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Richard A. Hesse
Prof. Franklin Pierce Law Center

Mitchell M. Simon
Prof. Franklin Pierce Law Center

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SERVING THE NEEDS OF BOTH THE CONSUMER OF LEGAL SERVICES AND THE PROFESSION THROUGH THE APPLICATION OF CONSUMER PROTECTION STATUTES TO LAWYERS

Richard A. Hesse and Mitchell M. Simon*

I. Introduction

Consumers of legal services are caught in a time warp. Their rights in a transaction with a lawyer are the same as they were fifty years ago. Meanwhile, those same consumers dealing with other sellers of products and services enjoy a wide variety of modern laws that protect them from the realities of the marketplace. During the last fifty years, lawyers have become increasingly business oriented as a result of heightened competition in the legal profession. Indeed, the practice of law has become a business. The legal profession expresses concern about the effects of this competitive climate on professionalism by warning that lawyers should not behave like merchants.[1] Despite the trend toward law as a business, the practice of law has for the most part been untouched by consumer protection statutes that govern other businesses.

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There is little question that for the legal profession there is serious trouble in paradise. The reputation of the profession is unacceptably low. In response, the legal profession has focused on productivity and profitability rather than the concerns of individual consumers. Accordingly, the profession has established new professional regulations and slightly more sophisticated mechanisms for enforcing those regulations. Meanwhile, consumers of legal services express great frustration when they attempt to hold lawyers accountable for inadequate legal service. This is not new. What is new is the presence of consumer-oriented groups focused on dealing with the legal profession. Their message is clear: Even if the profession's efforts to protect the public through self-regulatory and disciplinary schemes are effective, those efforts do not provide a remedy for the individual consumer of legal services.

This article takes the position that application of consumer protection statutes to attorneys will supplement traditional common law remedies and provide more complete protection to consumers injured by inadequate legal services that frustrate legitimate expectations. Not incidentally, enforcement of consumer rights will also improve professional behavior. First, the article examines the consumer's traditional common law remedies. Second, the article analyzes the various approaches that the courts take in resolving the applicability of the consumer protection acts ("CPA")[2] to lawyers. Finally, the article argues for the application of consumer protection statutes to attorneys as a tool for satisfying consumer needs and for serving the interests of the profession in achieving quality control.

II. Regulation of Legal Practice

A. The Disciplinary Process

The American legal profession is regulated chiefly through the state and federal judiciaries, with assistance from national and local bar associations. Since lawyers are the driving forces in these entities, this system is referred to as "self-regulation."

The regulators decide who is fit for admission to the practice of law and may impose sanctions, including disbarment, should an admitted attorney deviate from professional standards. Similarly, the courts, with the assistance of bar associations, establish the standards to be applied to these decisions. Most states have adopted a set of ethical standards derived from either the American Bar Association's Model Code of Professional Responsibility or Model Rules of Professional Conduct.

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The disciplinary procedures, substantive rules, and interpretation of these rules vary greatly from state to state. However, most states confront two problems: (1) the disciplinary systems are not adequately funded or staffed to deal with the "much more than charges of theft, neglect, or the commission of a felony,"[3] and (2) the systems are not designed to provide redress to individual clients.[4] Additionally, the underlying substantive rules have only indirect effect on the consumer's ability to recover for injuries inflicted by the lawyer.[5]

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*Richard A. Hesse is a Professor of Law a Franklin Pierce Law Center and served as th Reporter to the New Hampshire Bar Associa tion's Code of Professional Responsibilit Revision Committee. Mitchell M. Simon is Professor of Law at Franklin Pierce La Center and serves as the Chair of the Ne Hampshire Bar Association's Ethics Commi tee. The authors gratefully acknowledge th invaluable assistance of Aggie Pichette, an the research assistance of Lee Goodman Franklin Pierce Law Center, Class of 1990

Supreme Court described the limited utility of the process to individual clients as follows:

> We have held that "[t]he public is entitled to ample protection against the danger of any abuse of the great powers of the office which the public ... has conferred upon [attorneys]." However, the supervision of attorneys by this court or its professional conduct committee does not afford relief to the injured client. "The injured client can take little comfort from the fact that the wrongdoer has been reprimanded or suspended or stripped of the right to practice his profession." [Citations omitted.][6]

We need not enter the debate surrounding the effectiveness of self-regulation for the purposes of this article. Rather, one need only understand that even if the system is meeting fully its stated goal of protecting the public, it is not designed to redress a wrong suffered by a particular consumer of legal services.

In light of this aspect of the disciplinary system, a number of courts have attempted to frame a remedy within the disciplinary process that merges the interests of

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the public and those of the aggrieved consumer. The remedy, known as restitution, is the payment by an attorney of the amount of money lost by the client as a result of the lawyer's actions.

Restitution can be used in at least two ways. First, readmission to the bar can be expressly conditioned on payment of restitution.[7] Second, a court can order restitution as an independent sanction, even in a case where disbarment has been ordered.[8]

That the use of restitution as an adjunct to the disciplinary process saves the aggrieved client time and expense has not yet won it universal acceptance. At least one court has objected to being placed in the position of a "collection agency."[9] Other objections, such as the lack of a nexus between the lawyer's ability to make restitution and his or her qualifications to practice law, have caused commentators and courts to question the authority to order restitution within the disciplinary system.[10]

B. Legal Malpractice

The consumer of legal services injured by the performance of an attorney has traditionally resorted to legal malpractice to recover. However, there are many impediments to recovery in legal malpractice that render it an incomplete source of redress. The legal malpractice suit may be founded on negligence, breach of contract or fraud.[11]

1. Negligence

Negligence is the most frequent claim against lawyers in the malpractice area. The essence of the action is that the lawyer's failure to conform to accepted standards of care has caused the client injury. The facts of the particular claim will shape the case; thus, a claim based on negligent advice to a ***prospective client*** can sound in tort based upon the duty owed to one who seeks legal advice for purposes of determining whether to pursue a legal action.[12]

To prevail in the malpractice action, the plaintiff must establish:

