First Let's Sue All the Lawyers--What Will We Get: Damages for Estate Planning Malpractice

Martin D. Begleiter

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Martin D. Begleiter, First Let's Sue All the Lawyers--What Will We Get: Damages for Estate Planning Malpractice, 51 Hastings L.J. 325 (2000).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol51/iss2/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
First Let's Sue All the Lawyers—What Will We Get: Damages for Estate Planning Malpractice

by
MARTIN D. BEGLEITER*

Introduction
About ten years ago, I authored an article on malpractice in estate planning.¹ That article reviewed in detail the revolution in malpractice litigation in the estate planning area, attempted to predict issues which were likely to arise in future malpractice litigation, and suggested some links between the decline in the public opinion of attorneys and the growth in malpractice litigation.²

In the years since the publication of that article, I have received a number of telephone inquiries as to whether, in the course of writing that article, I had done any significant research on the damages recoverable in estate planning malpractice. My 1990 article does not discuss the damages question³ and, indeed, I did not focus on that question during my research. The number of inquiries, however, indicated that the issue did concern lawyers and that little work existed on the subject. This article attempts to fill that void.

Following a very brief review of the developments in malpractice liability in the estate planning area⁴ and a statement of the general

---

* Professor of Law, Drake University Law School. B.A., 1967, University of Rochester; J.D. 1970, Cornell University. The author wishes to gratefully acknowledge the assistance of Dean C. Peter Goplerud, III, of Drake University Law School for the award of a Summer Research Stipend, which aided the preparation of this Article. The author thanks Robert T. Kleinknecht, Drake Law School Class of 1999, and Kent P. Barnes, Drake Law School Class of 2001, for their valuable assistance in the research and preparation of this article. The opinions and conclusions expressed in this Article, as well as any errors, are, of course, those of the author.

2. See generally id.
3. See id.
4. See infra Part II. I intend a broad definition of the term "estate planning" in this
rules of damages recoverable in malpractice actions involving estate planning. I will discuss the two major types of damages recoverable in estate planning malpractice cases: the loss of the bequest and the costs to repair the error. The subject of whether attorneys fees are recoverable in these actions has generated substantial argument and will be discussed separately. In certain types of cases, primarily marital deduction trusts, whether damages will occur, and the amount of the damage, may not be ascertainable when the malpractice is discovered. The question of whether a plaintiff in such a case can recover against the attorney because the damages are “speculative” will be considered and some possibilities for either postponing the litigation or allowing recovery will be discussed.

I. Summary Of Developments In Estate Planning Malpractice

A. Privity

Until 1960, rarely was an attorney subject to liability to disappointed beneficiaries in a will case, regardless of the error made by the attorney. The reason was that only those in privity with the drafter of the will had standing to sue the drafter for malpractice. The beneficiaries under a defectively executed will or the intended beneficiaries under a deficiently drafted will had no contractual relationship with the drafting attorney and therefore could not bring

5. See infra Part III.
6. See infra Part IV.
7. See infra Part V.
8. See infra Part VII.
9. The marital deduction area is the area in which most of the cases of this type have arisen. However, a similar problem could arise in other areas. Two such areas are special use valuation and the newly enacted family owned business provisions of the Internal Revenue Code [hereinafter I.R.C.]. See I.R.C. §§ 2032A, 2057. For a discussion of possible malpractice errors in special use valuation, see Begleiter, supra note 1, at 237-39, 250-57. I am not aware of any case involving attorney malpractice in special use valuation which has squarely confronted the issue of whether errors in planning or electing special use valuation or involving the section’s recapture provisions constitute malpractice. See Sass v. Hanson, 554 N.W.2d 642 (Neb. Ct. App. 1996); Wilson v. Cherry, 612 N.E.2d 953 (Ill. App. Ct. 1993) (both decided on other grounds).
10. See infra Parts VIII, IX.
11. See Begleiter, supra note 1, at 194-95.
12. See id. at 195.
an action against the attorney. In 1961, the famous California case of *Lucas v. Hamm* changed that rule by making the question of whether the beneficiaries could sue the attorney a question of public policy. In evaluating the factors taken into account in making the decision, most courts found that a cause of action by the beneficiaries was available. Following the lead of Pennsylvania, a smaller group of states viewed the issue as a contract question, basing the determination on whether the plaintiffs were intended third party beneficiaries of the contract between the attorney and the testator. As of 1999, only six states retained a rule of absolute privity prohibiting beneficiaries under a will or trust from bringing a malpractice action against the drafting attorney. A small group of states, apparently misapprehending the nature of a malpractice recovery, limited the bringing of a malpractice action to cases where the attorney admitted the error or where the error was evident on the face of the will.

13. See id.
16. In restating the rule it was said that:

[i]t is not at all clear how [Biakanja v. Irving, 320 P.2d 16 (Cal. 1958)], which establishes the principle that in a malpractice case where there is a provable error, the attorney is liable to the parties for injury resulting to them, is to be reconciled with the rule that the attorney is not liable to third parties who are not in privity with him. The determination of whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.

Since defendant was authorized to practice the profession of an attorney, we must consider an additional factor not present in [Biakanja v. Irving, 320 P.2d 16 (Cal. 1958)], namely, whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession.

Id.
17. See Begleiter, supra note 1, at 196-98.
19. The states are Nebraska, New York, Texas, Virginia, Ohio and, since 1998, Maryland. See Begleiter, supra note 1, at 196-97 nn.20-24. For Maryland, see *Noble v. Bruce*, 709 A.2d 1264 (Md. 1998).
20. See Begleiter, supra note 1, at 198-204. Distressingly, the number of states adopting this limit and its erroneous rationale has grown since 1990. See, e.g., *Glover v. Southard*, 894 P.2d 21 (Colo. App. 1994); *Mieras v. DeBona*, 550 N.W.2d 202 (Mich. 1996). I hope to treat this in more detail in a future article. See also *RESTATEMENT OF THE LAW GOVERNING LAWYERS § 73*, illus. 3 (Tentative Draft No. 8 (1997)). Illustration 3 makes it clear that extrinsic evidence is allowed to establish the intent to benefit the non-client. However, the Restatement requires clear and convincing evidence of the client's intent to support an action by the non-client.
B. Statute of Limitations

Another roadblock to malpractice actions was the rule that the cause of action accrued on the date the error was made. In a will, this was the date the will was drafted (or, at the latest, was executed). Since a will does not become effective until testator dies, the malpractice statute of limitations often expired before the will became effective. Shortly after the changing of the privity rule, a California court held that the statute of limitations accrued only when testator died, that being the date the injury occurred and a remedy became available. Since then, some courts have gone further and applied the discovery rule or the continuous representation rule to estate planning malpractice cases.

C. Types of Errors

The earliest cases decided involved simple errors. Examples of such cases included wills which were invalid due to execution failures (such as interested witnesses or insufficient witnesses). Almost all such cases held that a malpractice action by a beneficiary under such a will survived a motion to dismiss or a motion for summary judgment. Similarly, plaintiffs won most (though not all) cases of misdescribed beneficiaries, omission of provisions and similar drafting errors. Later, cases involving more complicated legal errors, such as violations of the rule against perpetuities, arose. Again, plaintiffs tended to succeed in such cases. However, as closer cases began to arise in the last ten years, attorneys have begun to prevail more frequently in malpractice actions. Plaintiffs have also enjoyed a

21. See Begleiter, supra note 1, at 208-09.
22. See id. at 209.
23. See id. at 209-10.
24. See id. at 210-11.
25. The discovery rule begins the running of the statute of limitations when the plaintiff knew, or should have known, of the injury, the cause of the injury, and the attorney's negligence. See id. at 211-12.
26. This involves cases in which the attorney continues to represent the estate or the beneficiaries with regard to the matter on which the error occurred (here, the will or trust instrument). See id. at 216-18. There are not many cases applying this doctrine to estate planning malpractice. For an interesting case presenting a very liberal interpretation of the doctrine, see Dudden v. Goodman, 543 N.W.2d 624 (Iowa Ct. App. 1995).
27. See Begleiter, supra note 1, at 218-22.
28. See id.
29. See id. at 222-28.
30. See id. at 229-32.
31. See id.
32. See id. at 254-55. The more recent cases involve determining the scope of the attorney's duty. Often the cases are decided heavily on the facts involved. See, e.g., Leipham v. Adams, 894 P.2d 576 (Wash. Ct. App. 1995); Hargett v. Holland, 447 S.E.2d
great deal of success in cases involving tax and estate planning errors.\textsuperscript{33} In estate administration cases, executors have won cases against attorneys for failure to file tax returns,\textsuperscript{34} and in other situations of delay in acting or failure to act.\textsuperscript{35} An interesting current area is the impact of an ethics violation on the malpractice action.\textsuperscript{36}

D. \textbf{The Significance of Malpractice in Estate Planning}

There is no question that malpractice litigation has greatly increased since the 1970's.\textsuperscript{37} There is also evidence that attorney malpractice has significantly increased over the same period.\textsuperscript{38} And, of more interest to estate planners, malpractice claims in the estate, probate and trust area accounted for 7.59 percent of all malpractice claims from 1990-95.\textsuperscript{39} This reflected a .62% increase from the data


34. See Begleiter, \textit{supra} note 1, at 249-52. The most often litigated question in this area is whether the beneficiaries may sue the "attorney for the estate (or trust)." This, in turn, depends on who the attorney for the estate represents. I hope to discuss the question in a subsequent article because it is closely related to the effect of a violation of ethical rules on malpractice. \textit{See infra} note 36.

35. See Begleiter, \textit{supra} note 1, at 249-50.

36. This has become perhaps the most often-discussed question in estate planning malpractice in the last ten years. The ethical rules can be used directly or indirectly. The direct use of the ethical rules involves the question of whether a violation of the ethical rules is in and of itself malpractice. \textit{See id.} at 252-53. The indirect effects involve three different questions:

A. The scope of the attorney's duty. These cases involve questions such as delay in execution see, e.g., Krawczyk v. Stingle, 543 A.2d 733 (Conn. 1988); Radovich v. Locke-Paddon, 41 Cal. Rptr. 2d 573 (.Ct. App. 1995); Chaire v. Hulse, 619 So. 2d 1099 (La. Ct. App. 1993) and Gregg v. Lindsay, 649 A.2d 935 (Pa. Super. Ct. 1994) and the duty to investigate capacity see, e.g., Logotheti v. Gordon, 607 N.E.2d 1015 (Mass. 1993).

B. The question of whether a beneficiary can sue the attorney for the estate for malpractice committed during estate administration.

C. The use of ethical rules as support for the adoption of a strict privity rule.

Noble v. Bruce, 709 A.2d 264 (Md. 1998).

See \textit{THE IOWA STATE BAR ASSOCIATION, PROBATE AND TRUST LAW SECTION SEMINAR} (October 16, 1998) (outline of Martin D. Begleiter) (copy on file with the author). I hope to treat these matters in detail in a subsequent article.

