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Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina

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CREATING THE LEGAL MONSTER: THE EXPANSION AND EFFECT OF LEGAL MALPRACTICE LIABILITY IN NORTH CAROLINA

I. INTRODUCTION

It was on a dreary night of November that I beheld the accomplishment of my toils. . . I saw the dull yellow eye of the creature open; it breathed hard, and a convulsive motion agitated its limbs. . . His yellow skin scarcely covered the work of muscles and arteries beneath; his hair was of lustrous black, and flowing; his teeth of pearly whiteness; but these luxuriances only formed a more horrid contrast with his watery eyes. . . his shrivelled complexion and straight black lips. . . but now that I had finished, the beauty of the dream vanished, and breathless horror and disgust filled my heart. Unable to endure the aspect of the being that I had created, I rushed out of the room. . .

Malpractice. Like no other word, it doubles attorneys over in nauseated, gorge-bloated spasms of anxiety. The stigma the word carries is a powerful combination of personal, public, and professional humiliation. Over the last twenty years, legal malpractice

1. MARY WOLLESTONECRAFT SHELLEY, FRANKENSTEIN OR THE MODERN PROMETHEUS 48-49 (1831). The theme of her novel is man's inability to control what he cannot understand. Namely, the power of creation. Id. This situation seems analogous to legal malpractice. Attorneys themselves create malpractice through their own actions, yet they fail to understand the great power that they wield. Attorneys hold the power of creation but cannot control it. At one time in the past, an attorney hurt a client, and the client sued him for it. Thus, the process began. See Stephens v. White, 2 Wash. 203 (Va. 1796) (the first recorded legal malpractice action in the US).

has evolved into its own substantive area of law.\(^3\) In short, this Frankenstein creature has taken on a life of its own.

Why a Frankenstein? As in any body of law, the theories of liability carry out the vital functions, similar to internal organs. Liability rising out of legal services rests on distinctly separate theories.\(^4\) Attorneys have sutured these separate organs and entrails together with common factual patterns; their own conduct creating the life force beneath the single skin called legal malpractice.\(^5\) Standing firmly on civil damages, this trunk's limbs are becoming more powerful; their Herculean strength pushing the effects of legal malpractice outward.

Since the 1970's, the frequency of legal malpractice actions in the United States has skyrocketed.\(^6\) On average, attorneys can expect three malpractice claims against them during their careers.\(^7\) Lawyers Mutual of North Carolina, a major malpractice insurer, reported a five-fold increase in their reported claims between 1979 and 1990.\(^8\)

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3. JEFFREY M. SMITH & RONALD E. MALLEN, PREVENTING LEGAL MALPRACTICE § 1.6 (1989). Many procedural matters governing legal malpractice claims are still developing. Id.

4. See SMITH & MALLEN, supra note 3, § 1.1.

5. See SHELLEY, supra note 1, at 44-47. Frankenstein discovered the power of life and creation by examining corpses and observing them decay. He then fashioned his creature from parts of purloined cadavers. Id.

6. SMITH & MALLEN, supra note 3, § 1.6, fig. 1, at 18-19. For statistical data on high malpractice risk areas of law see SMITH & MALLEN, supra note 3, § 1.7, nn. 4, 6, 7 (citing American Bar Association, Profile of Legal Malpractice: A Statistical Study of Determinative Characteristics of Claims Asserted Against Attorneys (1986)). The study showed malpractice claims by area of law (28% in personal injury, 23% in real estate, 10% in bankruptcy, 8% in family law, 7% estates, 5% business/corporate, 3% in criminal law, and 16% in other areas), by activity (53% in litigation, 21% in document preparation, 5% for title opinions, 1% for advice, 10% from other activity), and by alleged error (44% substantive, 26% administrative, 16% client relations, 12% intentional wrongs, and other errors at 2%). Some type of calendaring error was involved in almost 25% of claims. Id.

7. NANCY BYERLY JONES, THE NORTH CAROLINA STATE BAR, LAWYERS' MANAGEMENT ASSISTANCE PROGRAM MANAGEMENT MANUAL 54 (1994). Ms. Jones is the Director and Management Counsel for the North Carolina State Bar Lawyers' Management Assistance Program and an adjunct professor at the Campbell University School of Law, where she teaches Legal Malpractice and Risk Management.

In North Carolina, this push has expanded the likelihood of attorney liability and affected the business forms legal practices take. The redefinition of duties, longer period of potential liability, and the advent of new claims for damages make it more advantageous for firms to move from partnerships into Limited Liability Partnerships and Professional Limited Liability Companies, which at first glance offer more malpractice protection. This comment will examine the existing and changing law of legal malpractice exclusively in North Carolina. But to grasp these changes, the various existing theories of malpractice liability need to be examined.

II. ORGANS AND ENTRAILS: THEORIES OF LEGAL MALPRACTICE IN NORTH CAROLINA

At the heart of this creature lie the commonalities that all the malpractice theories share. Each theory involves the following: 1. a duty, 2. a breach of that duty, and 3. damages to the plaintiff proximately caused by the breach. North Carolina courts presently recognize negligence, breach of contract, fraud, con-...
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structive fraud (i.e., breach of fiduciary duty), 15 statutory liability, 16 and agency 17 as valid malpractice theories. Negligence, breach of contract, fraud, and constructive fraud are often pled together. 18

A. Negligence

Factual examination of North Carolina case law shows two categories of negligence actions: 1. negligence in litigation (i.e., litigatory negligence), and 2. negligence in transactions (i.e., transactional negligence). 19 A plaintiff alleging attorney negligence must show that the attorney owed the plaintiff a duty, breached that duty, and that the breach proximately caused damage to the plaintiff. 20 Hodges v. Carter 21 enumerated the attorney's duty (or standard of care) as follows:

Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he

15. See Booher, 98 N.C. App. 570, 394 S.E.2d 816; Webster, 98 N.C. App. 432, 391 S.E.2d 204; Bumgarner, 92 N.C. App. 571, 375 S.E.2d 520.
19. See Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985)(alleged negligence in medical malpractice litigation); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954)(alleged negligence in insurance litigation); Hargett v. Holland, 111 N.C. App. 200, 431 S.E.2d 784 (1993)(Hodges standard applies to will drafting); Brophy v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167 (1991)(alleged negligence in real estate closing). This distinction is clearly stated by courts, although the two categories have never been expressly named "litigatory" or "transactional" until this comment. It is not uncommon for attorneys to try to lump all negligence actions into one category as transactional. This is clearly wrong. The distinction between litigatory and transactional negligence becomes critical in malpractice actions due to the additional burden of proof the plaintiff carries in litigatory negligence cases. See infra notes 24-32 and accompanying text.
21. 239 N.C. at 519-20, 80 S.E.2d at 145-46.
implies that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.\textsuperscript{22}

This standard applies to negligence in litigation and negligence in transactions.\textsuperscript{23}

However, \textit{Rorrer v. Cooke}\textsuperscript{24} made it very difficult for plaintiffs to win litigatory negligence cases by requiring them to show the following: 1. the original, underlying claim was valid; 2. the judgment would have been in their favor; and 3. the judgment would have been collectible.\textsuperscript{25} What results is a \textit{de facto} trial within a trial, where the plaintiff must literally win the original, underlying case to win the encompassing malpractice case.\textsuperscript{26} Due to that test, the plaintiff in litigatory negligence cases is almost always the client.\textsuperscript{27} As a result, the defendant-attorneys accused of litigatory negligence will be able to plead any defense available to the original defendants in the underlying case.\textsuperscript{28}

\textsuperscript{22} \textit{Id.} The court went on to say that an attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interests of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers. \textit{Id.} However, the court did express when an attorney is liable: Conversely, he is answerable in damages for any loss to his client which proximately results from a want of degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care. \textit{Id.}

\textsuperscript{23} \textit{See supra} note 19.


\textsuperscript{25} \textit{Id.} at 361, 329 S.E.2d 355, 369 (1985).

\textsuperscript{26} \textit{Id.}; \textit{See also} Bamberger v. Bernholz, 96 N.C. App 555, 386 S.E.2d 450 (1989), \textit{rev'd}, 326 N.C. 589, 391 S.E.2d 192 (1990) (plaintiff's original claim was not legally valid, so he could not prevail in litigatory negligence); \textit{Rorrer}, 313 N.C. at 361, 329 S.E.2d at 369. In the "trial within a trial" test, the plaintiff has to show but for the defendant's negligence, he would have won the original case, and then show that the judgment could have been collected. So even if but for is shown, the plaintiff can still lose if the judgment would not have been collectable or he cannot show it would have been collectable. \textit{Id.}

\textsuperscript{27} \textit{Rorrer}, 313 N.C. at 361, 329 S.E.2d at 369.

\textsuperscript{28} \textit{Bamberger}, 326 N.C. 589, 391 S.E.2d 192. The Supreme Court reversed the intermediate appellate decision at 96 N.C. App. 555, 386 S.E.2d 450 (1989)
On the other hand, negligent transactions are easier to win because the Rorrer "trial within a trial" test does not apply. But to determine liability, the Hodges standard of care is still used. Both clients and non-clients may recover here. For a non-client to recover, he must pass a balancing test in addition to proving negligence. He must also allege a non-client, non-privity relation to the attorney at the outset. A good example of non-client recovery is found in the estate planning area. Attorneys who draft defective wills are usually found liable to harmed beneficiaries for negligence.

B. Breach of Contract

Whether malpractice rises from negligence or contract has been long debated. The two theories are often pled at the same time. The contract theory rises out of the attorney-client relationship. Contracts here are either express or implied, but few

for the reasons in Judge Lewis's dissent. The original claim of the plaintiff had no legal validity, and the defendant-attorneys showed that at the malpractice trial.


