in Oregon overall); Alice Lipowicz, *Firms Suit Up To Try Attorney Malpractice: Rebel Lawyers Build Hot New Specialty; Firms Pay Big For Mishandling Cases*, CRAIN'S N.Y. BUS., Nov. 3, 1997, at 14, available at 1997 WL 8254953 (noting multi-million dollar malpractice judgments or settlements against several elite law firms in the 1990s); Edward McDonough, *Lawsuits Against Lawyers Becoming More Common*, SALT LAKE TRIB., Feb. 4, 1996, at AA3 (describing the new trend toward holding transactional attorneys representing securities issuers liable for third party damages to stock purchasers); Stephen A. Moses, *Long-term Care Due Diligence For Professional Financial Advisors*, 14 J. FIN. PLAN. 158, 161 (2001), available at 2001 WL 12215378 (warning that attorneys unfamiliar with the nuances of long term care insurance for elderly clients risk negligence claims).

⁸⁹ See Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the 'Captured' Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 459 (2000) (claiming the lack of any significant legal malpractice tort reform is due to the conflicting interests of the very lawyers and legal academics responsible for creating legal practice standards).

⁹⁰ See Algiers Anderson, *supra* note 30, at 510 (noting that "[l]iability under any 'malpractice' theory must be premised on the following: the existence of a duty, which was breached by the lawyer and that breach was the proximate cause of the plaintiff's (client's) damage"); Anderson & Steele, *supra* note 50, at 253 (noting that "[t]o prevail in an action against an attorney for the tort of malpractice, a client must allege and prove . . . that but for the attorney's misconduct the client would not have suffered damage").

necessitate expert testimony.⁹¹ These hurdles are substantial and could preclude recovery.⁹²

Under most consumer protection acts, the plaintiff need only show that the defendant engaged in some act that is “unfair” and/or “deceptive” to the consumer, without requiring that the defendant acted with intent to defraud.⁹³ In addition, although punitive damages may be available in particularly outrageous malpractice cases, this generally requires proof of intentional wrong doing or “conscious indifference” and some courts require evidence of “ill will, malice or intent to cause injury” to support such an award.⁹⁴ In contrast, many state consumer protection statutes provide enhanced damages provisions in a broader panoply of situations.⁹⁵ Statutes of limitations may also be problematic, particularly if it is not clear whether the suit sounds

⁹¹ See Barry Brown & Scott Hyman, *Case-within-a-Case: Trap for the Unwary*, 3 LEGAL MALPRACTICE REP. 1, 2 (1992) (“The client [in an attorney malpractice lawsuit] must also prove the attorney failed to exercise ordinary skill and knowledge. Finally, the client must affirmatively establish the fact of actual damage, the extent of the damage, and that such damages are not remote, speculative, or uncertain.”).

⁹² See generally *id.* (discussing the difficulty of maintaining a successful malpractice action and noting that in order to prevail a plaintiff must address the legal and factual merits of the underlying as well as the present litigation).

⁹³ See Hetrick, *supra* note 27, at 331-32 (noting that malpractice actions against attorneys may include an “unfair trade practices” cause of action); SHELDON, *supra* note 32, at 120-22 (“The [FTC] definition of deception does not require intent; a practice is deceptive even if there is no intent to deceive”). Furthermore, “unless a state statute specifically provides otherwise, intent is not necessary under state UDAP statutes.” *Id.*

⁹⁴ Annotation, *Allowance of Punitive Damages in Action Against Attorneys for Malpractice*, 13 A.L.R. 4TH 95, 96 (1982) (noting that “courts have held that punitive damages were dependent upon evidence of an intentional wrong or a conscious indifference on the part of the attorney”).

⁹⁵ *Id.* at 34 (Supp. 1998); see also Debra D. Burke, *The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?*, 15 CAMPBELL L. REV. 223, 236-38 (1993) (stating that the North Carolina consumer protection law has been construed to apply “to a variety of activities which affect commerce”).

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in contract or tort.⁹⁶ The liberal interpretation of consumer protection laws is also generally absent from determinations of attorney malpractice.

III. BARRIERS TO APPLYING CONSUMER PROTECTION STATUTES TO THE PRACTICE OF LAW

There are three potential barriers to applying consumer protections to legal services: state constitutional separation of powers, statutory construction and policy considerations relating to the professional stature of attorneys. These, however, should not preclude consumer regulation of attorneys by state legislatures. A willing legislature can remove the barriers raised by statutory construction. Ultimately, applying consumer protection concepts to the practice of law hinges on assurances that professional autonomy and respect for the legal profession will not be compromised.

A. Separation of Powers

Critics argue that applying state consumer protection legislation to attorneys implicates the constitutional separation of powers.⁹⁷ This critique, however, fails to consider the disparate

⁹⁶ Anderson & Steele, *supra* note 50, at 259-61 (observing that statutes of limitation for contract actions generally do not begin to run until breach has occurred and then afford a longer period than statutes of limitation for tort actions). Anderson and Steele characterize attorney malfeasance as a breach of contract as opposed to malpractice, which may be advantageous from a statute of limitations point of view. *Id.* at 259.

⁹⁷ See Hetrick, *supra* note 27, at 333-34. The California Supreme Court has declared that it has the plenary and inherent power to control the admission, discipline and disbarment of attorneys. *Santa Clara County Counsel Attorneys Ass'n v. Woodside*, 869 P.2d 1142 (Cal. 1994) (resolving a direct confrontation between the courts and the State Bar Act by ruling that despite the Act, the courts rather than the Legislature, had the power to determine whether disqualified attorneys would be readmitted). Separation of powers doctrine arises as an inference from the structure of the federal government created by the Constitution and the value placed by the framers on

purposes of the judiciary's disciplinary function and the consumer protection legislation's redress function, which allows each to regulate attorney conduct without conflicting with the jurisdiction of the other.

The argument is grounded in the separation of powers among the three branches of government: executive, legislative and judicial. This balance prohibits any of the branches from usurping powers or functions assigned to the other branches.⁹⁸ Historically, courts regulate attorney conduct.⁹⁹ Because lawyer discipline is a function of the judicial branch, it is arguably unconstitutional for the legislative branch to pass laws regarding attorney conduct.

To date, only two states' supreme courts have addressed this issue.¹⁰⁰ Both upheld applying state consumer protection laws to attorneys under their respective state constitutions.¹⁰¹ In a case

the division of power among branches. Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General In Multistate Litigation*, 101 COLUM. L. REV. 1998, 2025 (2001).

⁹⁸ *Id.*; U.S. CONST. Art. I, § 1 (stating that all legislative powers shall be vested in a Congress); U.S. CONST. Art. II, § 1 cl. 1 (stating that the executive power shall be vested in a President); U.S. CONST. Art. III, § 1 (stating that the judicial power shall be vested in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

⁹⁹ Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 912 (1994) (describing three eras of lawyer discipline in the United States). Devlin writes, "[f]rom at least the time of . . . 1275, attorneys have been subject to the summary jurisdiction of the courts in which they practice for their professional conduct." *Id.* Over the centuries, attorney discipline has evolved to the point of creation of formal disciplinary boards or agencies, fully staffed with disciplinary counsel and having their own hearing officers to conduct and adjudicate initial disciplinary investigations and proceedings. *Id.* at 933. But in the final analysis, such agencies remain under the direction of and are subject to the judicial branch of government. *Id.*

¹⁰⁰ These states are Washington and Connecticut. See Hetrick, *supra* note 27, at 333-34.