(1) The employment of or other relationship with a lawyer which gives rise to specific duties;[13]

(2) The lawyer failed to exercise ordinary skill and knowledge in the performance of the duty owed to plaintiff;[14]

(3) The lawyer's breach of the standard of care proximately caused injury to the plaintiff;[15]

(4) The plaintiff sustained actual injury;[16]

The straightforward recitation of the elements masks some of the difficulty in maintaining the suit in negligence. The second element requires proof that the lawyers failed to exercise the proper degree of care in the performance of the legal services. The plaintiff can move forward in the lawsuit only by establishing the applicable standard of care. To do that courts routinely require "expert" testimony on the standard of care which should govern the lawyer's conduct.[17] Where the issues do not involve questions of legal expertise, some courts do not impose the

A legal policy which allows no recovery against a lawyer who fails to appear on behalf of his client, fails to attach any value to the client's "day in court." Yet in so many other aspects of the law, the client's "day in court" is thought to be vital. The current approach to lawyer negligence declares that the accountant's bottom line is the only concern.

burden on plaintiff to produce "expert" testimony.[18] And where the conduct is clearly violative of existing standards of care, some courts excuse the plaintiff from the requirement to produce "expert" opinion on the standard to be applied.[19] However, this element of the case mandates in most situations that an injured plaintiff find an attorney willing to testify against a fellow attorney. There is evidence that this requirement can present a significant obstacle to recovery.[20]

Additionally, the requirement of proximate cause can be overwhelming in the legal malpractice action. In a majority of the courts, plaintiff must show that "but for" the lawyer's breach, the client's injury would not have occurred. In other words, plaintiff must prove that had the attorney exercised the proper degree of care, the outcome of the litigation would have been different. In operation the standard permits an attorney to give incorrect advice but escape liability because plaintiff cannot prove that the ultimate outcome would have been different.[21]

Most efforts by plaintiffs to avoid the harshness of the "but

(continued on page 118)

Lawyers

(continued from page 117)

for" requirement have been unsuccessful. Illustrative of the extent to which negligence actions fail to meet ordinary expectations of the consumer of legal services is *Maryland Casualty Co. v. Price.*[22] In that case plaintiff's attorney failed to appear on its behalf resulting in a default judgment. Despite the obvious causal connection between the lawyer's failure to appear and the default judgment, the court required plaintiff to prove that the legal action would have been successful had there been a full and proper presentation of the case.[23] Plaintiff's burden is increased by modern courts which not only require proof that plaintiff would have obtained a judgment on the underlying claim, but that the judgment would have been collectible as well.[24]

In a profession that aspires to improve its public reputation, it is at least remarkable, if not totally inconsistent, to operate a liability system that allows no recovery when the lawyer fails to appear on behalf of a client.

The current policy reflected in the law governing lawyer negligence is not responsive to the legitimate expectations of the consumer of legal services. A legal policy which allows no recovery against a lawyer who fails to appear on behalf of his client, fails to attach any value to the client's "day in court." Yet in so many other aspects of the law, the client's "day in court" is thought to be vital.[25] The current approach to lawyer negligence declares that the accountant's bottom line is the only concern. In a profession that aspires to improve its public reputation, it is at least remarkable, if not totally inconsistent, to operate a liability system that allows no recovery when the lawyer fails to appear on behalf of a client.

This "no harm, no foul" approach fails for two reasons. First, harm does occur even if it is not measurable in terms of victory in the underlying action. This approach damages the attorney/client relationship, and frustrates legitimate expectations of the consumers of legal services. Second, even if there is no "serious" harm, the approach encourages, or at least fails to discourage, irresponsible behavior. Permitting lawyers to escape all liability for irresponsible conduct can only foster bad habits, faulty instincts, and increased disrespect for the legal profession.

2. Breach of Contract—Express or Implied

A consumer injured by inadequate legal services may have a legal malpractice claim based on express or implied contract. In an express contract claim a lawyer owes a contractual duty to his client when the lawyer makes a specific representation or promise about the legal services. Thus, when a lawyer represents that he or she will perform a specific task and fails to do so, the client has a contractual right to insist that the lawyer reimburse the client for any damages that result. However, despite this general principle, the courts refuse to enforce certain promises. In *Corceller v. Brooks,* the court refused to uphold a promise by an attorney to win a case on behalf of his client. The court rejected the contract action by a restaurant operator against his attorney who represented that he would win the restaurant operator's case against a franchisor.[26] The court found the contract theory invalid since a suit based on guarantees of litigation results "is foreign to the nature of the legal profession."[27]

The decision in *Corceller* frustrates the expectations of the consumer and conflicts with the treatment of similar cases outside the law of legal malpractice. The court found that the lawyer represented that he would achieve specific results, yet the court held that the client who relied on the promise had no action for breach of contract. No inquiry was made into the extent of the client's reliance on the attorney's promise, the reasonableness of the promise, or the consideration extracted based on that promise. The breach presumably would have been actionable had the promise been made by the seller of any other product or service. Lawyers should not be insulated from failing to perform the promises made to induce the client to undertake the suit or to justify a particular fee. A contrary policy permits lawyers to make representations regarding the effect and value of their services without holding those lawyers accountable to clients who rely on the representations.

Although decisions like *Corceller* limit the efficacy of a contract action, promises not based on litigation results are more successfully asserted as grounds for breach of contract actions. The client may have a contract action even if the lawyer's conduct, with the exception of the broken promise, conformed to the ordinary standard of care. For example, in *Carroll v. Roundtree,*[28] a client in a domestic relations matter instructed his lawyer to arrange for a transfer of cash in a lump sum payment in exchange for an executed release of the spouse's interest in a parcel of property and a dismissal of a lawsuit. The client specified that the lawyer should not transfer the cash until receipt of the release and dismissal.