30. Patrick v. Ronald Williams, P.A., 102 N.C. App. 355, 402 S.E.2d 452 (1991). The court made it clear that cases that do not go to trial, due to attorney negligence or settlement or some other cause, do not qualify as litigatory negligence. The court noted that the "trial within a trial" rule stated the case had to have been lost at trial due to negligence. Id. So it follows that any non-litigated case or matter will fall under transactional negligence.

31. See supra note 22 and accompanying text.

32. See supra note 19.


34. Id. at 406-07, 263 S.E.2d at 318. The court balances various factors: (1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm. Id.


attorneys make express contracts with clients, so most actions are based on implied contracts.\textsuperscript{40} The few express contract disputes that do arise often involve the attorney's fee agreement or contracts between title insurers and certifying attorneys.\textsuperscript{41} The standard of care an attorney must use may be altered through the written agreement.\textsuperscript{42} Contract principles, instead of tort theories, apply in express contract actions.\textsuperscript{43} Breaches occur when the attorney violates the written agreement in some way.

Liability in implied contract cases is based upon the negligence standard of care enumerated in Hodges, which is a term implied upon the parties in the absence of an expressly stated standard of care.\textsuperscript{44} The attorney, by his consent to represent the client, has impliedly promised to use the legal standard of care used in negligence actions throughout the representation.\textsuperscript{45} North Carolina courts have noted that liability results from the negligent performance of this implied contract term.\textsuperscript{46}

Additionally, non-clients may recover for a breach of contract if they can show they were a third party beneficiary.\textsuperscript{47} Again, the non-client must allege a non-client, non-privity relation to the attorney at the outset.\textsuperscript{48}

representation). It is possible for attorneys to create an express warranty by guaranteeing a client a particular result. \textit{Id.}

\textsuperscript{40} 1 RONALD E. MALLEN \& JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.4 (3d ed. 1989).

\textsuperscript{41} See Broyhill, 102 N.C. App. 382, 402 S.E.2d 167; Holt, 36 N.C. App. 284, 244 S.E.2d 177.

\textsuperscript{42} MALLEN \& SMITH, supra note 39, § 8.4.

\textsuperscript{43} Id.

\textsuperscript{44} Id. § 8.5. See supra note 22 and accompanying text. Implied contract actions in North Carolina use the Hodges standard of care to determine negligence. See supra notes 25-26 and accompanying text. In implied contractual negligence cases arising out of litigation, the Rorrer "trial within a trial" test is still applied. \textit{Id.}

\textsuperscript{45} Id.


\textsuperscript{47} United Leasing Corp. v. Miller, 45 N.C. App. 400, 405-06, 263 S.E.2d 313, 317 (1980). After properly showing negligence and alleging a non-privity claim, the non-client will have to show the following:

(1) that there was a contract between two other people; (2) that it was a valid and enforceable contract; and (3) the contract was entered into not for the non-client's indirect benefit, but for his direct benefit. \textit{Id.}

\textsuperscript{48} Id.
C. Fraud

An attorney who commits fraud is liable for malpractice. Liability rests if the plaintiff shows the attorney did the following: 1. made a false representation or concealed a material fact, 2. which was reasonably calculated to deceive, 3. and made to deceive, 4. and which does deceive, 5. damaging the plaintiff.49 While other states have extended liability for fraud to non-clients,50 no North Carolina cases have done so. Plaintiffs must also plead fraud with particularity.51 Many fraud cases arise when the attorney actively tries to hide negligent actions that occurred during representation52 or mismanages client funds.53 Section 84-13 of the North Carolina General Statutes54 allows plaintiffs to recover double damages for attorney fraud.55 Plaintiffs may also impose constructive trusts.56

D. Constructive Fraud (or Breach of Fiduciary Duty)

In Miller v. Bank,57 the North Carolina Supreme Court described constructive fraud as follows:

Constructive fraud differs from active fraud in that the intent to deceive is not an essential element, but it is nevertheless fraud though it rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced.58

So it is the breach of a fiduciary duty alone that gives rise to a rebuttable presumption of constructive fraud.59 The intent to

51. N.C. GEN. STAT. § 1A-l, Rule 9 (b) (1993).
57. 234 N.C. 309, 316, 67 S.E.2d 362, 367 (1951); See also Vail v. Vail, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951). There the court described constructive fraud as follows:

Where a relation of trust and confidence exists between the parties, ‘there is a duty to disclose all material facts, and failure to do so constitutes fraud.’ citing 37 C.J.S., Fraud, § 16, p. 247. Id.
58. Miller, 234 N.C. at 316, 67 S.E.2d at 367.
59. Id.; See also Carroll v. Rountree, 36 N.C. App. 156, 243 S.E.2d 821 (1978).
deceive the client is not necessary and usually is not taken into account.60 Cases suggest that constructive fraud often occurs where the attorney fails to disclose information, acts against his clients' financial interests in favor of himself, or rides the coattails of a client's recovery for his own gain.61 As in actual fraud, double damages and constructive trusts are available.62 Usually, claims of fraud and constructive fraud are pled together because the same facts easily give rise to both; the result of which is even if the defendant wins the fraud claim, he can still be found liable for constructive fraud.63

Some states have extended an attorney's fiduciary duties to include the shareholders of corporate clients.64 North Carolina has not yet done so.

E. Statutory Duties

Numerous statutes impose duties upon attorneys. Violating these duties can give rise to civil liability. Federal statutes, such as the Securities Exchange Act of 193465 and the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO),66 provide dangers for attorneys nationally. Firms that handle securities transactions may face § 10 (b)67 violations, but Rule 10b-568 viola-

60. MALLEN & SMITH, supra note 39, § 8.9.
62. See Booher, 98 N.C. App. 570, 394 S.E.2d 816.
67. 15 U.S.C.A. § 78 j (b) (West 1981). This is better known as section 10 (b). In part, it reads:

It shall be unlawful for any person, directly or indirectly,. . .(b)To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may
tions are much more common. Also, attorneys are often exposed to RICO violations under § 1962 (c). 69

North Carolina has its own securities act which attorneys dealing in securities should beware. 70 The state also has the North Carolina Racketeer Influenced and Corrupt Organization Act. 71 Judicial sanctions under both federal 72 and state 73 law should also prescribe as necessary or appropriate in the public interest or for the protection of investors. Id.

This is a huge area of civil liability, and many books deal only with securities regulation. See generally Louis Loss, Fundamentals of Securities Regulation (1988); Mallen & Smith, supra note 39, § 10.

68. 17 C.F.R. § 240.10b-5 (1989). Providing in part:

(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. Id.

69. See supra note 66.
71. See N.C. Gen. Stat. § 75D-2 (1990). This act is similar to the federal RICO act.

72. See Fed. R. Civ. P. 11. The rule states:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A Party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses.

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be remembered. This list is by no means exhaustive, but attorneys should be aware that statutes remain a source of potential liability.

F. Agency

Agency concepts affect an attorney's partners and his clients. Under North Carolina's partnership law, partners are agents of the partnership.74 An attorney may bind the partnership entity when he commits malpractice.75 His partners may also be held

incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fees. Id.

73. See N.C. GEN. STAT. § 1A-1, Rule 11(a) (1993). The rule states in part: (a) Signing by an attorney. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. Id.


75. See N.C. GEN. STAT. § 59-43 (1993), which states:

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. Id.

See also Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949) (plaintiff injured by one partner's tort in the course of partnership business, where plaintiff sued that partner individually, has a judgment on that plaintiff individually and on the partnership property, not the other partners
jointly and severally liable.\textsuperscript{76} So malpractice by a partner may bind the firm and other partners,\textsuperscript{77} unless the partner committing the malpractice was sued individually.\textsuperscript{78} Then only that partner and the partnership entity are liable.\textsuperscript{79} But if the malpractice is outside the ordinary course of the partnership business, only the tortfeasor-partner is liable.\textsuperscript{80} It is this joint and several liability that makes the partnership a risky venture. Attorneys have searched for years for sanctuary from that risk.

Further, an attorney may be liable as an agent of the client to the client or a third party, leading to a malpractice recovery.\textsuperscript{81} As an agent, the attorney may enter into any dealing that he has the

\begin{itemize}
  \item \textsuperscript{76} N.C. GEN. STAT. § 59-45 (a) (1993). It states in part:
  \begin{itemize}
    \item (a) all partners are jointly and severally liable for the acts and obligations of the partnership. \textit{Id.}
  \end{itemize}
  \textit{See} Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952); \textit{Dwiggins}, 230 N.C. 234, 52 S.E.2d 892. Both cases noted that each partner is jointly and severally liable for a tort committed by a partner in the course of partnership business, and that the injured party has the choice to sue all the partners or any one partner. \textit{Id.}

  \item \textsuperscript{77} \textit{See supra} notes 75-76.

  \item \textsuperscript{78} \textit{See Dwiggins}, 230 N.C. 234, 52 S.E.2d 892. If the injured party sues the tortfeasor-partner individually, he may only recover against that partner personally and the partnership property. But the plaintiff may elect to sue one or all of the partners. The plaintiff has to two choices: sue either the tortfeasor and the partnership entity or sue the partners personally.

  \item \textsuperscript{79} \textit{Id.}

  \item \textsuperscript{80} \textit{See N.C. GEN. STAT. §§ 59-43 and 59-45 (1993); Dwiggins}, 230 N.C. 234, 52 S.E.2d 892 (Each partner is jointly and severally liable for a tort committed in the ordinary course of the partnership business); Jackson v. Jackson, 20 N.C. App. 406, 201 S.E.2d 722 (1974)(Malicious prosecution is not within the ordinary course of business of a law partnership). The key here is whether the tort was committed while doing something that a partnership normally does in the practice of law.