¹⁰¹ See *Short v. Demopolis*, 691 P.2d 163, 170-71 (Wash. 1984) (holding that Washington's Consumer Protection Act "does not trench upon the constitutional powers of the court to regulate the practice of law."); *Heslin v.*

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from Washington, *Short v. Demopolis*, the defendant's attorneys sued for nonpayment of fees.¹⁰² The defendant denied liability and asserted affirmative defenses and counterclaims, including a violation of the state consumer protection act.¹⁰³ He also alleged misrepresentation of the identity of the attorneys who actually provided the legal services.¹⁰⁴ The attorneys asserted that application of the state consumer protection act to the practice of

Connecticut Law Clinic of Trantolo and Trantolo, 461 A.2d 938, 946-47 (Conn. 1983) (holding the Connecticut Unfair Trade Practices Act constitutionally applied to the practice of law in a case where the Commissioner of Consumer Protection initiated an investigation of several attorneys suspected of engaging in deceptive trade practices). The Supreme Court of Connecticut recently reaffirmed the general holding of *Heslin*. See *Suffield Dev. Assocs., Ltd. P'shp v. Nat'l Loan Investors, L.P.*, 802 A.2d 44, 52 (Conn. 2002) (citing *Heslin* for the proposition that "in general, CUTPA applies to the conduct of attorneys.").

A Delaware appellate court recently suggested in dicta in an unpublished opinion that applying the Delaware Consumer Fraud Act to the practice of law might be unconstitutional. See *Jamgochian v. Prousalis*, 2000 WL 1610750, *4-6 (Del. Super. Aug. 31, 2000) (holding that Delaware's Consumer Fraud Act did not apply to the practice of law based on statutory rather than constitutional grounds). The court rested its decision on statutory construction, but did discuss Delaware Constitution's delegation of powers concerning attorney regulation to the Delaware Supreme Court, the breadth of the court's regulatory activity, and the state's "Lawyer's Fund for Client Protection" as a mechanism for assuring that clients victimized by an attorney's fraudulent conduct receive adequate compensation. *Id.* at *4-5.

¹⁰² *Short*, 691 P.2d at 165.

¹⁰³ *Id.* The defendant alleged:

10 causes of action: (1) unfair and deceptive practices in violation of the Consumer Protection Act, RCW 19.86; (2) breach of contract; (3) violation of Code of Professional Responsibility DR 2-106 (excessive fees); (4) violation of CPR DR 6-101 (incompetence); (5) negligence and malpractice; (6) fiduciary duty violations; (7) misrepresentation; (8) violation of CPR DR 2-110 (threat to withdraw) causing mental distress; (9) reformation of contract; and (10) attorney fees assessment.

Id.

¹⁰⁴ *Id.* at 164-65.

law violated the separation of powers in the state constitution.¹⁰⁵

Considering this argument, the Washington Supreme Court first quoted the state constitution, which reads, “[t]he judicial power of the state shall be vested in a supreme court.”¹⁰⁶ The court then noted that, although the judicial branch was vested with “exclusive, inherent power to admit, enroll, discipline, and disbar attorneys,” the constitution did not limit the legislative power to enact laws that may affect and apply to attorneys provided it did not “purport to take away the court’s power to admit, suspend, or disbar.”¹⁰⁷ Applying the state consumer protection law to an attorney’s conduct did not interfere with the state court’s “power to regulate the practice of law” because the remedies provided by the statute did not affect the court’s distinct disciplinary power.¹⁰⁸ The court found that “entrepreneurial aspects of the practice of law” fell within the ambit of the Washington Consumer Protection Act’s definition of “trade or commerce” and did not violate the separation of powers.¹⁰⁹

In *Heslin v. Connecticut Law Clinic of Trantolo and Trantolo*, the Supreme Court of Connecticut addressed the Connecticut Commissioner of Consumer Protection’s attempt to obtain information from attorneys under investigation for possible violation of the state’s consumer protection laws.¹¹⁰ The defendant law firm was investigated for alleged “unfair or deceptive use of the terms ‘clinic’ and ‘law clinic,’” based on false statements concerning fees and a referral scheme that resulted in clients paying more than the advertised fee.¹¹¹ The

¹⁰⁵ *Id.* at 165. Specifically, the plaintiffs claimed “to regulate the legal profession through the CPA was an unconstitutional infringement on the power of the judiciary to regulate the practice of law.” *Id.*

¹⁰⁶ *Short v. Demopolis*, 691 P.2d 163, 169 (Wash. 1984), *citing* WASH. CONST. ART. 4, § 1 (2003).

¹⁰⁷ *Short*, 691 P.2d at 169.

¹⁰⁸ *Id.* at 170.

¹⁰⁹ *Id.* at 170-71. The court specifically declined to decide “whether the CPA applies to every aspect of the practice of law in this state.” *Id.*

¹¹⁰ 461 A.2d 938 (Conn. 1983).

¹¹¹ *Id.* at 939.

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defendant refused compliance with the Commissioner's investigative demand, claiming that such regulation was a violation of the separation of powers contained in the Connecticut Constitution.¹¹²

The *Heslin* court first noted that, in Connecticut, the constitutionality of legislative action is presumed and any challenge must establish invalidity "beyond reasonable doubt."¹¹³ The mere fact that legislative action "affects" the judicial branch is insufficient for invalidation so long as the power exercised is within the proper sphere of powers assigned to the legislature.¹¹⁴ Incidental overlap is not problematic—a statute is not unconstitutional unless the legislature usurped a power "which lies exclusively under the control of the courts" or constitutes "significant interference" with the judicial function.¹¹⁵ The defendants claimed that the conduct governed by the Connecticut Uniform Trade Practices Act (CUTPA) fell under the judiciary's

¹¹² *Id.* at 943; *see also* CONN. CONST. art. II ("the powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."); CONN. CONST. am. art. XVIII (2003). Connecticut's Constitution states:

Article second of the constitution is amended to read as follows: The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. The legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.

Id.

¹¹³ *See Heslin*, 461 A.2d at 939; *see also* *State v. Angel C.*, 715 A.2d 652, 659 (Conn. 1998) ("legislative enactments carry with them a strong presumption of constitutionality, and that a party challenging the constitutionality of a validly enacted statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt") (citations omitted).

¹¹⁴ *Heslin*, 461 A.2d at 939.

¹¹⁵ *Id.*

authority and was also exclusively vested “within judicial control.”¹¹⁶ The court disagreed, finding that the CUTPA was a “statute of general applicability,” so that the incidental congruence of the statute’s provisions with some specific disciplinary rules relating to the conduct of attorneys did not rise to the level of unconstitutional encroachment.¹¹⁷

To elucidate this conclusion, the court observed that the attorney disciplinary system and the consumer protection law serve different purposes.¹¹⁸ Attorneys have a virtually symbiotic relationship with the courts, functioning as “officers” and “commissioners” thereof, and are properly subjected to discipline and regulation by the judiciary.¹¹⁹ For the *Heslin* court, the policy behind the disciplinary system concerns the fitness to practice in the ambit of the judicial arena, with no focus on the competing rights or interests of private parties.¹²⁰ The court went so far as to say that “the judiciary’s disciplinary machinery contains no mechanism for recompensing those who are victims of attorney misconduct.”¹²¹

The *Heslin* court noted that the consumer protection law neither conflicts with nor eliminates any ethical or professional requirement to which attorneys are subject under the disciplinary code.¹²² According to the court, the remedies provided by consumer protection statutes are separate and distinct because they provide money damages, injunctive and equitable relief as opposed to disbarment, suspension and censure.¹²³ The court found that both attorney discipline codes and consumer protection

¹¹⁶ *Id.* at 944 (noting that the trial court had agreed with this view); *see generally* CONN. GEN. STAT. §§42-110a–42-110q (2003).