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The lawyer exercised his own judgment without further consultation with the client and transferred the cash to the spouse's lawyer before obtaining the signed release and dismissal, relying on the custom and practice among members of the bar in the locality. The

spouse did not execute the release or dismiss the suit. The lawyer, assuming that the spouse had performed as agreed, gave his client assurances that the instructions had been followed. The client sued his attorney for breach of contract. The court held that the client had established a case for breach of contract.[29]

In the context of legal malpractice, the general view of the implied contract theory provides that the lawyer implicitly contracts to exercise ordinary skill, knowledge, and care in the performance of professional services.

Despite successful contract actions like *Carroll,* courts appear to favor legal malpractice claims based on negligence, thus limiting the availability of the contract action to the consumer of legal services. In essence the negligence claim swallows the contract claim. For example, in *Albany Savings Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge, P.C.,*[30] a bank retained a law firm to examine the title to a piece of property. The firm reported that the title was free and clear of all encumbrances and was marketable. The bank granted a mortgage and when the borrower defaulted, the bank obtained title to the property at the foreclosure sale. Thereafter, the bank discovered that the title was not marketable. The bank sued the law firm alleging that the firm had contracted to achieve a specific result—an accurate report on the status of the title. The court rejected the contract theory of the case holding that, "the wrong complained of consists of nothing more than the defendant's failure to use reasonable care in exercising professional skill. While such a breach subjects the attorney to liability for malpractice, it does not give rise to a contract action."[31]

Perhaps the generality of the understanding between the client and lawyer produced the difference between *Carroll* and *Albany Savings.* More likely, the nature of the lawyer's conduct accounted for the difference in the cases. In *Carroll* the lawyer's behavior was "wrong" only because he failed to follow his client's instructions; presumably the lawyer's handling of the matter conformed to the local custom and practice in relying on the opposing attorney to determine whether an agreement was performed. However, in *Albany Savings* the lawyer's conduct was "wrong" without regard to any contractual agreement. Having made the commitment to search the title, the lawyer was obligated to use ordinary skill and care. This duty existed regardless of contractual understanding.

It is theoretically true that the lawyer who fails to perform according to the ordinary standards breaches the contract of employment. However, the breach of this duty without more, will not sustain an action in express contract in most jurisdictions. The allegation

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in an express contract action must be that a specific promise was made and not delivered.[32] In the strict sense, the general agreement of the lawyer is to provide services, and unless the lawyer utterly fails to provide service, the express contract has not been breached. It is true that the failure to perform with ordinary care may well implicate an implied term of the contract which obligates the lawyer to perform in accordance with general standards of the profession. However, that failure gives rise to an action in implied contract, not express contract.

In the context of legal malpractice, the general view of the implied contract theory provides that the lawyer implicitly contracts to exercise ordinary skill, knowledge, and care in the performance of professional services.[33] These implied obligations serve much the same purpose as the standards in tort; they establish something of a minimum standard for behavior. The proof of the implied obligation is the same proof required for establishing the duty in a negligence action. Therefore, the implied contract action may be in essence the same claim as the negligence action.

If implied contract is nothing more than a mirror image of the negligence suit, little protection is

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added for consumers. Courts have not explored other implied terms of the contract for legal services. Is there, or ought there to be, an implied condition that the fees charged for the services will be reasonable; or can the law of unconscionably gross price disparity be applied to the contract for legal services? Should the contract for legal services contain an implied term that the services will be provided within a reasonable time? The point of these inquiries is to raise the question of whether the general expectations imposed on the contract for the sale of goods and services in other areas of commercial transactions ought to be equally enforceable in contracts for legal services.

3. Fraud or Deceit

In order to state an action for fraud the consumer must allege that the attorney had knowledge of

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a falsehood and an intent to deprive another of rights by means of the falsehood. The fraud action involves some form of dishonesty—the most egregious conduct for an attorney. The opportunity for consumer relief would be relatively small if actions against lawyers

(continued on page 120)

Lawyers

(continued from page 119)

were limited to that narrow band of situations in which the client is intentionally deceived by an attorney in order to deprive the client of a valuable right.

While it is true that lawyer liability for fraud is the same as the liability of nonlawyers for similar actions,[34] the fact that an attorney operates under a special relationship with the client casts the lawyer's misrepresentation in a light somewhat different from the misrepresentation that an ordinary seller of services might make to a purchaser of those services. Lawyers may properly be denied some of the latitude given to sellers of other products and services. For example, the nonlawyer will most likely not be held accountable for misleading others with an opinion. In contrast, because an attorney's opinion carries special weight, a client has a cause of action against an attorney who offers an opinion he knows to be false.[35] Moreover, the lawyer may be held liable for fraud when the lawyer's opinion is not known to be false when offered but is merely the product of recklessness.[36] However, a client whose claim is based on the fact that her lawyer gave bad legal advice has not stated a cause of action for fraud.[37] Although ordinarily stringent standards for actions in fraud are relaxed in actions against lawyers, consumers of legal services cannot use actions for fraud as a substitute for negligence actions.

III. Applicability of Consumer Protection Statutes to Attorneys Under Current Law

A. Learned Profession Exemption

Attorneys have long sought exemption from outside regulation by entities other than bar associations and courts. Such treatment is sought to be justified by the assertion that attorneys are engaged in a "learned profession," rather than in "trade or commerce." This distinction is important, attorneys contend, because the goal of a profession is service to the public, rather than enhancing profit.

The doctrinal underpinnings of learned profession doctrine were removed when the Supreme Court held, in 1975, that federal antitrust laws apply to anticompetitive activities of bar associations. The Supreme Court stated in *Goldfarb v. Virginia State Bar* that:

> In arguing that learned professions are not "trade or commerce" the County Bar seeks a total exclusion from antitrust regulation. Whether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anticompetitive practices with impunity. We cannot find support for the proposition that Congress intended such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public service aspect of professional practice controlling in determining whether § 1 includes professions.[38]

Close examination of some recent cases holding CPA to be inapplicable to lawyers demonstrates flawed statutory construction and vestiges of the "learned profession exemption."