37. See Begleiter, \textit{supra} note 1, at 193, 263-74.


39. See \textit{AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, LEGAL MALPRACTICE CLAIMS IN THE 1990'S 7}. It should be
from 1983-85.\textsuperscript{40} The area ranked seventh of twenty-five areas discussed,\textsuperscript{41} but the increase from the 1983-85 figures to the 1990-95 figures was the sixth greatest.\textsuperscript{42} Therefore, the estate planning area contributes significantly to the overall malpractice claims. It should also be noted that forty percent of the malpractice claims in this area involved preparation of documents and an additional sixteen percent were characterized as advice.\textsuperscript{43} Interestingly, thirty percent of the claims were abandoned or resulted in no payment and an additional twenty-two percent resulted in the action being dismissed or a judgment in favor of the attorney.\textsuperscript{44} Payment to the claimant as a result of a settlement occurred in forty-eight percent of the claims.\textsuperscript{45} A judgment for the claimant resulting in payment occurred in less than one percent of the claims.\textsuperscript{46}

Therefore, one might ask: why be concerned with damages? First, the damages recoverable are clearly significant in negotiating settlements, which resulted in payment in almost half of the claims.\textsuperscript{47} Second, the frequency of the cases and the payouts are relevant to malpractice insurance rates. Even more significant is the perception of lawyers' ability by the public and the legal community's reaction to the public's growing doubts about lawyer quality.\textsuperscript{48} Finally, even though the vast majority of payments are under \$10,000\textsuperscript{49} and involved small law firms,\textsuperscript{50} some large recoveries did occur\textsuperscript{51} and ninety-six percent of the law firms in the United States are comparable in size to the law firms involved in the majority of cases (one to five attorneys).\textsuperscript{52} Moreover, the reaction of the public to revelations of malpractice probably has repercussions for attorneys

\textsuperscript{40} See id.
\textsuperscript{41} See id.
\textsuperscript{42} See id. at 8.
\textsuperscript{43} See id. at 36.
\textsuperscript{44} See id. at 37.
\textsuperscript{45} See id.
\textsuperscript{46} See id.
\textsuperscript{47} See supra note 1, at 264-71.
\textsuperscript{48} See Begleiter, supra note 1, at 264-71.
\textsuperscript{49} See MALPRACTICE CLAIMS, supra note 39, at 15. Almost 64\% of the claims paid resulted in payments between \$0 and \$1,000. 12.37\% of the payments were between \$1,001 and \$5,000; 6.48\% were between \$5,001 and \$10,000; 8.10\% were between \$10,001 and \$25,000; 4.59\% were between \$25,001 and \$50,000; 2.68\% were between \$50,001 and \$100,000; and 1.83\% were over \$100,000. See id.
\textsuperscript{50} See Curtis, supra note 38, at 864. Sixty-one percent of the claims in the area were against firms with five attorneys or less. See id.
\textsuperscript{51} See supra note 49. Moreover, large recoveries (in excess of \$100,000) are likely to generate substantial publicity.
\textsuperscript{52} See Curtis, supra note 38, at 864.
far beyond the significance of the problem and certainly well beyond the percentage of successful claimants.53

II. General Measure of Damages in Legal Malpractice Actions

The general standard of damages in legal malpractice actions is not subject to dispute. In general, the damage recoverable is the amount of plaintiff's loss.54 In the estate planning area, this is usually the value of the intended bequest.55 It should be noted that if the plaintiff received some portion of the estate despite the negligence of the attorney (usually through intestacy), the recovery is reduced by the amount otherwise received.56 Alternatively, if the beneficiary takes action to reduce the damage, the expenses of so doing (including attorneys fees) would constitute the damages.57

The case law yields similar definitions. One court stated: "In a legal malpractice action, a plaintiff is entitled to recover damages proximately resulting from the negligent conduct of the attorney. Consequential damages that are foreseeable are likewise recoverable upon proof of breach of contract."58

53. See Begleiter, supra note 1, at 269-71. Large recoveries against lawyers are no doubt given more prominence by the media than cases in which lawyers are exonerated. It is also possible that malpractice charges against attorneys are more extensively publicized than the results of such cases, particularly when the attorney is found blameless or a small settlement is agreed to in order to avoid litigation.


55. See id. § 31.7, at 109. See infra Part IV.

56. See id.

57. See id. § 31.09, at 115-16. See infra Part V. Reasonable expenses incurred in an attempt to mitigate damages are recoverable, regardless of whether the effort is or is not successful. Sorenson v. Fio Rito, 413 N.E.2d 47, 55 (Ill. App. Ct. 1980) (Linn, P.J., concurring in part and dissenting in part).

58. City of Dubuque v. Iowa Trust, 519 N.W.2d 786, 790 (Iowa 1994) (citations omitted). It should be noted that this statement combines tort and contract damage rules. This is because, as previously stated, courts have sometimes viewed malpractice as a tort (negligence) action and sometimes as a breach of contract action. See supra Part II, and Begleiter, supra note 1, at 193-207. See also Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524, 525 (Iowa 1983) (the general measure of damages in a legal malpractice action is "the amount of loss actually sustained as a proximate result of the conduct of the attorney") (quoting 7A C.J.S. Attorney & Client § 273a (1980)). In Pete v. Henderson, 269 P.2d 78 (Cal. Ct. App. 1954), plaintiff, the administrator of an estate, retained the defendant attorney to represent him in an action against him as administrator. Judgment for $1660 was rendered against plaintiff. The administrator then employed defendant to appeal the judgment (and paid him $150), but defendant filed the notice of appeal one day late, resulting in the dismissal of appeal. In the administrator's action against the attorney, the attorney was found negligent by the trial court, but the damages were limited to the fee for the appeal. On appeal, the court held that if the administrator could prove the original judgment would have been reversed on appeal, the attorney would be liable for $1810—the original judgment and the appeal fee. The amount of the original judgment
III. Lost Bequest Recovery

A. General Rule

Consistent with the general rule stated in Section III, the general basis of recovery in legal malpractice actions in estate planning is the value of the bequest lost by plaintiff due to the attorney's negligence.59 The typical case of this type arises when the will is invalidly executed. In fact, this case is so common it was used by the drafters of the Restatement of the Law—The Law Governing Lawyers to illustrate liability to non-clients.60 Illustration 2 to section 73 of that Restatement involves a will with a bequest to plaintiff which is invalid because it is not signed by the requisite number of witnesses.61 Illustration 3 is based on the same facts, except that the correct number of witnesses are used but the plaintiff alleges the lawyer negligently named another beneficiary rather than plaintiff.62 In both cases, assuming that the state holds lawyers subject to liability to non-clients in such situations, the Restatement holds that the plaintiff can recover the value of the lost bequest.63

In fact, the seminal damage case in this area is factually similar to the illustrations used in the Restatement. In Schirmer v. Nethercutt,64 defendant attorney was hired by the beneficiary to draft a will for the beneficiary's grandmother. Under the will, the beneficiary was to receive one-half of testatrix's residuary estate. The will was held invalid because the beneficiary was a necessary witness.65 In an action by the beneficiary against the drafting attorney, the court held that plaintiff could recover the amount of his loss, one-half of the net residuary estate.66

In a similar, but more recent, case of a will invalid because only one person witnessed the signing, the beneficiary of a $25,000 bequest under the invalid will recovered the amount of his lost bequest.67 In the course of eliminating the requirement of privity, the Wisconsin constitutes damages proximately caused by the attorney's negligence. See id. at 79. See also McClung v. Smith, 870 F. Supp. 1384 (E.D. Va. 1994).

59. See supra Part III.
60. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 73 cmt. f, & Illus. 2 & 3 (Tent. Draft No. 8, 1997).
61. See id., Illus. 2.
62. See id., Illus. 3.
63. Id.
64. 288 P. 265 (Wash. 1930).
65. At that time, witnesses were not allowed to have an interest under the will they witnessed. See T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 312-14 (2d ed. 1953). This rule is changing in many states. See, e.g., U.P.C. § 2-505 (1990).
66. See Schirmer, 288 P. at 268 (Wash. 1930).
Supreme Court reversed a trial court decision for the attorney and directed the trial court to enter a verdict for the beneficiary in the amount of his bequest under the invalid will.68

In the estate tax area, the same rule prevails with two differences. It is the executor (on behalf of the estate) who brings the action and recovers against the attorney, and the recovery is in the amount of additional tax caused by the attorney’s malpractice, including interest and penalties. Illustrative is *Cameron v. Montgomery*.69 The attorney filed the tax return four months and two days late. One of the executors urged the attorney to prepare the return in a timely manner, but the attorney claimed the IRS would do nothing about a late filing. As a result of the late filing, the estate could not use alternate valuation.70 This caused additional estate tax, interest and penalties of $28,667.39. The executor sued the attorney and recovered the tax, interest and penalty. The Iowa Supreme Court affirmed.71

The “loss of bequest” type of recovery has been used in other estate planning situations to compensate beneficiaries. In one case,72 the attorney for the estate determined that the estate should be distributed per stirpes73 when it should have been distributed per capita.74 The court held the attorney liable for the difference between the amount each beneficiary should have received and the amount

---

68. See id. at 330.
69. 225 N.W.2d 154 (Iowa 1975).
70. I.R.C. § 2032. All references are to the Internal Revenue Code of 1986, as amended and in effect as of the date of this Article, unless otherwise indicated. Section 2032, simplified and in brief, permits the assets of an estate to be valued on the date of death or at a date six months after death if certain conditions are met.
71. See *Cameron*, 225 N.W.2d at 154. See also *Estate of Remsen*, 415 N.Y.S. 2d 370 (Sup. Ct. 1979); *Wiggen v. Gordon*, 455 N.Y.S.2d 205 (Civ. Ct. 1982) (a joint tenant had paid attorney to file New York estate tax proceedings and pay the tax which the attorney failed to do; joint tenant was held entitled to interest, the expense of filing the return, and attorneys fees paid to new attorneys to file the tax proceeding and prosecute a misconduct action against the former attorney); *Horne v. Peckham*, 158 Cal. Rptr. 714 (Ct. App. 1979).
73. Per stirpes means by stocks. The system distributes bequests (usually of a residuary estate or in cases of intestacy) by reference to the root stock of the beneficiaries. For example, if the residuary estate was bequeathed to “decedent’s then living issue, per stirpes” and decedent died with 3 children, all of whom predeceased him leaving living issue who survived decedent, the estate would be divided into 3 equal shares, with the share of each deceased child being distributed to that child’s issue by representation.
74. Per capita means by head. Each individual takes in his or her own right and not as a representative of his or her parent. For a more detailed description of per capita and per stirpes and illustrations of each, see Lawrence W. Waggoner, Critique, *A Proposed Alternative to the Uniform Probate Code’s System for Intestate Distribution Among Descendants*, 66 Nw. U. L. Rev. 626 (1971).
each did receive under the improper distribution, plus interest from the date of the erroneous distribution.\textsuperscript{75}

Where a court adopts the contract (third party beneficiary) theory of malpractice liability, the measure of damages is the beneficiary's loss of expectancy.\textsuperscript{76} The leading case adopting this theory measured the damages as the amount of the bequest to a beneficiary who was prohibited from taking under the will because she was a subscribing witness to the will.\textsuperscript{77}

A recent case interpreting this rule should be noted because it involved a more complicated situation. In that case, defendant attorney was hired to draft a will for the beneficiary's father leaving all testator's land to the beneficiary.\textsuperscript{78} This was the father's intent. The will as drafted did leave all the real estate to the son except for a life estate to testator's second wife in "our homestead located at Piscataqua Road, Dover, New Hampshire."\textsuperscript{79} A construction action was instituted on whether this referred to only the house or all property on that road, which included 100 acres of land and buildings used in the family business. The second wife, arguing for the latter construction, was successful. Two years later, the son purchased the widow's life estate for $400,000, then sued the attorney. The court held the measure of damages was "the date of death fair market value of a life estate in the real property other than the house (and, perhaps, limited surrounding acreage)."\textsuperscript{80}

Some courts may broaden the rule. One older case stated "the measure of damages is the difference in the pecuniary position of the client from what it should have been had the attorney acted without negligence."\textsuperscript{81} The case involved an action by removed executors against their attorney for bad legal advice and poor preparation of the executor's account. The court awarded damages for loss of executors' commissions ($10,000), the costs of the removal proceeding which were paid personally by the executors ($1,904.79), interest, and the

\textsuperscript{75} See Wisdom, 568 F. Supp. 4 at 8.
\textsuperscript{76} See Guy v. Liederbach, 459 A.2d 744, 752 (Pa. 1983).
\textsuperscript{77} See id. On the rule prohibiting a subscribing witness to a will from receiving a bequest under that will, see supra note 65.
\textsuperscript{79} Id. at 320.
\textsuperscript{80} Id. at 327. It is interesting that the court chose not to use the purchase price of the widow's life estate as the measure of damages. The court also held the appraisal values contained in the probate inventory were admissible as evidence of the value of the fees and then used a table to determine the value of the life estate. The court held the trial court could take judicial notice of the tables in the Treasury Regulations. See Treas. Reg. § 20.2031-7(d)(6) (1994). Plaintiff was permitted to testify as to the amount he paid for the life estate.
\textsuperscript{81} Flynn v. Judge, 133 N.Y.S. 794, 796 (App. Div. 1912).
return of counsel fees. The court interpreted the loss of bequest rule as requiring the plaintiff to be made whole. Though this interpretation has not been seen in recent cases, the right circumstances could lead a court to broaden the measure of damages in order to make the plaintiff whole.