  \item \textsuperscript{81} State v. Barley, 240 N.C. 253, 81 S.E.2d 772 (1954)(attorney/client relationship is one of agency); \textit{See} Forbes Homes, Inc. v. Trimi, 318 N.C. 473, 349 S.E.2d 852 (1986); Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 209 S.E.2d 795 (1974). These cases show the various ways attorneys operate as agents for clients. An agent’s authority to bind the principal is express, implied, or apparent. Third parties often have to determine whether the agent is acting for a principal or for himself. This leads to undisclosed and disclosed principal concepts. \textit{Id. See generally} 24 STRONG’S NORTH CAROLINA INDEX 4TH \textit{Principal and Agent} §§ 1-53 (1993). \textit{See also} Howell v. Smith, 261 N.C. 256, 134 S.E.2d 381 (1964); Walston v. R.B. Whitley & Co., Inc., 226 N.C. 537, 39 S.E.2d 375 (1946); Walker v. Pacific Mobile Homes, Inc., 413 P.2d 3 (Wash. 1966); Zummach v. Polasek, 32 N.W. 33 (Wis. 1929).

\end{itemize}
authority to enter. Through express, implied, or apparent authority, the agent may bind the client as principal. An agent is personally liable for any deals made outside the agent’s authority, absent estoppel or ratification. This situation often arises when attorneys have to make quick decisions in sales, negotiations, settlements, contracts, and other transactions for clients. Also, agency and respondeat superior imputes the staff members’ negligence to the firm.

G. Defenses

Historically, attorneys have had numerous defenses available in malpractice actions including an invalid underlying claim, contributory negligence, estoppel, ratification, accord and satisfaction, scrivener, in pari delicto, lack of an attorney-client relation, and the statute of limitations. What defense is necessary depends largely on the type of claim involved.

82. See generally cases cited supra note 81.
83. See generally cases cited supra note 81.
84. See generally cases cited supra note 81.
85. See generally cases cited supra note 81. The actions by third parties here are usually under agency principles and not under malpractice. However, clients will often bring malpractice actions based on tort, contract, or breach of a fiduciary duty where the attorney has bound the client against the client’s wishes.
86. See generally 24 Strong’s North Carolina Index 4th §§ 1-53 (1993); Restatement (Second) of Agency §§ 219, 229 (1957); Mallen & Smith, supra note 39, § 5.5; See also Lane v. Williams, 521 A.2d 706 (Me. 1987); Stinson v. Brand, 738 S.W.2d 186 (Tenn. 1987). Typical actions here are based on administrative mistakes such as misplacing files and calendaring errors. But staff breaches of fiduciary duties (for example, breaches of confidentiality) may also carry to the attorney. Id.
92. See Lawson v. Lawson, 84 N.C. App. 51, 351 S.E.2d 794 (1987), rev’d on other grounds, 321 N.C. 274 (1987). The defendant-attorney argued that all he did was draft documents and that there was no representation beyond that.
94. See Broxhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167 (1991)(verbal or written agreement or payment of fees not necessary for attorney client relation, it can be implied through actions of parties); Booher v. Frue, 98

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But now, the nature of this creature is changing. He is becoming more intelligent, more devious, and much stronger.

III. STRENGTHENING THE LIMBS:96 Rule Evidence & New Claims

Several developments have energized the creature's limbs, strengthening his grip and quickening his stride. The Rules of Professional Conduct redefine the legal standard of care, thus increasing the chance of liability and creating a uniform duty of care. Attorneys may contract themselves into providing what courts consider a "continuing course of treatment." Finally, the tort for negligent infliction of emotional distress considerably raises the economic risks of legal practice.

N.C. App. 570, 394 S.E.2d 816 (1990)(attorney argued no relation with client when his only action is referral; attorney lost); Insurance Co. v. Holt, 36 N.C. App. 284, 244 S.E.2d 177 (1978)(non-client must allege non-privity). This defense involves attacking the third party claimant as well as the client. In essence, the defendant-attorney is saying that there was no attorney-client relation, so no duty was owed. This is not a very successful defense.

95. N.C. GEN. STAT. §§ 1-15(c) and 1-52 (1993). § 1-15(c) is the malpractice accrual statute:

Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the Defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . .Id.

96. See SHELLEY, supra note 1.

I suddenly beheld the figure of a man, at some distance, advancing towards me with superhuman speed. He bounded over the crevices in the ice, among which I had walked with caution. . .I perceived, as the shape came nearer (sight tremendous and abhorred!) that it was the wretch whom I had created. . .'Devil,' I exclaimed. . .said the daemon. . .'Yet you, my creator, detest and spurn me, thy creature, to whom thou art bound by ties only dissoluble by the annihilation of one of us.'" Id. at 83-84.
A. The Massive Arms of the Rules of Professional Conduct

In North Carolina, the Rules of Professional Conduct do not define the standards for civil liability *per se*. Under the old Code of Professional Responsibility, the courts routinely held that a breach of a rule did not lead to liability *per se* and refused to admit rules into evidence at malpractice trials. In 1985, the State Bar adopted the Rules of Professional Conduct. The Scope of the North Carolina Rules of Professional Conduct states in part:

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. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

97. See Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816 (1990); *The Annotated Rules of Professional Conduct of the North Carolina State Bar*, Scope (1993). Malpractice actions and ethical grievances are not the same thing, although the same set of facts may give rise to both. Malpractice actions are filed in court and serve to compensate an injured party. They are filed by an injured client or related party. Ethical grievances are filed with the State Bar. Anyone can file an ethical grievance when they feel an attorney has acted improperly. "Anyone" includes clients, judges, other attorneys, and any member of the general public. Ethical grievances result in possible disciplinary action of the attorney, and no monetary award is involved.


[T]he code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct.

*Id.*


Despite this authority, courts are beginning use the Rules of Professional Conduct in malpractice trials as evidence of the attorney’s duty.

1. The Case

In *Booher v. Frue*,102 a North Carolina attorney referred his client to another attorney in Texas for the purpose of bringing various actions in Texas.103 The two attorneys made a referral fee arrangement without the clients knowledge.104 The Texas attorney was to get one-third of each of two recoveries and one-fourth of another as contingency fees, while the North Carolina attorney would get one-third of the total contingency fees as a referral fee.105 Subsequently, the client sued the North Carolina attorney under a constructive fraud theory.106

103. *Booher*, 98 N.C. App. at 574, 394 S.E.2d at 817.
104. *Id.*
105. *Id.* at 575, 394 S.E.2d at 817.
106. *Id.* at 574, 394 S.E.2d at 818.
107. DR2-106 provides in part:

Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

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

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

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

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

(8) Whether the fee is fixed or contingent. *Id.*

*See* THE ANNOTATED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR Rule 2.6 (A)-(B) (1993). DR2-106 (A) and (B) are exactly the same as Rule 2.6 (A) and (B). *Id.*

108. DR2-107 (A) provides:

Division of Fees Among Lawyers.
At trial, the court allowed DR2-106\textsuperscript{107} and DR2-107\textsuperscript{108} of the old North Carolina Code of Professional Responsibility\textsuperscript{109} into evidence as part of the attorney’s duty to the client.\textsuperscript{110} The disciplinary rules showed that the Rules of Professional Conduct forbid lawyers of different firms from splitting fees without the client’s consent or knowledge.\textsuperscript{111} On appeal, the court held that violation of a Rule was not liability \textit{per se}, but the Rules were admissible as evidence of the attorney’s duty to the client.\textsuperscript{112}

\begin{itemize}
  \item[(A)] A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
  \begin{itemize}
    \item[(1)] The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
    \item[(2)] The division is made in proportion to the services performed and responsibility assumed by each.
    \item[(3)] The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client. \textit{Id.}
  \end{itemize}

  \begin{itemize}
    \item[(D)] A division of fee between lawyers who are not in the same firm may be made only if:
    \begin{itemize}
      \item[(1)] The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
      \item[(2)] The client is advised of and does not object to the participation of all the lawyers involved; and
      \item[(3)] The total fee is reasonable. \textit{Id.}
    \end{itemize}
  \end{itemize}

The two rules are practically identical. The referral fee arrangement clearly amounted to fee splitting under DR2-106 and DR2-107. The defendant-attorney provided no legal services but collected a fee any way, without the client’s consent because there was no disclosure. \textit{See supra} note 107.


111. \textit{See supra} notes 107-08.

112. \textit{Booher}, 98 N.C. App. at 581, 394 S.E.2d at 821-22. Another strange twist emerged from this case. The defendant-attorney argued that the North Carolina rules should not apply since the referral arrangement was made in Texas, where the ethics rules allowed such arrangements. The court rejected the argument finding that the attorney-client relation was born in North Carolina, and the defendant was a North Carolina attorney, so the North Carolina rules applied, not the Texas rules. This almost creates a conflict of laws for ethical standards. \textit{Id.}
2. The Analysis

The admission of Rules of Professional Conduct\textsuperscript{113} into evidence increases the plaintiff's chance of recovery by redefining the attorney's duties. In fraud and constructive fraud cases, the specificity of the Rules\textsuperscript{114} alters the requisite elements of the actions. In negligence cases, the Rules\textsuperscript{115} subvert the standard of care by asking the wrong questions.

