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The Tort of Betrayal of Trust

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Fiduciary betrayal is a serious harm. When the fiduciary is a doctor or a lawyer, and the entrustor is a patient or client, this harm frequently goes unremedied. Betrayals arise out of disloyalty and conflicts of interest where the lawyer or doctor puts his or her interest above that of his or her client or patient. They cause dignitary harm that is different from the harm flowing from negligent malpractice. Nevertheless, courts, concerned with overdeterrence, have for the most part refused to allow a separate claim for betrayal. In this Article, we suggest that betrayal deserves a remedy and propose a new statutory tort with limits on the available money damages. We begin by explaining the importance of trust and the inadequacy of common law remedies such as malpractice, lack of informed consent, and breach of fiduciary duty. We then set out a statutorily limited monetary proposal and illustrate how this remedy would work. We do this by examining a series of cases in which the courts have struggled to address betrayals and then applying our statutory tort to the facts of those cases. Our proposed statutory tort offers a solution to the current failure to hold professionals accountable for disloyalty that will provide justice to those who are injured by exploitive self-dealing while setting clear parameters that address judicial concerns of runaway juries and overlap with other tort claims.

I. INTRODUCTION

An attorney, after intentionally misrepresenting his fertility, has sexual relations with his divorce client who suffers an ectopic pregnancy and ends up sterile.¹ A doctor refuses to refer a patient to a cardiac specialist because of financial pressure from an HMO, and the patient later dies of a heart attack.² A psychiatrist has an affair with his patient's wife, causing his patient to suffer long-term

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1. Barbara A. v. John G., 193 Cal. Rptr. 422 (Cal. Ct. App. 1983).

2. Shea v. Esensten, 107 F.3d 625 (8th Cir. 1997); Neade v. Portes, 739 N.E.2d 496 (Ill. 2000).

emotional distress.³ A criminal lawyer's conflict of interest creates the likelihood that his client receives a criminal punishment that he would not have received without the lawyer's disloyalty.⁴ A surgeon substantially overstates how much experience he has in the kind of surgery that he performs on a patient who ends up a quadriplegic.⁵

In each of these fact patterns, either a physician or attorney betrays the trust of another in the context of a fiduciary relationship, causing dignitary as well as physical or severe emotional harm. The professional misconduct in the above scenarios, where conflicts of interest are apparent, differs from purely competence-based professional malpractice claims. In these situations, harm arises from the fiduciary's disloyalty—putting his or her personal interests ahead of the interests of another person for whom a special responsibility exists, thereby betraying fiduciary trust.⁶

Trust and loyalty involving doctors and lawyers has been a hot topic among legal scholars.⁷ In particular, the influence of law on trust in medicine has been the recent focus of a number of legal commentators.⁸ The medical profession's own scrutiny of the ubiquitous financial relationships between doctors and pharmaceutical companies and medical device manufacturers has also raised con-

3. *Mazza v. Huffacker*, 300 S.E.2d 833, 843 (N.C. Ct. App. 1983). *See also* *Torgeson v. Connor*, 738 P.2d 994 (Or. Ct. App. 1987) (physician having a secret affair with patient's wife performed a vasectomy on the patient).

4. *In re Jeffrey*, 898 P.2d 752 (Or. 1995).

5. *Howard v. Univ. of Med. & Dentistry of N.J.*, 800 A.2d 73, 76, 77 (N.J. 2002) (using lack of informed consent based on affirmative misrepresentation of surgical experience instead of relying on breach of fiduciary duty); *Johnson v. Kokemoor*, 545 N.W.2d 495 (Wis. 1996) (same).

6. Professor Deborah A. DeMott suggests defining fiduciary duty claims in terms of "whether the plaintiff (or claimed beneficiary of a fiduciary duty) would be justified in expecting loyal conduct on the part of an actor and whether the actor's conduct contravened that expectation." Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 936 (2006). This definition of fiduciary duty is particularly well-suited for betrayal of trust claims, as discussed more fully below.

7. *See, e.g.*, Margaret Blair & Lynn Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001); Carl Schneider, *Family Law in the Age of Distrust*, 33 FAM. L. Q. 447 (1999); Lisa Fairfax, *Trust, The Federal Sentencing Guidelines and Lessons from Fiduciary Law*, 51 CATH. U. L. REV. 1025 (2002); Eileen Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897 (1993); Larry Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553 (2001).

8. *See, e.g.*, M. Gregg Bloche, *Trust and Betrayal in the Medical Marketplace*, 55 STAN. L. REV. 919 (2002); Robert Gatter, *Faith, Confidence, and Health Care: Fostering Trust in Medicine Through Law*, 39 WAKE FOREST L. REV. 395 (2004); Robert Gatter, *Walking the Talk of Trust in Human Subjects Research: The Challenge of Regulating Financial Conflicts of Interest*, 52 EMORY L. J. 327 (2003); Mark Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463 (2002).

cerns about betrayals.⁹ However, where a medical doctor receives a kickback or a substantial economic benefit from a drug company¹⁰ or has a substantial financial investment in a company that manufactures a device the doctor says the patient needs,¹¹ law has struggled with how to respond.

We wade into this conversation by demonstrating that betrayal of fiduciary trust by doctors and lawyers is a serious dignitary harm that deserves a legal remedy of its own. The remedy we propose is a statutory tort. Recovery under our statutory scheme would be solely for the dignitary harm stemming from the betrayal and would be separate from existing common law remedies. Entrustors could bring such a claim against doctors, lawyers and, if the legislature chose, other professionals in analogous trust relationships, such as clergy¹² or psychologists,¹³ for exploitive self-dealing. Our proposed limited remedy would provide monetary relief in addition to proven damages stemming from such common law claims as malpractice, lack of informed consent, misrepresentation, or battery. Furthermore, for egregious betrayals, plaintiffs who cannot make out a currently recognized common law claim could still recover under our statutory tort as a stand-alone claim.

Because financial loss is already an accepted basis for a breach of fiduciary duty claim against professionals,¹⁴ our statutory tort proposal focuses instead on the numerous situations where the professional's betrayal is either the only harm, or accompanies other injuries that are themselves compensable at common law.

To date, most appellate courts that have addressed whether to allow a claim for betrayal of trust in such settings (typically framed as

9. See Dr. Troyen A. Brennan et al., *Health Industry Practices That Create Conflicts of Interest*, 295 J. AM. MED. ASSOC. 429 (2006). See also Duff Wilson, *Harvard Medical School in Ethics Quandary*, N.Y. TIMES, March 3, 2009, at B1.

10. D.A.B. v. Brown, 570 N.W.2d 168, 172 (Minn. Ct. App. 1997).

11. Reed Abelson, *Financial Ties Are Cited as Issue in Spine Study*, N.Y. TIMES, Jan. 30, 2008, at A1.

12. Clergy and other religious advisors are professionals for whom the tort of betrayal is obviously apt. We do not include an in-depth analysis of clergy and parishioner cases here. It is the one area where the claim of breach of fiduciary duty has occasionally been successful. Legislatures adopting our proposed statutory tort could easily extend its remedy to apply to clergy. However, if breach of fiduciary duty claims are being permitted, the statutory tort might be redundant. It would also likely face claims of interference with the free exercise clause of the First Amendment. See, e.g., Jeffery R. Anderson et al., *The First Amendment: Churches Seeking Sanctuary for the Sins of the Fathers*, 31 FORDHAM URB. L.J. 617 (2004).

13. Corgan v. Mueling, 522 N.E.2d 153 (Ill. App. 1988) (psychologist breached fiduciary duty by having sex with patient).

14. See George Chamberlain, *Cause of Action for Breach of Fiduciary Duty or Undue Influence By Attorney in Self-Dealing with Client*, 25 CAUSES OF ACTION 1 (1991) (providing a practical outline of the claim of breach of fiduciary duty against attorney that focuses solely on economic loss).

a breach of fiduciary duty claim) have refused to do so.¹⁵ Furthermore, the few appellate cases providing remedies for fiduciary betrayal have varied widely in their descriptions of the kind of legal remedy allowed. In this Article, we urge that state legislatures step in where most courts have refused to go. We propose that legislatures provide a monetary remedy with specific dollar limits for dignitary injury resulting from betrayal of fiduciary trust by attorneys and physicians.¹⁶ This statutory tort would cover situations where the *only* provable harm was the betrayal itself, as well as situations where there is both a fiduciary's betrayal and physical or severe emotional harm for which a common law claim would be available.

A statutory tort remedy is necessary for the betrayal itself. Even where the professional performs competently and provides a beneficial service, as in the leading case of *Moore v. Regents of the University of California*¹⁷ discussed in detail later in this Article,¹⁸ if the betrayal of trust is proved intentional or reckless, the betrayal deserves a tort remedy. Thus, if an attorney competently represents a client while betraying her by demanding sexual favors in ex-

15. See, e.g., *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003); *Neade v. Portes*, 739 N.E.2d 496 (Ill. 2000); *D.A.B. v. Brown*, 570 N.W.2d 168 (Ct. App. Minn. 1997); see also Azza Jayaprakash, *Sum of Your Parts: Are There Adequate Remedies for Victims of Fraudulent Tissue & Organ Acquisition?*, 9 DE PAUL J. HEALTH CARE L. 1235 (2006).

