

Lawyer Accountability Under State Consumer Fraud Statutes

While the number of complaints filed with state attorney disciplinary bodies has remained steady for the past decade, the number of legal malpractice suits nationwide has exploded.¹ This discrepancy should be a signal to court administrators and legal reformers that the traditional attorney discipline system is inadequate for victims of attorney misconduct. Legal consumers, frustrated by the slow pace and inadequate remedies for attorney misconduct, are increasingly turning to legal malpractice claims because they are the only method by which an aggrieved legal consumer can recover all of her lost money. Yet, legal malpractice suits are time-consuming and costly. Malpractice lawyers demand a large percentage of any settlement, which quickly eats away at any real compensation that the victim receives. Additionally, legal malpractice claims are notoriously difficult to prove. In most jurisdictions, clients are required that prove that “but for” their attorney’s negligence or incompetence, the case would have turned out differently—a difficult burden of proof to meet.

Recognizing these realities, victims of lawyer misconduct are increasingly turning to state consumer fraud laws to fill this gap created by the attorney discipline system and legal malpractice suits. With a less stringent burden of proof on the plaintiff and the possibility of double, treble or punitive damages, claims under consumer fraud laws give legal consumers a meaningful weapon in the fight to hold fraudulent lawyers accountable.² Building on the modern trend to hold attorneys accountable under consumer fraud laws will help to ensure that more consumers are able to receive just compensation for the fraudulent or negligent acts of their attorneys.

THE INADEQUACY OF TRADITIONAL MEANS OF REDRESS

When injured by attorney negligence, fraud or misconduct, a consumer has four options for recourse: fee arbitration, a client compensation fund, a legal malpractice suit or a lawyer discipline complaint. Each is designed to address different aspects of lawyer misconduct, and more than one can be used at the same time.

The first option, fee arbitration, is used when a client disagrees with her lawyer about the appropriate amount owed for services rendered. A panel of arbitrators listens to the testimony, examines evidence and decides whether to uphold or reduce the lawyer’s

¹ See generally Donna Harkness, *Packaged and Sold: Subjecting Elder Law Practice to Consumer Protection Laws*, 11 J.L. & Pol’y 525 (2003).

² See generally Shelley D. Gaitlin, *Attorney Liability Under Deceptive Trade Practices Act*, 15 Rev. Litig. 397 (Spring 1996).

requested fee. This decision can be advisory (it is only a guideline and not enforceable) or binding (it can be enforced in court). In most cases, arbitration is a better option than taking the dispute to court because arbitration is considerably less expensive and faster. Fee arbitration is not perfect; the system is administered by lawyers and is often biased towards their point of view. In addition, because the nature of arbitration is to find a middle ground between two viewpoints, arbitrators will frequently try to find a compromise even when there is no agreement on the facts.

Client compensation funds, the second option, reimburse consumers if a lawyer has stolen or misappropriated money. Typically, these funds are financed by a portion of the mandatory dues paid to the state bar. If a claim is found to have merit, the fund committee orders reimbursement, but it reserves the right to reimburse only part of the money stolen. Most state funds impose a ceiling on the amount of any single award that will be paid. In cases where a client has lost a large sum of money—which is common for extensive litigation—the only recourse is to sue the lawyer for malpractice to recover the rest.

This third option, a legal malpractice suit, can, in theory, completely compensate a consumer if a lawyer has acted negligently, incompetently or fraudulently. In practice, legal malpractice claims are extremely difficult to win because most states require a very strong showing of egregious misconduct and a great deal of evidence to demonstrate that a loss has occurred as a result of that misconduct. In most jurisdictions, legal malpractice plaintiffs must also prove a "case within a case" and demonstrate that an attorney's negligence was the proximate cause of their loss in the underlying case. The client must demonstrate, through a preponderance of the evidence, that there would have been a better outcome in his or her underlying case, but for the attorney's negligence. Typically, this means retrying the underlying case as a part of the legal malpractice claim. The plaintiff must question all witnesses in the underlying case, her adversary in the underlying case, and often even her adversary's lawyer in the underlying case. The plaintiff must also show how the trial would have progressed had his attorney not made an important omission or committed significant misconduct. The rigorous "but for" causation standard, coupled with the speculative "case within a case" method of proof, imposes an extraordinarily onerous burden on most malpractice plaintiffs. As a result, plaintiffs are frequently unable to recover monetary damages in a legal malpractice lawsuit.³