¹¹⁷ *Heslin v. Connecticut Law Clinic of Trantolo and Trantolo*, 461 A.2d 938, 945 (Conn. 1983).

¹¹⁸ *Id.* at 945-46.

¹¹⁹ *Id.* at 946.

¹²⁰ *Id.* at 945.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Heslin v. Connecticut Law Clinic of Trantolo and Trantolo*, 461 A.2d 938, 945 (Conn. 1983).

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statutes can be constitutionally applied to the practice of law.¹²⁴

In the two decades since *Heslin*, a number of state disciplinary schemes have included some sort of restitution as a condition for reinstatement or provided some sort of fund to compensate clients injured by attorney malfeasance.¹²⁵ Such

¹²⁴ *Id.* (“That CUTPA, a statute of general applicability, may overlap with disciplinary rules specific to attorney conduct does not render the statute unconstitutional.”). It should be noted here that, since *Heslin*, the Connecticut Supreme Court declined to extend coverage of the state’s consumer protection act to every aspect of the practice of law, finding that “only the entrepreneurial aspects of the practice of law are covered,” and that professional malpractice does not fall within the ambit of the consumer protection statute. *Suffield Dev. Assocs. Ltd. P’ship v. Nat. Loan Investors, L.P.*, 802 A.2d 44, 53 (Conn. 2002). In *Suffield*, the Connecticut Supreme Court found that an attorney’s allegedly intentional act in obtaining an execution against the plaintiff’s property in excess of the judgment amount related to the attorney’s professional representation of his client and was not covered by the consumer protection act. *Id.* at 53. Although the court conceded that the attorney’s conduct was an abuse of process, it declined to find that an attorney’s intent to profit from knowing misconduct justified categorizing the attorney’s behavior as “entrepreneurial,” as opposed to professional. *Id.* The public policy behind exempting negligent malpractice from coverage under consumer protection laws is the fear that imposition of such liability would “have a chilling effect on lawyers’ duty of robust representation.” *Id.* at 54. The idea is that an attorney should not be deterred from aggressively pursuing his client’s interests out of concern that he or she might be liable to the opposing party for an unfair or deceptive practice. *Id.* This is a legitimate concern, as attorneys should not have any competing considerations of personal liability that would compromise the paramount duty of loyalty to their clients. *Id.* It would seem to this author that this concern could as easily be addressed by limiting the definition of “consumer” or of a “consumer transaction” to exclude one identified as an “opposing party” in a legal matter.

¹²⁵ *See, e.g.*, CO. ST. LWYR. DISC. R. 251.29(c)(6) (2002) (requiring as a condition of reinstatement “a statement of restitution made as ordered to any persons and the Colorado Attorney’s Fund for Client Protection and the source and amount of funds used to make restitution”); D.C. BAR R. 11 § 16(f) (2002) (stating that the “Court shall enter an order of reinstatement, which may be conditioned upon the making of partial or complete restitution to persons harmed by the misconduct. . .”); MO BAR R. 5.28(b)(2) (2002) (requiring that any attorney who is reinstated must first give restitution to all

provisions, although laudatory, fall short of the full recovery and public consumer functions served by the compensatory and treble damages provisions of most consumer protection laws. Restitution, for example, cannot be independently enforced by the client and is contingent upon a suspended or disbarred attorney's desire to be reinstated.¹²⁶ Client reimbursement is also limited to the amount of compensation.¹²⁷ Although the rules of professional conduct are concerned with the attorney-client relationship, the private interests of clients are not the *raison d'être*. As the *Heslin* court stated, "the code's emphasis is consistently ethical and regulatory," and the rules do not really address the "pragmatic concerns of the public."¹²⁸ Pragmatic concerns are the lynchpin and focus of consumer protection law: "the prevention of injury to the consumer of legal services and redress to those injured by attorney misconduct."¹²⁹

injured persons).

¹²⁶ *Id.* Restitution is a condition for applying for reinstatement to a state's respective disciplinary board—a suspended attorney must file a petition with the respective board for an order if the attorney wishes to be reinstated to practice law. *Id.*

¹²⁷ *See, e.g.*, DEL. S.C.R. 66 (Oct. 2002) ("The purpose of the trust fund shall be to establish . . . the collective responsibility of the profession in respect to losses caused to the public by defalcations of members of the Bar, acting either as attorneys or as fiduciaries" . . . and the trustees "receive, hold, manage and distribute . . . the funds raised" at their discretion). The Lawyer's Fund for Client Protection established by the Delaware Supreme Court Rule 66 provides that payment of client claims out of the fund is purely discretionary and that no one has "any right in the trust fund as beneficiary or otherwise." *Id.* The regulations governing administration of the fund further provide that the trustees may decide to pay only a portion of a claim in their discretion and that payment on any one claim may not exceed ten percent of the fund balance existing at the time. *See*, REG. IV.3, Claims Against the Fund, Regulations of the Trustees of the Lawyer's Fund for Client Protection of the Bar of Delaware, *available at* <http://courts.state.de.us/lfcpr/rules/regs.pdf> (last visited Feb. 24, 2003).

¹²⁸ *Heslin v. Connecticut Law Clinic of Trantolo and Trantolo*, 461 A.2d 938, 945 (Conn. 1983).

¹²⁹ *Id.*

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B. Statutory Construction

In addition to potential constitutional challenges, applying consumer protection laws to the legal profession may present problems of statutory construction. For example, courts have struggled with the proper application of the terms “consumer,” “consumer transaction” and “trade and commerce.”¹³⁰ Additionally, at least four states’ consumer protection statutes include specific exemptions for attorneys as members of “learned professions”¹³¹ while other courts in other states may choose to

¹³⁰ Courts are split concerning inclusion of persons receiving attorney services within the definition of “consumer.” *See, e.g.*, *Sears Roebuck & Co. v. Goldstone & Sudalter*, 128 F.3d 10 (1st Cir. 1997) (applying Massachusetts law to find a violation of Massachusetts’ consumer protection statute when attorneys billed clients in a manner that was in breach of their contract); *Banks v. D.C. Dept. of Consumer Regulatory Affairs*, 634 A.2d 433 (D.C. App. 1993) (applying consumer protection procedures act to nonlawyers who claimed to practice law by finding that their performance of legal services was trade practice); *Rousseau v. Eshleman*, 519 A.2d 243 (N.H. 1986), *recon. denied*, 529 A.2d 862 (N.H. 1987) (prohibiting application of the trade or commerce standard to attorney); *Vort v. Hollander*, 607 A.2d 1339 (N.J. Super. Ct. App. Div. 1992), *cert. denied*, 617 A.2d 1221 (N.J. 1992) (holding that attorney’s malpractice did not fall within the meaning of the consumer fraud act); *Roach v. Mead*, 722 P.2d 1229 (Or. 1986) (denying recovery under provisions of Unlawful Trade Practices Act for legal services rendered by attorney’s partner). *See also* SHELDON, *supra* note 32, at 14-16 (enumerating and categorizing transactions as for or not for consumer purposes); Michelle J. Evans, Annotation, *Who is a “Consumer” Entitled to Protection of State Deceptive Trade Practice and Consumer Protection Acts*, 63 A.L.R. 5th 1, 83-90 (1998) (distinguishing consumer protection cases that did and those that did not grant consumer status to the parties).