Alan Milstein, the attorney who settled the highly publicized suit against the University of Pennsylvania on behalf of Jesse Gelsinger, the 18-year-old who died during a gene-therapy experiment, has unsuccessfully sued other clinical researchers for various torts including the novel claim of "breach of the right to be treated with dignity." For additional information about Alan Milstein and the Gelsinger case, see <http://www.sskrplaw.com/attorneys/milstein/> (Attorney biography for Alan S. Milstein) (last visited Feb. 20, 2009) and <http://www.sskrplaw.com/gene/gelsinger.html> (compilation of internet links related to the Gelsinger litigation) (last visited Feb. 20, 2009). See also Tracy Johnson, *Jury Sides with Hutch, Doctors in Deaths of 5—Patients Knew Risks in Leukemia Treatment Study, Panel Decides*, SEATTLE POST-INTELLIGENCER, April 9, 2004, at A1.

16. This remedy could be extended to other fiduciary or fiduciary-like relationships such as clergy and psychologists. See *supra* notes 12–13 and accompanying text. For example, the Canadian Supreme Court has held that parents and stepparents can be found liable for breach of fiduciary duty in cases involving incest. See *M.(K.) v. M.(H.)*, 96 D.L.R. (4th) 289 (Can. 1992). This decision has been widely followed in Canada in cases involving incest. See Margaret Isabel Hall, "Intuitive Fiduciaries": *The Equitable Structure of Family Life*, 19 CAN. FAM. L. 345, 356 n.33 (listing cases where incest victim has brought claim of breach of fiduciary duty); see also *Norberg v. Wynrib*, 1992 Carswell B.C. 155 (McLachlin, J.) (finding doctor's sex-for-drugs relationship with patient was a breach of fiduciary duty).

17. 793 P.2d 479 (Cal. 1990) (competent and necessary removal of spleen with secret plans to use patient's cells for profit). See also *Rice v. Perl* (Perl I), 320 N.W.2d 407 (Minn. 1982) (competent settlement of torts case where attorney's employee also worked for the opposing party); *Pierce v. Cook*, No. 2006-CP-01842-SCT, 2008 WL 3500426, at ¶¶ 10–12 (Miss. Aug. 14, 2008) (holding that having an affair with a client's wife did not prevent competent representation in medical malpractice case but did amount to betrayal of trust).

18. See *infra* Part IV.A.1.

change, a remedy for the betrayal should be available.¹⁹ In the medical setting, if a doctor accepts kickbacks in exchange for prescribing a particular drug, and that kickback is contrary to ethical or regulatory limits imposed by the government or the American Medical Association, there should be a monetary remedy regardless of whether physical or economic harm results from this prescription.²⁰ Similarly, if a doctor invests in the manufacture of a medical device, such as an artificial spinal disk used in back surgery, patients should have a monetary remedy against their doctor/investor where regulatory agencies view the use of the device as medically unnecessary.²¹ Too often courts misdescribe such cases as malpractice, misrepresentation, or lack of informed consent.

Betrayal of trust inflicts a dignitary harm. This harm is analogous to other dignitary harms such as the interference with bodily integrity, which is remedied by actions for assault, offensive battery, and false imprisonment; harm to one's reputation which is remedied by actions for slander and libel; and invasion of privacy which is remedied by various privacy claims.²² For all of these claims, there are at least some situations where no injury beyond the dignitary interference itself is necessary for recovery. Similarly, we propose that, when betrayal by a fiduciary is established, limited damages for dignitary harm be recoverable without proof of any other harm. If a professional betrays the trust of a patient or client, the law should treat the betrayal as a separate and compensable dignitary injury.

We also propose that if an entrustor proves betrayal accompanied by physical or severe emotional harms such as those described at the beginning of this Article, the limited damages for the dignitary harm should be allowed in addition to any damages based on common law claims such as malpractice. Thus, an attorney's sexual relationship with a client might result in liability for incompetent representation as well as for violation of the client's trust. In the medical context, a doctor might be held accountable for actively concealing medical negligence from his or her patient as well as for the malpractice itself.²³ As these examples

19. See, e.g., *In re Wood*, 358 N.E.2d 128 (Ind. 1976) (disbarring attorney for repeatedly bartering legal services for sexual favors).

20. See, e.g., Gardiner Harris, Benedict Carey & Janet Roberts, *Psychiatrists, Troubled Children and Drug Industry's Role*, N.Y. TIMES, May 10, 2007, at A1.

21. See Abelson, *supra* note 11; see generally Jerome Groopman, M.D., *How Doctors Think* 223–33 (Houghton Mifflin Co. 2007).

22. See generally DAN B. DOBBS, *THE LAW OF TORTS* 1197–1211 (2000).

23. See Mary Anne Bobinski, *Autonomy and Privacy: Protecting Patients from Physicians*, 55 U. PITT. L. REV. 291, 352–353 (1994) (“In the largest grouping of cases, courts have noted the fiducial character of the relationship when considering whether the malpractice statute

show, the harm covered by a malpractice claim will differ from the harm upon which a betrayal of trust claim is based, and the betrayal of trust claim will represent an independent ground for recovery.

These varied scenarios involving betrayals by professionals who hold themselves out as healers or counselors demonstrate that fiduciary loyalty should be more widely and consistently recognized as a separate, legally protected dignitary interest. Money damages for betrayal of trust in these situations are justified for compensatory, corrective justice, therapeutic, symbolic, prophylactic, and punitive purposes. The legislature can address legitimate concerns about over-deterrence and excessive punishment by placing specific dollar limits on the amount of damages recoverable, similar to the limits many states place on torts claims against the government.²⁴

In Part II, below, we begin by discussing the importance of trust and the appropriateness of and need for a statutory claim to remedy breaches of trust. Part II then explores the injuries that accompany many betrayals and explains how existing legal remedies often leave victims of betrayal without recourse. Next, in Part III, we set out the parameters of our proposed statutory tort, including a draft statute. Finally, in Part IV we demonstrate, through

of limitations should be tolled by a physician's 'fraudulent concealment' of her patient's negligently induced injury.").

A related example involving both malpractice and betrayal is mentioned in an American Medical News article about the power of apology under the insensitive heading "Timing is Everything." See Andis Robeznieks, *The Power of an Apology: Patients Appreciate Open Communication*, AM. MED. NEWS, July 18, 2003, available at <http://www.ama-assn.org/amednews/2003/07/28/prsa0728.htm>. The author describes a situation where an apology after a cover-up did not suffice. *Id.* Due to medical negligence, a man's wife died during childbirth. *Id.* However, the husband only discovered that a physician's mistake caused his wife's death because he had doctor-friends who followed up with the hospital until it finally admitted the error. *Id.* The man sued, noting that an admission and apology would most likely have sufficed: "It would have been easier to forgive. But the first thing they did was treat me with disrespect, and lie and cover up." *Id.*

This is an example of more than just bad timing. In addition to the original fatal malpractice, the doctor and hospital were disloyal and betrayed the trust of the deceased patient's spouse by refusing to admit that medical negligence was the cause of his wife's death. An immediate admission and apology would have certainly avoided the betrayal and may also have avoided the malpractice lawsuit. This is an ideal case for allowing both malpractice damages and the limited betrayal damages we propose. The betrayal damages would send a clear message that disloyalty is not just bad timing and demonstrate that honesty and trustworthiness make economic sense.

See also Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis Into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 258-259 (1999) (most doctors do not inform patients of medical errors).

24. See, e.g., FLA. STAT. ANN. § 768.28 (West 2007); OR. REV. STAT. § 30.270 (2004) (both set out specific dollar limits on tort recoveries against the state and its officers, employees or agents).

an examination of cases involving doctors and lawyers who have breached fiduciary trust, how the proposed statutory remedy would provide justice and bring increased uniformity to the inconsistent findings of state courts.

II. THE CASE FOR A STATUTORY TORT

Trust is an essential aspect of the professional relationships of doctors and lawyers, both of whom have fiduciary relationships with those they treat or counsel. Regarding medicine and trust, Professor Mark Hall notes that “trust is the core, defining characteristic of the doctor-patient relationship—the ‘glue’ that holds the relationship together and makes it possible.”²⁵ Similarly, trust lies at the core of attorney-client relationships. As the Minnesota Supreme Court observes: “The law treats a client’s right to an attorney’s loyalty as a kind of ‘absolute’ right”²⁶ This section describes the relationship between trust and fiduciary duty, and examines how a statutory remedy would fit in the current framework of legal and non-legal remedies for harms that attorneys and physicians, in their roles as fiduciaries, inflict on their clients and patients.