³ In an action based on a consumer fraud claim, however, the plaintiff need not satisfy such a difficult standard. Rather, a consumer fraud plaintiff must simply demonstrate: (1) he or she had a relationship with the defendant in the context of trade or commerce and (2) the defendant engaged in deceptive acts or practices. *See, e.g.,* Conn. Gen. Stat. § 42-110a et seq. (2003) (Connecticut Unfair Trade Practices Act); Tex. Bus. & Com. Code Ann. §17.49(c) (2004) (Texas Deceptive Trade Practices Act); Mass. Gen. L. ch. 93A, § 2(a) (2004) (Massachusetts Consumer Protection Act). The plaintiff makes this showing by a preponderance of the evidence, a standard that simply requires the plaintiff to present facts that are more credible and convincing than those presented by the defendant attorney or that demonstrate that the attorney's fraud is more probable than not. *See Concrete Pipe and Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993). This workable standard sharply contrasts with

The final option is filing a lawyer discipline complaint with the local state bar alleging that the lawyer acted unethically and violated his state's Rules of Professional Conduct. Pursuing a claim of lawyer misconduct can take years while the disciplinary board investigates whether the claim has merit. In most states, the bar council must demonstrate, through clear and convincing evidence, that a lawyer has violated that state's Rules of Professional Conduct. This standard is more difficult to meet than the "preponderance of evidence" required in civil cases. If the body finds that the lawyer has broken the Rules of Professional Conduct, it may issue a private reprimand, a public reprimand, a suspension or a disbarment. The advantage of a claim of professional misconduct is that the lawyer can be prevented from harming other clients. However, a complaint with a disciplinary body cannot repay clients the money that has been lost. In addition, disciplinary bodies rarely dispense meaningful sanctions, favoring instead private admonitions and temporary suspensions—which themselves are rare.

Together these four options—fee arbitration, client compensation funds, legal malpractice suits and lawyer discipline complaints—are inadequate remedies for a victimized client seeking monetary compensation. Fee arbitration can at most return all of the money that a client has paid to a lawyer. In this process, there is no compensation for the effects of the fraud or punitive damages to deter future fraudulent activities. Client compensation funds are frequently under-funded and operate with a restrictive upper limit on the amount that a client can recover.⁴ Assuming that the fund has enough money to compensate victims, many claimants may find that they can recover only a portion of the stolen funds—they just have to absorb the difference. Legal malpractice claims are difficult to prove and often require a victimized client to pay even more money in legal fees before he or she can hope to recover his or her losses. Attorney discipline complaints, which cannot yield monetary compensation, dispense justice slowly and often with a bias towards the lawyer's point of view. Increasing attorney liability under consumer fraud legislation will fill in the gap created by the traditional methods of lawyer discipline and give consumers meaningful recompense.

NOT EVERY ACTION INVOLVES THE "PRACTICE OF LAW," ONLY THOSE THAT REQUIRE LEGAL KNOWLEDGE OR JUDGEMENT.

The organized bar would have the public believe there is something innately special about the work that lawyers do, which should exempt them from liability under consumer fraud laws. However, not every action performed by a lawyer involves the "practice of law." A lawyer who overbills a client is committing fraud, not practicing

the rigid "but for" standard required in the context of a legal malpractice case. "But for" demands that the fact-finder determine with certainty that a particular outcome would have occurred given a hypothetical set of facts. Consumer fraud actions do not place such an arduous burden on victims of attorney misconduct.

⁴ Elizabeth Amon, *Client Funds Improved, Still Flawed*, National Law Journal, September 27, 2004.

law. It is outrageous to suggest that fraudulent lawyers should somehow be above the laws that were enacted to protect consumers from ordinary fraud.