¹³¹ Maryland and Ohio have specific attorney exemptions. *See supra* note 40 (citing to statutes and quoting statutory language). North Carolina and Texas have “learned professional” exemptions. N.C. GEN. STAT. ANN § 75-1.1(b) (1999 & Supp. 2000) (defining “commerce” as not including professional services rendered by a member of a learned profession); TEX. BUS. & COM. CODE ANN. §17.49(c) (West 1987 & Supp. 2002) (exempting application of the statute to the rendering of professional services). The Texas exemption applies to the attorney’s “professional skill” defined as “providing of advice, judgment or opinion.” The statute expressly allows consumers to proceed under the Texas Consumer Protection Act in cases involving

infer such an exemption.¹³² These difficulties, however, do not necessarily prohibit attorney regulation under consumer protection laws.

The Supreme Court of New Hampshire interpreted its consumer protection law to exempt the legal profession. It found that New Hampshire's consumer protection act, although "comprehensive," did not exempt any "[t]rade or commerce otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of this state or of the United States."¹³³ The court noted that this would exempt doctors, electricians and plumbers from application of the consumer protection law as they are under the jurisdiction of regulatory boards.¹³⁴ The court also found that the state judiciary's "professional conduct committee" constituted a "regulatory board acting under statutory authority" of the state, thus exempting the practice of law from coverage by the statute.¹³⁵

misrepresentation of material fact, unconscionable acts, breach of warranty, etc. See TEX. BUS. & COM. CODE ANN. § 17.49(c) & (c)(1)-(4) (West 1987 & Supp. 2002).

¹³² In states without specific exemptions, courts may also limit application of consumer protection statutes and imply an exemption for those in the "learned professions," which historically included medicine, theology and the law. See, e.g., *Jamgochian v. Prousalis*, 2000 WL 1610750 (Del. Super. 2000); *Vort v. Hollander*, 607 A.2d 1339 (N.J. Super. Ct. App. Div. 1992), cert denied 617 A.2d 1221 (N.J. 1992). See also *Burke*, supra note 95, at 224. Learned professions are those "characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place." *Id.* at 242-43.

¹³³ *Rousseau v. Eshleman*, 519 A.2d 243, 245 (N.H. 1986), citing N.H. REV. STAT. ANN. § 358-A:3.

¹³⁴ *Rousseau*, 519 A.2d. at 245.

¹³⁵ *Id.* Recent case law upheld the *Rousseau* majority's reading of the exemption. See *Colonial Imports Corp v. Volvo Cars of North America*, 2001 WL 274808 (D. N.H. 2001) (following *Rousseau* and applying the principle to the commercial relationship of motor vehicle dealers to distributors or manufacturers); *Averill v. Cox*, 761 A.2d 1083 (N.H. 2000) (holding that the practice of law falls within the scope of the exemption in the state's consumer protection statute).

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A well-reasoned dissent objected to the majority's characterization of the professional conduct committee as a "regulatory board," pointing out that the statutory language contemplated boards created pursuant to legislative authority, while the professional conduct committee was created pursuant to the judiciary's "inherent" constitutional power to govern the conduct of attorneys and the practice of law.¹³⁶ The dissent argued that the judiciary, as a "separate, independent branch of government" is not "acting under statutory authority of this state."¹³⁷ Thus, the dissent concluded, the exemption should not extend to the practice of law as a matter of clear statutory construction.¹³⁸ Although the dissent's narrow reading did not prevail, it represents a viable alternative that courts could employ.

C. Policy Considerations

Critics have argued that because the legal profession requires practitioners to exercise discretion and adhere to codes of ethics, it is a learned profession and therefore properly set apart from

¹³⁶ *Rousseau*, 519 A.2d at 246-47.

¹³⁷ *Id.*

¹³⁸ *Id.* See, also, *Gilmore v. Bradgate Associates, Inc.*, 604 A.2d 555, 557 (N.H. 1992) (using principles of statutory construction to find that "neither the legislature nor the *Rousseau* court could have intended to exclude from the protection of the act the large number of industries which are subject to regulation in this State simply because the legislature has provided for regulation of that industry within a statutory framework"). *Gilmore*, which suggested that *Rousseau* might be overruled, was overruled. See *Averill v. Cox*, 761 A.2d 1083, 1087 (N.H. 2000). The *Averill* court noted:

the *Gilmore* court limited the reach of the statutory exemption to actions that are expressly permitted by a regulatory board or office . . . This reasoning produces a troubling result because it is difficult to envision any commercial transaction which is prohibited by the Consumer Protection Act but expressly permitted by a statutorily authorized regulatory body.

Id.

other types of businesses subject to consumer protection laws.¹³⁹ Upon thorough analysis, however, it is clear that the application of consumer protections to legal services does not threaten the legal profession's status as a learned profession.

Professor Debra Burke has noted that, historically, the law was included among the "learned professions."¹⁴⁰ By definition, a learned profession contemplates exceptional education as a criteria for practice, the repositing of confidence and trust between practitioners and their clientele, adherence to ethical standards far superior to those expected of tradesmen or merchants, and services rendered which require the exercise of professional judgment and tailored to the individual goals and circumstances of each client.¹⁴¹ In the case of the profession of law, there is an additional societal responsibility to promote justice as an officer of the court, even when this runs counter to the desires of a particular client.¹⁴² In these ways, the legal

¹³⁹ See, e.g., Shelley D. Gatlin, Note, *Attorney Liability Under the Deceptive Trade Practices Acts*, 15 REV. LITIG. 397, 412 (1996) (arguing that strict liability as against lawyers is inconsistent with the service of providing professional judgment). The designation of the legal profession as a "learned profession" was rejected by the Supreme Court as a justification for automatic inapplicability of consumer protection laws in 1975. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (stating, "[t]he nature of an occupation [as a learned profession], standing alone, does not provide sanctuary from the Sherman Act."), cited in Gatlin *supra*, at 402.

¹⁴⁰ Burke, *supra* note 95, at 242.

¹⁴¹ See generally ANTHONY T. KRONMAN, *THE LOST LAWYER* 353-75 (1993) (comparing a lawyer to a classical statesman); ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953) (noting that certain professions, including the legal profession, are learned arts in pursuit of public service); Louis L. Hill, *Solicitation By Lawyers: Piercing the First Amendment Veil*, 42 ME. L. REV. 369, 376-80 (1990) (tracing the development of the law as a learned profession from the medieval period to colonial America).

¹⁴² CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 17-19, 688-89 (1986) (noting that lawyers have a duty, for example, of "candor" in representations made to a court and to counsel clients in nonlitigation contexts to behave in a just fashion); William F. Harvey, *MDP Versus the Legal Profession*, 44 RES GESTAE 24, 29-31 (2000) (urging caution in regarding "learned professions" as beyond regulation in light of recent trends toward

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profession is qualitatively different from such service occupations as plumbing, real estate or home repair contracting.