A. *Betrayal of Trust Inflicts Real Injury*

Section II.A begins by explaining why trust is so critical to the relationship between certain professionals and their clients and patients. We then build on this well-accepted premise to suggest that, even if an entrustor does not suffer financial harm, betrayal of trust nevertheless can severely damage both the professional relationship and the entrustor.²⁷

25. Hall, *supra* note 8, at 470. See also Frances H. Miller, *Trusting Doctors: Tricky Business When It Comes to Clinical Research*, 81 B.U. L. REV. 423, 426 (2001) (“Trust has always been deemed a critical component of the therapeutic relationship.”)

26. *Perl v. St. Paul Fire & Marine Ins. Co.* (Perl II), 345 N.W.2d 209, 212 (Minn. 1984). See also Charles Fried, *The Lawyer as Friend: the Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060 (1976) (arguing that both doctors and lawyers have similar duties of loyalty akin to a unilateral personal friendship for a limited purpose).

27. Tamar Frankel coined this term to describe the person who gives power to, and is dependent on the discretion of, the fiduciary. *Fiduciary Law*, 71 CAL. L. REV. 795, 800–01 (1983).

1. Why Trust Matters

Fiduciary duty is consistently described as the most demanding duty the law recognizes.²⁸ The requirement of loyalty is what makes it so demanding. Originating in equity as part of the law of trusts, the stringent standard in a fiduciary relationship flows in one direction from the fiduciary to the entrustor. A fiduciary typically owes undivided loyalty to his or her entrustor. This is because, for a specific limited purpose, the entrustor places trust in and is dependent upon the fiduciary, who exercises discretion affecting the entrustor.²⁹ This builds a power imbalance, and an inherent risk of abuse, into the fiduciary relationship. Professor Deborah DeMott describes fiduciary relationships as relationships in which the “determining criterion” is “whether the plaintiff (or claimed beneficiary of a fiduciary duty) would be justified in expecting loyal conduct on the part of an actor.”³⁰ Clearly, the doctor-patient and attorney-client relationships fit this definition.

Much has been written about the fiduciary duty. Most scholarship has addressed divided loyalties of trustees and money managers that result in financial harms.³¹ Nevertheless, when addressing breach of fiduciary duty, even in the typical context of business and financial loss, the language of morality and obligation rather than of the marketplace dominates. Betrayal of trust, self-dealing, disloyalty, abuse of power, and conflict of interest are the terms used to describe breaches of fiduciary duty. As Justice Cardozo observed in an oft-quoted passage from *Meinhard v. Salmon*:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties [who are] held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior Uncompromising rigidity has been the attitude

28. *Enders v. Parker*, 66 P.3d 11, 16 (Alaska 2003); *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. Ct. App. 1997).

29. RESTATEMENT (SECOND) OF TORTS § 874, cmt. a (1979).

30. DeMott, *supra* note 6, at 936.

31. Two particularly influential articles are Frankel's *Fiduciary Law*, *supra* note 27, and Deborah A. DeMott's *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L. J. 879. See also Mark Blair Barta, *Is the Imposition of Fiduciary Responsibilities Running from Managers, Directors and Majority Shareholders to Minority Shareholders Economically Efficient?*, 38 CLEV. ST. L. REV. 559 (1990); Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595 (1997); Robert W. Hillman, *Business Partners as Fiduciaries: Reflections on the Limits of Doctrine*, 22 CARDOZO L. REV. 51 (2000).

of courts of equity when petitioned to undermine the rule of undivided loyalty. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.³²

Fiduciary duty is often described as involving both due care and undivided loyalty.³³ For professionals who have fiduciary relationships, such as doctors and lawyers, the due care aspect of the fiduciary duty merges with competence-based professional malpractice claims in situations where, because of the professionals' negligent performance of a service, injuries result. Professional malpractice is therefore a kind of breach of fiduciary duty.³⁴ However, it is undivided loyalty—the avoidance of self-dealing—that is the essence of the fiduciary obligation and distinguishes it from the competence-based negligence duty of care. While there are many different circumstances where people, whether they are fiduciaries or not, owe a duty of due care,³⁵ fiduciaries also owe a duty of loyalty. Trust and loyalty are what distinguish fiduciary from non-fiduciary relationships. As one court noted, in a lawyer-as-fiduciary context: “Professional negligence implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty

32. 164 N.E. 545, 546 (N.Y. 1928). For a more recent example of the language of fiduciary duty, see the Seventh Circuit's majority opinion in *Pegram v. Herdrich*, 154 F.3d 362, 375 (7th Cir. 1998), *rev'd*, *Pegram v. Herdrich*, 530 U.S. 211, (2000) (allowing a statutory breach of fiduciary duty claim against an HMO for harm suffered allegedly because of improper incentives to limit medical care). The court noted that, “The specter of money concerns driving the health care system . . . ‘threaten[s] to transform healing from a covenant into a business contract. Canons of commerce are displacing dictates of healing, trampling [the medical] professions’ most sacred values.” *Id.*

33. Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 Nw. U. L. Rev. 651, 653–55 (2002). See also RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 170 (1992); RESTATEMENT (SECOND) OF TRUSTS § 174 (1959); J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* 47–48 (1981); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045, 1047 (1991); Joseph M. Healey, Jr. & Kara L. Dowling, *Controlling Conflicts of Interest in the Doctor-Patient Relationship: Lessons from Moore v. Regents of the University of California*, 42 MERCER L. REV. 989, 1000 (1991).

34. Those courts that conclude that breach of fiduciary duty claims against professionals are duplicative of malpractice claims are in essence saying that malpractice is a form of breach of fiduciary duty. See, e.g., *Neade v. Portes*, 739 N.E. 2d 496, 503 (Ill. 2000) (finding that medical negligence, not breach of fiduciary duty, is the appropriate claim when physical injury results from medical treatment). An Illinois appellate court had previously held that a claim against an attorney for engaging in sexual relations with a client is a claim for breach of fiduciary duty. See *Doe v. Roe*, 681 N.E.2d 640 (Ill. App. 1997). However, the Illinois Supreme Court in *Neade* implied that, had the issue of overlap between legal malpractice and breach of fiduciary duty been presented in *Doe* and other cases, malpractice most likely would have been found to preempt a claim for breach of fiduciary duty. *Neade*, 739 N.E. 2d at 505.

35. DOBBS, *supra* note 22, at 578.

and honesty.”³⁶ Without this demand of loyalty, which is not implicated in many instances where a negligence claim against a professional is allowed, there would be little to distinguish a fiduciary duty from the ordinary professional duty to perform competently. When examining the doctor-patient and attorney-client relationships through the lens of loyalty, it becomes apparent that the law needs to provide a meaningful remedy for the dignitary harm resulting from betrayal of trust.

2. Different Types of Harm

The traditional focus of the fiduciary duty is on careful and faithful property and money management. Thus, as Justice Souter noted in *Pegram v. Herdrich*, “At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries.”³⁷ When trustees use trust funds for their own purposes or when corporate officers engage in insider trading,³⁸ this self-dealing violates the fiduciary’s duty of loyalty. Most judicially recognized breach of fiduciary duty claims have involved conflicts of interest resulting in actual or potential financial loss to the entrustor.³⁹ However, fiduciary betrayals are not always about financial or economic loss. In certain areas of legal practice such as family law, personal injury practice and criminal defense work, the most serious injuries are frequently non-economic.⁴⁰ Similarly, in the medical setting, the harm to patients

36. *Beverly Hills Concepts, Inc. v. Schatz & Schatz*, 717 A.2d 724, 730 (Conn. 1998).

37. 530 U.S. 211, 231 (2000).

38. *See, e.g., In re Reliance Securities Litigation*, 135 F. Supp. 2d 480, 520 n.7 (D. Del. 2001); *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969).

39. While they may also experience a feeling of betrayal, the economic loss is the central injury. Consider the facts that led to Justice Cardozo’s famous language about fiduciary duty in *Meinhard v. Salmon*, 164 N.E. at 546:

Two men engaged in a joint venture in which they leased the Hotel Bristol on 42d Street and 5th Avenue in New York City for 20 years. Plaintiff Meinhard put up much of the funding while defendant Salmon was the active manager of the property. Just as the lease was about to expire, the lessor approached Salmon about a new twenty-year lease that did not include Meinhard. Salmon signed this lease without having informed Meinhard. As Cardozo noted: “Whatever his motive may have been, he had kept the negotiations to himself. Meinhard was not informed even of the bare existence of a project. The first that he knew of it was . . . [w]hen the lease was an accomplished fact.”

Id. at 463.

40. The statutory remedy has less relevance for corporate and other business type of law involving institutional clients. In these business settings, betrayal of trust is likely to result in financial loss for which fraud or breach of fiduciary duty actions are, in fact, available.

caused by betrayal will usually be dignitary and will often be accompanied by physical or emotional rather than economic harm.