The modern trend in state and federal courts rejects the organized bar's claim and requires that lawyers' business dealings with clients comply with consumer protection statutes, just like any other profession. This well-developed body of precedent from both state and federal courts recognizes a distinction between those actions which require the exercise of professional judgment, and those that do not. Only those actions which require professional judgment are exempted from liability for fraud; the remaining "business aspects" of the practice of law are held to the same standards that protect consumers from fraudulent practitioners of every other occupation.

When the landmark decision in Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975) struck down mandatory fee schedules adopted by the state bar as violating federal antitrust laws, the U.S. Supreme Court recognized that "[i]t is no disparagement on the practice of law as a profession to acknowledge that it has this business aspect." Since then, many jurisdictions have chosen their own definitions of what constitutes the "business aspect" of the practice of law. Although the rules in each jurisdiction that allow consumer fraud claims to be brought against attorneys vary in specificity and breadth, they are all in agreement that tasks which involve no legal judgment can be held liable. In Vermont, for example, the District Court of Vermont ruled that "advertising, billing and collection practices, fee arrangements, and methods of obtaining, retaining and dismissing clients" are liable to consumer fraud laws. Kessler v. Loftus, 994 F. Supp. 240 (D. Vt. 1997). In contrast, the Massachusetts Supreme Court ruled more expansively that a consumer need only "show that the defendant [attorney] had a commercial relationship with the plaintiffs or that the defendant's actions interfered with 'trade or commerce.'" First Enterprises, Ltd. v. Cooper, 680 N.E.2d 1163, 1165, (Mass. 1997). In Texas, the state legislature enacted a bill that amended the Deceptive Trade Practices Act to hold attorneys accountable under four circumstances:

- (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
- (2) a failure to disclose information in violation of [the Act];
- (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
- (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion.

Tex. Bus. & Com. Code Ann. § 17.49(c) (Vernon 1995).

Although the Vermont, Massachusetts and Texas laws are worded differently, each state recognizes the distinction between those acts that require professional judgment and those that do not. In these states, as well as all the others where attorneys

are liable for fraudulent business actions, consumers fare better in recovering money from their unethical attorneys. Expanding the modern trend to hold fraudulent attorneys liable under consumer fraud laws to new jurisdictions will ensure that an increasing number of consumers are able to receive just compensation for the fraudulent acts of their attorneys.

ATTORNEY LIABILITY UNDER CONSUMER FRAUD STATUTES

For nearly 30 years, federal and state judges have ruled that attorneys may be held responsible for their fraudulent or deceptive actions under state consumer fraud laws. In holding attorneys liable under these laws, judges have given consumers a powerful tool to combat fraud and deception in the legal profession. Unfortunately, not every jurisdiction that recognizes the need for consumer protection recognizes the need to extend protection to legal consumers.⁵

Development of Consumer Fraud Legislation and Attorney Liability

Every state has enacted some form of consumer fraud legislation, but the laws and the amount of protection for legal consumers vary from state to state.⁶ When first enacted in the 1970s and 1980s, no state consumer fraud law explicitly included attorneys

⁵Currently, there have been six states that have ruled that attorneys cannot be liable under their consumer fraud statutes for any reason: Maryland (Md. Code Ann., Com. Law I § 13-104 (2003)), Ohio (Ohio Rev. Code Ann. § 1345.01 (Anderson 2004)), Illinois (Frahm v. Urkovich, 113 Ill. App. 3d 580 (1983) and Cripe v. Leiter, 184 Ill. 2d 185 (1998)), New Hampshire (Rousseau v. Eshleman, 29 N.H. 306 (1987)), and North Carolina (Sharp v. Gailor, 132 N.C. App. 213 (1999)).