1. *The Reputation of the Profession*

Some argue that subjecting the practice of law to consumer law standards implies that legal services are analogous to mass produced commodities that can be bought and sold without individual assessment and evaluation.¹⁴³ This implication undermines professional autonomy and fosters the idea that many lay people may already have—that the practice of law can be reduced to filling in blanks on standardized forms and can be marketed to the public with minimal instructions.¹⁴⁴ The issue is whether such a devaluation of the practice of law ineluctably results from subjecting the profession to application of consumer protection laws. Although form books may be popular, thoughtful people realize that they are no substitute for an attorney's advice, just as they would not substitute a book on home remedies for a doctor's examination. If anything, applying

multidisciplinary practice). This caution is especially compelling in light of recent events concerning unethical, and even illegal, activity at accounting firms.

¹⁴³ See William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49 (2002) (arguing that the regulation of lawyer advertising demeans a valuable tool for client development to the point of calling into question its morality); Bob Rouder, *Mediating The Professional Paradox: An Application of the Aggregate Idiot Phenomenon*, 80 TEX. L. REV. 671, 682-83 (2002) (characterizing professional regulation as penalizing individuals who are nothing worse than imperfect human beings). *But see* Mylene Brooks, *Lawyer Advertising: Is There Really a Problem?*, 22 LOY. L.A. ENT. L.J. 1, 29 (1994) (arguing that more consumer regulation than what is typical for commercial services is unnecessary as legal services are already a commodity).

¹⁴⁴ See Nancy Pasternack, *Self-help Legal Work a Growing Practice*, OLYMPIAN, March 3, 2003, at A1 available at 2003 WL 11262360. See also W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 39 (1984) (asserting that courts' analyses of form contracts is cursory).

consumer law protections to the practice of law could serve to educate the public on the importance of a high level of competence and professionalism associated with legal practice.

2. *Professional Discretion*

It could also be argued that subjecting the legal profession to scrutiny beyond an expectation of a minimal level of competence would chill professional judgment.¹⁴⁵ This concern, however, is misplaced. Such claims misapprehend the focus of current state consumer protection laws, which are principally directed at “unfair and deceptive practices.”¹⁴⁶ Additionally, the burden of proof is high and a client would be required to demonstrate that his or her attorney engaged in such behavior either negligently or knowingly.¹⁴⁷

Some courts have articulated a dichotomy between the “entrepreneurial” aspects of the practice of law, to which consumer protection law may be applied, and “professional”

¹⁴⁵ See David J. Webster, *Rule 11: Has the Objective Standard Transgressed the Adversary System?*, 38 CASE W. RES. 279, 311-12 (1987); Lorraine Wright Feuerstein, *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 PEPP. L. REV. 125, 134-36 (1995) (discussing and describing Rule 11’s potential and ability to chill exercise of professional judgment when litigating).

¹⁴⁶ See SHELDON, *supra* note 32, at 1. Sheldon notes that state statutes regarding unfair or deceptive acts and practices (UDAPs) often echo the concepts of deception and unfairness set forth in the FTCA, but, unlike the federal statute, state laws provide consumers with a private right of action. *Id.* State provisions, therefore, accomplish the same goals of punishing and deterring merchant misconduct as envisioned by the federal act, but achieve those goals through private litigation, which may make state UDAPs especially attractive tools for consumer protection. *Id.* He also points out that these statutes are remedial in nature, allowing consumers to challenge new practices and ensure that the law keeps up with the ever-changing marketplace and novel forms of consumer abuse. *Id.* at 91.

¹⁴⁷ See Uniform Deceptive Trade Practices Act, 7A U.L.A. §§ 2 (a)(9), (10) (1984 & Supp. 1993) (requiring proof of intent to show that one engaged in a deceptive trade practice).

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aspects of practice, which are beyond application.¹⁴⁸ In so doing, the courts seek to clearly demarcate between those facets of legal practice that are commercial in nature and those that are not. For example, the courts have classified such activities as billing and advertising as entrepreneurial, whereas decisions requiring a legal education are not, inasmuch as they implicate the “competence and strategy of the lawyer.”¹⁴⁹

Although billing and advertising are areas where consumer protection is necessary, the greatest harm to clients arises from misrepresentations and exploitative practices connected with the actual provision of legal services. The example provided in

¹⁴⁸ See *Gadson v. Newman*, 807 F. Supp. 1412, 1415-18 (C.D. Ill. 1992) (denying defendant hospital and psychiatrist motion to dismiss Illinois Consumer Fraud Act and conspiracy to commit consumer fraud counts). In *Gadson*, the court determined that the underlying rationale for this distinction is that the practice of law is already highly regulated by professional organizations. *Id.* at 1417. However, the court suggested other tasks that may also be part of an attorney’s legal practice, such as setting a fee schedule, are more closely tied to the business aspect of the profession. *Id.* These aspects of a legal practice are subject to statutory regulation as they would be in other commercial enterprises. *Id.* See also *Reed v. Allison & Perrone*, 376 So. 2d 1067, 1068-69 (La. Ct. App. 1979) (finding that attorneys could be held liable under the state’s consumer protection act for unfair and deceptive advertising in certain circumstances); *Matthews v. Berryman*, 637 P.2d 822 (Mont. 1981).

¹⁴⁹ See, e.g., *Kessler v. Loftus*, 994 F. Supp. 240 (D. Vt. 1997) (excluding as opinion and professional judgment attorney’s assertion that a mortgage would be adequate security for plaintiff’s property settlement opinion and finding Vermont’s Consumer Fraud Act inapplicable); *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin*, 717 A.2d 724 (Conn. 1998) (holding that professional negligence was not covered by the state’s Unfair Trade Practices Act); *Short v. Demopolis*, 691 P.2d 163, 168 (Wash. 1984) (finding state consumer protection law applicable to the entrepreneurial aspects of defendant’s law practice, such as determination of, billing and collection of legal fees, but upholding dismissal of claims related to attorney’s competence and strategic decisions). See also *Eriks v. Denver*, 824 P.2d 1207, 1214 (Wash. 1992) (citing *Short* and finding the concealment of concurrent representation of clients was entrepreneurial in nature, subject to the consumer protection act).

Columbus Bar Association v. Ramey is illustrative.¹⁵⁰ In that case, the attorney's wrongdoing involved misuse of professional judgment that created a conflict between his client and himself, and a potential economic windfall at his client's expense.¹⁵¹ Restricting coverage of consumer protection laws to the entrepreneurial aspects of law would allow such an attorney to escape liability for blatantly wrongful conduct.

The most compelling argument against applying consumer protection concepts to the practice of law is the possibility that such application could impose strict liability on the lawyer for any marketing, selling, distribution or provision of legal services.¹⁵² Because liability can attach under many state consumer protection statutes without proof that the defendant knowingly or intentionally engaged in unfair or deceptive conduct, concerns have been raised that attorneys risk strict liability if consumer protection laws are applied to legal practice.¹⁵³ The fear is that, under consumer protection law, an attorney could be liable for unintentional error in the exercise of professional judgment.¹⁵⁴ However, given that the legal profession already adheres to higher ethical and professional

¹⁵⁰ 290 N.E.2d 831 (Ohio 1972).

¹⁵¹ *Id.* at 836-37.