During the past thirty years, numerous breach of fiduciary duty claims have been brought where the injury is essentially non-financial; on review, appellate courts have occasionally allowed them to go forward.⁴¹ In these cases, the impermissible conflict of interest may be financial, personal, or both. The parties most frequently sued in these contexts are doctors, lawyers, clergy, and other professionals whose main role is not managing money or running a business. Instead, their central role is to provide services to people who are faced with personal problems that require both undivided loyalty and the maintenance of confidentiality.⁴²

41. See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (using patient's bodily materials for financial gain); *Perl I*, 320 N.W.2d 407 (Minn. 1982) (employing agent for opposing side of lawsuit); *Doe v. Roe*, 681 N.E.2d 640 (Ct. App. Ill. 1997) (attorney-client sex).

42. We do not discuss cases involving what has come to be described as "breach of confidentiality" where the harm is caused by unauthorized release of patient or client information. However, a legislative remedy for betrayal of trust may also be appropriate there.

Revelation of confidential information without the entrustor's consent is a burgeoning and complex category of breach of fiduciary duty cases involving professionals and non-financial harm. Various federal and state statutes and codes of ethics have made this an area deserving of separate attention. See generally Bobinski, *supra* note 23, at 352-353; Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFFALO L. REV. 1, 39-52 (1995).

Breach of confidentiality can arise in a variety of settings. For example, the United States Supreme Court decision, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), presented the issue of whether a doctor is legally justified in breaching doctor-patient confidentiality by sharing urine tests with police authorities indicating that patients were using cocaine during pregnancy. The Court concluded that unless the women consented, this violated the Fourth Amendment's prohibition against unreasonable searches. The consent required must be after the client is "fully informed about their constitutional rights, as standards of knowing waiver require." *Id.* at 85. *Ferguson* leaves unanswered the question of whether such revelations by a doctor without informed consent would be viewed as actionable breaches of confidentiality. See generally Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1, 18-20 (2002).

A situation where breach of attorney-client confidentiality may result in conviction of the attorney's client is where the attorney gives damning confidential information to a third party, and the information is admitted into evidence because it was disclosed outside of the judicial context. See, e.g., *Nickel v. Hannigan*, 97 F.3d 403 (10th Cir. 1996); see also Robert P. Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 WASH. U. L. Q. 961 (2003).

B. Existing Remedies Are Inadequate

Section II.A, above, explained the importance of trust. This Section shows why existing legal remedies are inadequate to address the harm of betrayal.

Because of the expectation of loyalty stemming from fiduciary relationships between doctors, lawyers and their entrustors, betrayal is especially damaging. Trust is the essence—the heart and soul—of both the doctor-patient⁴³ and attorney-client relationships.⁴⁴ A proposal that the law recognize a meaningful remedy when doctors and lawyers betray this essential trust is a natural outgrowth of its importance to these fiduciary relationships. This Section explores possible remedies ranging from money damages for malpractice to apologies. We conclude that a monetary remedy for betrayal is the only remedy that both compensates the victim and provides the type of prophylactic or deterrent effect needed to avoid future betrayals.

1. Common Law Claims

We begin by offering a brief introduction to several existing common law claims often raised when certain types of betrayal occur, and explain why each of those claims fails to provide appropriate or sufficient recourse.

a. Malpractice

As noted earlier, the harm covered by a claim for malpractice will often differ from the harm upon which a betrayal of trust claim is based.⁴⁵ In situations where a client suffers no injury beyond the betrayal itself, a malpractice claim will be impossible to make out.⁴⁶ In cases where harm resulted from incompetence, malpractice may be available, but if a conflict of interest also existed, malpractice damages will not provide a remedy for this distinct injury.

Furthermore, concerns regarding who pays, affordability and availability of insurance and whether the defendant has deep pock-

43. Hall, *supra* note 8, at 470.

44. Fried, *supra* note 26.

45. Professional malpractice involves a specific professional duty to exercise reasonable care, the breach of which causes physical, psychological, or economic injury. BLACK'S LAW DICTIONARY 978 (8th ed. 2004).

46. See *supra* Part II.A.2 (discussing non-pecuniary harm) & *infra* Part IV.A (illustrating the problems courts have in classifying claims of this nature).

ets, make it important to distinguish the tort of betrayal of trust from professional malpractice. This is particularly important when discussing law's impact on medicine where strong arguments exist for revamping our current system for remedying medical malpractice. The legitimate concerns about the medical malpractice system will not be satisfied by continuing to deny a tort remedy for disloyalty. Fiduciary betrayals of trust involve very different kinds of conduct than incompetent treatment or advice. The importance of trust to both the practice of medicine and law makes providing a remedy for the dignitary injury resulting from disloyalty compelling.

Providing affordable insurance for doctors and lawyers who betray their entrustors is less of a concern than insuring other claims. Insurance is not as necessary because most lawyers and doctors can personally afford to pay the limited damages for betrayals set out in the proposed statutory tort. Furthermore, doctors and lawyers should be personally responsible when they engage in intentional or reckless betrayal because law and medicine are professions designed to help people when most in need, and who are oftentimes at their most vulnerable. Law and medicine are not merely businesses or trades: doctors and lawyers are hired to be loyal; to be the keepers of entrustors' secrets; and to counsel and act on behalf of their clients and patients. Thus, while doctors and lawyers are not required to be selfless, selfishness has no place in the fiduciary relationship and when it leads to self-dealing and disloyalty, personal liability is justified.⁴⁷

b. Lack of Informed Consent

Similarly, the claim of lack of informed consent is an inadequate remedy. Lack of informed consent is often described as a form of medical malpractice.⁴⁸ Most jurisdictions frame it as a negligence claim. While courts often proclaim that a traditional lack of informed consent claim protects the rights to self-determination and

47. *E.g.*, *Pierce v. Cook*, No. 2006-CP-01842-SCT, 2008 WL 3500426 at ¶¶ 10–12 (Miss. Aug. 14, 2008).

48. *See, e.g.*, *Hidding v. Williams*, 578 So.2d 1192, 1193 (Ct. App. La. 1991); *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. Ct. App. 1997) (describes lack of informed consent as a medical malpractice claim); *see also* Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 620 (“[I]nformed consent, as seen by most courts, protects the same interest malpractice and other negligence torts protect—the interest in being free of injury caused by unreasonable action.”).

bodily integrity,⁴⁹ this is highly questionable. As commentators have noted, if interferences with those interests were viewed as legally protectable harms in themselves, traditional informed consent would allow recovery for failure to disclose material risks even if the risks did not materialize.⁵⁰ However, lack of informed consent, as a negligence claim, does not treat interferences with self-determination and bodily integrity as compensable harms in and of themselves. Instead, it requires the traditional negligence elements of duty to act reasonably, unreasonable conduct, cause-in-fact, and bodily harm.⁵¹

Liability under traditional lack of informed consent is not available even if there is an extremely unreasonable failure to disclose a very grave and highly probable risk, unless the physical harm that this risk creates actually materializes. "Negligence in the air"⁵² is not sufficient; there must also be a causal link to a physical injury. Thus, in an ordinary lack of informed consent case the plaintiff must prove that the risk was a material one;⁵³ that had a reasonable patient been fully informed, she would not have proceeded with the treatment;⁵⁴ and that the risk of which she was not informed actually resulted in physical injury.⁵⁵ An example of a typical informed consent case is a doctor's failure to inform a patient that a hysterectomy might cause incontinence where, after the surgery, the patient becomes incontinent and claims that, had she known of this risk, she and a reasonable person would not have had the surgery.⁵⁶ In cases where the only harm is dignitary, however, lack of informed consent is simply unavailable.

49. See, e.g., *Canterbury v. Spence*, 464 F.2d 772,780 (D.C. Cir. 1972); *Scott v. Bradford*, 606 P.2d 554, 556—57 (Okla. 1979).

50. See, e.g., Marjorie Maguire Shultz, *From Informed Consent to Patient Choice*, 95 YALE L. J. 219, 251—253 (1985); Grant H. Morris, *Dissing Disclosure: Just What the Doctor Ordered*, 44 ARIZ. L. REV. 313, 330—35 (2002).

51. In a few rare cases, recovery for lack of informed consent without any accompanying betrayal may be for purely emotional harm. See *Curtis v. MRI Imaging Servs. II*, 956 P.2d 960, 961 (Or. 1998) (emotional harm resulting from failing to inform of extreme claustrophobia caused by MRI was compensable).

52. SIR FREDERICK POLLACK, *THE LAW OF TORTS* 455 (11th Ed. 1920).

53. There is a split of authority concerning whether the materiality of the risk is assessed from a reasonable physician's perspective or from a reasonable patient's perspective. See Richard A. Heinemann, Note, *Pushing the Limits of Informed Consent: Johnson v. Kokemoor and Physician-Specific Disclosure*, 1997 WIS. L. REV. 1079, 1082 (1997).