⁶The state consumer fraud statutes are as follows: Ala. Code 8-19-5 (1993); Alaska Stat. 45.50.471 (Michie 1998); Ariz. Rev. Stat. Ann. 44-1522 (West 1994); Ark. Code Ann. 4-88-107 (Michie 1996); Cal. Bus. & Prof. Code 17200, 17500 (West 1997); Cal. Civ. Code 1770 (West 1985 & Supp. 1995); Colo. Rev. Stat. Ann. 6-1-105 (West 1996); Conn. Gen. Stat. Ann. 42-110b (West 1992 & Supp. 1999); Del. Code Ann. tit. 6, 2513 (1993 & Supp. 1999); Fla. Stat. Ann. 501.204 (West 1997); Ga. Code Ann. 10-1-393 (1994 & Supp. 1999); Haw. Rev. Stat. Ann. 481A-3 (Michie 1999); Idaho Code 48-603 (1997); Ill. Comp. Stat. 815/505-2 (West 1993 & Supp. 1995); Ind. Code Ann. 24n 5-0.5-3 (West 1998); Iowa Code Ann. 714.16(2) (West 1993 & Supp. 1995); Kan. Stat. Ann. 50-626 (1994); Ky. Rev. Stat. Ann. 367.170 (Michie 1998); La. Rev. Stat. Ann. 51.1405 (West 1987); Me. Rev. Stat. Ann. tit. 5, 207 (West 1989); Md. Code Ann., Com. Law I 13-303 (1990 & Supp. 1994); Mass. Gen. Laws Ann. ch. 93A, 2 (West 1997); Mich. Comp. Laws Ann. 445.903 (West 1989); Minn. Stat. Ann. 325D.44 (West 1995); Miss. Code Ann. 75-24-5 (1991 & Supp. 1999); Mo. Ann. Stat. 407.020 (West 1990 & Supp. 1999); Mont. Code Ann. 30-14-103 (1993); Neb. Rev. Stat. 59-1602 (1998); Nev. Rev. Stat. Ann. 598.0914 (Michie 1998); N.H. Rev. Stat. Ann. 358-A:2 (1995); N.J. Stat. Ann. 56:8-2 (West 1989); N.M. Stat. Ann. 57-12-2 (Michie 1999); N.Y. Gen. Bus. Law 349 (McKinney 1999); N.C. Gen. Stat. 75-1.1 (1994); N.D. Cent. Code 51-15-02 (1989); Ohio Rev. Code Ann. 1345.02 (West 1993 & Supp. 1998); Okla. Stat. Ann. tit. 201 3 (1997); Or. Rev. Stat. 646.607, 646.608 (1997); 73 Pa. Cons. Stat. Ann. 201-3 (1993 & Supp. 1995); R.I. Gen. Laws 6-13.1-2 (1992); S.C. Code Ann. 39-5-20 (Law. Co-op. 1985 & Supp. 1994); S.D. Codified Laws 37-24-6 (Michie 1994); Tenn. Code Ann. 47-18-104 (1995 & Supp. 1998); Tex. Bus. & Com. Code Ann. 17.46 (West 1987 & Supp. 1995); Utah Code Ann. 13-5-2.5 (1999); Vt. Stat. Ann. tit. 9, 2453 (1993); Va. Code Ann. 59.1-200 (Michie 1998); Wash. Rev. Code Ann. 19.86.020 (West 1999); W. Va. Code 46A-6-104 (Michie 1998); Wis. Stat. Ann. 100.20 (West 1998); Wyo. Stat. Ann. 40-12-105 (1993). See also Shelley D. Gatlin, *Attorney Liability Under Deceptive Trade Practices Acts*, 15 Rev. Litig. 397, 399-400, n. 9 (1996).

under its purview. During this time, the argument that the legal profession was a public service and that lawyers did not practice solely for monetary gain was advanced to persuade lawmakers that the attorney-client relationship was more elevated than the merchant-customer relationship and that attorneys should be exempt from the purview of consumer fraud legislation.⁷

This traditional presumption that attorneys are above commercial regulation was challenged in two cases brought before the United States Supreme Court. First, in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court ruled that a bar association's minimum fee schedule for lawyers violated section 1 of the Sherman Act. This section provides, in part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 USCS § 1 (2004). The Goldfarb Court observed that the text of the Sherman Act does not explicitly exempt the practice of "learned professions," such as the law. Goldfarb, 421 U.S. at 787. Therefore, the Court held that there was little justification for exempting learned professions absolutely. And while the Court noted that not all aspects of the practice of law could be considered business activity, a fee control system is clearly a restraint on commerce, regardless of the nature of the profession. Id. at 788. The Supreme Court also noted that there is a discrepancy between arguing that the goal of the profession is to serve the community, not to make money, and supporting a fee control system that discourages price competition. Id. at 786-7.