3. Presumed Intent & Liability Per Se

In fraud actions, the key element is the intent to deceive.\textsuperscript{116} The plaintiff must show that element by a preponderance of the evidence. The Rules\textsuperscript{117} help the plaintiff to redefine fraud by creating a presumption of intent. How is this presumption created? Through clarity and simplicity. The clearer the submitted rule, the more likely a breach of it will be found. The more rules the plaintiff can get into court, the more likely it is that he will sway the jury. For example, see Rule 5.8, stating as follows:

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a disputed claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation may appropriate in connection therewith.\textsuperscript{118}

Rule 5.8,\textsuperscript{119} like most of the Rules,\textsuperscript{120} is very specific in its terms. It clearly tells an attorney what to do, and what not to do. If an

\textsuperscript{113} See The Annotated Rule of Professional Conduct of the North Carolina State Bar (1993).
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{117} See supra note 113.
\textsuperscript{119} Id.
\textsuperscript{120} See supra note 113. See Hizey v. Carpenter, 119 Wash.2d 251, 830 P.2d 646 (1992). The Washington Supreme Court refused to admit the rules in evidence because they are considered minimum standards of attorney behavior. That is why the rules are so clear and simplistic. An injured party can only seek a non-financial disciplinary action from the state for a rule violation, absent any damage. Not every rule breach causes damage that would be compensable in a civil case. The Court expressed concern that the using the rules in a malpractice case dragged the level of civil culpability down due to their simplicity, noting the legal standard of care is a higher standard of care because of the damage
attorney settles a malpractice claim with an unrepresented client, and Rule 5.8\textsuperscript{121} is then used in the resulting fraud case, the battle will revolve around intent.

The clarity of Rule 5.8\textsuperscript{122} guarantees that any conduct to the contrary, no matter how menial, will be a blatant breach. If several Rules\textsuperscript{123} are introduced, evidence can mount rapidly showing multiple breaches of clearly defined Rules.\textsuperscript{124} Rules which are evidence of the attorney's duty to his client.\textsuperscript{125} The plaintiff's question to the jury becomes, "The Rules\textsuperscript{126} are so clear, how could an attorney not understand or not follow them?" That question and the Rules\textsuperscript{127} themselves raise the presumption of intent, and the simpler the rule, the more apparent a breach becomes.

The strength of the presumption is measured by the clarity and simplicity of the Rule. The clearer the Rule, the more obvious the breach, thus the stronger the presumption. Intent becomes defined by the clarity of the Rule in relation to the conduct. The attorney is quickly overwhelmed by a presumption. Before Rule-evidence, the plaintiff would have to show evidence of intent some other way, no matter how egregious the attorney's conduct. Even worse, in constructive fraud (i.e., breach of fiduciary duty) cases, Rule-evidence can create liability \textit{per se}. Recall the following definition:

Constructive fraud differs from active fraud in that the intent to deceive is not an essential element, but it is nevertheless fraud though it rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced.\textsuperscript{128}
Here, no intent showing is required. A lesser showing is required than in fraud. The greater the Rule-clarity, the easier it is to find a breach. A jury reading the definition of constructive fraud and then looking at clear, fiduciary-type rules, like Rule 5.8, could easily conclude that there had been some fiduciary duty owed, and that there was in fact a breach of this duty and thus liability. This becomes even more likely when multiple Rules are put into evidence. There can be more breaches for the jury to consider. For all intents and purposes, constructive fraud becomes a liability per se action. The ethical standard begins to alter the elements of an action by being considered the attorney's legal duty in court.

4. Blurring the Legal Standard of Care

In cases of alleged transactional or implied contractual negligence, the Rules confuse the proper standard of care by asking the wrong, irrelevant question. This makes liability more likely. The court, in malpractice cases, looks to the Hodges standard of care. Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation

129. Miller, 234 N.C. at 316, 67 S.E.2d at 367.
130. Id.
131. See supra note 118 and accompanying text.
132. See supra note 63 and accompanying text. Allowing Rules as evidence in fraud/constructive fraud cases works against the defendant another way. Even if he wins the fraud claim, he will still face a constructive fraud claim that he is almost certain to lose. Id.; See also North Carolina State Bar v. Sheffield, 73 N.C. App. 349, 326 S.E.2d 320 (1985)(Standard of proof in Bar disciplinary proceeding is clear, convincing, and cogent evidence). There is also a standard of proof problem when Rules are used in court. The standard of proof in civil actions is preponderance of the evidence. So in court, Rule breaches are being found at a lower evidentiary standard. See supra note 120.
133. See supra notes 113 and 120.
134. 239 N.C. 517, 80 S.E.2d 144 (1954)
135. See supra notes 33 and 45 and accompanying text; See also supra note 27 and accompanying text. Litigatory negligence cases are not affected to any great extent by the clouding of the standard of care because the plaintiff would still have to pass the "trial within a trial" test.
entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause. 136

Compare Rule 6 to the above quotation: Rule 6 Failing to Act Competently

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating himself with a lawyer who is competent to handle it. Competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(2) Handle a legal matter without preparation adequate under the circumstances.

(B) A lawyer shall:

(1) Keep the client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(2) Explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(3) Act with reasonable diligence and promptness in representing the client. 137

Under the Hodges standard, 138 the practices of other "similarly situated" 139 attorneys and the defendant are compared to determine liability. 140 But under Rule 6, 141 the defendants conduct is judged on its own face. The Rules 142 ask the wrong question. The proper question is "What do other attorneys in the same practice and geographic area do, and did the defendant conform to that?"

136. Hodges, 239 N.C. at 519, 80 S.E.2d at 145-46.


138. See supra note 136 and accompanying text.

139. See Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985); Hodges, 239 N.C. 517, 80 S.E.2d 144. "Similarly situated" means other attorneys in the same geographical area engaged in the same area of law. For example Rorrer looked at the attorneys in Greensboro handling medical malpractice cases. Hodges looked at the state as a whole.

140. See Rorrer, 313 N.C. 338, 329 S.E.2d 355 (the plaintiff has an evidentiary burden of showing the practices of other attorneys, and that the defendant did not observe those practices); Hodges, 239 N.C. 517, 80 S.E.2d 144 (attorney not liable for following legally invalid service procedure because all North Carolina attorneys had done the same thing for 20 years, and the law on it was unclear).

141. See supra note 137. Notice the title of Rule 6—"Failing to Act Competently." Just the title makes it look like a legal duty of care.

142. See supra note 113.
Not, "What did the defendant do, and did it conform to the ethical Rules?" Thus, the rule-evidence shifts the relevant focus.

Shifting the focus isolates the defendant-attorney. This is important because even if the defendant-attorney's conduct was in line with other attorneys' practices, the plaintiff can use the Rules to make the defendant-attorney's conduct appear worse than that of the other attorneys. Before Rule-evidence, a plaintiff could not enjoy this easy isolation. How much can the water be muddied? It becomes a mere game of perception.

Remember, comparing the attorney's conduct against a submitted Rule increases the chance of finding a breach of the Rule. The greater the simplicity and clarity of the Rule, the more obvious the breach. The defendant-attorney can be made to appear incompetent despite the practices of other attorneys. This alone does not create liability, but it does help the plaintiff to cloud the real issue and create the impression of a breach of duty. When you ask the wrong question, you get the wrong answer.

And flowing from this is the creation of a uniform legal standard of care for attorneys in North Carolina. The legal requirement of showing what other attorneys in the same practice and geographic area do becomes a nullity, since the plaintiff can argue that all attorneys are bound by the Rules. The legal and ethical standard of attorney conduct merges into one. This merger further increases the likelihood of attorney liability because rule-evidence usurps the notion that the Rules themselves are not standards of civil liability, and more critically that the level of con-

143. See supra notes 113 and 120.
144. See supra notes 113 and 120.
145. See supra notes 113 and 120.
146. This puts the defendant at a disadvantage because if he has not fully conformed with a Rule, and it is common practice not to, he must then find attorneys who are willing to admit that in court as an expert witness. See supra note 120.
147. See supra notes 134-41 and accompanying text. The conflict between a statewide and local legal standard of care is reflected in Hodges and Rorrer. The question has never been decided as a matter of law in North Carolina. Other states however have addressed the issue. See Hizey v. Carpenter, 119 Wash.2d 251, 830 P.2d 646 (1992)(noting that Washington uses a statewide standard of liability).
duct required to breach most ethical rules is not enough on its own to violate the *Hodges* legal standard of care.\(^{149}\)

That is because the Rules are often considered a minimum standard of behavior of which the attorney is liable only to the state for violations.\(^{150}\) Indeed, this expectation of a minimum level of behavior is why the Rules are so clear and simple in the first place. Not every breach of rule will injure a client, and every breach that does injure a client may not be of a serious enough nature to lead to civil liability under the *Hodges* standard.\(^{151}\) But the rule-evidence/legal standard merger puts an unreasonable burden on the defendant-attorneys by requiring them to show that they were not only within ethical standards but that they were also within legal standards. But if they were not within ethical standards, they would have to show that the ethical violation was in no way causally related to the legal standard, and that the ethical violation did not cause damage that would violate legal standards. It is the later scenario that becomes nearly impossible to show since the line between the two standards are blurred. So as North Carolina courts continue to admit rule-evidence, the creature's arms will grow stronger, stretching outward to snap more and more attorneys in their crushing grip.

B. *Increasing His Stamina: Longer Liability Over Time*

North Carolina medical malpractice law has long recognized the concept of a doctor's liability in a "continuous course of treat-

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149. See *supra* notes 22-32 and accompanying text. See *supra* note 101 and accompanying text. *See Hizey*, 119 Wash. 2d 251, 830 P.2d 646. The preceding provides an extensive discussion of the intent behind ethical standards as minimum standards of attorney conduct. A breach of which provides only a public remedy, i.e. bar discipline, and not a private cause of action. *See also* Mayol v. Summers, Watson, & Kimpel, 223 Ill. App. 3d 794, 585 N.E.2d 1176, 166 Ill. Dec. 154 (1992)(ethical rules are minimum standards of behavior). Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991)(Maryland's version of the Rules of Professional Conduct are inadmissible in legal malpractice cases as they do not constitute standards of civil liability). *See also* MALLEN & SMITH, *supra* note 39, § 6.27. See also *supra* note 120.