The Court two years later in *Bates v. State Bar of Arizona,* commented that the "belief that lawyers are somehow 'above trade' has become an anachronism."[39]

While not so holding, *Goldfarb* and *Bates* strongly imply that federal regulatory laws may also apply to the legal profession. In fact, the Federal Trade Commission ("FTC") has specifically applied the Federal Trade Commission Act to the practice of law. The FTC held that "an attorney who had prepared a dunning letter and had participated in a collection scheme violative of 15 U.S.C. § 45(a)(1) ... violated the FTC Act."[40]

In light of the above-cited authority it would seem safe to assume that the "learned profession" exemption is no longer a viable doctrine. Therefore, any exclusion of the practice of law from coverage of CPA must be based, if at all, on a specific statutory exemption or on the inapplicability of the statute to the facts of a particular case. However, close examination of some recent cases holding CPA to be inapplicable to lawyers demonstrates flawed statutory construction and vestiges of the "learned profession exemption."

B. Statutory Exemptions

The relevant inquiry in determining the scope of consumer protection statutes is legislative intent. *Goldfarb* did not bar a legislature from exempting a profession from CPA coverage. Rather, the court looked to whether there was clear legislative intent to exclude the legal profession from statutory coverage. The learned profession doctrine itself was deemed insufficient to compel exclusion.

This, of course, leaves legislative bodies free, as a policy matter, to include or exclude lawyers from CPA coverage. For example, Maryland has, in clear language, decided to exclude attorneys and various other classes of persons from coverage.[41] As will be discussed below, the authors believe sound public policy supports the inclusion of attorneys within the scope of CPA. However, absent a successful constitutional challenge, a topic beyond the scope of this article, legislative bodies are free to make the decision on the scope of their statutes.

C. Judicially Created Exemptions

A number of courts have limited the applicability of CPA to attorneys through statutory interpretation. The approach taken by the New Hampshire Supreme Court may provide a method for evaluating these types of cases.

The New Hampshire statute[42] does not contain the clear statutory exemption provided in Maryland's CPA; nevertheless, the state supreme court has exempted attorneys from the reach of the CPA. The reasoning of the case in which this was decided appears, on close examination, to be based on the lingering notion of law as a "learned profession."

In *Rousseau v. Eshleman,* a 3-2 majority of the New Hampshire Supreme Court held attorneys exempt from the application of the consumer protection statute.[43] The court's interpretation was based on

the provision of the law exempting "[t]rade or commerce otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of this state."[44] Since the New Hampshire Supreme Court's Professional Conduct Committee controls discipline of attorneys, the court reasoned that the statutory exemption applied to all situations involving attorney conduct.[45]

The facts in *Rousseau I* warrant examination. The plaintiff consulted with Attorney Eshleman regarding the purchase of real estate. Upon the recommendation of the attorney, plaintiff purchased certain commercial real estate. Eshleman proposed and subsequently executed a contingent fee arrangement with the purchaser and represented that this was the "usual" practice. Evidence at trial indicated that this assertion was false and could create a conflict of interest. In addition, the attorney failed, despite having knowledge of the fact before the closing, to correct his advice regarding the assumability of certain mortgages.

The buyer suffered a substantial loss in the transaction and sued the attorney alleging causes of action in legal malpractice, negligent misrepresentation and unfair and deceptive trade practices. The jury found the defendant negligent and held that he had committed unfair and deceptive practices.

On appeal, the New Hampshire Supreme Court held the attorney exempt from CPA and granted a new trial on the other claims due to the possible prejudice caused by submitting the CPA issue to the jury.[46] This result was severely criticized by the dissenters, who believed that the commercial aspects of law should be covered by CPA.[47] However, two more fundamental flaws in the decision—i.e., the overly broad interpretation of the exemption clause and its relationship to the learned profession exemption—were given insufficient attention.

The first problem with the majority's interpretation is that it is not true to the language of the statute. The applicable section exempts trade or commerce "permitted" under the laws of a regulating body.[48] As Justice Thayer in his concurring opinion in *Rousseau II* pointed out, "neither party argues that the conduct complained of [the] misleading and deceptive setting of legal fees was permitted by a regulatory board or officer."[49] Therefore, the court's ruling must be understood to bar application of CPA in cases involving any person or entity subject to regulatory authority. Given the large number of industries currently subject to some form of regulation, this interpretation is certainly overbroad. It also creates an anomalous situation. Here, the supreme court's regulatory body, which is designed to protect the public, is unable to provide a monetary remedy to the client due to the nature of the regulatory process. Despite this inability to fully protect the consumer through the regulatory process, the mere fact that regulation exists, deprives the person whom the disciplinary system is designed to protect, of the protections afforded any other consumer.[50]

If lawyers are to be exempted from the general rules that apply to others engaged in business, it should be because there exists a sound policy reason to distinguish lawyers from others who deal with the public.

More fundamentally, however, the court seems to base its exemption on the attorney's privilege to self-regulate. This form of regulation, as has been previously discussed, is authorized in large part by the principles underlying law as a profession rather than a business. If lawyers are to be exempted from the general rules that apply to others engaged in business, it should be because there exists a sound policy reason to distinguish lawyers from others who deal with the public. The reasoning of *Rousseau I* neither provides any insight into what those reasons are nor addresses adequately the consequences of such decisions to consumers of legal services. We assert in section IV, *infra,* that no such basis for distinction exists.