54. *Canterbury v. Spence*, 464 F.2d 772, 790—91 (D.C. Cir.1972).

55. See, e.g., *Nickell v. Gonzalez*, 477 N.E.2d 1145, 1148 (Ohio 1985).

56. *Scott v. Bradford*, 606 P.2d 554 (1979).

c. Breach of Fiduciary Duty

Claims for breach of fiduciary duty typically require a plaintiff to prove financial harm and therefore provide no remedy to entrustors whose only harm is dignitary or whose other harm is non-financial as in the case of medical malpractice. While courts could expand breach of fiduciary duty claims to cover the cases of dignitary harm that we are concerned with, they have been reticent in doing so, most likely out of concern that this would lead to a flood of new claims and fears of over-deterrence. Only a handful of cases have allowed breach of fiduciary claims against physicians or attorneys in situations where the betrayal was not purely financial. Frequently courts declare that breach of fiduciary duty is redundant of a claim for malpractice or lack of informed consent.⁵⁷ This judicial refusal to recognize that betrayal in non-financial cases is a form of breach of fiduciary duty provides the main impetus for our proposed legislative remedy.

2. Criminal and Regulatory Intervention

In some areas, where fiduciary betrayals have frequently occurred, the government has responded by imposing hefty penalties. For example, when doctors receive kickbacks for referring Medicare or Medicaid patients to other health care providers, the federal Anti-Kickback Statute⁵⁸ makes such conduct a felony and imposes both a criminal fine and civil monetary penalties. However, even when government regulation is directly applicable, it still does not address the harms entrustors suffer. It provides no money to the injured party and therefore fails to take into account the compensatory, symbolic, therapeutic and justice purposes money damages serve in cases of betrayal of trust. Industry pressure, especially in medicine, can also mar attempts at government regulation of professions. The many safe harbors in the Anti-Kickback Statute are an example. Similarly, when the federal Agency for Health Care Policy and Research convened a panel of experts to examine back-pain issues and to formulate guidelines for the profession, it came under attack from

57. D.A.B. v. Brown, 570 N.W.2d 168, 172 (Minn. Ct. 1997).

58. 42 U.S.C. § 1320a-7b (2006); *see also* The Stark Law, 42 U.S.C. § 1395nn (2006) (providing civil penalties where a physician refers Medicare and Medicaid program patients for health services to an entity in which the physician or a family member has a financial relationship). However, there are many exceptions or "safe harbors" that make the Anti-Kickback and Stark statutes much less draconian than they first appear.

proponents of an expensive and arguably over-used spinal surgery method called fusion surgery.⁵⁹ The “North American Spine Society,” concerned that the panel was “anti-surgery,” lobbied Congress to cut funding to the panel. The House of Representatives, against efforts by the American Medical Association and other professional organizations, attempted to cut funding entirely.⁶⁰ Although the Senate restored minimum funding, the panel’s credibility was damaged. This pattern is but one demonstration of why the regulatory systems cannot be relied upon to regulate conflicts of interest and betrayals within professions.

Problems also exist when conflicts of interest result in the provision of inadequate or incorrect information to the regulating agency. Recent news reports described the failure of medical researchers, who had a financial stake in a particular medical device, to inform the FDA of this interest when submitting the results of clinical trials in order to gain FDA approval of the device. The device received FDA approval and has been widely used even though some patients claim that the device was ineffective (or worse) for its intended purpose.⁶¹

Several states have recently taken steps to track ties between doctors and the drug and device industries.⁶² Although these registries might be public, they do not reflect direct communication between a doctor and his or her patient. In other words, the disclosure provided by the doctor flows to the state rather than to the patient. Nor are these directories properly classified as “regulation” of the medical profession: the directories require disclosure but do not limit doctors’ ability to receive kickbacks in the first place. Government regulation in that area is inadequate.

3. Other Alternatives to Litigation

a. Apologies

Most, if not all, betrayals of trust call for an apology, but patients and clients who have been harmed by betrayal often need more to be made whole, even if the apology is sincere. Disloyalty, unlike

59. GROOPMAN, *supra* note 21, at 229–231.

60. *Id.*

61. Abelson, *supra* note 11.

62. See Allison Torres Burtka, *Drug Companies Go Too Far to Influence Doctors, Critics Say*, TRIAL MAG., October 2007, at 18.

negligent medical treatment, is personal. In fact, in many cases the fiduciary *did* mean to act in a disloyal manner.

Much has been written about the importance of apologies in the context of harms inflicted by fiduciaries.⁶³ But violations of trust or acts of betrayal are not mere “mistakes or unfortunate results” that can be cured by saying “I’m sorry, I didn’t mean to betray you.”⁶⁴ In the malpractice context, studies show that patients are less likely to sue when doctors apologize for mistakes they make in treatment.⁶⁵ The current trend in medicine and law towards expressly apologizing for mistakenly injuring patients and patients responding with forgiveness⁶⁶ fits into a patient-focused version of therapeutic jurisprudence.

However, mistakes made during medical procedures are distinct from intentional and even negligent betrayals of trust where the harm is simply more personal. Furthermore, whether or not apologizing for a betrayal contributes to recovery depends on the quality of the underlying bad act. Forgiving negligent betrayal is different than forgiving intentional betrayal. Robert C. Solomon and Fernando Flores’ warning in the book *Building Trust* rings true:

[T]o think of an apology as a sort of social magical wand, for which forgiveness is automatic and assured, is itself a serious misunderstanding and a betrayal of trust. To assume that one’s apology erases the error for which it has been issued violates the trusting relationship, which is that one will take seriously and try to make amends for one’s errors. An apology is a statement of an intention to redeem oneself, and the beginning of a conversation about how this can be done.⁶⁷

In short, a sincere apology may contribute to a victim’s recovery following a betrayal. It should be viewed as the beginning of a conversation about recovery and damages. But an apology is not, standing alone, sufficient to remedy the very personal harm an entrustor suffers when a fiduciary betrays his or her trust.

63. See, e.g., Steven Keeva, *The Power of Apology*, ABA L.J., Dec. 1999, at 64–66; Kevin Sack, *Doctors Say “I’m Sorry” Before “See You in Court”*, N.Y. TIMES, May 18, 2008, at A1. See generally Orenstein, *supra* note 23, at 255–279.

64. But see Hall, *supra* note 8, at 494.

65. See, e.g., Keeva, *supra* note 63; Robeznieks, *supra* note 23; Sack, *supra* note 63, at 66, 68. See generally Orenstein, *supra* note 23, at 255–279.

66. See Keeva, *supra* note 63, at 66, 95; Sack, *supra* note 63.

67. ROBERT C. SOLOMON & FERNANDO FLORES, *BUILDING TRUST IN BUSINESS, RELATIONSHIPS, AND LIFE* 133 (2001).

b. Peer Review and Private Regulation

Peer review and regulation via ethics boards may help deter doctors and lawyers from acting in a manner contrary to professional standards or guidelines. However, there is substantial evidence that current peer review is not effectively preventing doctors and lawyers from engaging in conflicts of interest.⁶⁸ For example, the *Journal of the American Medical Association* published a paper in 2006 calling for academic medical institutions to self-police the many ties between the pharmaceutical and medical device industries and the medical profession.⁶⁹

Whether or not peer review is effective in punishing some disloyal professionals, it fails to address the harm that disloyalty does to entrustors. Even when peer review results in a published admonition and limits the professional's ability to practice law or medicine, the betrayed entrustor is left uncompensated.

Of course, we do not discourage professions from undertaking peer review or from using ethics boards to govern themselves. Indeed, these are important functions. Our concern is that such self-policing does nothing to make the injured person whole again, save for some possible public airing of a grievance. The statutory remedy for betrayal of trust is aimed at compensating the victim for the harm done by the professional. By offering compensation, it encourages the entrustor to bring the betrayal to the law's attention. Coupled with industry self-policing, the statutory remedy fills the gap left by peer-review mechanisms. Both have the desired effect of making professionals and professions take trust seriously.

C. A New, Distinct Tort is Needed

A new distinct tort of betrayal of trust is needed in order to make professionals and professions take loyalty and trust seriously. In addition, a monetary remedy will frequently have a restorative therapeutic value that an insincere or half-hearted apology does not and will make doctors and lawyers both appear and be more deserving of trust.

Betrays of trust by doctors and lawyers take many different forms. Some, notably those involving criminal behavior such as sex

68. See Orenstein, *supra* note 23, at 265 n.226 (physician's self-regulation is inadequate). See generally, Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583 (1996) (proposing that legal malpractice suits replace attorney self-regulation).