150. *Hizey*, 119 Wash. 2d 251, 830 P.2d 646. The *Hizey* court notes that the Code and the Rules are too confusing to try to apply in a malpractice case because they are minimum standards of conduct. The inherent incongruity between the ethical rules and legal standards of care only serve to distort the true issues. *Id.*

151. *Id.*
This theory holds that the statute of limitations on a medical malpractice action tolls until the last act of treatment occurs, and upon the last act involved in the treatment the statute begins to run. In effect, the action survives longer than it would if measured from the actual injury. This concept has energized the creature, increasing his vigor. He now runs even farther.

1. The Case

In Hargett v. Holland, the plaintiffs were children of a testator whose will had been drafted by the defendant-attorney. The drafting and execution took place in 1978. The will language was unclear as to whether the plaintiffs or the testator's second wife were to receive the remainder of a life estate in the family farm. The wife and children litigated the matter, the plaintiff-children receiving the remainder. The children subsequently sued the defendant-attorney in 1991, claiming he negligently drafted the will.

The trial court ruled that the plaintiff's action was barred by the applicable statute of limitations and granted the defendant's Rule 12(b)(6) motion to dismiss. However, the Court of Appeals, in a widely criticized decision, reversed. They held that the last act giving rise to the cause of action was not the execution of the will but was instead the testator's death in 1988. The North Carolina Supreme Court reversed the Court of Appeals, holding that the testator and attorney had only contracted to draft and execute a will. By the implied terms of the contract, once the execution was complete, the relationship was

153. Ballenger, 38 N.C. App. at 58, 247 S.E.2d at 290. See supra note 95 and accompanying text. This is the appropriate statute of limitations for legal and medical malpractice actions.
155. Id. at 654, 447 S.E.2d at 787.
156. Id. at 653, 447 S.E.2d at 787.
157. Id. at 653-54, 447 S.E.2d at 787.
158. Id. at 654, 447 S.E.2d at 787.
159. Id.
160. Id.
162. Id. at 203-04, 431 S.E.2d at 786.
163. See Hargett, 337 N.C. 651 at 655-57, 447 S.E.2d at 788.
over and the statute began to run.\textsuperscript{164} Attorneys from around the state huffed a great sigh of relief.

2. The Analysis

While many attorneys feel that the short term effect of this case has been to level mountains of potential liability, the long term impact of the case has been largely ignored. Chief Justice Exum's decision was by no means a wide-swiping brush that protects every attorney who drafts wills. It is more correctly read as an extremely narrow opinion that protects attorneys only where they have been wise enough to clearly delineate where their service begins and ends. More ominously, Chief Justice Exum extended the circumstances and time period whereby an attorney may be held liable for malpractice.

In \textit{Hargett}, Chief Justice Exum delved into the depths of the "continuous course of treatment" doctrine.\textsuperscript{165} He analogized this concept to the liability that the Court of Appeals had imposed on the defendant-attorney.\textsuperscript{166} This discussion went well beyond mere dicta. The current state of the law in North Carolina, according to the Exum decision, is that to invoke the "continuous course of treatment" doctrine in the legal malpractice context, a plaintiff must allege an "ongoing attorney-client relationship," or in the least "allegations of facts from which such a relationship may be inferred."\textsuperscript{167}

The key to properly pleading the "continuing course of treatment" doctrine in the legal malpractice context is determining the following: 1. what service was contracted for (i.e., was it

\begin{footnotes}
\footnote[164]{Id.}
\footnote[165]{Id. See Mathis v. May, 86 N.C. App. 436, 358 S.E.2d 94, disc. rev. denied, 320 N.C. 794, 361 S.E.2d 78 (1987); Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978). These are the leading North Carolina cases on the continuous course of treatment doctrine in the medical malpractice area. The rule is best stated as where doctor continues a particular course of treatment over a period of time and there is some negligence in the treatment, the statute of limitations begins to run on the last act of the treatment. North Carolina also states the theory as once negligence has occurred: so long as the relationship of surgeon and patient continued, the surgeon was guilty of malpractice during that entire relationship for not repairing the damage he had done and, therefore, the cause of action arose against him arose at the conclusion of his contractual relationship. Ballenger, 38 N.C. App. at 58, 247 S.E.2d at 293(citing DeLong v. Campbell, 157 Ohio St. 22, 25, 47 Ohio Ops. 27, 104 N.E.2d 177, 178 (1952)).}
\footnote[166]{Hargett, 337 N.C. at 655-57, 447 S.E.2d at 788.}
\footnote[167]{Id. at 655-56, 447 S.E.2d at 788.}
\end{footnotes}
expressly or impliedly continuous or non-continuous), 2. whether there was a breach of duty, and 3. when the last act of the service contracted for occurred.\textsuperscript{168} The service contracted for will determine the existence or non-existence of the "continuous course of treatment."\textsuperscript{169} The date of the last act is the date used to measure the starting point for the statute of limitations, as opposed to the date the action actually accrued; as the tort committed here is in the nature of a continuous tort that builds upon itself until completed.\textsuperscript{170}

It is the nature of the service contracted (expressly or impliedly) that controls the application of the doctrine.\textsuperscript{171} The case makes clear that a continuous service would be one of the type where the attorney would provide various services in a single, stated endeavor over time.\textsuperscript{172} The doctrine would apply there. Conversely, a non-continuous service would end at a specified time or event effectually severing the attorney-client relationship.\textsuperscript{173}

What types of services could be considered continuous? Any type of ongoing planning process, such as estate, tax, or business planning could be seen as a continuous transaction. Some types of litigation could be seen this way as well. A prime example is in the family law arena, where claims for divorce, alimony, child support, and equitable distribution are so closely related that a mistake in one area has serious consequences in another area.

But there would seem to be a bright spot. It would appear from Justice Exum's decision that attorneys can avoid the "continuous course of treatment" doctrine through careful planning.\textsuperscript{174} By using terms that clearly describe events in time as starting and stopping points, a clear time line of the attorney-client relation can be created.\textsuperscript{175} This simplifies figuring out when the performance of services contracted for began and ended. So if a fee/representation agreement uses open-ended language in describing the services and when they are to begin and end, that language would seem to lend itself more readily to the doctrine.

\textsuperscript{168} Id. at 655-57, 447 S.E.2d at 788. See supra note 165.
\textsuperscript{169} Hargett, 337 N.C. at 655-57, 447 S.E.2d at 788. See supra note 165.
\textsuperscript{170} Hargett, 337 N.C. at 655-57, 447 S.E.2d at 788.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
The "continuous course of treatment" theory affects both negligence and contract actions. But as stated above, the service sought will determine the extent of liability in those theories. Transactional negligence seems to be the biggest expansion area as litigatory negligence will be subject to the "trial within a trial" test and harder to show over time.

The creature now has increased stamina. He is free to race over miles and miles of countryside, into the cold, damp night.

C. Quickening the Gate: Adding a New Claim

Parties injured by legal malpractice have traditionally recovered in the same way as under the North Carolina tort law. In the past, claims for emotional distress in legal malpractice cases were rarely allowed because of their speculative nature. But this is no longer the situation. The creature not only runs further, but he now runs faster.

1. The Case

In Johnson v. Ruark, a medical malpractice case, a group of doctors allowed a mother to give birth to a fetus they knew to be stillborn. The parents sued, with one of the claims being for the negligent infliction of emotional distress. The trial court dismissed the claims on a Rule 12 (b) (6) motion, ruling that North Carolina law required the plaintiff to suffer some physical injury or damage from the defendant's act to collect for the negligent infliction of emotional distress. The appellate court recognized the claim and reversed, however. The Supreme Court affirmed and validated claims for the negligent infliction of emotional dis-

176. See supra notes 19 and 23-32 and accompanying text.
177. See supra notes 19 and 23-32 and accompanying text.
181. Id. at 287, 395 S.E.2d at 87.
182. Id.
183. Id.; See also Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960).
184. See Johnson, 327 N.C. at 287, 395 S.E.2d at 87.
tress when caused by concern for another or where the plaintiff suffered no physical harm.\textsuperscript{185}

2. The Analysis

Under \textit{Johnson},\textsuperscript{186} the plaintiff is allowed recovery for the negligent infliction of emotional distress out of concern for another, or where there is no physical injury. He must show the following: 1. the defendant was negligent; 2. it was reasonably foreseeable that the conduct would cause the plaintiff severe emotional distress; and 3. the conduct did cause severe emotional distress.\textsuperscript{187} No physical harm from the defendant's act or physical harm is required; only a generally recognized psychological condition must be shown.\textsuperscript{188} The foreseeability of harm is judged by the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act.\textsuperscript{189} The ultimate question is, does this claim apply to legal malpractice? The answer is invariably yes.

In the past, the impediment which blocked plaintiffs from recovering damages for negligent infliction of emotional distress was the physical harm requirement.\textsuperscript{190} Plaintiffs are never physically injured by an attorney's malpractice and would have trouble showing any physical manifestation from emotional distress.\textsuperscript{191} But now, that barrier is removed because the only injury required is a recognized mental illness.\textsuperscript{192}

Also, the \textit{Johnson} case was a professional malpractice case. The North Carolina legislature and courts often lump medical malpractice and legal malpractice together under the concept of "professional malpractice."\textsuperscript{193} The legislature even gave both mal-

\begin{flushleft}
\textsuperscript{185} \textit{Id.} at 306-07, 395 S.E.2d at 98-99.

\textsuperscript{186} 327 N.C. 283, 395 S.E.2d 85.

\textsuperscript{187} \textit{Id} at 304, 395 S.E.2d at 97.