¹⁵² Gatlin, *supra* note 139, at 409-12 (noting that strict liability, as opposed to a fault standard, gives attorneys less leeway in exercising their professional judgment when pursuing legal strategies because attorneys are forced to become guarantors of their opinions and decisions and can be accountable for careful, well reasoned, albeit incorrect decisions). *See also* Rousseau v. Eshleman, 519 A.2d 243, 249-50 (N.H. 1986) (Johnson, J., dissenting) ("Attorneys never have been required to insure the correctness of their opinions, and any policy of strict liability would make it virtually impossible for the attorney to function in the traditional role of legal counselor."). Justice Johnson articulated in his dissent that any of an attorney's activities which constitute the "actual practice of law," requiring the professional judgment of an attorney based upon his or her legal knowledge and skill, should be exempt from the consumer protection act. *Id.* at 250.

¹⁵³ SHELDON, *supra* note 32, at 120-24; *see also* Gatlin, *supra* note 139, at 412.

¹⁵⁴ *See* Gatlin, *supra* note 139, at 412 (noting that "even a carefully executed opinion has the potential to deceive if incorrect.").

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standards than imposed by the marketplace, applying consumer protection law would not necessarily undermine the practice of an attorney that abides by those lofty standards.¹⁵⁵

Examining consumer protection case law demonstrates that defendants have attempted to claim lack of knowledge or intent in order to shield against accountability for misrepresentations made without knowledge of truth or falsity.¹⁵⁶ These defendants' suggestion that carelessness equates with a lack of culpability is rejected by the courts in instances of is unfairness and deception to the consumer.¹⁵⁷

¹⁵⁵ The most important duties recognized by attorney ethical codes are those obligations owed to clients. Allen Blumenthal, *Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession*, 3 KAN. J.L. & PUB. POL'Y 6 (1994) (arguing that this emphasis on the client is at the expense of an emphasis on important duties to the court, adversaries and third parties).

¹⁵⁶ See, e.g., *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 929 (1st Cir. 1985) (involving liability for misrepresentations by defendant shoe company to the effect that it was "going public" with its stock, thereby inducing plaintiff creditor to release the guarantor for defendant's debts); *In re Andrews*, 78 B.R. 78, 83 (Bankr. E.D. Pa. 1987) (holding that the imposition of excess late fees by a mortgage company not authorized by contract was unfair and deceptive notwithstanding the lack of actual fraud or willful misrepresentation); *Falcon Associates, Inc. v. Cox*, 699 N.E.2d 203 (Ill. App. Ct. 1998) (involving misrepresentation by builder of amount of insulation provided in homes and the quality of the home built as compared to the display model), *app. den.*, 707 N.E.2d 1239 (Ill. 1999); *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 365 (N.J. 1997) (holding real estate brokerage firm liable for affirmative misrepresentation of its agent concerning quality of workmanship performed by builders of defective new homes, even in the absence of actual knowledge of the falsity); *Williams v. Trail Dust Steak House, Inc.*, 727 S.W.2d 812 (Tex. Ct. App. 1987) (holding that a sale of a defective motor home may be deemed unconscionable under Texas consumer protection law if consumer could show that he was "taken advantage of to a grossly unfair degree" whether or not defendant acted with intent, knowledge or conscious indifference); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531 (Wash. 1986) (holding that title insurance company's failure to advise borrowers of tax consequences when preparing deed is not unfair or deceptive).

¹⁵⁷ See *supra* note 156 (setting forth case law wherein defendants attempted to avoid liability by claiming lack of knowledge or intent).

A case decided by the North Carolina Court of Appeals, *Torrance v. AS & L Motors*, is illustrative.¹⁵⁸ The plaintiff, a purchaser of a used automobile, inquired whether the car had ever been involved in an accident; the salesperson responded that it “had never been involved in an auto accident.”¹⁵⁹ The plaintiff relied on this affirmative assertion and purchased the car for \$13,000.¹⁶⁰ Three weeks later, she found specks of paint on the windshield that suggested the car was wrecked and repainted.¹⁶¹ The plaintiff took the car to a mechanic, who, upon inspecting the vehicle, determined that the car had “been substantially damaged on its right side and that it would cost approximately \$2,500 to satisfactorily repair.”¹⁶² The seller maintained that although the salesperson’s statement was untrue, it should not be characterized as unfair and deceptive because the salesperson believed the statement was true.¹⁶³ The court rightly found that the salesperson’s subjective belief as to the truth or falsity was not the issue.¹⁶⁴ The salesperson misled the buyer by representing that he *knew* the car had not been in an accident when he did not have this knowledge, and was liable for committing an unfair and deceptive act.¹⁶⁵ The salesperson in this case could have avoided liability by telling the buyer, honestly, that he did not know the car’s history. This truthful response would have empowered the buyer and avoided liability.¹⁶⁶

¹⁵⁸ 459 S.E.2d 67 (N.C. App. 1995), *review denied*, 461 S.E.2d 768 (N.C. 1995) (admitting into evidence a vendor’s statements that would be ordinarily be barred under the parol evidence rule to support a deceptive practice claim but reversing an award of attorney’s fees because the statement was not willful, frivolous or malicious).

¹⁵⁹ *Torrance v. AS & L Motors*, 459 S.E.2d 67, 68 (N.C. App. 1995).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 68-69.

¹⁶³ *Id.* at 69-70.

¹⁶⁴ *Id.* at 70.

¹⁶⁵ *Torrance v. AS & L Motors*, 459 S.E.2d 67, 70 (N.C. App. 1995).

¹⁶⁶ *Id.* (noting that the buyer could have chosen whether to have the car inspected before purchasing, since the car was being sold “as is,” or assumed the risk and purchased without obtaining any further information). Although

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Menuskin v. Williams, involving negligent misrepresentation by a real estate title company, demonstrates the same principle in a legal context.¹⁶⁷ In *Menuskin*, a title company's attorney drafted a warranty deed stating that land was free and clear of any encumbrance when, in fact, a developer had an outstanding construction lien on the property.¹⁶⁸ In his defense, the attorney claimed that he had relied on assertions of the seller that the title was clear, and that he was not instructed to perform a title search.¹⁶⁹ The plaintiffs relied on the representation of clear title and bought the property.¹⁷⁰ The lien holder contacted the plaintiffs a year later, after the developer declared bankruptcy, and advised them that the property would be foreclosed upon unless the purchasers made arrangements to "repurchase" their homes.¹⁷¹ As in *Torrance*, the defendant manifested belief in a statement without knowing whether or not it was true.¹⁷² Despite lack of knowledge and intent, the conduct was deemed actionable by the court under Tennessee's consumer protection law because the attorney's misrepresentations constituted an unfair and deceptive practice resulting in harm to the purchasers.¹⁷³ Again, the attorney could have easily avoided liability by disclosing that he did not know whether the title was clear because no title

the court found that the seller violated the state's consumer protection act, it acknowledged the salesman's "good faith" and reversed the lower court's award of attorney's fees to the plaintiff because nothing in the record suggested that the defendant "willfully engaged in a deceptive act or practice." *Id.*

¹⁶⁷ 145 F.3d 755 (6th Cir. 1998) (holding title company and attorney liable for negligent misrepresentation of existing encumbrances on property purchased by the plaintiffs).

¹⁶⁸ *Menuskin v. Williams*, 145 F.3d 755, 761 (6th Cir. 1998).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See Torrance*, 459 S.E.2d 67, 69-70 (N.C. App. 1995).