Lastly, it should be noted that the estate of the testator (as opposed to the “disappointed beneficiary”), clearly may recover from the attorney for legal malpractice in will drafting, even in states requiring privity or having limited exceptions to privity. However, the damages recoverable consist only of the attorney’s fees paid for the will drafting or estate planning, plus the costs and fees incurred in defending the estate against liability in an action by the disappointed beneficiary caused by the lawyer’s negligence. The estate cannot recover the bequest “lost” by a beneficiary because the estate consists of the same amount regardless of who receives it. Therefore, the estate suffers no injury for such malpractice by the attorney.

B. Reduction in Damages

Several factors can result in alterations of the loss of bequest rule. One is if the plaintiff does not actually lose the bequest. A simplified illustration involves an attorney’s advice to his clients to accept a settlement and not challenge a will. Eventually, the clients received the full value of their rights. However, litigation was necessary to achieve this result and the attorney had erroneously advised them to accept a settlement. The court awarded the clients the costs of the litigation (mainly attorneys fees) to validate their rights.

Similarly, if what would normally be damages is excused, such damages are not recoverable. For example, if the IRS waives or excuses tax penalties, the amount of such penalties are not recoverable as malpractice damages. Additionally, amounts recovered in a settlement or in some other manner involving the same matter reduce the malpractice damages. For example, the amount

82. See id.
83. See id.
84. This is because the estate represents the testator’s interest and is thus in privity with him.
86. See id. at 1224.
88. See id. at 244-45.
89. See id.
91. See McLane v. Russell, 546 N.E.2d 499 (Ill. 1989). In that case, testatrix left a will leaving a farm to plaintiff for life, with the remainder to plaintiff’s son. However, the farm
of damages for a bequest under an invalid will is reduced by the amount received by that beneficiary as an heir in intestacy. Another illustration is a case where an attorney, in changing a will, omitted the residuary clause from the former will. Under the omitted residuary clause, the two plaintiffs were equal beneficiaries. However, one of the plaintiffs was also an heir and received $3,296.35 as an heir. The court held that the damages consisted of the value of the residuary estate after deducting administration expenses and the amount the plaintiff received as an heir. Lastly, of course, there can be no recovery if plaintiff in the malpractice action is successful in the underlying action on which the malpractice action is based.

was held in joint tenancy with testatrix's sister who survived her. Thus, the bequest was not fulfilled. The plaintiff sued the drafting attorney for negligence in failing to sever the joint tenancy so that testatrix's plan could at least have been partially effectuated. At trial, the jury awarded plaintiff damages for one-half of the value of the farm ($325,000). The trial court reduced the award by one-half of the amount plaintiff received from a settlement of his suit with the estate of the other joint tenant. On appeal, the award and the reduction on account of the settlement were affirmed.

92. See Arnold v. Charmichael, 524 So. 2d 464 (Fla. Dist. Ct. App. 1988). The allowance of a recovery in this case is contrary to the Florida rule allowing malpractice recovery only when the error is evident on the face of the will. See Begleiter, supra note 1, at 198-204. The court does not explain its deviation from the Florida rule.

93. See Arnold, 524 So. 2d at 465. The residuary clause was not intended to be changed.

94. See id. at 467.

95. See id. The court computed the damages as follows:

\[
\begin{align*}
\text{Residuary Estate} & \quad \text{Administration expenses} \\
& \quad (\text{payments to attorneys, accountant, hospital and personal representative}) \\
& \quad - \quad 20,835.00 \\
& \quad \text{Less: Amount received as heir by one of plaintiffs} \quad 3,296.35 \\
\text{Damages} & \quad 56,041.76
\end{align*}
\]

96. See, e.g., Zarin v. Reid & Priest, 585 N.Y.S.2d 379, 382 (App. Div. 1992). Plaintiff was a compulsive gambler. He lost in an action by the IRS for failure to pay tax on his winnings in Tax Court. He then sued his attorney for malpractice. The Tax Court decision was reversed by the Third Circuit. In the malpractice case, the court held for the attorney, stating that there can be no malpractice damages if the client wins the underlying case. Plaintiff claimed damages for business ventures that failed because his credit sources dried up. The court held this was speculative. The Third Circuit opinion reversing the Tax Court, Zarin v. Commissioner, 916 F.2d 110 (3d Cir. 1990), achieved a certain notoriety in its own right and is discussed in many Federal Income Tax casebooks.
C. Damages for Mental or Emotional Distress

A rather surprising number of cases have considered whether in a malpractice case a plaintiff can recover for mental or emotional distress. In general, courts have refused recovery for mental or emotional distress unless plaintiff has suffered physical injury. Since there is rarely a physical injury in estate planning cases, it would appear that plaintiff would have a difficult time recovering on this basis. The usual allegation for such recovery is for emotional distress in paying taxes or suffered from family disputes. It is uncertain whether such allegations are made in anticipation of a jury trial or for some other reason, but they are rarely successful.

IV. Costs To Repair Damages

Instead of engaging in litigation with other beneficiaries over the uncertainty or mistake in the will, some executors or beneficiaries take action to correct the error and then sue the drafting attorney for malpractice. To date, this type of case has been confined to errors involving estate tax planning.


98. See Camenisch, 44 Cal. App. 4th at 1692-93. The client hired the attorney to prepare an irrevocable life insurance trust so the insurance proceeds would not be included in his estate. Later, because the client's other attorneys said the trust was not created correctly, he transferred ownership of the policies to his daughters. The client spent $11,800 to correct his trust and would have to pay $25,000 in gift tax. If he died within 3 years of the gift, his estate would owe $525,000 in estate taxes. The client sued for at least $1,000,000 in emotional distress. See id. at 452. The court held that emotional distress damages are not allowed in malpractice cases, whether the malpractice occurs in litigation or in advice and drafting.

99. See Mieras, 550 N.W.2d at 206. The plaintiff alleged the attorney had a duty to protect the testator from undue influence. Plaintiff alleged the attorney drafted the will on the instructions of the beneficiaries and gave it to the beneficiaries who were to have it executed. The will was executed one day after testator underwent surgery. The will disinherited testator's daughter. The complaint requested recovery of the share the daughter received when she challenged the will, the legal fees incurred in defending the will, and emotional distress suffered as a result of the daughter's challenge. The Court held the attorney was under no obligation to protect the beneficiaries from an undue influence claim. The emotional distress alleged from the challenge to the will resulted from the plaintiffs desire to retain their preferred position under the will, for which they cannot recover. See id.

100. This probably results from the fact that such errors are fixable in the sense that, by the use of disclaimers and the payment of gift taxes, the correct tax result can usually be achieved. See infra notes 101-115: In order to correct a non-tax error, a construction or
One of the earliest cases well illustrates the problem. The case involved a rather typical pre-1976 estate plan. Barbara Bucquet's father (the grantor) created a revocable inter vivos trust. On the grantor's death, the trust was divided into equal shares. One half of the trust (the marital share) qualified for the marital deduction. The other half (the nonmarital share) provided that the net income was payable to the grantor during his life and to his wife if she survived him, which she did. On his wife's death, the income was payable to Barbara for life. On her death, $175,000 was to be paid to Barbara's husband and the remainder to Barbara's children. However, the reformation proceeding would have to be commenced. The malpractice would then consist of drafting the document in a way that did not reflect testator's intent or was unclear. If the reformation or construction action was successful, the attorney could probably defend the malpractice action on the ground that the beneficiaries achieved the result they desired, see supra notes 87-89 and accompanying text, although the costs of the action could be recovered. If the underlying action was unsuccessful, the attorney could defend based on lack of negligence.

The increasing recognition of reformation actions to conform wills to testator's intent could ease the way to non-tax cases using a "cost to fix" damages rule. Discussion of the recent recognition of reformation in estate planning situations is beyond the scope of this article. See UNIF. PROBATE CODE (UPC) § 2-503; RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS) § 12.1 (Tentative Draft No. 1) (1995) (to be renumbered as § 14.1, Tentative Draft No. 2 (1998) xxviii); see also John H. Langbein & Lawrence W. Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U. PA. L. REV. 521 (1982).

101. Before 1976, the estate tax marital deduction was allowed only to the extent of fifty percent of the adjusted gross estate. See I.R.C. § 2056(c) (1975). For decedents dying after December 31, 1976 and before January 1, 1982, the marital deduction varied depending on the size of the estate. See I.R.C. § 2056(c) (1981). For decedents dying after December 31, 1981, the marital deduction is unlimited. See I.R.C. § 2056(a). However, the same basic plan is used today for many spousal plans. See infra note 103.


103. See id. The testator's clear intention, as stated by the court, was that at testator's death, one-half of the trust corpus would qualify for the marital deduction and the other half would be available for his wife during her life but would not be includable in her estate or subject to estate taxes in her estate.

Most of the readers of this article are sufficiently familiar with estate planning to understand the purpose of the dispositive format of the grantor in the case and to recognize that the same plan, with a small variation, is still the basic estate plan for most couples today. However, perhaps a brief explanation of the reason such a plan is necessary is in order.