69. See Brennan et al., *supra* note 9.

with a minor⁷⁰ or acceptance of kickbacks,⁷¹ are per se betrayals that even an entrustor's informed consent will not cure. In other situations, a betrayal of trust can be avoided if the entrustor consents to the fiduciary's conduct after receiving sufficiently timely and accurate information.⁷² In still other cases, trust is only betrayed if the fiduciary provides misleading or false information or intentionally conceals material information.⁷³ The common thread that links these diverse situations is that a fiduciary puts his or her personal interest ahead of the interests of the entrustor resulting in the dignitary injury of betrayal. Providing a carefully circumscribed monetary remedy for the dignitary injury caused by disloyalty would demonstrate that the law believes trust matters. Requiring doctors and lawyers to pay those whom they betray would encourage loyalty and trustworthiness. The bite of monetary damages would serve as both corrective justice and a punishment for disloyal behavior.

1. Compensatory and Other Effects of Money Damages Personal to the Injured Party

Money is, quite simply, the kind of remedy for harm that Americans view as most effective. A tort remedy means that the betrayed entrustor will at least partially be "made whole"⁷⁴ through money damages, the mechanism most commonly used when injuries to legally recognized personal rights occur. In our society everything, whether tangible or intangible, is valued in monetary terms.⁷⁵ Thus, in the context of fiduciary disloyalty and betrayal, commodification

70. *In re Wolf*, 826 P.2d 628 (Or. 1992) (personal injury attorney has sexual relations with his minor client).

71. *D.A.B. v. Brown*, 570 N.W.2d 168 (Minn. Ct. App. 1997) (doctor accepted kickbacks from pharmaceutical company).

72. The *Moore* fact pattern is an example of a situation where a doctor could have avoided breaching his fiduciary duty if he had revealed his financial interest in advance of treatment, and sought and received the patient's informed consent. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990); discussion *infra* Part IV.A.1.

73. Examples include cases where a doctor who knows he committed malpractice intentionally conceals this fact from his patient. See, e.g., *Nardone v. Reynolds*, 538 F.2d 1131 (5th Cir. 1976); *Brown v. Bleiberg*, 651 P.2d 815 (Cal. 1982). In other cases, when asked, physicians provide false information about their skills or state of health. See, e.g., *Howard v. Univ. of Med. and Dentistry of N.J.*, 800 A.2d 73 (N.J. 2002).

74. The concept of restoring the person to the status quo ante or making the victim whole, at least metaphorically and symbolically, through money damages, is widely viewed as a major purpose of tort law. See Heidi L. Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1577-1580 (1997).

75. Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L. J. 56, 74 (1993).

of the dignitary interest of trust is a good thing.⁷⁶ Providing a tort for betrayal of trust demonstrates, both substantively and symbolically, that the dignitary interest in loyalty, when injured, is harm worth compensating, and that it matters. As Margaret Radin observes: “In a quid pro quo conception of compensation, payment is in return for rights that are violated.”⁷⁷ She notes further:

Requiring payment is a way both to bring the wrongdoer to recognize that she had done wrong and to make redress to the victim. . . . Redress . . . means showing the victim that her rights are taken seriously. It is accomplished by affirming that some action is required to symbolize public respect for the existence of certain rights and public recognition of the transgressor’s fault in disrespecting those rights.⁷⁸

Disloyalty upsets the moral balance between a fiduciary and entrustor. Awarding compensation for this dignitary injury, by correcting this injustice, restores the balance.⁷⁹

Providing money damages for breaches of fiduciary loyalty is widely accepted and uncontroversial when it comes to economic disloyalty.⁸⁰ Extending liability for disloyalty to dignitary injuries through tort law can be compared to the law’s current recognition of the legally protected dignitary interests of reputation, privacy, and bodily integrity, all of which, when harmed, have well-accepted common law tort claims providing money damages.⁸¹ The torts of libel and slander for defaming a person’s reputation have existed for hundreds of years. Similarly, assault, false imprisonment, and offensive battery, which all provide money damages for interferences with bodily integrity, have a long history. The fact that the harm suffered is usually purely dignitary rather than financial has not deterred the law from compensating such harms. In contrast—as is currently the case with betrayals of trust that cause non-financial harm—until relatively recently, there was no right to

76. See generally Margaret J. Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987).

77. Radin, *supra* note 75, at 59.

78. *Id.* at 61.

79. Many commentators have written about corrective justice as an important reason for providing the tort remedy of money damages. See generally DOBBS, *supra* note 22, at 13–15 (citing various books and articles on corrective justice).

80. See *supra* Part II.A.2.

81. See DOBBS, *supra* note 22, at 1115. Another non-economic interest for which a tort law in the twentieth century began to provide a remedy is intentional infliction of emotional distress. A major impetus was William Prosser’s article *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939). In contrast to the dignitary torts of defamation and interference with the right of privacy, intentional infliction of emotional distress does not focus on a particular valued right like reputation, privacy or fiducial loyalty.

money damages when a person's privacy was invaded. Even though our society highly values privacy,⁸² tort remedies for invasion of privacy were not allowed until the twentieth century.⁸³ The first recognition of a right of privacy tort was legislative.⁸⁴ Today most states allow either common law or statutory torts for violations of the right of privacy.⁸⁵ The existence of these established dignitary tort claims demonstrates that providing a tort remedy for betrayals of trust would not be something extraordinary for the law to do.

Another justification for a monetary remedy (and for the tort of betrayal of trust itself) is reflected in the equity maxim, "[e]quity will not suffer a wrong without a remedy."⁸⁶ Most of the "no right without a remedy" scholarship and case law focuses on analyzing what statutory limits on common law torts claims are permissible⁸⁷ under the thirty-five state constitutions that provide specific remedies clauses.⁸⁸ The venerable doctrine of *ubi ius ibi remedium* (no right without a remedy), however, has much more ancient roots than state constitutions,⁸⁹ and when rights are violated it should support claims for statutory remedies as well as claims against statutory limitations on remedies.⁹⁰ When the long-recognized and important equitable right to fiduciary loyalty is betrayed, liability should not depend on the kind of harm suffered. For deterrence,

82. One torts commentator describes the value of privacy as follows:

A degree of privacy is probably required for full human development. It is essential to personal autonomy and liberty and it is treasured, even by the most open and gregarious people, as important to the quality of life, valuable in itself. In addition, privacy of individuals reflectively asserts a limit on the power of other individuals, corporations, and government entities.

DOBBS, *supra* note 22, at 1197.

83. The impetus for allowing a tort of right of privacy was the famous law review by Louis D. Brandeis and Samuel D. Warren, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). DOBBS, *supra* note 22, at 1197.

84. N.Y. CIV. RTS. L. §§ 50–51. Originally, courts rejected the tort of right of privacy. See *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

85. DOBBS, *supra* note 22, at 1197.

86. David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 35 n.1 (1986) (citing 2 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 423, at 185 (Spencer W. Symons ed., 5th ed. 1941) (1882)).

87. See, e.g., Jonathan Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L. J. 1005 (2001); Thomas R. Phillips, *The Constitutional Right to Remedy*, 78 N.Y.U. L. REV. 1309 (2003); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992).

88. 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES app.6, 6–65 to 6–67 (3d ed. 2000).

89. See Phillips, *supra* note 87, at 1319–20; see also Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 IND. L. REV. 781, 811–812 (1990).

90. See *infra* Part II.C.2 (discussing appropriateness of a statutory tort remedy).

symbolic, and compensatory reasons, a specific limited tort remedy should exist for betrayal of trust.

Furthermore, a monetary remedy provides corrective justice. As Margaret Radin explains:

[C]orrective justice means to make required changes in an unjustified state of affairs between an injurer and a victim, when the injurer's activity has caused the injustice, so that such changes bring about a just state of affairs between them, and one that is related in a morally appropriate way to the status quo ante. A shorthand way of saying this is that corrective justice restores moral balance between the parties.⁹¹

Because of the vulnerability of patients and clients, trust is the essence of physician and attorney fiduciary relationships. Especially in the areas of medicine and family, tort and criminal defense law, an entrustor has highly personal needs at a time of crisis and risk. The vulnerable state in which the entrustor comes to the fiduciary makes the extreme levels of trust that are given in these settings understandable. Professor Mark Hall correctly notes that "[w]hat is specific to [our trust relationships with professionals] is the peculiar constellation of urgency, intimacy, unavailability, unpredictability, and extraordinary vulnerability within which trust must be given."⁹² What choice do wounded entrustors have but to turn their lives over to doctors and lawyers under these circumstances? The fact that the circumstances are unavoidable, unpredictable, urgent, and occur at a time of extreme vulnerability implies that entrustors' trust is mandatory. In such circumstances, loyalty should be mandatory too, not just in words, but also in fact. The law needs to assist in this endeavor by encouraging loyalty through compensating entrustors when fiduciary disloyalty injures them.⁹³

2. Statutory, Not Common Law

The previous Sections demonstrated the importance of fiduciary trust in doctor-patient and attorney-client relationships and why a monetary damages remedy is needed to provide a satisfactory remedy for the betrayed entrustor. This Section explains why a statutory tort, instead of a common law remedy, is the most appro-

91. Radin, *supra* note 75, at 60.

92. Hall, *supra* note 8, at 479.

93. We previously demonstrated the lack of effective remedies currently available. See *supra* Part II.B.

priate and practical mechanism for preserving and restoring this trust. The legitimate concerns about the risks of overly deterring and overly punishing make a limited statutory tort the better legal response.