\textsuperscript{188} \textit{Id}.

\textsuperscript{189} \textit{Id.} at 305, 395 S.E.2d at 98. This issue of foreseeability matters only in cases where emotional distress is brought on out of concern for another. It does not apply to claims for the negligent infliction of emotional distress with a physical injury. \textit{Id}.


\textsuperscript{191} \textit{See supra} note 190.

\textsuperscript{192} \textit{Johnson}, 327 N.C. at 304, 395 S.E.2d at 97.

\textsuperscript{193} \textit{See supra} note 95. \textit{See} Hargett v. Holland, 337 N.C. 651, 447 S.E.2d 784 (1994). The court went into a lengthy discussion of the "continuous course of

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practice actions the same statute of limitations. Further, other states recognize claims for the negligent infliction of emotional distress in the legal malpractice context.

Most likely, this claim will have the biggest impact on transactional negligence situations. Although application would not be impossible in contract cases, the additional requirements needed for a claim in such cases should limit the situations of applicability. Again, the Hodges standard of care should be used in actually determining negligence in transactions and implied contract situations. It is easy to find scenarios where attorney negligence causes emotional distress. If a will is defective, for example, an entire estate could pass intestate, bypassing intended beneficiaries. The harm here is clearly foreseeable and certain as is the severe upset which surviving spouses and children would suffer. The biggest battle may revolve around proving that a mental illness resulted from the negligence. This will probably result in a battle of the experts.

treatment" doctrine that applies to medical malpractice cases. The court stated that it could apply to the legal profession as well. Id.

196. See Johnson, 327 N.C. at 301, 395 S.E.2d at 96 (citing Stanback v. Stanback, 297 N.C. 181, 194, 254 S.E.2d 611, 620 (1979))(normally, no recovery in contract for emotional distress); Carroll v. Rountree, 34 N.C. App. 167, 237 S.E.2d 566 (1977)(no recovery for emotional distress due to negligent breach of contract in legal malpractice case due to pecuniary nature of client's interest in legal dealings). Because of these cases, claims for negligent infliction of emotional distress in implied contractual negligence cases will probably be barred. Both courts cited the general rule that to recover for emotional distress in contract, the plaintiff must show the following:

1. that the contract was not concerned with trade and commerce with elements of profit involved; 2. contract had other benefits than pecuniary (i.e., where pecuniary interests were not the dominating motivating factor); and 3. contract must relate directly to matters of dignity, mental concern, or solitude, or the sensibilities of the party to whom the duty is owed which directly involves interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected. Id.

See supra notes 25-26 and accompanying text. The Rorrer "trial within a trial" test should protect the area of litigatory negligence.

197. See supra note 22 and accompanying text.
198. See Johnson, 327 N.C. at 310, 395 S.E.2d at 100-01. In Justice Meyer's dissent, he points out the difficulties in determining what mental disorders do in fact accrue from emotional distress. Id.
It seems unlikely that courts will allow claims based solely on one’s concern for another.\textsuperscript{199} While non-clients can recover for transactional negligence, case law suggests that these parties had more of an interest in the legal activity than mere observers.\textsuperscript{200} The interest was usually financial.\textsuperscript{201}

While no North Carolina legal malpractice cases have reported claims of negligent infliction of emotional distress based on the \textit{Johnson} case, attorneys need to recognize that the legs of the creature have gotten stronger and faster.

\textbf{IV. Fleeing the Monster}\textsuperscript{202}

Is there respite from the continuous onslaught of the creature? Attorneys continue to search for sanctuary. Now, North Carolina has two new business forms that offer some, but not total, protection to the attorney and those he practices with.

\textbf{A. New Business Forms}

Two new business forms exist that offer attorneys somewhat greater liability protection from malpractice committed by those with whom they work: 1. Limited Liability Partnerships (LLP’s) and 2. Professional Limited Liability Companies (LLC’s or PLLC’s). Their superiority to a partnership is evidenced in their names. But because they are new, the judiciary has not examined them yet, making analysis dependent upon statutory interpretation and prior law.

\textsuperscript{199} See supra note 158 and accompanying text. The foreseeability factors should weed out the vast majority of claimants, especially if they are so far removed as not to be involved or have an interest in the legal transaction.

\textsuperscript{200} See United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313 (1980)(non-client plaintiff relied on attorney’s bad title search); Chicago Title Co. v. Holt, 36 N.C. App. 284, 244 S.E.2d 177 (1978)(non-client title insurer sues attorney after relying on bad lien waivers). See supra note 35 and accompanying text. The balancing test for non-clients in transactional negligence cases seems better suited for determining whether a non-client was harmed because it expressly looks at the intent of the transaction itself.

\textsuperscript{201} See supra note 200.

\textsuperscript{202} See \textit{Shelley}, supra note 1 and accompanying text. Frankenstein thought he could hide from his creation. But the creature proved to be highly intelligent, and he began to learn, amassing an intellect just as powerful as his body. Eventually, he desired revenge on his creator, and he killed Frankenstein’s loved ones instead. An enraged Victor Frankenstein pursued his creature on a chase to frozen ends of the Earth. At the end of which, Frankenstein died. \textit{Id}. 

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1. Limited Liability Partnerships

In 1993, the North Carolina General Assembly began to allow partnerships to register with the Secretary of State as Limited Liability Partnerships. The advantages of doing so rest in the concept of limited liability. A partner is only personally liable for his own negligence or malfeasance, in the "ordinary course of the partnership business," and not for another partner's, unless the acting partner or employee was under the partner's "supervision or direction," or the partner himself was "directly involved." Clearly, the partner involved in the act will be personally liable himself, as would the LLP entity. But it is clear that the normal joint and several liability among partners in ordinary partnerships is avoided. However, this does not mean that partners in an LLP cannot be treated as a partnership in certain situations. The creature is still lurking in the darkness.

204. See N.C. GEN. STAT. § 59-45 (1993). Section 59-45 provides:

Nature of partner's liability in ordinary partnerships and in registered limited liability partnerships

(a) Except as provided by subsection (b) of this section, all partners are jointly and severally liable for the acts and obligations of the partnership.

(b) A partner in a registered limited liability partnership is not individually liable for debts and obligations of the partnership arising from errors, omissions, negligence, incompetence, or malfeasance committed in the course of partnership business by another partner or representative of the partnership not working under the supervision or direction of the first partner at the time the errors, omissions, negligence, incompetence, or malfeasance occurred, unless the first partner was directly involved in the specific activity in which the errors, omissions, negligence, incompetence, or malfeasance were committed by the other partner or representative.

(c) Subsection (b) of this section does not affect any of the following:

(1) The joint and several liability of a partner for debts and obligations of the partnership arising from any cause other than those specified in subsection (b) of this section.

(2) The joint and several liability of a partner for any taxes owed by the partnership.

(3) The liability of partnership assets for partnership debts and obligations.

205. Id. See supra notes 75-79 and accompanying text.
206. See supra notes 204-05 and accompanying text.
2. **Statutory Non-compliance**

To gain the benefit of limited liability, a partnership must follow the proper registration and renewal procedures, which means filing with the Secretary of State's office. Presumably, failure to do so or an incomplete filing would mean the loss of limited liability. The ultimate result is that the organization is treated as a partnership for the period of non-compliance. This is the only possible result, as the state is providing the members of the organization with limited liability through the registration process. It only makes sense that non-compliance would render a loss of limited liability, creating a partnership by operation of law.

3. **Partnership by Estoppel**

Even though the statute abrogates many of the statutory rules of partnership liability, a limited liability partnership could become a partnership by estoppel. This occurs where the LLP or its partners hold themselves out as a normal partnership in accordance with the statute. If the LLP is not technically an LLP until registered properly, then the parties would still fit the definition of a partnership. See N.C. GEN. STAT. § 59-36 (1993). This is akin to personal liability for promoters and participants in a defectively incorporated corporation, where these parties are personal liable during the period of defective incorporation as no entity exists. See infra notes 272, 276-77 and accompanying text.

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207. *See supra* note 203.

208. *See supra* note 203.

209. *See supra* note 203. A loss of limited liability is likely because the LLP is not technically an LLP until registered. If it is not registered properly, then the parties would still fit the definition of a partnership. *See N.C. GEN. STAT. § 59-36* (1993). This is akin to personal liability for promoters and participants in a defectively incorporated corporation, where these parties are personal liable during the period of defective incorporation as no entity exists. *See infra* notes 272, 276-77 and accompanying text.


211. *See supra* note 209.

212. N.C. GEN. STAT. § 59-46 (1989) provides:

**Partner by Estoppel.**

(a) When a person, by words spoken or written, by conduct, or by contract, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(1) When a partnership liability results, he is liable as though he were an actual member of the partnership.
some manner to a third party. Partnership by estoppel involves violations of common law agency principles as well as those defined in the partnership statute.

For instance, the LLP should have the abbreviation "L.L.P." behind its name and printed on all materials going to third persons. If the LLP fails to file its papers at the proper time or fails to represent itself to third parties as a LLP by its name or documents, it may be holding itself out as a normal partnership. An obvious question is what happens if limited liability partners call each other "partners?" Third parties relying on the title "partner" may think that the LLP is in fact a partnership. To avoid these problems, a partnership converting to an LLP must change ads, letterheads, cards, and signs to prevent holding out that it is still a partnership. Another device that prevents a holding out is stating in fee agreements the statutory business form the practice has taken and the resulting limited liability.

4. The Ratification Dilemma

Another important question is what happens when an act of malpractice committed by a partner or employee is ratified by a partner or partners of the LLP? Here, the partnership statute and

(2) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(b) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representations to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

See supra note 204 for comparison.