Two years after Goldfarb, Bates v. State Bar of Arizona, 433 U.S. 350 (1977), expanded commercial speech protection to attorneys. In this case, attorneys were charged by the State Bar with violating an Arizona Supreme Court disciplinary rule, which prohibited attorneys from advertising in newspapers or other media. The complaint was based on two attorneys' newspaper advertisement for a "legal clinic," which stated that they were offering "legal services at very reasonable fees," and listed their fees for certain services, such as uncontested divorces and adoptions. Id. at 354. The Supreme Court held that the restriction on attorney advertising violated the First Amendment right to free speech. Id. at 381-383.

In reaching this conclusion, the United States Supreme Court held that the advertisement of legal services is not detrimental to the reputation or quality of service of the profession. In fact, the absence of any advertisement could be seen by the community as a policy to ensure trade secrecy and hinder price competition. The Court noted that this would besmirch the reputation of the legal profession more than if lawyers conceded the inherent contradiction between holding oneself out as a public servant and demanding to be paid for services rendered. Id. at 368. Finally, the Court noted that "[s]ince the

⁷ See generally Donna Harkness, *Packaged and Sold: Subjecting Elder Law Practice to Consumer Protection Laws*, 11 J.L. & Pol'y 525 (2003).

belief that lawyers are somehow ‘above’ trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.” *Id.* at 371-372.

Together, Goldfarb and Bates have helped shift the prevailing legal opinion to recognize that the legal profession is a commercial occupation. In Goldfarb, the Court held that a minimum fee schedule would interfere with trade and commerce, and in Bates, the Court embraced the idea of attorney advertising because of the positive effects it would have on competition between lawyers for business. Collectively, these two cases have provided the foundation on which various state supreme courts are now able to hold fraudulent attorneys accountable to their clients under state laws regulating commercial activities.

State Development of Consumer Fraud Law Attorney Liability

After the Supreme Court opened up the possibility of holding attorneys liable under consumer fraud laws with its decisions in Goldfarb and Bates, state supreme courts began to examine this option as a method for expanding lawyer accountability. Nearly 30 years later, courts in Louisiana (Reed v. Allison & Perrone, 376 So. 2d 1067 (La. Ct. App. 1979)), Texas (DeBakey v. Staggs, 605 S.W. 2d (1980)), Connecticut (Heslin v. Connecticut Law Clinic of Trantolo & Trantolo, 461 A.2d. 938 (Conn. 1983)), Washington State (Short v. Demopolis, 103 Wn.2d 52 (1984)), Massachusetts (First Enterprises, Ltd. v. Cooper, 425 Mass. 344 (1997)) and Vermont (Kessler v. Loftus, 994 F. Supp. 240 (D. Vt. 1997)) have joined this trend that recognizes the importance of protecting consumers from the fraudulent actions of their attorneys.⁸ In these jurisdictions, attorneys who fraudulently advertise, bill or retain clients are subject to consumer fraud laws that could impose double, treble or punitive damages.

Time and time again, the supreme courts of these jurisdictions have found arguments that attorneys should not be liable under consumer fraud laws unpersuasive. Jurisdictions that consider expanding consumer fraud liability in the future would be well-advised to follow the lead of these states and reject the claims of opponents. Many judges have noted that holding attorneys accountable under these laws does not relieve attorneys of their other ethical duties. Rather, liability under consumer fraud laws complements traditional ethical duties, which are ill-equipped to deal with modern developments such as attorney advertising. Arguments against increasing legal consumer protection generally focus on two issues: the definition of ‘trade and commerce’ and the separation of power between the legislative and judiciary branches. Both have been successfully and repeatedly countered by courts that value consumer protection.

⁸ The New Jersey Legislature is currently considering a bill that would place attorneys, among other professionals, under the jurisdiction of the Consumer Fraud Act. A version of the Bill, [A2088](#), has recently passed the House of Representatives. Another version, [S1972](#), is before the Senate Commerce Committee.