The importance of trust is intimately tied to the necessarily broad discretion that doctors and lawyers have to manage the personal interests of entrustors. As Professor M. Gregg Bloche writes, “[d]iscretion, poorly scrutinized, invites opportunism.”⁹⁴ This discretion enables doctors and lawyers to help their vulnerable patients and clients who lack the expertise to help themselves. However, it is inevitable that some fiduciaries will abuse their discretion unless it is monitored. As noted previously, however, leaving this monitoring solely to the professions themselves or governmental regulation is inadequate. Yet courts have been reluctant to provide a common law tort remedy that would encourage monitoring and compensate victims of professional disloyalty. We believe that courts are likely concerned that it would be difficult to provide any reasonable limitation on the extent or scope of damages for disloyalty and therefore over-deterrence and over-punishment could result. In contrast, a limited statutory tort of betrayal of trust encourages patients and clients to subject doctors and lawyers to the scrutiny of the judicial system when disloyalty and self-dealing are suspected. Knowing such scrutiny is a serious possibility will help deter doctors and lawyers from being disloyal but the limited damages will assure that the lawyers’ and doctors’ necessary exercise of discretion and judgment on behalf of the entrustor will be unhampered.

3. Other Torts Have Evolved Similarly When Necessary

Statutory torts are increasingly common.⁹⁵ Universally accepted statutory torts include wrongful death statutes⁹⁶ and statutes that permit lawsuits against formerly immune governmental entities.⁹⁷ Recently, legislatures have been actively involved in statutory “tort reform” that places legislative limits on existing common law claims in this context.⁹⁸ We advocate that legislatures continue to serve as providers of remedies for injuries that the common law has

94. Bloche, *supra* note 8, at 930.

95. GUIDO CALABRESI, *A COMMON LAW IN THE AGE OF STATUTES* (1982); Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se, What’s the Difference?*, 77 OR. L. REV. 497, 499, 515–24 (1998).

96. *See, e.g.*, OR. REV. STAT. § 30.020 (2004).

97. *See, e.g., id.* § 30.265.

98. *See, e.g.*, CAL. CIV. CODE § 3333.2 (2007) (cap on medical liability); MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (West 1992) (cap on non-economic damages).

failed to address adequately by enacting the tort of betrayal of trust.

The history of wrongful death claims illustrates how legislatures sometimes step in to remedy harm where courts have refused to do so.⁹⁹ Of course, negligently, recklessly or intentionally killing someone is a serious harm; it is, after all, the ultimate interference with the right to life. Yet, as William Prosser wryly noted, until the mid-nineteenth century it was cheaper to kill someone than to maim them.¹⁰⁰ Up through the 1840's, American courts either refused to provide a tort remedy when death of the victim resulted¹⁰¹ or provided a remedy that was both inadequate and inequitable.¹⁰² Following the example of Britain, which enacted Lord Campbell's Act in 1846,¹⁰³ in 1847 New York's legislature enacted a statutory tort claim for wrongful death on behalf of dependent wives and children for the loss of support resulting from their male provider's death.¹⁰⁴ Soon most states enacted similar statutes, some also allowing claims by widowers.¹⁰⁵ Today all states provide statutory wrongful death tort claims for survivors of the deceased victims.¹⁰⁶

Like courts' adamant refusal to provide an appropriate remedy for wrongful death, courts today refuse to provide a tort remedy for non-monetary betrayals of fiduciary trust. The current hostility to malpractice suits and the concern about runaway jury verdicts makes it highly unlikely that, in the foreseeable future, courts will recognize an unlimited claim for breach of fiduciary duty/betrayal of trust for dignitary injury and any accompanying emotional and physical harm. Indeed, the resistance to providing a common law remedy for betrayal claims may be justified. Fears of over-deterrence resulting from jury confusion, double recovery, runaway jury ver-

99. Another example is the refusal of most courts to abolish the harsh doctrine of "all or nothing" contributory negligence, leaving it to legislatures in the 1960's and 70's to enact comparative fault statutes that allowed injured parties to recover damages even if their own negligent behavior in some way contributed to their being injured. This effectively allowed a whole new class of victims to recover in tort when they were wrongfully harmed by another. See DOBBS, *supra* note 22, at 503-04.

100. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984).

101. See, e.g., Greist v. Phillips, 906 P.2d 789, 797 (Or. 1995) (no tort action for wrongful death existed at common law).

102. John F. Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 731-732 (2000) (explaining that most American appellate courts originally allowed wrongful death actions but only for loss of services and only by masters, husbands, and fathers for their servants, wives and children).

103. Lord Campbell's Act, 1846, 9 & 10 Vict., c. 93, §§ 1-2 (Eng.).

104. 1847 N.Y. Laws c. 450, § 1, at 575.

105. Witt, *supra* note 102, at 736-37.

106. 2 DAN B. DOBBS, DOBBS LAW OF REMEDIES 430 (2d ed. 1993).

dicts, or false or trivial claims may be legitimate policy reasons against common law routes to recovery. However, as discussed earlier, such a remedy is needed for compensatory, prophylactic, symbolic, corrective and restorative justice, and punitive reasons. A statutory remedy, unlike a common law remedy, will adequately address these concerns, and should be enacted by state legislatures. In the next Part, we propose a framework for a statutory tort of betrayal of trust that includes limitations on damages that likely will survive constitutional challenge¹⁰⁷ and requires clear and convincing evidence for certain elements to ensure that only clear cases of disloyalty will result in liability.

III. THE TORT OF BETRAYAL OF TRUST

We describe the basic outline of the tort of betrayal of trust below. This proposal is one example of what a statutory tort for betrayal of trust might look like. There are myriad ways in which this proposal could be modified.

PRIVATE CAUSE OF ACTION FOR BETRAYAL OF TRUST BY ATTORNEY OR PHYSICIAN

(1) *Betrayal; Cause of Action.*

a. It is unlawful for an attorney or physician licensed in this state to breach the fiduciary duty of loyalty owed to an entrustor by putting his or her interest above that of the entrustor. Such a breach is a betrayal to trust.¹⁰⁸

b. It is unlawful for an employer of an attorney or a physician licensed in this state to negligently, recklessly or intentionally contribute to a betrayal of trust as described above.

107. Most states' wrongful death statutes originally included specific dollar limitations on recovery. For example, when Massachusetts enacted the first wrongful death statute, the maximum recoverable was \$5000. Witt, *supra* note 102, at 733–34 (2000). *See also* Goheen v. Gen. Motors Corp., 502 P.2d 223, 228 (Or. 1972) (Oregon's original wrongful death statute limited damages to \$5000).

Courts that have addressed the constitutionality of specific limits on amounts of recovery in tort actions created by statute that did not exist at common law have generally upheld those limits. *See, e.g.*, English v. New Eng. Med. Ctr., 541 N.E.2d 329, 331 (Mass. 1989) (cap on recovery against charities is constitutional); Greist v. Phillips, 906 P.2d 789, 797 (Or. 1995) (same); Maurin v. Hall, 682 N.W.2d 866, 888–92 (Wis. 2004) (same). *See generally* Phillips, *supra* note 87, at 1337 n.121.

108. Clearly, terms such as “entrustor” would have to be defined in any statute. We have left such definitions out of this model statute in the interest of conserving space.

(2) *Harm.*

a. A private cause of action for a betrayal under Section (1) of this statute is available when any common law claim for physical, financial, or emotional harm is also available, but recovery for breach of fiduciary duty preempts recovery under Section (1).

b. A private cause of action for betrayal under Section (1) of this statute is available without proof of a common law claim for physical, financial, or emotional harm if the attorney or physician's disloyal conduct was intentional or reckless.

(3) *Standard of Proof.*

a. To recover under Section (1)(a), an entrustor must prove attorney or physician disloyalty by clear and convincing evidence.

b. To recover under Section (1)(b), an entrustor must prove by a preponderance of the evidence that the attorney or physician's employer acted negligently, recklessly or intentionally in contributing to the attorney or physician's betrayal.

(4) *Limitations Period.* An action to recover damages under this Section shall be brought within two years of the date the act of disloyalty is discovered, or in the exercise of reasonable care should have been discovered. However, every such action shall be commenced within five years from the date of the act of disloyalty or, if there has been no action commenced within five years because of fraud, deceit or misleading representation, then within two years from the date such fraud, deceit or misleading representation is discovered, or in the exercise of reasonable care should have been discovered.