214. Id.
217. See supra notes 212-14 and accompanying text.
218. See supra notes 212-14 and accompanying text. See also Kaplan v. Gibson, 192 Ga. App. 466, 385 S.E.2d 103 (1989)(where a professional corporation was held to be a partnership by estoppel due to doctors' references to each other as partners).
common law agency principles apply. This problem should be viewed first as to individual partners and then to the LLP itself.

Under the statute, agency principles seem to be affected to the extent that associate attorneys and employees fall under the statute's definition of "representative." If so, a limited liability partner would not be bound by another partner's, associate's, or employee's acts unless he ratified them or the partner was somehow involved. Mere knowledge of a representative's actions could lead to ratification if the partner does nothing after learning about it. This is where personal liability begins to attach to


Partnership Charged With Knowledge of or Notice to Partner.

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of fraud on the partnership committed by or with the consent of that partner. Id.

This section appears to raise the likelihood of partners being charge with knowledge of their partners acts by operation of law. Those partners' subsequent acts or lack thereof could easily be construed as a ratification or adoption of the acting partner's activities. See also N.C. Gen. Stat. § 59-34 (1989). Another point, it would also seem that ratification of another's act by a partner would be included as "involvement" in the act for purposes of the limited liability section of the statute. See supra note 204.

220. See supra notes 86 and 204 and accompanying text.


In a broad sense, the confirmation of a previous act done either by the party himself or by another; as confirmation of a voidable act. The affirmation by a person of a prior act which did not bind him, but which was done or professedly done on his account whereby the act, as to some or all persons, is given effect as if originally authorized by him. Id.

It continues:

In the law of principal and agent, the adoption of and confirmation by one person with knowledge of all material facts, of an act or contract performed or entered into in his behalf by another who at the time assumed without authority to act as his agent. Essence of "ratification" by principal of act of agent is manifestation of mental determination by principal to affirm the act, and this may be manifested by written word or by spoken word or by conduct, or may be inferred from known circumstances and principal's acts in relation thereto. Id. at 1262.

222. See supra note 221.
other partners under the Limited Liability sections of the statute. Ratification is a level of involvement and carries the force of an official sanction.\textsuperscript{223} Complications arise between partners since the statute deems that the knowledge of one partner is imputed to the others.\textsuperscript{224} If this knowledge and subsequent conduct leads to ratification, then the ratifying partner becomes jointly and severally liable for the other's act.\textsuperscript{225}

This charge of knowledge carries over to the LLP organization itself. If the all the limited liability partners (or those who compose the controlling majority of the LLP) are charged with knowledge and/or ratify someone's acts, the LLP as an entity and the ratifiers should be jointly and severally liable.\textsuperscript{226} When all the partners in an LLP have engaged in ratification, the prohibition of joint and several liability should fall.\textsuperscript{227} This is especially true where the ratification takes the form of affirmative action, which includes acquiescence and silence. Case law can only clear up such situations. While the LLP offers more protection than a partnership, it is not an impenetrable organization. The creature still stalks his creator.

5. \textit{The Professional Limited Liability Company}

In 1993, the General Assembly passed the North Carolina Limited Liability Company Act.\textsuperscript{228} Professional Limited Liability Companies (PLLC's) are creatures of statute which operate as a cross between corporations and partnerships.\textsuperscript{229} They resemble corporations in that they have special filing and formality require-

\begin{itemize}
\item \textsuperscript{223} \textit{See supra} note 221.
\item \textsuperscript{224} \textit{See supra} note 221.
\item \textsuperscript{225} \textit{See supra} note 221.
\item \textsuperscript{226} \textit{See supra} notes 204-21 and accompanying text. The notion here is that the entity and all those composing it will all eventually become liable. The LLP veil is in effect pierced although not expressly set aside. The partners by their own actions have waived limited liability by becoming involved in the acts under the LLP statute. Joint and severable liability stems from the LLP statute, not the partnership statute.
\item \textsuperscript{227} \textit{See supra} note 226.
\item \textsuperscript{228} N.C. GEN. STAT. Chapter 57C (1993).
\item \textsuperscript{229} RUSSELL M. ROBINSON, II, ROBINSON ON NORTH CAROLINA CORPORATION LAW § 1.8 note 2 (4th ed., 1993 cum. supp.)(citing final report of the Joint Committee on Limited Liability Companies of the Business Law Section and Tax Section of the North Carolina Bar Association).
\end{itemize}
ments and have members and managers instead of partners. But, PLLC’s can be taxed as partnerships under state and federal law if they take only two of the four characteristics of a corporation: limited liability, centralized management, free transferability of interests, and continuity of life. Under the North Carolina statute, every LLC and PLLC member has limited liability, so the choice of which other characteristic to take requires careful consideration. Members’ and managers’ liability is limited to the obligations they personally guarantee, their own acts, the acts of those working under them, and those acts in which they are directly involved. However, the PLLC section applies limited liability only to acts of malpractice in a PLLC and the LLC section applies to all other situations in PLLC’s and LLC’s.

230. See N.C. GEN. STAT. §§ 57C-1-20 to 57C-1-29 (1993). See also N.C. GEN. STAT. Chapter 55B and § 57C-2-01 (1993). Every PLLC must also register itself with the North Carolina State Bar as a PLLC.

231. See N.C. GEN. STAT. § 57C-1-03 (1993).


233. Id. See infra note 234 and accompanying text.

234. N.C. GEN. STAT. § 57C-3-30 (a) (1993). For LLC’s the section provides in part:

Liability to third parties of members and managers (a) A person who is a member or manager, or both, of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being a member or manager or both, and does not become so by participating, in whatever capacity, in the management or control of the business. A member or manager may, however, become personally liable by reason of his or her own acts or conduct.

See N.C. GEN. STAT. § 57C-2-01 (c) (1993). This provides for PLLC members and managers in part:

Purposes
(c). A member or manager of a professional limited liability company is not individually liable for debts and obligations of the professional limited liability company arising from errors, omissions, negligence, incompetence, or malfeasance committed in the course of the professional limited liability company’s business by another member or manager or a representative of the professional limited liability company not working under the supervision or direction of the first member or manager at the time the errors, omissions, negligence, incompetence, or malfeasance occurred, unless the first member or manager was directly involved in the specific activity in which the errors, omissions, negligence, incompetence, or malfeasance were committed by the other member or manager or representative.

See also infra notes 239-51 and accompanying text. These two sections operate together under the statute. Obviously, the first statute applies to LLC’s and PLLC’s and the second only to PLLC’s, but this arrangement sets up the back
Despite the fact that all LLC statutes say that in a suit against an LLC, members are improper parties,235 the PLLC label is not an impenetrable wall that protects members and managers by keeping the creature at bay. North Carolina law allows "veil piercing" of PLLC's similar to that of corporations.236 Partnership by estoppel237 and statutory non-compliance238 also allow penetration of the corporate wall. From a practical standpoint, these theories of liability remove the PLLC shield and make the improper party language irrelevant because the plaintiff is attempting to show the entity itself is not operating as a PLLC but as an alter ego or other business form and cannot claim the statutory privilege.

6. Piercing the Veil

Applying corporate law's "piercing the veil" theory to the LLC and PLLC liability sections shows that the likely result is the setting aside of the PLLC shield.239 Members and managers of a PLLC can still be personally liable in certain situations for acts of malpractice committed by another party in the PLLC. Some other states expressly state in amendments to their LLC statutes that the members and managers of an LLC can be held personally lia-

235. 2 NICHOLAS G. KARAMBELAS, LIMITED LIABILITY COMPANIES § 5.04 (1994); N.C. GEN. STAT. § 57C-3-30 (1993). Note that managers are proper parties through negative implication.


237. See supra notes 212-14 and accompanying text.


239. See, 2 NICHOLAS G. KARAMBELAS, LIMITED LIABILITY COMPANIES § 5.04 (1994); LARRY E. RIBSTEIN & ROBERT R. KEITANGE, RIBSTEIN AND KEITANGE ON LIMITED LIABILITY COMPANIES § 12.03 (1992). See supra note 234. The statutes concerned here are §§ 57C-3-30 and 57C-2-01. The first applies to the organizational and control structure of the PLLC. The second refers ONLY to the malpractice liability of the parties. By using the first statute to pierce, you destroy the applicability of the second. See infra notes 240-51 and accompanying text.
ble on LLC liabilities through corporate law “piercing the veil” theory. These states use corporate common law theory as the law used in piercing a LLC.

While North Carolina has not yet amended its statute to provide such clear guidance, the statute nevertheless allows the application of veil piercing theory. The pierce occurs by striking down the PLLC solely on the basis of its organizational structure and controlling parties, which destroys the PLLC status; then the plaintiff attempts to attach liability for malpractice. The LLC liability section notes that a member or manager does not become liable for the obligations of the LLC “solely” by reason of their position in the LLC. However, a member or manager may be “personally liable by reasons of his own acts or conduct.” Here, the party’s “conduct” that is attacked is the organization and control of the business as opposed to the actual practice of law. The party’s “acts or conduct” in relation to the business, as opposed to the practice of law, is key here because North Caro-


241. Ribstein and Keitange supra note 239, § 12.03 (Larry E. Ribstein, 1995 cum. supp.)

242. N.C. Gen. Stat. § 57C-3-30 (1993). See supra note 234. This is where the piercing begins. You look only at the organization and operations of the entity and at who controls those actions. This organizational set up and the parties’ control actions will play the major role.