Several states, including Connecticut, Massachusetts, Vermont and Washington, have addressed the issue of whether legal services qualify as ‘trade and commerce.’ This question recurs in state after state due to the fact that nearly every jurisdiction has a similar consumer fraud law, which was modeled after legislation written by the Federal Trade Commission. One example of a typical law is the Connecticut Unfair Trade Practices Act (CUTPA), Connecticut General Statute § 42-110. This statute provides, in part, that “[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” As defined in section 42-110a:

‘[t]rade’ and ‘commerce’ means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.

Conn. Gen. Stat. § 42-110a (2003).

Therefore, holding attorneys accountable under consumer fraud laws like the Connecticut statute requires that an attorney’s actions are classified as “trade and commerce.” And although many jurisdictions have ruled that an attorney’s actions can be classified as “trade and commerce,” they have all used different grounds and justifications for their rulings.

The Connecticut Supreme Court tackled this issue in Heslin v. Connecticut Law Clinic of Trantolo & Trantolo, where attorneys were accused of misrepresenting their fees and those of their competitors in their advertisements. 461 A.2d. 938 (Conn. 1983). In its decision, the Supreme Court noted:

It is not surprising that CUTPA is textually inconclusive on the question of whether the practice of law is included within the conduct of trade or commerce. In 1973[when CUTPA was enacted], before lawyers engaged in advertising and when few lawyers were incorporated, existing precedents tended to exclude the work of the legal profession from the category of trade or commerce.

Heslin, 461 A.2d. at 942. In addition, the Court noted that the Connecticut statute predated the seminal cases of Bates and Goldfarb. Therefore, that CUTPA does not mention attorneys or learned professions is not because the legislature intended them to be exempt. Rather, it is because the profession of lawyer did not include acts such as advertising. Therefore, the Court held that advertising as it is now practiced by attorneys is subject to the same regulations as advertising in any other occupation.

The issue was addressed again in 1997 by the Massachusetts Supreme Court, in First Enterprises, Ltd. v. Cooper, 680 N.E.2d 1163 (Mass. 1997). In this case, an attorney represented an ex-partner in a suit against his former partners. When the ex-partner reconciled with his former partners and withdrew the lawsuit, he signed an affidavit that stated that his attorney had filed a false and frivolous lawsuit. The partners then filed a claim under the Massachusetts Antitrust Act, stating that the attorney had engaged in fraudulent trade or commerce by filing a frivolous lawsuit against them. The Court held “the mere filing of litigation does not of itself constitute ‘trade or commerce.’” 680 N.E.2d at 1165. The court ruled that a claim under the consumer fraud law could not be maintained if “no commercial relationship ever existed between the parties; their only contact occurred in the context of this litigation.” Id., quoting Arthur D. Little, Inc. v. East Cambridge Sav. Bank, 625 N.E.2d 1383 (Mass. App. Ct. 1994). Therefore, the partners’ case was dismissed because they had never entered into a fiduciary relationship with the attorney, and his actions did not interfere with trade or commerce. However, the Court did leave open the possibility that the client could bring a case against his attorney. “The plaintiffs must show that the defendant had a commercial relationship with the plaintiffs or that the defendant’s actions interfered with ‘trade or commerce.’ The facts alleged in the verified complaint do not meet either requirement.” Id. at 348.

The District Court of Vermont has also held that an attorney’s actions can constitute trade and commerce under certain situations. In Kessler v. Loftus, 994 F.Supp. 240, 241 (2nd Cir. 1997), a client brought suit against her divorce attorney because the attorney had filed necessary documents late, which caused the client to receive a much lower settlement. The court held that “[i]f a lawyer’s misrepresentations affect one of [the commercial] aspects [of law], they will be actionable under the Consumer Fraud Act.” Id. at 243.

To answer this question, the court distinguished between an attorney’s representation of *legal opinion* and representation of *fact*. The court held that if the attorney’s misrepresentation caused the client to retain the attorney’s services, the client could have a valid claim under the CFA but only if the attorney “concealed or misrepresented facts, not opinions” in order to keep his client. Kessler, 994 F.Supp. at 244. Thus, an attorney’s actions constitute ‘trade or commerce’ if they influence the client’s decision to enter into a fiduciary relationship with the attorney. This is distinguished from poor professional work, which is regulated by the state bar and subject to malpractice actions.