The federal estate tax is a tax on the transfer of property by reason of a person's death. See Treas. Reg. § 20.0-2 (1958). A person's estate consists of the property that person owns at the time of his death, plus certain other property (e.g., property held in joint tenancy, life insurance where incidents of ownership are retained by the decedent) and certain transfers where rights or interests are retained by the decedent (e.g., revocable trusts). See I.R.C. §§ 2031-2045 (1999). Tax is assessed on the taxable estate, which is the gross estate less certain deductions. See id. § 2051. The deductions include amounts paid for administration expenses, debts, the charitable deduction, the marital deduction and the recently-enacted deduction for family owned businesses. See id. §§ 2053-2057. After the
tax is computed by applying the rate table in I.R.C. § 2001(c) to the taxable estate plus
adjusted taxable gifts (which are not relevant here, see I.R.C. § 2001(b)(1)(B), 2001(b)(2))
some credits are used to reduce the tax dollar for dollar. Relevant to our purposes is the
applicable credit amount under I.R.C. § 2010(a). The amount of the credit is the amount
of tax on an estate of the applicable exclusion amount. See id. § 2010(c). The applicable
credit amount is really a floor. Estates below this floor pay no estate tax. For estates
above the floor, the tax on the floor is subtracted from the estate tax on the taxable estate.
For 2000, the applicable exclusion amount is $675,000 (meaning that estates of persons
dying with estates under this amount pay no tax). (The applicable exclusion amount
increases in stages until reaching $1,000,000 in 2006). The simplified computation of estate
tax for most decedents can be summarized as:

\[
\begin{array}{c}
\text{Gross estate} \\
\text{Deductions} \\
\text{Taxable estate} \\
X \\
\text{Tax Rate} \\
\text{Tentative Estate Tax} \\
- \text{Applicable Credit Amount} \\
\text{Estate Tax Due.}
\end{array}
\]

However, since a credit only reduces the tax, and since the applicable credit amount
cannot reduce the tax below zero (I.R.C. § 2010(d)), in order to use the credit, the estate
must generate a tax. Put otherwise, if an estate has deductions equal to the gross estate, it
will generate no estate tax and will not use the I.R.C. § 2010 credit.

The usual way an estate could generate deductions equal to the gross estate would be
to leave all the decedent's property to his or her surviving spouse. Since the marital
deduction, as a deduction from the gross estate, is applied before the credit in the formula
given above, bequeathing all a decedent's property to the surviving spouse results in a
taxable estate of zero, no tentative tax and no credit. For example, if decedent had a gross
estate of $2,000,000 and bequeathed it all to his spouse, his tax computation would be as
follows:

\[
\begin{array}{c}
\text{Gross Estate} \quad $2,000,000 \\
- \text{Marital Deduction} \quad $2,000,000 \\
\text{Taxable estate} \quad 0 \\
\text{Tentative Tax} \quad 0 \\
- \text{Applicable Credit Amount} \quad 0 \\
\text{Tax Due} \quad 0
\end{array}
\]

So far, the lack of use of the credit has no adverse tax consequences for the couple.
However, two other facts must be added. First, property for which a marital deduction is
given, if not consumed, will be included in the surviving spouse's estate. See id. §§ 2033,
2044, 2041. Therefore, in our example above, the surviving spouse, unless she spent her
spouse's $2,000,000, would have to include that amount in her estate when she died, in
addition to her other property. And estate tax would be generated in the surviving
spouse's estate. To illustrate, suppose the surviving spouse had no other property, and
had retained the entire $2,000,000 received from her husband, and the property had not
appreciated or depreciated. The surviving spouse's estate tax would be (ignoring debts
and administration expenses):

\[
\begin{array}{c}
\text{Gross Estate} \quad $2,000,000 \\
- \text{Deductions} \quad 0 \\
\text{Taxable estate} \quad 2,000,000 \\
\text{Tax} \quad 780,800 \\
\text{Less:} \\
\text{Applicable Credit Amount} \quad 220,550 \\
\text{Tax Due} \quad $560,250
\end{array}
\]
trust included a provision giving the grantor's spouse a power to revoke the trust. 104 This power (which was a general power of appointment in the surviving spouse) would make the non-marital share of the trust includable in the wife's estate under I.R.C. § 2041 and completely defeat the estate plan. 105

After discovering the consequences of the power to revoke, the surviving spouse disclaimed the power to revoke and assigned her life income interest in the nonmarital share in an attempt to avoid the

One might say the surviving spouse ought to spend the inheritance. However, the second fact we must add is that property need not be given to the spouse outright to qualify for the marital deduction. In fact, the two most popular forms of the marital deduction (the life estate plus general power of appointment trust under I.R.C. § 2056(b)(5) and the QTIP trust under I.R.C. § 2056(b)(7)) do not envision the spouse being able to dispose of the property during lifetime.

Thus, the problem in not using the applicable credit in the estate of the first spouse to die is an increase in tax on the estate of the surviving spouse.

For comparison purposes, if our hypothetical testator above had not given all his property to his surviving spouse, but had given enough property to use the applicable credit amount in a form that did not qualify for the marital deduction (for example, leaving it in a trust with only income to his spouse and on her death to his issue, and his executor had not elected QTIP treatment (see id. § 2056(b)(7)(B)(i)(III)), the estate tax on the couple would be:

<table>
<thead>
<tr>
<th>Husband's Estate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross Estate</td>
</tr>
<tr>
<td>Marital Deduction</td>
</tr>
<tr>
<td>Taxable Estate</td>
</tr>
<tr>
<td>Tentative Tax</td>
</tr>
<tr>
<td>Applicable Credit Amount</td>
</tr>
<tr>
<td>Tax Due</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Wife's Estate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross Estate</td>
</tr>
<tr>
<td>Deductions</td>
</tr>
<tr>
<td>Taxable Estate</td>
</tr>
<tr>
<td>Tentative Tax</td>
</tr>
<tr>
<td>Applicable Credit Amount</td>
</tr>
<tr>
<td>Tax Due</td>
</tr>
</tbody>
</table>

This would be a savings of $300,250 over a plan of bequeathing all the property to the spouse.

It should be noted that the situation in Bucquet v. Livingston is slightly different in that before 1976 there was no applicable credit amount and the marital deduction was limited to fifty percent of the adjusted gross estate. However, the plan was the same because it saved no taxes to give more than fifty percent of the estate in a marital deduction form and, since everything bequeathed to the surviving spouse was included in the surviving spouse's estate, additional taxes were due when the surviving spouse died. Thus, the pre-1976 plan was designed to not overfund the marital deduction. The same plan applies today.

104. See Bucquet, 129 Cal. Rptr. at 516.
105. See id. at 919.
inclusion of the nonmarital share in her estate for federal estate and California inheritance tax purposes. Her actions were successful.\textsuperscript{106}

To avoid estate taxes, the surviving spouse had to pay approximately $50,000 in federal and state gift taxes and attorneys fees of $3,750 for the assignment.\textsuperscript{107} After her death, her estate sued the attorney who drafted the husband’s lifetime trust for malpractice. The court held the attorney liable for malpractice, because the marital deduction trust “is one of the best known estate planning devices. . . . The potential consequences of the retention of general power of appointment are a matter within the reasonable competence of an attorney.”\textsuperscript{108} The court held, if proven, that the amount the shares of the trust payable to the other beneficiaries was diminished by the payment of state and federal taxes caused by the erroneous tax advice and drafting would be recoverable.\textsuperscript{109}

Another significant case using the “cost to fix” measure of damages is \textit{Linck v. Barokas \\& Martin}.”\textsuperscript{110} Linck’s entire estate, valued at $3,000,000, was bequeathed to his widow. The widow sued the testator’s attorneys for failing to advise her to disclaim part of the bequest to avoid overfunding the marital deduction.\textsuperscript{111} The widow later made gifts to her children and paid gift taxes.\textsuperscript{112} The court held that the complaint would be upheld despite the contention that no present damage was caused. The court stated that the widow alleged damages of the amount of gift tax paid, of attorneys\textsuperscript{113} and accountant’s fees incurred in connection with the gifts, of the reduced amounts to be received by her children,\textsuperscript{114} and of the loss of the use of the funds until the widow’s death which would have been disclaimed and passed to the children.\textsuperscript{115}

Although the two cases discussed in this section were decided on the pleadings, the principle of the cases clearly indicates that the courts considered the damages to be the costs to correct the damage

\begin{itemize}
  \item 106. See id.
  \item 107. See id. at 918-20.
  \item 108. Id. at 922.
  \item 109. See id. at 923.
  \item 110. 667 P.2d 171 (Alaska 1983).
  \item 111. See id. at 172-73. On overfunding the marital deduction, see supra note 103.
  \item 112. See id.
  \item 113. On whether attorneys fees can be recovered as damages, see infra Part VII.
  \item 114. The amount to the children would be reduced because of the inclusion of the amounts not disclaimed or given to the children in the widow’s estate and the payment of a second estate tax on this amount. Decedent died in 1978, when (simplified) the maximum allowable marital deduction was fifty percent of the adjusted gross estate. See supra note 101.
  \item 115. See Linck, 667 P.2d at 173-74. Note that the case was decided on a motion to dismiss for failure to state a claim. The court technically, of course, did not determine the damages since the trial had not yet occurred.
\end{itemize}
caused by the malpractice. In addition, several cases have awarded fees and costs incurred in attempts to recover estate or inheritance taxes paid as a result of the attorney's malpractice in preparing or filing late the tax returns. These results support the conclusion that in certain types of cases, primarily those involving estate planning errors, the "cost to repair" the damage done by the attorney's error, in addition to any loss sustained by the beneficiaries, is the proper measure of damages.

V. Reconciling the Two Theories of Damages

From the preceding discussion, it would appear that different measures of damages apply depending on whether the beneficiaries choose to take action to repair the defect caused by the attorney's actions. On further reflection, however, both measures reflect the loss to the beneficiaries. This is obvious in the "loss of bequest" measure. However, the "costs to repair" measure reflects the expenses required to undo the damage caused by the attorney's actions—gift taxes, additional attorneys fees and other costs. It is, in a very real sense, the costs of making the situation as it should have been if the attorney had performed competently. It is as much a measure of the beneficiaries' loss as is the "loss of bequest" measure. Thus, the two measures are not in reality different—they represent the difference caused by a choice of the beneficiaries. The significance for our purposes is that the recognition by the courts of the different measures of damages reflects the underlying recognition that the beneficiaries should and do have the choice of taking action to "correct the error" and that the beneficiaries should not be penalized for either choosing to fix the plan or not to fix the plan. If the beneficiaries choose to act—by gifts, tax payments or otherwise—to correct the error, they recover the costs of the correction. If correction of the error is not feasible or is simply not the course chosen by the beneficiaries, they recover the loss of the bequest. The choice belongs to the beneficiaries—and rightly so, because as between the beneficiaries and the attorney, the beneficiaries, as the innocent parties, should have the choice.

117. See supra Part IV and V.
118. See supra Part V.
VI. Recovery of Attorney Fees As Damages

A number of cases have raised the question of whether attorney fees can be recovered as damages in legal malpractice cases. This problem has arisen because of the so-called “American Rule” on attorney fees. The “American Rule” states that in a tort action the winning party cannot require the losing party to pay its attorney fees. The rule on attorney fees can be stated rather simply. A successful plaintiff cannot recover from the negligent attorney the legal fees incurred by plaintiff in bringing the malpractice action. However, if the attorney’s negligence has required the plaintiff to employ other attorneys to correct the errors, the fees paid to the other attorneys are recoverable as damages because they are reasonably foreseeable consequences of defendant attorney’s negligence. In short, damages will include the fees paid to other attorneys to cure, attempt to cure (even if unsuccessful) or mitigate the damage caused by the attorney’s negligence. The only fees not recoverable are the attorney fees incurred in the malpractice litigation itself.