243. See supra note 242. Here, the piercing attempt is not based on the party’s practice of law. Rather, the focus is on the business entity and the controlling parties. You look at those first, at the conduct of the parties in relation to the operating and organizational structure of the business aside from their practice of law. You pierce solely on the basis of the organizational structure and the party’s own control conduct. This business activity and organization is the “conduct” you want show. You are looking at how the entity is set up and how the parties ran it as a business. If you look at the practice of law, you will fall into the “ordinary course of business” language in the PLLC liability section of § 57C-2-01, making a pierce impossible. Avoiding this section is vital, as it only extends limited liability for acts occurring during the rendition of professional services. So you do not attack the rendition of services, but the business set up and conduct of the parties and the entity. This is essentially a bootstrapping method, where you avoid the malpractice limited liability by attacking the control and operation of the business form on totally separate grounds, then attacking malpractice after limited liability is removed. See supra note 234. At this first stage you are not attacking the professional services rendered, but the way the business entity itself is set up and run. Once the veil is pierced, then you assert professional liability. Of course, to pierce you must meet the required elements. See infra notes 244 - 251 and accompanying text.
lina's corporation veil piercing theory is solely dependent on a party's business conduct. As such, one should pierce the corporate veil to remove entity liability in a malpractice claim.

Generally, the corporate entity is disregarded where a corporation is operated as an instrumentality or alter ego of the sole or dominant shareholder and as a shield for his activity from declared public policy or statute. The entity and the shareholder are then treated as one. This is an equitable doctrine that is applied flexibly to serve justice. The major elements are as follows:

1. Control—not majority or complete stock control, but complete domination, not only of finances, but policy and business practices in respect to the transaction attacked so the corporate entity as to transaction attacked had no separate mind; and,
2. The control is used perpetuate the fraud, wrong, violation of statute or other positive legal duty, or a dishonest and unjust act; and,
3. The control and breach of duty must be the proximate cause of the injury complained of.

When examining these elements, courts look to a non-exclusive list of other guiding factors that point toward the corporation being an alter ego, including, inadequate capitalization, non-compliance with corporate formalities, complete domination and control of the corporation so that it has no independent identity, and excessive fragmentation of a single enterprise into separate corporations. The absence or presence of any factors is not determinative, because courts look to a combination of factors that, when taken together with injustice or abuse of corporate privilege, show

244. See Glenn v. Wagner, 313 N.C. 450, 329 S.E.2d 326 (1985); Henderson v. Security Mortgage and Finance Company, 273 N.C. 253, 160 S.E.2d 39 (1968); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966); Atlantic Tobacco Co. v. Honeycutt, 101 N.C. App. 160, 398 S.E.2d 641 (1990). All of these cases look to the way the parties organized and operated the corporation. Domination is a central issue. This is the same type of conduct you must examine under the LLC section before you examine liability from the rendition of professional services. See supra notes 242 - 243 and accompanying text.
246. See supra notes 242-43.
247. See supra notes 242-43.
the entity had no separate existence or mind. Consequently, the veil piercing case law of North Carolina concentrates mainly on the actor's conduct regarding the business.

Having explained what law applies to pierce the veil, how is this law allowed into the LLC statute? The critical language of the LLC statute that applies corporate veil piercing case law to LLC's states that the liability of members and managers of a limited liability company organized and existing under this Chapter shall at all times be determined solely and exclusively by this Chapter and the laws of this State. On first reading, this wording appears to restrict determination of liability solely to the statute, but a careful reading of the last several words seems to expand the scope of liability beyond the statute. The words "and the laws of this State" are conjunctively connected to the restricted language in the statute. It would seem that this last phrase significantly broadens the scope of applicable law to the entire case law of North Carolina, which includes corporate veil piercing case law. While this language is not a crystal clear enumeration, it is definitely an expansive concept.

From a policy standpoint, it makes sense that some device exists to set aside the PLLC's limited liability. The PLLC is an entity that lies on the middle ground between a corporation and a partnership but receives the preferred legal benefits of each. PLLC participants benefit because they enjoy more protection than partners in a partnership with less organizational hassles than a corporation. However, where attorneys associate themselves together and use this business form to practice law, they should not be able to avoid personal liability based on the acts of their cohorts. Especially where the entity is run as their own alter ego.

250. See supra note 249.
251. See supra note 244. These cases support the concentration on conduct through espousing elements that are conduct based. Id. See supra notes 234 and 239-50 and accompanying text.
252. See supra notes 242-43 and accompanying text.
253. See Robinson supra note 229, § 1.8 note 14. The author states that veil piercing applies to LLC's based on this section.
254. See supra note 252 and accompanying text.
255. See supra notes 44-51 and accompanying text.
256. See supra note 229 and accompanying text.
257. See supra notes 74-79 and accompanying text.
The alter ego scenario is particularly likely where the PLLC is organized and operated like a close corporation. Generally, as shown by North Carolina case law, close corporations bare the brunt of piercings. This is because North Carolina's corporate veil piercing theory is geared for situations where a sole or dominant shareholder, or small group, runs the corporation as an alter ego or instrumentality. Typically, this happens in the close corporation setting because of the control one individual or a small group is able to exercise unchallenged. Consequently, PLLC's run a smaller risk of being pierced as opposed to smaller ones.

7. Partnership by Estoppel

In a sense, partnership by estoppel is another form of veil piercing. It is another way to hold participants in the firm personally liable for the actions of others. The members and managers of a PLLC can hold the organization out as a partnership, and accordingly, the legislature has expressed its concern that the public know what business form they are dealing with. By the terms of the statute, the PLLC should have the abbreviation "PLLC" behind its name, which would include all printed materials sent to third persons. The idea is to put others on notice of the business form being used. But a PLLC is still subject to being held a partnership by estoppel.

Even though the PLLC is registered with the state, partnership by estoppel can still occur. Under the North Carolina statutes, a person or entity that holds himself out as a partner or a partnership does not have to actually be an actual partner or an actual, existing partnership. Essentially, all that matters is that a party or entity somehow makes a representation to another who relies upon it to his detriment. Although North Carolina has no reported cases on the subject, case law from other states confirms the theory that a PLLC could be treated as a partnership

259. See Ribstein & Keitange, supra note 240. See also supra note 245.
260. See supra note 259 and accompanying text.
261. See supra note 259 and accompanying text.
262. See supra note 259 and accompanying text.
263. See N.C. Gen. Stat. § 57C-2-02 (c) (1993). A law firm doing business as a PLLC must register with the State Bar.
264. See supra note 263.
265. See supra notes 212-14 and accompanying text.
266. See supra notes 212-14 and accompanying text. See also Volkman v. D.P. Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980).
in situations where there has been a holding out that the PLLC is a partnership.267

The danger of partnership by estoppel rises mainly out of two events in time. The first is the dangerous transition period where firms convert from partnerships into a PLLC. Failing to change stationery, advertisements, business cards, pleadings, and office forms could be considered a holding out to the public and the court. A second danger arises where participants in the PLLC continue to address controlling attorneys as “partners.”268 Although this a term of tradition, it can be misleading to lay persons, who do not know what the PLLC abbreviations mean.269 Appropriate risk management can alleviate such problems over time.

8. Statutory Non-Compliance

Also related to veil piercing is the resulting personal liability that arises from failure to comply with the PLLC filing requirements. A PLLC is not an organization until its articles of organization are properly and officially filed with the secretary of state.270 A plaintiff should be able to attack the articles themselves to show they are somehow defective. Although the statute gives no clear punishment for ineffective filing, the result would have to be loss of the statutory shield and personal liability for those transacting the PLLC business. This is true for two reasons: 1. The statutory language implies that personal liability for PLLC liabilities would result,271 and 2. corporate law holds that ineffective filing leads to personal liability.272

The statute places personal liability on those transacting PLLC business during the time of ineffective filing by implication.273 The “...proposed organization becomes a limited liability company” only “When the Secretary of State files the articles of

267. See Kaplan v. Gibson, 192 Ga. App. 466, 385 S.E.2d 103 (1989). This case dealt with a group of doctors who had formed a professional corporation but continued to call one another partners in public. Id. The court held the doctors to a partnership by estoppel based upon those representations. Id.
268. Id.
269. Id.
271. Id.
273. See supra note 271.
organization..."274 "Filing of the articles by the Secretary of State is conclusive evidence of the organization..."275 Clearly, this language stands for the notion that unless the articles are in proper form and filed, there is no PLLC. But even though the statute fails to set out a clear rule of participants' liability during the time of ineffective filing, it only makes since that the participants would not enjoy the benefit of limited liability until the articles are filed properly.

Bolstering this personal liability concept, North Carolina corporate law holds parties transacting business on behalf of an organizing corporation personally liable on transactions.276 The corporations statute does not clearly set this out in text, but the comments to the statute do make clear that case law is to guide courts in this area and case law clearly reflects that participants have no limited liability on transactions that occur during a period of ineffective filing.277 The idea of attacking an entity's documentational existence is by no means a novel one.

9. PLLC Summary

What is critical to remember is that the LLC statute holds that a member, not a manager, is an improper party in any suit against the LLC.278 To bring members into a suit against the LLC, the above theories should serve to set aside the LLC shield.

So the new business forms offer some shelter from the creature's onslaught, but the protection is not a fortress, or as complete as it appears on first glance. Using his intelligence, cunning, strength, and stamina, the creature will find ways inside.

V. Conclusion

Legal malpractice is a single skin covering many different theories of liability. The scope of liability continues to evolve. New ways of defining old legal duties, larger liability, and new claims for damages are strengthening a plaintiff's position. Attorneys hold the power to halt expansion by altering their conduct and management styles; so far they have failed to do so. Instead, they seek shelter from angry and disappointed clients in new business forms that offer more protection than did previous forms.

274. See supra note 271.
275. See supra note 271.
276. See supra note 272.
277. See supra note 272.
278. See supra note 235.
Awareness is the key. Awareness of one's own acts and awareness of the expanding scope of liability. Whether wrongful acts are inadvertent or intentional, they continue to breathe life into the malpractice monster.

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