¹⁷³ *Menuskin*, 145 F.3d at 767-68, *citing* TENN. CODE ANN. §§ 47-18-101. The court did note that treble damages would have been inappropriate under the facts alleged, as there was no allegation of willful or knowing violation of the state consumer protection act. *Id.*

search was performed. In this way, the plaintiffs would not have had the false impression that a title search was performed.¹⁷⁴

Thus, although attorneys are not “insurers of the correctness of their opinions,”¹⁷⁵ an attorney can easily avoid allegations of deception by disclosing to the client that the law is unsettled and an attorney’s opinion is simply that—an opinion, and not a guarantee. In any event, an attorney providing an opinion regarding an unsettled area without such a disclosure arguably falls below the standards of due care. An attorney knows or should know that a client will rely on an opinion to their potential detriment, a risk that is increased if the area of law is in flux.¹⁷⁶

This is not to suggest that there is no room for sympathy for an attorney, particularly one that is young, inexperienced or eager to predict optimistic outcomes. The bottom line, however, is that some conduct falls below the standards of independent professional judgment attorneys are expected to exercise. If harm results, particularly to clients who are elderly and vulnerable, attorneys should be accountable for paying the cost. Of course, no one is immune from an occasional lapse. No ethical attorney, however, should engage in the sort of nefarious practices described in this article, or conduct approaching an “unfair and deceptive” act. Conscientious attorneys need not fear incurring liability due to application of the standards of consumer protection law.¹⁷⁷ Thus, such protection would penalize only

¹⁷⁴ *Menuskin v. Williams*, 145 F.3d 755, 763 (6th Cir. 1998) (stating that “[b]y including the National Title logo on the documents delivered to the appellants, [the defendants] may have given the appellants the false impression that they had performed a title search.”). In the author’s experience, disclaimer or disclosure statements are now routinely displayed on deeds in Tennessee where no title work has been performed, apparently as an outgrowth of the holding in this case.

¹⁷⁵ *Gatlin*, *supra* note 139, at 412 (“Strict liability applied to the practice of law under DTPAs overturns the judicially established axiom that attorneys are not insurers of the correctness of their opinions.”).

¹⁷⁶ See MODEL RULES OF PROF’L CONDUCT R 2.1 cmt. n.1 (2002). (requiring that a lawyer provide an honest assessment of a situation regardless of how unpalatable it may be to the client).

¹⁷⁷ See *supra* note 60 (listing results of survey of state bar disciplinary

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those whose standards of practice fall grossly below the norm—those who cannot, in good faith, characterize their conduct as within the realm of permissible professional discretion.¹⁷⁸

authorities by state as to the volume of complaints compared to several years prior with no definite trend identified). The cases involving attorneys and legal practice are especially instructive. In *Thomas J. Sibley, P.C v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, the law firm's malpractice carrier attempted to avoid defending the firm in a lawsuit filed by an injured third party raising a consumer protection claim. 921 F. Supp. 1526, 1528 (E.D. Tex. 1996). The malpractice policy excluded coverage for any claim "arising out of any dishonest, fraudulent or malicious act, error or omission" of the insured. *Id.* at 1530. The court found that under the Louisiana Unfair Trade Practices Act, the plaintiff would not have to establish dishonesty, fraud or malice on the part of the firm to prevail, so the policy exclusion would not apply. *Id.* at 1532. However, the court did note that in order to show that the firm engaged in unfair trade practices, the plaintiff would have to show the firm had committed acts that "offend public policy, are immoral, unethical, oppressive and unscrupulous." *Id.* at 1531.

Similarly, in *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.* a title insurance company acting as escrow agent failed to advise borrowers of tax consequences when, as a condition of receiving a loan, the insurance company transferred property from the borrower's business to the borrower personally. 719 P.2d 531 (Wash. 1986). Because there was no duty on the part of the title company to provide such advice, the court found that the failure to provide any advice at all was not unfair and deceptive, particularly since there was no way the transfer tax could have been avoided if the borrowers wanted to obtain the loan. *Id.* at 535-36. On the other hand, had the escrow agent made an affirmative representation that the transaction contained no tax consequences, it is possible the result might have been different. *Id.* at 539-40.

¹⁷⁸ See *Cripe v. Leiter*, 703 N.E.2d 100, 108 (Ill. 1998) (Harrison, J., dissenting). As Judge Harrison stated in dissent:

[h]olding attorneys to the same standards of honesty and fair dealing that apply to other business people will inevitably affect the practice of law. In my view, the results can only be positive The conduct alleged in this case, if proven, would not be permissible under the rules of our court. Although the attorneys involved might ultimately be subject to discipline, that is no reason to deny plaintiff her right to bring a statutory damage action against them. If what the attorneys did constituted a crime, we would surely not say that they are exempt from prosecution merely because they are subject to disbarment by us. The same principle applies here.

IV. APPLICATION TO ELDERS ONLY

The foregoing discussion illustrates that including legal services within the ambit of activities governed by consumer protection law presents no inherent constitutional problem, nor would such inclusion threaten the legal profession's status as a learned profession.¹⁷⁹ Nonetheless, this article does not advocate expanding consumer protection statutes to encompass the entirety of legal practice.¹⁸⁰ Rather, this article focuses on the efficacy of applying consumer protection legislation to legal practices affecting the elderly. Indeed, several state consumer protection statutes already contain special provisions protecting the elderly.¹⁸¹ Analysis of states' consumer protection statutes reveals that, although barriers exist, willful courts or legislatures can remove them. Exemptions provided to the legal profession are largely definitional in nature or derived from construction of existing statutory language. Therefore, if it is desirable to include attorney services under consumer protection statutes where elderly clients are likely to be impacted, state statutes can be amended.

The fact is, elders remain vulnerable.¹⁸² Many of the elderly

Id.

¹⁷⁹ See *supra* Part III.A (addressing separation of powers concerns), III.C (addressing the argument that special treatment is needed in order to protect professional judgment).

¹⁸⁰ The author does suggest, however, that doing so would not be inconsistent with the ethics of the legal profession.

¹⁸¹ See *supra* note 35 (noting that California, Arkansas, Florida, Georgia, Indiana, Iowa, Nevada, Tennessee, and Wisconsin have all enacted statutes that allow private remedies and/or increased damages where elderly customers are injured by unfair or deceptive commercial practices).

¹⁸² Consumer studies indicate that elders often have less knowledge about the products or services they are offered and are more trusting of those who offer them. See James Depriest, *Protecting the Vulnerable Elder Consumer*, 35 AR. LAWYER 18, 19 (2000). Elders are also primary targets for financial schemes because "approximately seventy five percent of all funds deposited in financial institutions are controlled by persons age sixty five and older." Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 205 (2000). Examples of elderly vulnerability abound. For example, "[a]

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are isolated, living alone without anyone they can trust to discuss decisions concerning financial and legal matters.¹⁸³ Many also suffer from physical ailments making it difficult to concentrate on complex legal and financial matters.¹⁸⁴ Approximately two million Americans aged 65 and above have Alzheimer's disease, which greatly affects cognitive abilities.¹⁸⁵ Isolation and physical

women in Kentucky pays \$3,400 for improvement to her house that were never made; she then pays an additional \$1,260 to a nonexistent company on a "lien" for the cost of materials for the improvements." Starnes, *supra* note 3, at 201-02. "[a] man suffering from bladder cancer refuses to see a doctor because health store clerks told him that a combination of herbal remedies would prevent the cancer from living in his body." *Id.* at 202. An elderly couple becomes ill and must move closer to their son and as a result loses \$8,000 spent for prepaid funerals and burial plots when the funeral chain refuses to transfer the plans to a funeral home in their new location. *See Final Arrangement*, CONSUMER REPORTS, May 2001 at 28.