Perhaps the clearest and most extensive discussion of this distinction was by the Illinois Appellate Court in Sorenson v. Fio Rito. Sorenson employed Fio Rito to probate her husband’s will and do the tax work. Fio Rito did no work for two years after decedent’s death and did not prepare or file the federal estate or Illinois inheritance tax returns. About two and a quarter years after her husband died, Sorenson retained a new attorney to handle her

119. See RESTATEMENT (SECOND) OF TORTS § 914(1) cmt. a (1979). The rule in England is the opposite. See id.
120. The Restatement of Torts phrases it as follows:
The damages in a tort action do not ordinarily include compensation for attorney fees or other expenses of the litigation.
RESTATEMENT (SECOND) OF TORTS § 914(1).
123. See supra note 122.
124. See supra note 121.
125. 413 N.E.2d at 47.
126. See id at 49. Fio Rito contended that Sorenson employed another attorney in his office (an “office associate”) to do the tax work. See id. at 50. However, the trial court ruled against Fio Rito on this contention and the Appellate Court affirmed. See id. at 51.
husband's estate. The new attorney filed the tax returns. Because of the late filing, $6,409.25 in penalties and interest were paid. In addition, Sorenson paid $1500 in attorney fees in unsuccessful attempts to obtain refunds of the penalties and interest.

Fio Rito, the attorney, contended that awarding the $1500 attorney fees as damages violated the "American Rule." The court noted that the general rule of damages charges one who commits an illegal or wrongful act with all the natural and ordinary consequences of the act. This would logically include attorney fees incurred in suing the wrongdoer. However, the "American Rule" was adopted as an exception to the normal damage rule because allowing attorney fees might deter persons from bringing or defending uncertain claims. The court then went on to distinguish the attorney fees involved in seeking a refund of the penalties and interest from the litigation expenses for which recovery is prohibited by the "American Rule":

It is clear from this statement that the policy against awarding attorneys' fees was intended to apply only where a successful litigant seeks to recover his costs in maintaining the lawsuit. We do not believe it was intended to preclude a plaintiff from recovering losses directly caused by the defendant's conduct simply because those losses happen to take the form of attorneys' fees. The plaintiff here is not attempting to recover the attorneys' fees she expended in bringing this lawsuit. Rather, she seeks to recover losses incurred in trying to obtain refunds of tax penalties which were assessed against her solely as a result of the defendant's negligence. Had the plaintiff been forced to hire an accountant to repair the damage caused by the defendant's conduct, she would undoubtedly have been entitled to recover the accountant's fee as an ordinary element of damages. There is no basis in logic for denying recovery of the same type of loss merely because the plaintiff required an attorney instead of an accountant to correct the situation caused by the defendant's neglect. In holding the defendant liable for the plaintiff's losses, we are not violating the policy against "penalizing" a litigant for defending a lawsuit. We are simply following the general rule of requiring a wrongdoer to

127. See id. at 50.
128. See id.
129. See id. at 51.
130. See id.
131. See id. The Sorenson court quoted Flieschman Distilling Corp. v. Maier Brewing Co.:

In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.

bear the consequences of his misconduct.

The distinction between legal expenses which are recoverable as ordinary damages and attorneys' fees which are not recoverable as costs of litigation.\textsuperscript{132}

Other courts have also recognized the distinction between litigation expenses in the malpractice action, which are not recoverable, and other foreseeable attorney fees caused by the wrongdoing of the attorney, which are elements of damage recoverable in the malpractice action.\textsuperscript{133}

VII. Speculative Damages

A. The Rule

An attorney accused of malpractice is not responsible for speculative damages.\textsuperscript{134} Otherwise put, if the only damages which can be alleged by plaintiff are speculative, the judgment will be in favor of the defendant attorney, since the existence of damages is an essential element of the cause of action.\textsuperscript{135} The test is not the difficulty in ascertaining or calculating the damages, but rather whether any actual damages have happened.\textsuperscript{136} Thus, speculative damages arise when there is doubt of whether damage has occurred, as opposed to certainty of damage but uncertainty as to the amount or the method of ascertaining the amount.\textsuperscript{137} For example, although a claim for lost profits in a tort action is usually speculative,\textsuperscript{138} if an injury has occurred it is proper to award damages for future pecuniary losses.\textsuperscript{139}

\textsuperscript{132} Sorenson, 413 N.E.2d at 51-52. In distinguishing two prior cases, the court further remarked:

In both of those cases, the indemnity plaintiff [the party suing the attorney] was properly subject to suit by the injured party. The indemnity defendant [the attorney] did nothing to subject the plaintiff to avoidable litigation and was therefore not required to pay the resulting attorney's fees. Here, on the other hand, the defendant's neglect was the direct cause of the legal expenses incurred by the plaintiff. Had the defendant properly filed the necessary tax returns, there would have been no need for the plaintiff to engage in efforts to recover penalty and interest charges.

\textit{Id.} at 53.


\textsuperscript{134} See 2 MALLEN & SMITH, supra note 54, \S 19.3, at 599.


\textsuperscript{136} See 2 MALLEN & SMITH, supra note 54, \S 19.3, at 599-600.

\textsuperscript{137} See id. at 599-601.

\textsuperscript{138} See id. at 601.

\textsuperscript{139} See RESTATEMENT (SECOND) OF TORTS, \S 913A (1979). The amount awarded is reduced to the present value. See id., cmt. a.
B. Estate Planning: The Problem Cases

A problem may arise in legal malpractice cases involving estate planning because the damage may be labeled as speculative. Two types of cases (one of which has arisen) may illustrate this problem.

(1) The Marital Deduction Case

One problem case is the marital deduction-credit shelter will where the drafter erroneously gives the surviving spouse a lifetime power of withdrawal or a general testamentary power of appointment. If the surviving spouse has a lifetime power of withdrawal, damages may be speculative for at least three reasons. First, it is unknown whether the surviving spouse will exercise the power and to what extent the value of the trust will be includable in his gross estate. Second, even if the surviving spouse exercises the power, he may spend or otherwise dispose of the assets gained from the trust, with the result that these assets will not be included in the surviving spouse's gross estate. Third, the value of the trust, together with the surviving spouse's assets, may be under the threshold for the imposition of an estate tax. This final reason can make the damages speculative for both lifetime and testamentary powers.

(2) The Rule Against Perpetuities Case

The common law rule against perpetuities voided any contingent remainder or executory interest which vested later than the termination of lives in being at the creation of the interest plus 21 years.

140. For a discussion of this problem see supra note 103 and accompanying text.

141. Either of these powers will result in inclusion of the property in the surviving spouse's gross estate. See I.R.C. § 2041. This error occurred in Bucquet v. Livingston, 57 Cal. App. 3d 914 (1976). In that case, the surviving spouse made gifts and paid gift taxes so that damages became certain during her lifetime and the problem discussed here did not occur. See supra notes 102-109 and accompanying text. A similar situation could occur when the will gives the entire estate to a marital deduction trust, particularly a QTIP trust (see I.R.C. § 2056(b)(7)), thus overfunding the marital deduction and giving the surviving spouse no way to solve the problem except to either disclaim the exemption equivalent portion of the trust or, if the I.R.C. § 2518 disclaimer time limit has expired, to make a gift of his life income interest. Again, the damage would not be determinable until the death of the surviving spouse. This was the situation in Linck v. Barokas & Martin, 667 P.2d 171 (Alaska 1983), but again the surviving spouse made gifts to her children on which she paid gift taxes, thus rendering the damages certain at an earlier time. See supra notes 110-115 and accompanying text.

142. The applicable credit amount for 2000 is the amount of tentative tax on $675,000 ($220,550). See I.R.C. § 2010. This means that if the taxable estate plus adjusted taxable gifts is less than $675,000 (and the decedent has not used any of the applicable credit amount during lifetime), no estate tax is payable. See I.R.C. § 2001. The "exemption equivalent" of the applicable credit amount is scheduled to increase in stages to $1,000,000 for decedents dying in 2006 and thereafter. See I.R.C. § 2010(c).
years. Any interest which violated the rule was void *ab initio*, which meant that the damage occurred when the will or trust containing the provision became effective rather than when a court declared the violation.

However, under the Uniform Statutory Rule Against Perpetuities ("USRAP"), that rule is changed for interests which may violate the rule. For such interests, no finding of invalidity is made until it is determined whether the interest either vests or terminates within 90 years after the interest is created. Therefore, no nonvested interest will be invalidated prior to 90 years after its creation. In a case where an interest might violate the rule against perpetuities in a USRAP state, no violation (and therefore no damage) will occur prior to 90 years after the creation of the interest. Any malpractice action brought against the drafting attorney prior to that time will be dismissed because damage will be speculative.

C. Estate Planning: The Decided Cases

In general, the cases so far decided in the estate planning area have confirmed the general rule that actual damages are required for attorney liability. Perhaps the most extended discussion occurred in a recent Ohio case. The case involved an amendment to a revocable inter vivos trust executed by a terminally ill decedent. The effect of the amendment, which was drafted in response to a question from the grantor to his attorney as to whether any changes were needed in the trust because of the change in the estate tax marital deduction rules in 1981, was to put grantor's entire estate into a marital trust. This overfunded the marital trust by failing to use the

144. See id. at 642-43. It is beyond the scope of this Article to go any further into the complexities of the rule against perpetuities. For a list of some recent articles dealing with the rule, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 2 n.4 (1992). See also Ira Mark Bloom, *Perpetuities Refinement: There is an Alternative*, 62 WASH. L. REV. 23 (1987). For malpractice cases involving the rule, see Begleiter, supra note 1, at 195-96, 230-31, 256-59.
146. See USRAP § 1(a)(2); cmt. c. The statement in the text is somewhat simplified. Some interests may be reformed if a nonvested interest can vest but not before the expiration of the 90 year period. See id. § 3(3).
147. It probably does not need to be stated that the attorney is unlikely to be alive (or at least still practicing) at the time it is determined that a violation does occur. If the attorney has died and his estate has been closed, what course of action is left for the beneficiaries whose interests have been invalidated?
148. See supra Part VIII.A.
150. See id.
grantor’s applicable credit amount.\textsuperscript{151} When the error was discovered the widow and the son, who were the trust beneficiaries, sued for malpractice for failure to utilize the applicable credit amount. They requested compensatory damages, including the son’s lost inheritance and tax disadvantages, and punitive damages.\textsuperscript{152} The trial court held that the widow suffered no damages.\textsuperscript{153} Decedent’s children appealed on the ground that the credit shelter trust created under the will, of which they were beneficiaries, was not funded due to the error. The court held the damages to the children were speculative. After repeating the general rules that “damage must be shown with certainty and not be left to conjecture and speculation”\textsuperscript{154} and “[I]t is uncertainty as to the existence of damages, not uncertainty as to the amount, which precludes recovery”\textsuperscript{155} the court noted that the credit shelter trust directed that the net income and as much of the corpus as the trustee deemed necessary for the comfort, care and support of the widow was to be paid to her. Under this provision, the court reasoned that the trustee could have distributed all the income and corpus from this trust to the widow, leaving nothing for the children.\textsuperscript{156} Therefore, the amount the children might ultimately receive could not be ascertained at the time of the case. Moreover, the tax advantages depended on the size of the widow’s estate at her death and the tax laws at that time.\textsuperscript{157} These factors rendered any damage to the children speculative.\textsuperscript{158}

In a case where attorneys drafted a trust which was not executed prior to decedent’s death, the court ruled that any damages based on an unexecuted document (a single life trust, under which plaintiff’s income interest was at the sole discretion of the trustees) were speculative.\textsuperscript{159} A similar result occurred where, because of an error in witnessing the will, the estate passed to the beneficiaries outright rather than into a family trust.\textsuperscript{160} The widow married a person who embezzled the estate. The beneficiaries alleged that had the will been witnessed properly and the estate been placed in a family trust, the

\textsuperscript{151} This is the situation referred to in Part VIII.B.1, supra.