In the instant case, Kessler alleges that Loftus led her to believe that she had adequate security for the debt, and he had represented her competently. These claims may give rise to a malpractice claim, but are not actionable under the Consumer Fraud Act, because they are Loftus’s ‘professional judgment

based upon his...legal knowledge and skill.’

Id. at 243 (*quoting Jackson*, 1 Vt. Trial Ct. Rep. at 70).

Finally, the Washington Supreme Court ruled that attorneys’ actions can constitute “trade or commerce” in Short v. Demopolis, 691 P.2d 163 (1984). In Short, a client was successfully represented by his attorney, but the attorney charged many times more than the total of the settlement itself. Id. The client then sued his attorney for unfair and deceptive practices under the Washington Consumer Protection Act (CPA). Id. Citing Goldfarb as federal precedent, the Court held:

Certain entrepreneurial aspects of the law may fall within the ‘trade or commerce’ definition of the CPA. The more recent federal cases stand for the principle that attorneys, as well as other professionals, are not exempt from antitrust laws. The CPA, on its face, shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce.”

Id. at 168. In addition, the court noted that extending an exemption to the Washington CPA for attorneys would be contrary to the framers’ intent because they would have listed attorneys in the section exempting other professionals, if they had wished them to be so.

Aside from challenges to increasing attorney accountability on the grounds that attorneys do not provide service that constitute “trade and commerce,” several state supreme courts have also wrestled with the issue of whether policing attorney behavior with consumer fraud laws impinges on the separation of powers between the legislative and the judiciary branches. Traditionally, regulating the legal profession has been solely the responsibility of the judiciary. Proponents of such regulation claim that the legal profession is highly specialized; therefore, only those trained in the field are qualified to regulate it. However, such claims have little basis in fact. “It is doubtless true that some law practice issues involve legal complexity, but the further claims that those complexities are common and that only lawyers can and will comprehend them is highly dubious.” Charles W. Wolfram, Modern Legal Ethics, 21 (1986). While it is true that courts have traditionally regulated the legal profession, “that tradition has frequently been interrupted by legislative regulation of the legal profession, some of the most important and most controversial of which has not been declared unconstitutional by a state court.” Id. at 26.

For example, nearly 40 state legislatures have stepped in to regulate the practice of law.⁹ In most cases, these lawmakers have defined what it means to “practice law” in their states, made the unauthorized practice of law a crime, and prescribed penalties for that crime. For example, New York’s statute prohibits “practicing or appearing as [an] attorney-at-law without being admitted and registered.” Oregon’s statute contains similar prohibitions and describes how alleged violations should be investigated, prosecuted, and punished. Such statutes clearly demonstrate that legislative participation in regulation of the legal profession is both common and effective. “It simply claims too much to assert that courts must enjoy total control over regulation of the legal profession.” Wolfram at 30.

In addition to statutes aimed specifically at regulating the practice of law, “in all jurisdictions at least some legislation is applicable to lawyers and law practice.” Restatement (Third) of the Law Governing Lawyers, § 1(b) (2000).¹⁰ Specifically, a number of consumer-protection laws already apply to attorneys to protect consumers from various forms of fraud. *Id.* at § 56 (j). Again, the fact that existing statutes already heavily regulate lawyers contradicts the assertion that regulation of legal professionals is the sole province of the court. State supreme courts confronted with this issue have repeatedly and strongly held that overlapping regulations are far superior to gaps in regulation that allow fraudulent attorneys to continue to harm consumers.

In Heslin, the Connecticut Supreme Court held that even though the Connecticut statute may intersect with disciplinary regulations specific to attorney conduct, that does not render the statute unconstitutional. 461 A.2d. 938 (Conn. 1983). In fact, the Court stated:

In many situations, executive, legislative and judicial powers necessarily overlap. In such situations, a statute is not unconstitutional unless ‘it represents an effort by the legislature to exercise a power which lies exclusively under the control of the courts’ or if it establishes a significant interference with the orderly conduct of the Superior Court's judicial functions.