D. Noncommercial Actual Practice of Law Exemption

A number of courts have struggled to develop a doctrinal basis for applying the CPA to attorneys which still allows for professional discretion. These courts posit a distinction between the commercial and noncommercial aspects of law. In *Short v. Demopolis,*[51] the Supreme Court of Washington held that certain aspects of the legal profession, such as the pricing of legal services, billing and collection methods and practices surrounding the obtaining, retaining and dismissing of clients are "legitimate concerns of the public which are properly subject to the CPA."[52] The respondents in *Demopolis* were members of a law firm who sued Demopolis for breach of an express contract to pay for legal services. Demopolis asserted a number of counterclaims, including unfair and deceptive practices, in violation of Washington's CPA.[53]

The Washington Supreme Court found respondents liable under Washington's CPA and stated that the legislative intent of the act was to apply to "every person who conducts unfair or deceptive acts in any trade or commerce."[54] The court held that entrepreneurial aspects of law fall within the act's "sphere of 'trade or commerce'."[55] Demopolis's other counterclaims, however, were held to be beyond the scope of the state's CPA. These claims related to the respondents' alleged failure to perform certain non-entrepreneurial functions of the law, such as filing a judgment in a timely manner.[56] The court stated that these claims related to the "actual practice of law" and amounted to allegations of negligence and malpractice. They were therefore exempt from the CPA.[57]

The distinction between "actual practice" and the commercial aspects of law certainly has a greater doctrinal claim of legitimacy than the approaches previously identified. These courts distinguish one aspect of the legal profession from another by drawing a line between commercial acts and those acts

(continued on page 122)

Lawyers

(continued from page 121)

which involve professional judgment. Analytically, the distinction between conduct involving judgment and acts involving the commercial dimensions of the legal practice may seem appealing. However, if the distinction is meaningful, it must be based on something unique about the judgments of lawyers. After all, the law does not allow the judgments of the sellers of other products and services to escape the reach of the CPA. For example, the law does not allow the seller of real estate to separate his judgments about the market, financing arrangements, and the like from the more tangible aspects of the transaction-like transfer of the property itself.

The court in *Demopolis* declined to apply the CPA to the "actual practice of law" in part based on the reasoning that such application would alter the standard of care owed by lawyers to their clients. Liability under the CPA does not require any showing of fault. It follows that if an act or practice resulted in deception, an attorney would be liable whether or not due care was exercised. Therefore, it is argued that application of the CPA to the "actual practice of law" may require an attorney to guarantee far more than due care in providing legal services.

The application of the CPA would not make attorneys insurers of their opinions. These type of statutes only prohibit actions that are unfair or deceptive, not merely wrong. An attorney who chooses between two courses of action after reasonable consideration, who explains the consequences of the decisions to the client and then implements the chosen course does not violate the statute merely because the choice later turns out to be wrong. Furthermore, including attorneys under the CPA does not mean that the client will necessarily win the lawsuit. Of course, one could argue that the threat of vexatious litigation will increase the cost of legal services without any benefit to the client. However, at this point no evidence exists to support that contention. Additionally, the history of consumer litigation in other areas does not suggest vexatious litigation is a necessary result.

E. Application of the CPA Without the Noncommercial Exemption

A few courts have held attorneys liable under consumer protection statutes in situations involving the "actual practice of law." For example, the Texas Supreme Court upheld an appellate court decision finding an attorney liable for consumer protection act violations for failing to obtain timely a name change for a client's daughter.[58] The appellate court stated that because an attorney "sells legal services and the client purchases them," the attorney, unless specifically exempted by statute, is subject to the provisions of the CPA. Under the Texas statute, physicians and health care providers are expressly exempted. The appellate court reasoned that because the legislature tabled an amendment to the act which would have exempted all professionals, it was reasonable to conclude that the legislature intended the act to cover legal services.[59]

> The principal effect of application of the CAP would be to impose potential liability for the breach of professional standards in those cases where consumer injury standards can be satisfied.

Likewise, the Massachusetts appellate court has applied the act to the legal profession without regard to the actual practice of law distinction. *Brown v. Gerstein* involved a claim against an attorney for failure to file suit against a bank to restrain a foreclosure. The attorney involved allegedly made a number of false representations to the client.[60] The court held that "in circumstances like those here present the practice of law constitutes "trade or commerce"' under the state's consumer protection statute.[61]

IV. Justification for Attorney Liability Under The CPA

A. The Consumer Protection Statutes

1. The Historical Basis

The state legislatures fashioned the consumer protection acts to address major problems in the world of consumer transactions. In a substantial number of transactions the consumer fell victim to unequal bargaining and economic power. The lack of bargaining power resulted, in part, from the inaccessibility and high cost of information for the consumer. Consequently, the consumer typically relied on those with whom he dealt. At the same time, a lack of economic power made it difficult for the consumer to employ costly legal representation to redress the frustration of reasonable expectations. In light of these realities, the consumer protection laws were fashioned to articulate common standards for fairness and honesty in order to uphold reasonable consumer expectations. Further, in order to make remedies readily available to consumers injured by deceptive practices, the statutes reduced the barriers to recovery by imposing the cost of prosecuting the claim on the seller.

2. The Typical Statutory Language

Generally, state legislatures patterned consumer protection statutes after federal trade regulation law. The New Hampshire Consumer Protection statute employs language typical of most state statutes. The act provides: "It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive practice in the conduct of any trade or commerce within this state."[62] The express language of the statute eliminates the argument that application of the CPA will force attorneys to guarantee the correctness of their opinions. In order to recover, a client must show more than an incorrect opinion offered by the attorney; the client must establish that the attorney's conduct was unfair or deceptive.

The statutory terms unfairness and deception are intentionally broad due to the impossibility of

listing all unfair and deceptive practices in a statute or regulation. Since enactment of the statutes, the task of giving meaning to the terms has been one for the courts.[63] Critics of applying the consumer protection statutes to attorneys assert that the concept of "unfairness" seems so vague that uncertainty is virtually guaranteed. In light of past success with the statutes, this argument lacks merit. The application of the law of unfairness and deception to lawyers would be developed just as the law based on those concepts has been developed for other industries—by the courts in the context of practical experience. The conduct of honest business has not been seriously hampered by the application of the statute. Likewise, it is not realistic to assume that the judges interpreting the law will be insensitive to the legitimate concerns of the legal profession.

Furthermore, the law of unfairness has taken on relatively specific form over the years. The FTC and the United States Supreme Court have given approval to an approach for determining whether a particular act or practice is unfair. These factors are: (1) whether the practice injures consumers; (2) whether the practice violates established public policy; and (3) whether the practice is unethical or unscrupulous.[64] Those factors are stated and restated with increasing specificity and elaboration in the FTC statement of policy and guidelines for enforcement.[65] Each of the criteria has a developed body of law which represents further refinement. The historical development of specific criteria for these statutes makes it apparent that consumer protection laws will not subject lawyers to unlimited liability.