\textsuperscript{152} See 577 N.E.2d at 1121.

\textsuperscript{153} Her complaint alleged that the trust would be included in her estate and that the inclusion would generate federal estate tax. See id. Although the court does not give the basis of the trial court’s holding that the widow suffered no damage, it is presumably because the widow was alive at the time of the case and had not paid estate tax on her estate. See id.

\textsuperscript{154} Id. at 1122.

\textsuperscript{155} Id.

\textsuperscript{156} See id. at 1122.

\textsuperscript{157} See id.

\textsuperscript{158} See id.


estate would not have been lost. The court held that the loss of funds was not proven to have resulted from the attorney's negligence.\textsuperscript{161} The loss of commissions by executors due to an alleged error of their attorney was held to be speculative, since the award of executor's commissions is always discretionary with the court.\textsuperscript{162} One court has held that the same rules applied where the roles of the parties were reversed.\textsuperscript{163} An attorney advised contingent remaindermen of a trust that a disclaimer would not cause estate or gift tax liability. In fact, at that time, the law on the subject was uncertain. Ultimately, the I.R.S. asserted gift tax liability, which was paid. The attorney argued that if plaintiffs had not disclaimed and the remainders had become possessory, their estates would have included the value of the remainder interest on which they paid gift taxes after disclaiming. Thus, the attorney alleged, the remaindermen suffered no damage. The court rejected the attorney's allegation on the ground that under the set of facts posited by the attorneys, the plaintiffs could have spent the money or given it away. Thus, the allegation of offsetting taxes was speculative.\textsuperscript{164}

A few cases involved circumstances under which the courts refused to hold the damages speculative. In a case involving the failure to establish a testator's capacity at the time of the execution of the will, the court refused to dismiss the action and held a determination of damages should be possible.\textsuperscript{165} The testator executed the will while he was in the hospital during his last illness. During his eight days in the hospital, he executed several wills. This resulted in a will contest. Plaintiff asked for the expenses incurred in defending the will contest, which she alleged were at least double what they should have been. And in a case where the question of whether the value of a life insurance trust would be included in the client's estate would be determined within three years following the date of the gift,\textsuperscript{166} the court refused to strike the allegation of damages since the costs of correcting the error could become recoverable before or during the trial.\textsuperscript{167}

\textsuperscript{161} See id. at 809.
\textsuperscript{164} See id.
\textsuperscript{166} See I.R.C. § 2035.
\textsuperscript{167} See Camenisch, 52 Cal. App. 4th 1689, 1699 (Ct. App. 1996). In that case, a client hired Camenisch, an attorney, to prepare a life insurance trust with the object of having the life insurance removed from his estate. The trust as drafted reserved a number of powers to the grantor, although there was disagreement over whether these powers would cause inclusion of the trust in the client's estate. Twelve years later, the client dismissed Camenisch, transferred the insurance to his daughters, and paid some $25,000 in gift taxes.
D. Analysis

It is difficult to argue with the cases discussed in the preceding subsection holding the damages speculative. If a court were required to make an outright award of damages at trial when it is uncertain whether the plaintiff might ever suffer any damage, the attorney would be justified in complaining profusely of injustice.

And yet, in the situations hypothesized in subsection B of this section, it appears similarly unjust to leave the plaintiff without any remedy. In the marital deduction situation, it is surely possible that some tax may be generated by the inclusion of the trust in the surviving spouse's gross estate. It is, of course, also possible, either due to the lack of other assets or because of the repeal or alteration of the estate tax, that no tax will be incurred because of the attorney's error. Similarly, in the perpetuities case under USRAP, it is possible that some beneficiaries that testator desired to benefit will receive nothing or less than testator intended. Should there be no remedy in these cases because the incurring of damages is postponed? In considering this question, the oft-mentioned rule that "[t]he 'speculative nature' of the damages is no defense to a negligent lawyer whose client has lost the opportunity to have his claim adjudicated by a court and jury" should not be ignored. After all, the attorney has erred. As between a negligent party and an innocent party, should not the innocent party be at least given consideration? And yet, if it turns out that the beneficiaries suffer no damage, why should the attorney be forced to pay?

For these situations, a new way of thinking is needed. A new remedy, which balances the interests of the attorney and the beneficiaries, and which takes into account the deferred nature of the damage determination, is required. We now proceed to an examination of possible remedies.

The client sued for emotional distress and other damages. The client spent approximately $11,800 to correct the alleged errors to the trust and $25,000 in gift tax paid. If the client died within three years of the gift, the inclusion of the life insurance in his estate would generate approximately $525,000 in estate tax. The court ruled that the client could not recover for emotional distress. As to the damage for potential estate taxes, the court refused to strike the allegation. Although the damages may be speculative at the time the motion is made, they could become recoverable if the client died before trial.See id. at 1692-93, 1696-97, 1699.


169. Or an actor who has breached his contract, if the court views malpractice in estate planning as a third party beneficiary contractual question. See Begleiter, supra note 1, at 204-06.
VIII. The Potential Remedies

A. The Statute of Limitations

The last section discussed the inequity in the "speculative damages" rule, prohibiting recovery in legal malpractice cases where the damages are uncertain. 170 This section discusses two potential arguments to overcome this problem and some analogies to other types of damages that are routinely allowed in malpractice actions.

First, it could be argued that the cases dismissing malpractice actions based on speculative damages do so because the action is premature. Put another way, the cause of action for malpractice has not yet accrued (the statute has not yet begun to run) because damage—a necessary element for the cause of action—has not yet occurred. 171

The majority rule is clearly that damage is a necessary element of the cause of action for legal malpractice (whether legal malpractice is viewed as a tort, a contract or a separate action). 172 The requirement of damages for a negligence case leads to the rule that the statute of limitations does not begin to run until some damage has occurred. 173 Moreover, nominal damage is not sufficient; actual, measurable damages are required for a malpractice cause of action. 174 More significant for our purpose, the threat of future harm is not sufficient to begin the running of the statute of limitations, since no present damage has resulted. 175 Lastly, whether or when damage has occurred is a question of fact in each case. 176

Perhaps the best statement of this rule, and certainly the most quoted, is from the case credited with first stating the rule:

The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and

170. See supra Part VIII.
171. See generally 2 MALLEN & SMITH, supra note 54, § 21.11, at 776-814.
173. See id. If this is not a universal rule, it is certainly a majority rule. One article states that, as of 1994, 30 states and the District of Columbia required some damage to occur for the statute of limitations to begin running in a legal malpractice action, and two states rejected the rule, Pennsylvania was divided, seven states accrue the action at the date of the negligent act, and the remaining states have not passed on the question. See Tyler T. Ochoa & Andrew J. Westrich, Limitations of Legal Malpractice Actions: Defining Actual Injury and The Problem of Simultaneous Litigation, 24 SW. U. L. REV. 1, 26-27 (1994).
175. See KEETON, supra note 172, at 165.
exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence. If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney’s negligence, the client cannot establish a cause of action for malpractice. . . . The cause of action arises, however, before the client sustains all, or even the greater part, of the damages occasioned by his attorney’s negligence. Any appreciable and actual harm flowing from the attorney’s negligent conduct establishes a cause of action upon which the client may sue. . . . In any event, the determination of the time when plaintiff suffered damage raises a question of fact.  

Given the rule that damages (in the sense of the occurrence of actual damages rather than the quantity of damage) are necessary to start the running of the statute of limitations, what constitutes damages for the purposes of the rule? First, whether damages have occurred is always a question of fact and depends on the circumstances of the case.  

Recent California cases have confirmed that the statute adopted the rules stated in Budd and only clarified that it was the fact of injury, rather than the amount of damages, that was significant in the accrual of the cause of action. See Jordache v. Brobeck, Phleger & Harrison, 958 P.2d 1062, 1071 (Cal. 1998). This appears to be the general rule, see 2 MALLEN & SMITH, supra note 54, § 21.11, at 785, although some decisions require a certain quantity of damage, usually described as “substantial” or “appreciable,” id. at 785-86 & n.26. The question of whether the cause of action for malpractice was tolled until (or the statute begins running before) actual damages were suffered or whether a specific quantity of damage was required has been the subject of a great deal of litigation and is beyond the scope of this article. See generally 2 MALLEN & SMITH, supra note 54, § 21.11.

177. See Budd, 491 P.2d at 437-38.
the statute of limitations.\textsuperscript{179} Later cases generally have agreed that incurring of attorney fees to correct or defend the document in question constitutes damages sufficient to begin the running of the statute of limitations.\textsuperscript{180}

This question has been considered in a considerable number of cases. In \textit{Bormaster v. Baldridge},\textsuperscript{181} malpractice was alleged due to the failure of the attorney to obtain the acknowledgment of the grantor's signature on a trust amendment. The court held that the payment by the beneficiary named in the amendment to an attorney to represent him in litigation he thought would be filed by other beneficiaries constituted damage sufficient to start the statute of limitations running.\textsuperscript{182} \textit{Palmras v. Barcelona} was a malpractice action for negligently drafting a will which was supposed to give most of the estate above the amount specified in a settlement agreement to the testator's second wife rather than the children of his first marriage.\textsuperscript{183} The complaint alleged that the children of the former marriage brought two actions challenging the will, which the second wife was forced to defend. The court held that the malpractice cause of action accrued when the second wife paid attorneys to defend the will in the actions brought by the children. The court held that injury was synonymous with damage, which means merely that the plaintiff suffered a loss.\textsuperscript{184} The paying of an attorney constituted damages sufficient to cause accrual of the malpractice action.\textsuperscript{185}

The recent case of \textit{Sindell v. Gibson, Dunn & Crutcher} was an action by the daughters of decedent's first marriage who were required to defend a litigation challenging an inter vivos trust created for their benefit against the children of grantor's second wife.\textsuperscript{186} The attorneys had failed to procure a statement from the second wife when the trust was created, at a time when she was competent and willing to execute it, that the property used to fund the trust was the

\begin{itemize}
\item \textsuperscript{179} See \textit{id.} at 437. The case was decided on a motion for summary judgment so the court did not pass on the sufficiency of the legal fees as damages. In dicta, however, the court noted that plaintiff alleged that she had incurred $1,503.38 plus additional legal fees on a judgment of $38,450.61 in the underlying action and that these fees might suffice as damages. See \textit{id.} at 437.
\item \textsuperscript{181} 723 S.W.2d 533, 537 (Mo. Ct. App. 1987).
\item \textsuperscript{182} See \textit{id.} It should be noted that the payment of the attorney fee constituted damage even though the litigation had not yet been filed. It is interesting that the fee paid was $500, but the liability the client expected at the time the litigation was filed was $125,000-$150,000 and the action by the other beneficiaries was eventually settled for $75,000.
\item \textsuperscript{183} 672 N.E.2d 1245, 1246 (Ill. App. Ct. 1996).
\item \textsuperscript{184} See \textit{id.} at 1247.
\item \textsuperscript{185} See \textit{id.}
\item \textsuperscript{186} 63 Cal. Rptr. 2d 594, 597 (Ct. App. 1997).
\end{itemize}
grantor's separate property rather than community property. When
the grantor died, the court held that the children had sustained
damage by having to litigate issues which would have been
unnecessary but for the attorney's negligence in failing to procure the
statement. Therefore, although the underlying action concerning the
nature of the trust assets as separate or community property was still
pending, damage had occurred and the action was not premature.187
The court held that although normally in cases of this type, damage
does not occur until the resolution of the underlying action because
that determines the accuracy of the attorney's work,188 this case was
not controlled by that rule because the attorney's error was not in
drafting the language of the plans, but in failing to obtain the
statement from the first wife.189 Therefore, the event was the damage.
If plaintiffs were successful in the underlying litigation, their damage
was the attorneys fees and litigation costs of the underlying litigation.
If they lost, they incurred additional damages consisting of the
portion of the trust paid to the second wife's children.190 However, in
any event, the cause of action accrued on the date the underlying
litigation was filed.191