⁹ At least 39 states include statutes regulating the practice of law and the unauthorized practice of law (UPL) in the main body of their state code, including: AL, AK, AR, CO, GA, HI, ID, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NV, NC, ND, OH, OR, PA, RI, SC, SD, TN, TX, UT, VA, WA, WV, WI, and WY. For specific citations to statutes, please see <http://www.crossingthebar.com/upl.htm>. A handful of these states’ statutes leave the definition of the practice of law to the court or bar rules, but provide for penalties in the main body of the code. The above list does not include states whose practice of law statute contained wholly in the Supreme Court rules of that state.

¹⁰ The restatement specifically lists antitrust and consumer-protection laws that apply to lawyers. Under these broad legislative umbrellas, lawyers can be subject to civil liability for helping clients violate antitrust laws, for knowing misrepresentations or reckless drafting in securities opinion letters, for violating RICO statutes by submitting fraudulent claims to insurance agencies, and for violating the Civil Rights Act where such violations constitute state action. *Restatement (Third) of the Law Governing Lawyers*, § 56(i) (2000).

Heslin, 461 A.2d. at 944.

In addition, the Court ruled that the Connecticut statute does not unconstitutionally operate in an area under the exclusive control of the courts because although it may overlap with disciplinary rules, it does not pursue the same goals. Court administered disciplinary proceedings are designed to discover and remove unfit members from the legal profession, and because of this, the disciplinary process has little to do with the grievances between the two parties themselves. Id. at 945. The Connecticut statute, on the other hand, is designed to address the practical concerns of the public with an emphasis on the prevention and redress of injury caused by fraud or misconduct. Therefore, the Court ruled that the Connecticut statute “in no way relieves attorneys of the ethical duties imposed on them by the code [of professional responsibility]. For the conduct that [the Connecticut statute] declares illegal, it provides distinctly separate remedies, different in both purpose and in form from the scheme of regulation envisaged by the code.” Id. at 946.

In Short, the Washington Supreme Court came to the same conclusion as the Heslin court. 691 P.2d 163 (1984). Citing Goldfarb, which noted that although “certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions,” the Washington Supreme Court held that attorney liability under the WCPA would not trench upon the power of the Court to regulate the practice of law. Short, 691 P.2d at 166 (*citing Goldfarb*, 421 U.S. 793 (1975)). Additionally, the Court’s power to regulate the legal profession is limited to discipline of acts within the practice of law. Their regulation of professional actions does not preclude regulation of the conduct of attorneys.

The development of the modern trend to hold attorneys accountable under consumer fraud laws gives jurisdictions that are concerned with consumer protection a valuable tool in fighting unfair and deceptive acts by attorneys. Once solely the jurisdiction of the judiciary, the regulation of attorneys under consumer fraud laws increases both the likelihood that a consumer will win his or her claim and the amount that he or she can receive in compensation. As dissatisfaction with the current system of attorney self-regulation grows, more jurisdictions should look to consumer fraud laws to close the gap in attorney liability. Those jurisdictions that choose to follow the precedent of states that already allow claims under consumer fraud laws will be following a well-traveled path. Many federal and state courts have already dismissed arguments that claim attorneys do not participate in “trade or commerce” and that liability would infringe on the separation of powers.

As future state courts address the issue of attorney liability under consumer fraud legislation, there should be a greater focus on what is better for the consumer, rather than the lawyer. Making attorneys untouchable in a legal system already tailored to lawyers is

a detrimental trend that ultimately hurts the legal consumer. Honest attorneys would not be harmed by their inclusion; it is only the unethical attorneys that would be forced to pay for their fraud in a meaningful way—out of their own pockets. Additionally, the ability to sue a lawyer under consumer fraud laws goes far in filling in gaps created by the existing methods to address attorney misconduct, which do little to actually repay the financial harm done to consumers. Attorneys who now face little more than a slap on the wrist and a private reprimand are more likely to continue with “business as usual” than if they were forced to compensate the victims of their fraud out of their own pockets. Expanding attorney liability under consumer fraud legislation will help ameliorate this situation and assure that the system protects consumers from fraud, not fraudulent lawyers.