Implementing the public policy criteria for defining unfair and deceptive in the context of the legal profession may be easier than in the typical business context. Most states already have specific professional regulations in place which represent the established public policy standards for attorney conduct. The public policy reflected by the professional regulations would constitute a standard of conduct to which lawyers could be held. For example, a lawyer who violates the competency standards of the Rules of Professional Conduct would violate an established public policy and would be held accountable for the consumer injury.[66] Thus, the principal effect of application of the CPA would be to impose potential liability for the breach of professional standards in those cases where consumer injury standards can be satisfied.

The American Bar Association Code of Professional Responsibility was not developed with the imposition of liability in mind.[67] The more recent American Bar Association Model Rules of Professional Conduct expressly renounce the use of ethical standards as grounds for civil liability. The "Scope" provisions of the Model Rules state:

> Nothing in the CPA would make a lawyer the insurer of his legal opinions. It is not unfair or deceptive to offer, after careful consideration, an opinion which later turns out to be wrong.

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached... They are not designed to be a basis for civil liability... The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.[68]

Regardless of the fact that the drafters intended that the Rules not be available for clients frustrated by a lawyer's violations of the Rules, the use of the professional codes of ethics as a supplement from which to define fairness is not uncommon.

Use of the Rules of Conduct in the "unfair and deceptive" analysis may serve the best interests of the profession in addition to protecting the consumer. Currently there is a debate regarding the extent to which the professional disciplinary system operates to adequately enforce the standards of legal practice represented by the Rules or the Code of Professional Responsibility. It seems clear that most state disciplinary systems are understaffed and underfunded. Consequently, violations of the rules go unchecked and the legal profession falls short of its self-regulatory goal of protecting the public through quality control of legal services.

In areas other than the regulation of lawyers, Congress and state legislatures have thought that empowering "private attorneys general" to bring individual claims was an efficient and effective way of policing the marketplace. If the legal profession is serious about quality control, the time has come to give serious consideration to empowering clients to enforce those standards through civil actions. As one studies the Model Rules of Professional Conduct, there appear to be very few obligations that could not be made operative as standards by which unfairness could be established under the consumer protection laws.[69] Would lawyers behave differently if they were exposed to liability for the failure to adhere to those standards? Would the cost of legal services be affected by that exposure? These questions and many more ought to be explored in a search for a way to serve two worthy objectives: providing a remedy for injured consumers of legal services, and improving the quality of legal services.

B. Resulting Changes

1. Altered Standard of Care

Those who argue against applying the CPA to the "actual practice of law" claim that lawyers' judgments cannot form the basis of CPA liability because the lawyers would effectively be required to insure the correctness of their opinions and therefore, would be unable to function in their traditional role as counselor.[70] Implicit in that claim is the concern that the standard of care owed to clients by attorneys would be altered.

(continued on page 124)

Lawyers

(continued from page 123)

Nothing in the CPA would make a lawyer the insurer of his legal opinions. It is not unfair or deceptive to offer, after careful consideration, an opinion which later turns out to be wrong. The lawyer would only be the insurer of the correctness of his opinion for purposes of the CPA, if his opinion was offered in such a way that it deceived the consumer. Surely the profession which makes its living on the spoken and written word is capable of offering opinions in a form which adequately communicates to reasonable persons that there is a margin of error in the advice being given. Far from impairing the ability of the lawyer to function as a counselor, a law which in effect requires full disclosure to the client of the possibilities surrounding the opinion offered could only serve to empower the client by assuring that the risks of error are understood and accounted for in the client's ultimate decision. In fact, the American Bar Association Mode Rules of Professional Conduct, adopted in some form in at least thirty-five states, require lawyers to communicate with their clients in a manner that makes informed decision-making possible.[71] Undeniably, the standards of fairness, honesty, and accuracy in the consumer protection statutes would alter the standards of care owed by lawyers to their clients. To the extent that the existing theories for holding lawyers accountable to their clients permit lawyers to engage in unfair and deceptive practices without incurring liability, some changes ought to be considered.

2. The Economic Impact

The plea that the CPA would change the standard of care and make it impossible for business to survive is not novel. The same claim was made by the financial services industry in response to regulation. Indeed, merchant groups ranging from direct sellers to auto dealers and manufacturers have claimed that the CPA would put them out of business. As history has shown, those claims were almost always overstated. On the other hand, there is no question that adoption of a new standard of care would entail costs. In order to meet the new duty owed to clients, lawyers may be required to expend time and effort for which they may have to bill clients. However, the mere fact that there is a cost associated with a change should not, without more, eliminate the possibility of change. The proper question is whether the benefit outweighs the cost.

The economics of a change of the sort proposed here—that lawyers be held to the same standards as other sellers of services—are straightforward. At present each consumer bears the full burden of an injury when a lawyer engages in a practice for which there is no practical recovery under the restrictive policies of legal malpractice. There is currently no economic incentive for the lawyer to guard against such injuries other than the competitive disadvantage that results from unhappy customers. As long as the lawyer's conduct does not alter the outcome of the representation in any substantial way, there is presently no direct economic accountability. Imposition of the consumer protection statutes to lawyers could expose them to liability and provide an economic incentive to change present practices to avoid liability. Preventive devices to limit the attorney's exposure to liability may impose a cost on each consumer in the form of increased fees. Imposing the cost of those preventive devices on the consuming public represents a spreading of the costs that formerly were imposed on individual consumers. The actual ability of the lawyer to pass the costs of the preventive devices on to the consumer will depend upon price competition and the efficiency with which the lawyer can meet the new standards.

V. Conclusion

Despite the fact that the practice of law has become more of a business, most states do not apply consumer protection statutes to attorneys. The legal profession has made changes in its disciplinary system to improve the quality of legal services. However, even if this self-regulatory system is effective, it does not provide redress to individual consumers injured by inadequate legal services. The traditional common law remedy of legal malpractice entails many impediments to recovery for the aggrieved consumer. For this reason the application of consumer protection acts to the legal profession will supplement traditional common law remedies to provide additional relief to consumers. Further, application of the consumer protection acts to attorneys will serve the best interests of the profession by allowing more complete enforcement of the standards of professional conduct.