In summary, in the will drafting cases, the payment of attorneys'
fees to investigate or defend against actions caused by the attorney's
actions will trigger the running of the statute of limitations.192

In the tax cases decided, the question generally concerns at what
stage of the proceedings damage occurs. Most of the decisions hold
that damage occurs when the IRS assesses a deficiency,193 although
some courts have held that damage can occur prior to the notice.194
Other courts have held that damage occurs later, when court action is

187. See id. at 603.
188. There has been a good deal of argument over whether damage occurs only when
the underlying litigation is concluded (or any appeals are concluded or barred by time
limits on appeal) or at some earlier time. A discussion of this matter is beyond the scope
of this article. See 2 MALLEN & SMITH, supra note 54, § 21.11 at 800-01 (Supp. 1999 at
184-85 (1999)). At the time of Sindell, it was thought that governing California law
required judgment in the underlying action in at least some circumstances to begin the
running of the statute of limitations. See ITT Small Bus. Fin. Corp. v. Niles, 885 P.2d 965,
972 (Cal. 1994). Sindell distinguished Niles on the facts. See Sindell, 63 Cal. Rptr. 2d at
600-01. Niles was overruled in Jordache, 958 P.2d at 1079.
189. See Sindell, 63 Cal. Rptr. 2d at 601.
190. See id. at 602.
191. See id. at 603.
192. See also Adams v. Paul, 904 P.2d 1205, 1210 (Cal. 1995), which is not an estate
planning case, but which cites Horne v. Peckham, 97 Cal. App. 3d 404, 417 (1979) as
holding that no actual damage for negligent preparation of trust documents arose until
the trust was challenged and plaintiffs had to raise legal fees to defend their interests.
193. See MALLEN & SMITH, supra note 54, at 797-98.
194. See id. at 798.
final or on appellate review. Still other courts have found other events crucial in determining when the statute of limitations begins to run.

How does the law on the accrual of the statute of limitations affect the speculative damage cases in estate planning? Recall our two prototypical cases: The marital deduction-credit shelter will where the credit shelter trust contains a general power of appointment and the will containing a trust which violates the rule against perpetuities. In the marital deduction-credit shelter case, no damage would occur until the death of the surviving spouse, when the value of the credit shelter trust would be includable in the surviving spouse’s estate. In the rule against perpetuities case, even though under perpetuities law the provision violating the rule is void immediately, it is arguable that no damage occurs until at least a beneficiary must defend the will against a challenge based on the violation of the rule against perpetuities. If the jurisdiction involved has enacted USRAP, the “wait and see” rule will clearly postpone any damage until the trust is challenged or until the passing of 90 years from the date of the trust’s creation. Therefore, it appears that unless the beneficiary incurs attorneys fees to investigate and/or correct the estate tax consequences of including the power of withdrawal or general power of appointment in the credit shelter trust or the rule against perpetuities violation, there will be no damage suffered and the malpractice statute of limitations will not start running.

Suppose, however, that the beneficiary, fearful that the statute of limitations for the malpractice action will expire, sues the drafting attorney. As we have seen, the action will no doubt be dismissed under the speculative damage rule. But, as a recent case makes clear, that dismissal should be without prejudice. A client sued his

---

196. See, e.g., Witte v. Goldey, 590 N.W.2d 266, 268-69 (S.D. 1999) (accountant malpractice, damage occurred when returns were filed); Herrmann v. McMenony & Severson, 590 N.W.2d 641, 644 (Minn. 1999) (excise tax for prohibited transaction in pension plan, damage occurred at time of prohibited transaction). See also KEETON, supra note 172, at 41-45.
197. See supra Part VIII.B.
199. See supra note 144.
200. See supra notes 178-192 and accompanying text.
201. See supra notes 145-147.
202. See supra Part V.
203. See supra Part VIII.C.
former law firm for inaccurate advice regarding solicitation of his
former employer's clients. The former employer had sued plaintiff,
but that action was pending. The court held that plaintiff had
suffered no damages and that plaintiff's action was premature.205
However, the appellate court also held that the trial court should
have dismissed the claim without prejudice and that plaintiff should
be able to refile the case when the underlying litigation was
completed.206

Therefore, it appears that a plaintiff in a "speculative damage"
estate planning case is not required to sue the attorney until he either
incurs attorneys fees (either to cure the defect or to defend against
litigation brought by the other beneficiaries), or until the IRS assesses
a tax deficiency. The question remains, however, whether this rule is
the best solution to the speculative damage problem and whether it
will protect beneficiaries in all cases.

The first problem with the above analysis is that it applies only in
the absence of a statute specifically providing otherwise. In recent
years, a number of states have enacted so-called "statutes of repose,"
which typically provide that no action for legal malpractice may be
brought after a certain number of years from the occurrence of the
act, omission, or failure constituting the malpractice.207 The above
analysis, which concentrates on the damage element of the action,
would be inapplicable to at least some of these statutes.208 Therefore,
if the local jurisdiction has a statute of repose, the malpractice action
may be barred by the statute by the time the damage finally occurs.

Perhaps more significantly, there are serious disadvantages to
postponing a decision on malpractice until the death of the second
spouse or a decision on the validity of an interest under the rule
against perpetuities. One of the purposes of the statute of limitations
is to encourage the bringing of an action while the evidence is fresh.209
Postponing the malpractice action for many years would make the
recollection of witnesses stale (indeed, many witnesses might die in
the interim) and could cause deterioration of evidence.210 Indeed,

205. See id. at 475.
206. See id. at 481.
207. See, e.g., Hargett v. Holland, 447 S.E.2d 784, 787 (N.C. 1994). See generally 2
MALLEN & SMITH, supra note 54, § 21.8, at 750-64 and especially 751 n.2; Ochoa &
Wistrick, supra note 173, at 26-27.
208. Section 340.6 of the California Code of Civil Procedure would be amenable to the
above analysis because its repose provision contains an exception tolling the statute for
the period when the plaintiff has not sustained actual damages. See Ca. Civ. Proc. Code §
340.66 (West 1999). Many of the other statutes listed in 2 MALLEN & SMITH, supra note
54, at 751 n.2, 175 n.2 (Supp. 1999), do not contain this exception.
209. See Ochoa & Wistrick, supra note 173, at 11.
210. See id.; 2 MALLEN & SMITH, supra note 54, at 813-14.
tolling the statute of limitations until damage results in the two prototypical cases of speculative damages discussed in this article is directly contrary to one of the major policies underlying the statute of limitations. Therefore, faced with this policy, there is no guarantee that a court would decide to postpone the accrual of the malpractice cause of action for many years. Remembering that the question of when a malpractice cause of action accrues is a question of fact, a court has room to make distinctions between different factual circumstances in deciding when a malpractice cause of action accrues. Moreover, that decision involves a process of balancing the interests of the claimant, the attorney and the judicial system. There is no guarantee that in the “speculative damage” cases discussed that balance would favor the claimant.

B. Comparable Recoveries Allowed

Before proceeding to discuss a method of solving the speculative damages problem which does not suffer from some of the disadvantages of postponing the accrual of (or tolling the running of) the statute of limitations, it would be appropriate to briefly discuss certain situations in which recovery has traditionally been allowed, although both the amount and the basis of recovery contain considerable uncertainty. My purpose here is not to discuss any of these in any detail, but merely to point out the allowance of recovery for these damages and briefly compare these damages to the “speculative damage” situations posed previously.

1) Trust Investment Violations

Violations by trustees of the “prudent person” or “prudent investor” rules have always been remedied. Under the newly formulated prudent investor rule, the damages for failure to make proper investments, if the beneficiary does not affirm the transaction, is the total return which would have accrued had the trust been invested properly. This return is “based on a total return experience for suitable investments of generally comparable trusts.” The Reporter’s Notes state that “[t]his approach is facilitated by the ready availability of relevant performance data in the modern financial world” and can be accomplished by looking at

211. See 2 MALLEN & SMITH, supra note 54, at 813.
212. See generally, RESTATEMENT (THIRD) OF TRUSTS (PRUDENT INVESTOR RULE) § 211 [hereinafter RESTATEMENT], §§ 205, 211 reporter’s notes [hereinafter Reporter’s Notes](1990).
213. RESTATEMENT, supra note 212, § 211.
214. See id.
215. Id.
the performance of comparable trusts or parts thereof, or to an index or benchmark portfolio.\textsuperscript{216}

The author has no quarrel with the Restatement's remedy or its purpose. For the purpose of this Article, however, the assumptions inherent in the remedy should be noted. How are the comparable portfolios chosen? Even if the trustee had invested the trust assets in accordance with the prudent investor rule, would the returns of the trust have matched the returns of comparable portfolios, or some standard index?\textsuperscript{217} Indeed, if the trustee had invested the assets properly, the portfolio might have had the same return as it did with the improper investments.\textsuperscript{218} The uncertainties seem to equal those in the paradigm cases previously posed—the rule against perpetuities violation in a USRAP state or the inclusion of a general power of appointment in a credit shelter trust where the tax liability does not arise until the death of the surviving spouse.

Some courts did not even wait for the Restatement to invoke similar remedies. In \textit{First Alabama Bank of Huntsville, N.A. v. Spragins},\textsuperscript{219} the court awarded damages against a trustee for lack of diversification based on the testimony of an "expert in trust management,"\textsuperscript{220} who alternated investing the assets in an index fund\textsuperscript{221} and U.S. Treasury bills. The testimony of the expert was based on the entire portfolio being 100\% in the index fund or treasury bills.\textsuperscript{222} More importantly, the expert's calculations were based on changing from the index fund to the treasury bills and back at exactly the right time.\textsuperscript{223}

Would any trustee have invested as did the expert witness in \textit{Spragins}? Would a trustee have been as accurate in calling the market turns as the expert? And, if not, aren't the damages allowed in \textit{Spragins} as speculative as the damages in our hypotheticals?

One may state that in the improper investment cases, there was damage from the improper investment. In our hypotheticals, there may never be damages because the trust may never violate the rule against perpetuities\textsuperscript{224} or the surviving spouse may have an estate not

\begin{itemize}
\item 216. Reporter's Notes, supra note 212, § 211.
\item 217. And, indeed, which index would be chosen?
\item 218. I want to emphasize that I do not disagree with \textit{RESTATEMENT} section 211 either in theory or in application. I simply point out the uncertainties involved in the measure of damages for comparison with the "speculative" cases in Part VIII.
\item 219. 515 So. 2d 962 (Ala. 1987).
\item 220. \textit{Id.} at 965.
\item 221. An S&P 500 Index Fund. \textit{See id.} at 970 (Tarbert, C.J., dissenting).
\item 222. \textit{See id.}
\item 223. \textit{See id.}
\item 224. Or because no beneficiary may ever bring an action challenging the validity of the interest.
\end{itemize}
exceeding the unified credit. But there is only damage from improper investment if the measure chosen for damages indicates a loss. In both cases there is a clear breach of duty. But the damage difference is not so clear.