¹⁸³ Lori A. Stiegel, *Financial Abuse of the Elderly: Risk Factors, Screening Techniques, and Remedies*, BIFOCAL, Summer 2002, at 1 (citing to a dependent relationship, frailty or impairment, and social isolation as the factors most common to financial exploitation of the elderly).

¹⁸⁴ THOMAS P. GALLANIS, ET AL. , ELDER LAW 3-4 (2000) (stating that "as more people live to the oldest ages, there may also be more who face chronic, limiting illnesses or conditions, such as arthritis, diabetes, osteoporosis, and senile dementia. These conditions result in people becoming dependent on others for help in performing the activities of daily living."). *See also A Profile of Older Americans: 2002: Health, Health Care and Disability*, ADMINISTRATION ON AGING, available at <http://www.aoa.gov/aoa/stats/profile /12.html> (last visited May 1, 2003). According to the Administration on Aging:

[i]n 2000, 27% of older persons assessed their health as fair or poor. . . . Limitations on activities because of chronic conditions increase with age. . . . In 1997, more than half of the older population (54.5%) reported having at least one disability of some type. . . . 6.9 million (21.6%) reported difficulties with instrumental activities of daily living (IADLs). . . . IADLs include preparing meals, shopping, managing money, using the telephone, doing housework, and taking medication.

Id.

¹⁸⁵ *See* Jack Schwartz, *Alzheimer's Disease and The Role of State Law*, BIFOCAL, Winter 2001, at 1. It is expected that this number will increase four-fold by the year 2050, meaning that one of every 45 elderly people will suffer

debilitation make it unlikely that a professional's advice, no matter how suspect, will be questioned or scrutinized.¹⁸⁶ The elderly should be able to rely on the honesty and integrity of their attorneys, and anyone willfully and knowingly taking advantage of that trust should be liable to the fullest extent possible.

The elderly are also more likely to be on fixed incomes.¹⁸⁷ This makes them, as a group, less likely to afford to initiate malpractice lawsuits, which are less attractive to contingency basis practitioners due to the high standards of proof than suits under the consumer protection law.¹⁸⁸ Protecting elderly

from at least a mild form of the impairment. *Id.* at 1. *See also Facts: About Alzheimer's Disease*, ALZHEIMER'S ASSOCIATION, available at <http://www.alz.org/AboutAD/WhatisAD.htm>. The Alzheimer's Association stated:

The disease is the leading cause of dementia, a condition that involves gradual memory loss, decline in the ability to perform routine tasks, disorientation, difficulty in learning, loss of language skills, impairment of judgment and personality changes. As the disease progresses, people with Alzheimer's become unable to care for themselves.

Id.

¹⁸⁶ John Morrison, *What Montana Lawyers Can Do to Protect Seniors from Increase in Financial Scams*, 28 MONT. LAW. 5 (2003) ("as people grow older, the aging process can impair certain cognitive abilities that may impede them from effectively collecting critical information, asking relevant questions and evaluating information"); Starnes, *supra* note 3, at 204 (arguing that elderly victims' embarrassment about being defrauded, fear of appearing senile, or inability to care for themselves decrease the likelihood that they will report any incidence of fraud).

¹⁸⁷ *See* JOAN M. KRAUSKOPF, ET AL., ELDERLAW: ADVOCACY FOR THE AGING §§ 1.20-1.22 (1993, Supp. 2000). Krauskopf notes that "[o]lder economic units traditionally have had approximately half the income of younger counterparts. . . The difference was due primarily to the fact that retirement benefits and investment income for older families fail to balance out the loss of earnings upon retirement." *Id.* at 15. Social security is the major source of income for 90 percent of older people. *See A Profile of Older Americans: 2002: Highlights*, Administration on Aging, available at <http://www.aoa.gov/aoa/stats/profile/highlights.html> (last visited May 1, 2003).

¹⁸⁸ *See supra* notes 50-52 and accompanying text (setting forth the

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consumers of legal services further the public purpose of consumer protection statutes by facilitating recovery of relatively small claims that may be devastating to the victims.¹⁸⁹ Pursuit of minor claims may otherwise be economically unfeasible in the absence of the treble damages and decreased the burden of proof afforded by these laws.

Given this state of affairs, applying consumer protection standards of honesty in fact, fairness, and elimination of deceptive conduct to all aspects of legal practice when representing elderly clients should not pose any threat to attorneys already bound to the higher standards of a “learned profession.”

CONCLUSION

In 1993, then Associate Professor Debra D. Burke issued a challenge to all members of the “learned professions” to “lobby for inclusion” under the umbrella of consumer protection statutes, rather than continuing to scramble for cover under a plethora of restrictive and self-serving exemptions.¹⁹⁰ Although

contrasting standards of proof and available damages).

¹⁸⁹ See Keilin, *supra* note 45, at 1552-53. For example, elderly clients may be charged excessive legal fees upfront for drafting documents such as wills, trusts and powers of attorney, and then unjustified fees for largely illusory “monitoring” or “advisory” services, or may be victimized by misappropriation of funds pursuant to such documents, either by the attorney alone, or by the attorney in concert with the attorney in fact. Many times the individual amounts involved may total less than \$1,000 but are multiplied over many clients and are devastating to the individuals involved because their incomes are fixed by retirement. *Id.*

¹⁹⁰ Burke, *supra* note 95, at 261. Dr. Burke is now Professor in the Department of Marketing and Business Law, Western Carolina University. Dr. Burke criticizes the North Carolina Deceptive Trade Practices Act for exempting professional services rendered by a member of a learned profession from its prohibition on unfair or deceptive acts or practices in or affecting commerce. *Id.* at 224. She suggests that learned professionals—individuals practicing theology, medicine, and law—should call for inclusion of their professions in the Act’s prohibition because it would promote the public interest of eradicating unfair and deceptive acts in all professions,

she recommended caution and argued for limitation on the application of “automatic” treble damages to avoid any chilling or hampering effect on the exercise of professional judgment,¹⁹¹ she rightly perceived that eradication of unfair and deceptive actions among members of the bar is crucial to restore public trust.¹⁹² Perhaps it should come as no surprise that there has been no groundswell of response from the organized bar to follow Burke’s clarion call. This article optimistically proposes that attorneys who specialize in elder law will lead the way by advocating for specific inclusion under consumer protection laws of any legal practice involving or impacting those who are vulnerable due to advanced age, whether or not also disabled, incapacitated, isolated, or on a fixed income. By so doing, they will raise the standard of practice and the public’s trust for all reputable members of our learned profession.

notwithstanding the nature of the professional services. *Id.* at 261.

¹⁹¹ Unlike the law of many other states, treble damages are triggered under the North Carolina statute whenever there is a violation of the statute. N.C. GEN. STAT. § 75-16 (2002).

¹⁹² Burke, *supra* note 95, at 260-62. Dr. Burke argues that the act’s exemption for learned professionals makes an “archaic” and “ambiguous” distinction” because it unjustly focuses on *who* acted deceptively instead of *what* constitutes unfair or deceptive conduct under the act. *Id.* at 261-62. Moreover, Dr. Burke states that by exempting learned professionals, the Act indemnifies the individuals who are in the best positions to abuse their power. *Id.* at 260-61.