ENDNOTES

1 In 1988 the American Bar Association House of Delegates adopted a resolution calling on local bar associations to develop and encourage compliance with a creed of professionalism. The message of the ABA Model "Lawyer's Creed of Professionalism" illustrates the deep concern that lawyers are behaving in much the same way that merchants behave; indeed, the first item in the ABA's "Lawyer's Pledge of Professionalism" is:

> I will remember that the practice of law is first and foremost a profession, and I will subordinate business concerns to professional ism concerns. ABA Lawyer's Creed of Professionalism [Not adopted as ABA policy.]

2 In this article we use the term consumer protection acts CPA to refer to that genre of laws listing specific acts and practices which are deemed to be unfair and deceptive. Many of these laws were modeled on Section 5(a) of the Federal Trade Commission Act. *See e.g.*, N.H. REV. STAT. ANN. Ch. 358-A.

3 *See* ABA Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (1986), reprinted in Hazard & Rhode, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 130 (Foundation Press 1988).

4 Several states have established client security funds to provide partial reimbursement to clients whose assets have been misappropriated by their attorney. The funds are generally maintained by mandatory contributions by attorneys or by state bar dues. The client must meet strict proof requirements in order to obtain compensation from the funds, and ceilings restrict the amount a single client may recover.

5 Both the ABA Model Code of Professional Responsibility and the ABA Model Rules of Conduct disclaim any connection between the professional standards and civil liability.