(2) *Unrealized Capital Gains*

Perhaps even closer to our current topic are two recent cases allowing a discount from the gift tax value of a closely held corporation for "built-in" capital gains. A bit of background is necessary before proceeding.

A federal gift tax is imposed on gifts. The value of the property at the time of the gift is the amount of the gift. For federal gift tax purposes, the value of the property is:

- the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts. All relevant facts and elements of value as of the time of the gift shall be considered.

While the valuation of publicly traded stock is based on market prices, no such market price is available for a closely held stock, which is valued from a variety of factors. In two recent cases, the question has arisen of whether, in the valuation of gifts of closely held stock, account should be taken of the built-in federal income tax on the stock which would be payable. In both cases, the court held that in valuing the stock, the built-in capital gains tax should be considered even though there was no evidence indicating the owner had any plans to sell the asset.

While there are clearly differences between awarding malpractice damages and determining the fair market value of property for federal gift tax purposes, it is instructive that in both gift tax cases the Internal Revenue Service argued that, because there were no plans to sell the asset, consideration of the capital gains was

---

225. Or the estate tax may be completely repealed, as has been proposed recently by the Republicans. See *Tax Relief Among GOP Proposals*, DES MOINES REG., July 21, 1999, at 3.
231. See Eisenberg, 115 F. 3d at 53; Davis, 110 T.C. at 550. The courts ruled that a hypothetical willing buyer would consider the capital gains tax in determining the value of the stock. *Eisenberg*, 155 F.3d at 56; *Davis*, 110 T.C. at 550.
"too speculative to be considered."232 The IRS in Eisenberg further argued that it was impossible to determine when the property would be sold and thus what the tax rate would be, nor could the value of the property at that time be determined. Therefore it would be speculative as to whether a gain or loss would result.233 This sounds almost exactly like the arguments made by the courts in the estate planning malpractice cases discussed earlier in this article holding the damages speculative. The court in Eisenberg disagreed. The court noted that the issue was not what the buyer planned to do with the property, but the effect of the potential capital gains tax on the hypothetical willing buyer.234 It also noted that courts had previously allowed discounts for such taxes if payment of the tax was likely.235 Clearly, the court was convinced both that the possibility of the imposition of income tax in the future would have influenced a willing buyer and that a court could give it the proper weight.

(3) Administrative Discretion

One other recent case on a subject which, at first glance, is completely unrelated to the topic at hand, also supports awarding damages in the speculative cases. The case was a legal malpractice case in which the alleged malpractice was in preparing the documents required by the Comptroller of the Currency under a federal statute.236 Because of the failure to obtain prior approval of a transfer in ownership, when the bank became insolvent, the Comptroller issued a notice of assessment for $595,000 against the client. As part of a settlement, the Comptroller agreed to forego the assessment of a civil penalty against the client but reserved the right to take future action on the assessment if he deemed such action appropriate.237 In the malpractice action, the attorney claimed the damages were speculative because the Comptroller had never taken action to collect the assessment.238 The South Dakota statute allowed damages for detriment "certain to result in the future."239 Interpreting the purpose of the statute to require that facts exist to determine the loss with reasonable certainty, the court held that damage had been alleged with sufficient certainty to survive a summary judgment motion by the attorney.240 While this is not a holding that such

233. See Eisenberg, 155 F.3d at 56.
234. See id. at 57.
235. See id. at 58.
237. See id. at 623.
238. See id. at 624.
239. Id.
240. See id.
damages are not speculative, it does represent a retreat from the cases holding such damages too speculative to survive dismissal.

C. A Remedy

The previous two subsections have suggested that, in some "speculative damage" malpractice cases involving estate planning, an argument can be made that the statute of limitations would be tolled and the action would not accrue until actual damages occurred and that analogous situations to the "speculative damage" cases exists in which courts have awarded damages despite the factual uncertainties involved in these cases. The question remains whether there is a way to avoid the problems involved in tolling the statute of limitations and still satisfy the client's claim. A possible answer emerges from a most unlikely source: an IRS Private Letter Ruling.

In 1997, the IRS issued a private ruling on the gift, estate and generation-skipping tax consequences of a settlement agreement. Two taxpayers (husband and wife) established several trusts and hired an accountant at an accounting firm to prepare the Form 709 (U.S. Gift and Generation Skipping Tax Return) reporting the gifts. No election was made on the form to allocate any of the generation-skipping exemptions of taxpayer or his wife to the trusts. Such an election would have shielded all or some portion of the trusts from the generation-skipping tax. The taxpayers sued the accountant and the accounting firm which employed the accountant for malpractice. The suit was settled. The settlement agreement established four trust funds. Each fund would reimburse one of the originally established trusts or its beneficiaries which became liable for any generation-skipping tax on account of the failure to allocate exemptions on the returns. Any remaining portion of the fund would be paid to taxpayer's children or the issue of a predeceased child. It should be noted that the initial funding of the funds was in an amount

241. In our hypotheticals, the death of the surviving spouse (or the later assessment of estate tax) in the tax planning hypothetical, or the incurring of attorneys fees in defense of a challenge by other beneficiaries in the rule against perpetuities hypothetical.
243. Technically, the suit alleged breach of contract, breach of fiduciary duty and professional negligence. See id at *4.
244. The rulings on the tax questions are beyond the scope of this article. Briefly, the IRS held that the funds were qualified settlement funds under Treasury Regulation section 1.468B, the gross income of each fund would not include amounts transferred by the firm or the accountant to satisfy a liability for which the funds were established, the transfer of the settlement proceeds to the funds would not be gifts from the creators of the trusts to their children, nor would the value of each fund be included in the grantors' gross estate. The grantors would be treated as transferors of the bonds for generation-skipping tax purposes. See id. See generally PRACTICAL DRAFTING 5125-5129.
equal to the present value of the expected future generation-skipping tax liability.\textsuperscript{245}

With several minor changes, the settlement involved in the private letter ruling could serve as a model for malpractice cases which are now disposed of under the "speculative damage" rule. Instead of dismissing the cases because the damages are speculative, the court could order a trust to be created by the attorney. The amount of the trust would be the present value of the future expected liability.\textsuperscript{246} The computation of the expected future liability would depend on the facts of the case. To use one of our hypotheticals as an example, in the case where a general power of appointment was mistakenly included in a credit shelter trust, the court could compute the liability by adding the value of the credit shelter trust at the time of the malpractice suit to the value of the marital (QTIP) trust\textsuperscript{247} and the value of the surviving spouse's assets, applying an interest factor to account for growth, using standardized mortality tables to predict the length of the surviving spouse's life, and adjusting for expected spending. The tax on that amount would be computed, and compared with the tax on the surviving spouse's estate without the inclusion of the credit shelter trust. This amount, reduced to its present value, would be the expected liability. The significant point is not to analyze the mechanics of the computation but merely to show that it can be done. Courts have experience with this kind of computation.

When the amount is determined, it would be placed in a court-supervised trust. Income would be retained in the trust.\textsuperscript{248} When the surviving spouse died,\textsuperscript{249} the question of whether the inclusion of the general power of appointment in the credit shelter trust\textsuperscript{250} caused additional estate tax on the surviving spouse's estate could be determined. Any additional estate tax generated would be paid from the trust. Any funds in the trust remaining after payment of the estate tax would be payable to the attorney or the law firm,

\textsuperscript{245. See PRACTICAL DRAFTING 5126.}

\textsuperscript{246. Discounting the amount to present value would not be a problem. Courts have used present value tables in malpractice cases. See, e.g., Simpson v. Calivas, 650 A.2d 318, 325 (N.H. 1994) (court approved use of IRS tables to value life estate in a malpractice case).}

\textsuperscript{247. The QTIP trust will be included in the surviving spouse's estate under I.R.C. section 2044.}

\textsuperscript{248. This is necessary because of the discount of the expected future liability to present value.}

\textsuperscript{249. Or in other types of cases, when the value became ascertainable by virtue of judicial decision or otherwise.}

\textsuperscript{250. And the consequent inclusion of the credit shelter trust in the surviving spouse's gross estate.
depending on who provided the consideration for the establishment of the trust. If the attorney provided the consideration individually and had died, the residuary beneficiaries under the attorney's will would receive the trust proceeds. Of course, if the surviving spouse's estate was insufficient to generate estate tax even with the inclusion of the credit shelter trust, the entire court-created trust would be paid to the attorney or the law firm.

This solution avoids the problems inherent in tolling the running of the statute of limitations. The malpractice case is tried while the evidence is fresh and the witnesses are available. In addition, litigation over whether damages have been incurred or are speculative would become unnecessary.

A not incidental benefit of this solution is that it could be used in cases where the plaintiff had incurred attorneys fees, and a malpractice cause of action had accrued, but the possibility of large damages to be incurred in the future existed. The attorneys fees incurred could be paid to the plaintiff directly and the possible future damages could be placed in a trust of the type described above.

While courts may experience some difficulty in estimating the possible future liability, the task should be no more difficult than valuing a closely held corporation for federal estate and gift tax purposes or other matters courts currently decide. The creation of a trust in the speculative damage cases has the advantage of avoiding the difficult factual question of determining what constitutes damage, which has caused the courts a great deal of difficulty. It has the additional advantages of adjudicating the malpractice case when witnesses are available and the evidence is fresh and avoiding tolling the statute of limitations (or postponing the accrual of the cause of action) for potentially long periods of time. Perhaps its most significant advantage, however, is that it avoids dismissing the client's malpractice action because damages are speculative. After all, in many of these cases, the malpractice is clear. Denying the client's recovery on what most non-lawyers would see as a technicality is not calculated to improve the already low public image of lawyers.

251. Or the attorney's heirs if the attorney died intestate. If the attorney's malpractice insurer paid the amounts necessary to create the trusts, adjustments to the remedies would be necessary.

252. One instance of such a case could occur in the rule against perpetuities in a USRAP state example. A beneficiary might have employed an attorney to investigate the possibility of a violation prior to the expiration of 90 years from the creation of the trust.

253. See, e.g., Davis v. C.I.R., 110 T.C. 530 (1998), for an example of the difficulty involved.

254. See supra notes 178-192 and accompanying text.

255. See Begleiter, supra note 1, at 263-79.
Conclusion

This article has explored the question of the damages awarded in legal malpractice cases involving estate planning. In many cases, the damages recoverable are quite clear under the well established rules. The plaintiff can recover the value of the lost bequest or the costs incurred to repair the error. Attorneys fees involved in fixing the error are recoverable as damages, but not fees incurred in bringing the malpractice action. The troublesome cases occur where damages may but are not certain to occur in the future. Two examples of such "speculative damage" cases, one involving granting to the surviving spouse a general power of appointment in a credit shelter trust and the other involving a possible rule against perpetuities violation in a USRAP state, were described. The current solution, to dismiss these cases because no damage has occurred, appears unsatisfactory. Given that such dismissal should be without prejudice, this solution is even more unsatisfactory, because it presents the possibility of a refiling of the malpractice action many years later. The experience of the courts in such cases in attempting to formulate a workable test through tolling the statute of limitations or deferring the accrual of the cause of action was explored, but the results introduced complications without a satisfactory solution to the problem. The cases could be solved by a court-created trust with alternative beneficiaries to be determined when the facts regarding damages became known. It is respectfully suggested that courts explore this solution in future "speculative damage" cases.