6 *Rousseau v. Eshleman*, 128 N.H. 564, 572 (1986) (dissenting opinion).
7 *See, e.g., In re Dawson*, 131 So.2d 472 (Fla. 1961).
8 *See, e.g., In re Millard*, 98 Wis. 2d 114, 295 N.W.2d 352 (1980).
9 *See, e.g., In re McKeon*, 201 Mont. 515, 656 P.2d 179, 183 (1982)
10 C. Wolfram, MODERN LEGAL ETHICS, 138 (West 1986).
11 R. Mallen and V. Levit, LEGAL MALPRACTICE § 71 (1977).
12 *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980).
13 *Berman v. Rubin*, 138 Ga. App 849, 227 S.E.2d 802, 804 (Ga. App. 1976); *Banerian v. O'Malley*, 42 Cal. App. 3d 604, 116 Cal. Rptr. 919, 924 (1st Dist. 1974).
14 *Collins v. Slocum*, 317 So.2d 672, 679-680 *cert. denied*, 321 So.2d 362-364 (La. 1975).
15 *Walker v. Porter*, 44 Cal. App. 3d 174, 118 Cal. Rptr. 468, 470 (2d Dist. 1974); *Sherry v. Diercks*, 29 Wash. App. 433, 628 P.2d 1336, 1338 (Wash. App. 1981).
16 *Bronstein v. Kalcheim & Kalcheim*, 90 Ill. App. 3d 957, 414 N.E.2d 96, 98 (Ill. App. 1980); *Frank v. Bloom*, 634 F.2d 1245, 1257 (10th Cir. 1980) (applying Kansas law).
17 *ABC Trans Nat'l Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill. App. 3d 817, 413 N.E.2d 1299, 1311 (Ill. App. 1980); *Lentino v. Fringe Employee Plans*, 611 F.2d 474, 480 (3d Cir. 1979) (construing Pennsylvania law); *O'Neil v. Bergan*, 452 A.2d 337, 341-342 (D.C. 1982).
18 *Joos v. Auto Owners Ins. Co.*, 94 Mich. App. 419, 288 N.W.2d 443 (Mich. App. 1979); *Olfe v. Gordon*, 93 Wis. 2d 173, 286 N.W.2d 573, 576-577 (Wis. 1980).
19 *Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller*, 75 Ill. App. 3d 516, 394 N.E.2d 559, 564-565 (Ill. App. 1979).
20 *See* Wolfram, MODERN LEGAL ETHICS 213 (West 1986).
21 *See, e.g., Webb v. Pomeroy*, 8 Kan. App. 2d 246, 655 P.2d 465 (Kan. App. 1982); *York v. Stiefel*, 109 Ill. App. 3d 342, 440 N.E.2d 440 (Ill. App. 1982); *aff'd in part, rev'd in part*, 99 Ill. 2d 312, 458 N.E.2d 488 (1983).
22 231 F.397 (4th Cir. 1916) (applying West Virginia law).
23 *Id.* at 402.
24 *See, e.g., Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355, 369 (N.C. 1985); *Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27, 30 (S.D. 1983); *Larson v. Crucet*, 105 A.D.2d 651, 481 N.Y.S.2d 368, 105 A.2d 651 (N.Y. Sup. Ct. App. Div. 1984).
25 *But see, O'Callaghan v. Weitzman*, 291 Pa. Super. 471, 436 A.2d 212, 214 (Pa. Super. Ct. 1981).
26 347 So.2d 274 (La. App. 1977), *cert. denied*, 350 So.2d 1223 (La. 1977).
27 *Id.* at 277.
28 34 N.C. App. 167; 237 S.E.2d 566 (N.C. 1977).
29 237 S.E.2d at 570-571.
30 95 A.D.2d 918, 463 N.Y.S.2d 896 (S.Ct. App. Div. 1983).
31 *Id.* at 897.
32 *See, e.g., Busk v. Flanders*, 2 Wash. App. 526, 468 P.2d 695, 697 (Wash. App. 1970); *Benard v. Walkup*, 272 Cal. App. 2d 595, 77 Cal. Rptr. 544, 548 (Cal. App. 1969); *Kartikes v. Demos*, 214 So.2d 86, 87 (Fla. App. 1968).
33 *See, e.g., Bucquet v. Livingston*, 57 Cal. App.3d 914,129 Cal. Rptr. 514, 518 (Cal. App. 1976); *Gunn v. Mahoney*, 408 N.Y.S. 2d 896, 900 (Sp. Ct. 1978); *Peters v. Simmons*, 87 Wash. 2d 400, 552 P.2d 1053, 1055 (Wash. 1976).
34 *See, e.g., Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App.3d 104, 128 Cal. Rptr. 901, 905 (Cal. App. 1976).
35 *Lietz v. Primock*, 84 Ariz. 273, 327 P.2d 288, 290 (Ar. 1958).
36 *Berkman v. Cohn*, 111 N.J.L. 229, 168 A. 290, 292 (N.J. 1933).
37 *Byland v. Nowack*, 76 Or. App. 416, 709 P.2d 252 (Or. App. 1985).
38 *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). 39 433 U.S. 350, 371 (1977); *see also Short v. Demopolis*, 103 Wash. 2d 52, 691 P.2d 163, 168 (1984).
40 *In re Wilson Chemical Co.*, 64 F.T.C. 168, 186-187 (1984), quoted in *Heslin v. Connecticut Law Clinic of Trantolo and Trantolo*, 190 Comn. 510, 461 A.2d 938, 942 (1983).
41 The Maryland statute provides that:
This title does not apply to:
(1) The professional services of a certified public accountant, architect, clergyman, professional engineer, ***lawyer,*** veterinarian, insurance company authorized to do business in the State, insurance agent or broker licensed by the State, Christian Science practitioner, land surveyor, property line surveyor, optometrist, physical therapist, podiatrist, real estate broker or salesman, or medical or dental practitioner. ... [Emphasis supplied.] MD. COMM. LAW. CODE ANN. § 13-104 (1990).
42 N.H. REV. STAT. ANN. Ch. 358-A (1989).
43 128 N.H. 564, 519 A.2d 243 (1986) *("Rousseau I"), modified on reh'g*, 129 N.H. 306, 529 A.2d 862 (1987) *("Rousseau II")*. In *Rousseau II*, one of the judges in the 3-2 majority retired. The newly appointed member of the court, Justice Thayer, concurred in the denial of a rehearing application, but indicated that he did not support a blanket exemption for attorneys. Rather, he adopted the reasoning of the dissent, which argued for a limited application of the statute to commercial activities by an attorney. *Id.* at 310, 529 A.2d at 865. The discussion in the remainder of this section will focus for purposes of analysis on the opinions in *Rousseau I*.
44 N.H. REV. STAT. ANN. 358-A:3(I) (1989).
45 128 N.H. at 567, 519 A.2d at 245.
46 *Id.* at 566-568, 519 A.2d at 246.
47 The commercial/noncommercial distinction will be discussed in detail in the Section III D, *infra*.
48 N.H. Rev. Stat. Ann. 358-A:3(I) (1989).
49 *Rousseau II*, 129 N.H. at 310, 529 A.2d at 865.
50 The language excluding regulated industries is a common feature of many CPA. Much of the case law interpreting the exemption has focused on the insurance industry. Courts are sharply divided on the proper scope of the exemption. *See* ANNOTATION, Coverage of Insurance Transactions Under State Consumer Protection Statutes, 77 A.L.R. 4th 991.
51 103 Wash. 2d 52, 691 P.2d 163 (Wash. 1984).
52 *Id.*, 691 P.2d at 168.
53 *Id.* at 165.
54 *Id.* at 168 (emphasis in original).
55 *Id.* at 170.
56 *Id.* at 168.
57 *Id.; see also Rousseau I*, 128 N.H.573, 519 A.2d 249-250 (Johnson, J., dissenting) (dissent would apply CPA to commercial aspects of legal practice but not to noncommercial aspects, because such application would alter the standard of care owed by lawyers to clients); *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 190 Conn. 510, 461 A.2d 938 (1983) (alleged practices including unfair and deceptive use of the terms "clinic" and "law clinic" in the defendant's advertising and misrepresentation by the defendant as to fees were held to fall within Connecticut's CPA); *Reed v. Allison & Perrone*, 376 So.2d 1067 (La.App. 1979) (attorneys' advertising subject to Louisiana's CPA).
58 *DeBakey v. Staggs*, 612 S.W.2d 924 (1981).
59 *DeBakey v. Staggs*, 605 S.W. 2d 631, 633 (Tex. Civ. App. 1980), aff'd, 612 S.W.2d 924 (1981).
60 *Brown v. Gerstein*, 460 N.E.2d 1043 (Mass. App. 1984). 61Id. at 1052.
62 N.H. REV. STAT. ANN. Ch. 358-A § II.
63 *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972).
64 *Id.* at 244-245, n.5. References to federal developments in this area are justified since many state laws specifically incorporate FTC law as guidance.
65 *See* letter to the Chairman and Ranking Minority Member of the Consumer Subcommittee, U.S. Senate Committee on Commerce, Scient and Transportation, from the Federal Trade Commission, December 17, 1980, at HEARINGS, U.S. Senate Committee on Commerce, Science and Transportation, 97th Congress, 2d Session, Ser. No. 97- 108 at 23.
66 Consumer injury, under the FTC criteria, must satisfy three tests before it will be regarded as sufficient to support a claim of unfairness. The injury must be substantial in its effect; it must not be outweighed by any countervailing benefits to the consumer; and it must be injury that the consumer could not have reasonably avoided. It should be apparent that consumer protection laws do not subject lawyers to unlimited liability.
67 *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble and Preliminary Statement.
68 ABA MODEL RULES OF PROFESSIONAL CONDUCT, Scope [6].
69 *See* e.g., ABA MODEL RULES OF PROFESSIONAL CONDUCT, 8.4(a), (c), (d) and (e).
70 *Rousseau I*, 128 N.H. at 573, 519 A.2d at 249; Comment, *Applicability of Texas Deceptive Trade Practices Act to Attorneys*, 30 BAYLOR L. REV. 65, 72 (1978).
71 ABA MODEL RULES OF PROFESSIONAL CONDUCT 1.4(b).