(5) *Damages.*

a. A plaintiff proving violation of this statute shall be entitled to collect compensatory damages that shall not exceed \$50,000 per incident, \$100,000 per plaintiff, and \$500,000 for all betrayals of a similar type caused by the same attorney or physician.

b. A plaintiff proving by clear and convincing evidence a violation of this statute based on an intentional betrayal may be entitled to collect punitive damages that shall not exceed \$50,000.

(6) *Attorney Fees.* A court shall award an entrustor prevailing under this statute reasonable attorney's fees and costs, including attorney's fees and costs associated with any appeal.

Regardless of its parameters, the major advantage to a statutory claim of betrayal of trust is that, like a statutory wrongful death action, it can provide clear limits on who can be sued, who can sue, how much they can sue for, and under what circumstances.

We propose that only state-licensed medical doctors and attorneys who had physician-patient or attorney-client fiduciary relationships with the entrustor at the time of the alleged betrayal and their employers whose alleged wrongdoing contributed to the betrayal may be sued.¹⁰⁹ If the entrustor is dead as a result of malpractice or betrayal, the claim should belong to the entrustor's estate.

The claim for betrayal of trust would be available in two situations where disloyalty is the harm for which recovery is sought. First, where a betrayal is intentional or reckless, but only the dignitary harm of betrayal can be proved, statutory liability would be available for that harm regardless of whether there was any provable physical, financial, or severe emotional harm. For example, suppose that a family law attorney has sexual relations with his or her client during the time that the client is seeking a divorce. Even if the attorney competently completes the legal work related to the divorce and therefore no legal malpractice claim would be available, the client most likely could prove an intentional or reckless betrayal and therefore recover under the statutory claim. Second, where betrayal is negligent, reckless or intentional, and malpractice or another common law tort is also proved, recovery under the statute would be available in addition to the damage award under the common law claim. This would assure that there is compensation for the dignitary injury of betrayal apart from the injury for which damages are recoverable under the common law claim. For

109. While all professionals for whom a major aspect of their practice is counseling, therapy, or medical treatment could be included, we propose limiting the statutory tort to these two professions because they are easily identifiable through state licensing and many of the cases involving fiduciary betrayal have been brought against these professionals. If a state finds that a statutory tort for betrayal of trust is effective against these two groups it can then decide whether to expand the tort to cover other groups of professionals.

example, where a surgeon substantially overstates his experience and then, during surgery, permanently paralyzes his patient, it is likely that the patient could prove intentional or reckless misrepresentation, and therefore the betrayal of trust statutory remedy would be available to the victim. In addition, these facts would likely support a separate negligence-based malpractice or lack of informed consent claim for the physical harm suffered by the victim.

To prevent double recovery, an award of damages for a claim of breach of fiduciary duty would not be permitted if an entrustor recovered under a statutory betrayal claim under the same set of facts. Both claims could be brought in the alternative but a damage award could only be made under one or the other. The separate statutory betrayal of trust claim would require clear and convincing evidence of disloyalty so that there would be strong proof that the fiduciary placed his or her self-interest ahead of the entrustor's interest.

The amount of compensatory damages recoverable for the purely dignitary injury arising from betrayal of trust would be limited to a maximum of \$50,000 per incident, \$100,000 per person, and \$500,000 for all betrayals of a similar type caused by the same individual.¹¹⁰ Punitive damages could be awarded if clear and convincing evidence of an intentional betrayal was proved, but these damages would be limited to no more than \$50,000.

An award of attorney fees in addition to the limited recovery for compensatory damages is also advisable to encourage both entrustors to bring, and attorneys to take, these kinds of cases by ensuring that the compensation for both the entrustor and the attorney is fair and reasonable. The prophylactic benefit of bringing these claims justifies this form of incentive. Therefore, an award of attorney fees following recovery for the betrayal of trust would be appropriate.

An employer of the doctor or lawyer who is liable for betrayal of trust could also be held liable if, by the preponderance of evidence, it is proved that the employer's negligent, reckless or intentional conduct contributed to the betrayal. If an employer is liable under this statute, the liability of the employer and doctor or lawyer would be joint and several for the entire amount of statutory damages awarded. Joint and several liability provides one less obstacle to recovery, allowing the victim to recover the full statutory

110. Obviously these are arbitrary figures that a legislature could change. However, in order for this tort to be effective without over-detering and to be politically acceptable, some reasonable limit on the amount of recoverable damages is necessary.

amount from either the employer or the professional. It also adds an additional incentive for employers to prevent the unethical behavior of their employees.

Often courts have held that breach of fiduciary duty claims for the kinds of harms described by this proposed statute are barred by the statute of limitations for malpractice.¹¹¹ It would therefore be important to establish a separate statute of limitations for bringing a claim for betrayal of trust. The limitations period would not begin to run until the discovery of the betrayal, and a claim for betrayal of trust could proceed even when the statute of limitations for other injuries such as malpractice or lack of informed consent had already run. Thus, entrustors would not be denied recovery—at least in terms of the statute of limitations hurdle—by active concealment of conflicts of interest or other betrayals. Instead, like a standard fraud claim, an entrustor could bring a betrayal claim within a statutory period that begins running upon discovery. So long as a discovery rule is clearly set out in the statute, the statutory period could be as short as one or two years from discovery.

All the above proposals regarding a statutory tort for betrayal of trust are obviously subject to modification. They are simply suggestions for what the tort should look like. The following sections describe cases in California, Illinois and Minnesota involving doctors and lawyers who betrayed the trust of their patients and clients. For the most part, courts refused to provide a remedy or provided a clearly inadequate remedy. The proposed statute is applied to these various case scenarios to illustrate how, if enacted, a tort of betrayal of trust would work.

IV. CASE STUDIES AND APPLICATION OF THE NEW TORT

As demonstrated above, a new statutory remedy for betrayal of trust is justified. Fitting clear betrayals by doctors and lawyers into currently available common law remedies is like fitting a round peg into a square hole. Thus, not surprisingly, existing common law claims usually leave a betrayed entrustor without any remedy whatsoever when the harm is solely to a plaintiff's dignitary interests. Even when a betrayal coincides with a provable malpractice or lack of informed consent claim, no remedy for the betrayal itself is currently available. In a series of cases, beginning with the landmark case of *Moore v. Regents of the University of California*,¹¹² we demonstrate

111. See, e.g., *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. Ct. App. 1997).

112. 793 P.2d 479 (Cal. 1990).

how courts have struggled with the inadequate menu of remedies in situations where a plaintiff entrustor has been wronged—often in a highly disturbing fashion—by a doctor or lawyer in a fiduciary relationship. After examining *Moore*, we engage in a discussion of *Neade v. Portes*, a case where the Illinois Supreme Court put an end to the short life of breach of fiduciary duty as a remedy for betrayal based on a doctor's financial conflict of interest. The *Neade* outcome provides a compelling justification for adoption of our statutory tort. Finally, we address a group of Minnesota cases where the court provides a remedy for betrayals by lawyers on one hand, but denies the same remedy for betrayals by doctors. Our proposed statutory tort would compensate the victims of such betrayals by both doctors and lawyers, thereby providing consistency as well as justice.

A. Eliminating Confusion over Permissible Claims

The following Section demonstrates that our proposed statutory tort will alleviate problems that already plague the courts when attempting to use existing remedies to address betrayals of trust by professionals. Our proposed statutory tort would have given these courts a useful tool to remedy the harm suffered by the plaintiffs in both *Moore v. Regents of the University of California* and *Neade v. Portes*.

1. Moore v. Regents of the University of California

Moore v. Regents of the University of California is both important and unique.¹¹³ In *Moore*, the Supreme Court of California unanimously¹¹⁴ allowed a breach of fiduciary duty claim against a physician who removed his patient's spleen and repeatedly took samples of his patient's cells without informing him of the physician's preexisting financial and research interests in his bodily materials. While doctors are widely viewed as owing their patients a fiduciary duty,¹¹⁵ *Moore* is the only reported case to have allowed an independent claim of breach of fiduciary duty action against a

113. *Id.* *Moore* is the subject of much academic commentary and is regularly taught in both first year Torts and Property courses. See Keith Sealing, *Teaching Fundamental Learning Techniques with Moore v. Regents of the University of California*, 46 St. Louis U. L.J. 755 (2002).

114. Even though there were dissents and concurrences in *Moore*, all the justices agreed that a breach of fiduciary duty claim was available. *Id.* at 485 (majority opinion); *id.* at 499 (Broussard, J., concurring in part and dissenting in part); *id.* at 506, 518–19 (Mosk, J., dissenting).

115. See, e.g., *Lockett v. Goodall*, 430 P.2d 589, 591 (Wash. 1967).

medical doctor for harm other than cases involving release of confidential information without the patient's consent.¹¹⁶ It provides a clear example of an intentional betrayal of trust where the doctor's care was competent and therefore the only basis for a legal remedy is the betrayal.

Moore is a controversial decision with compelling facts. The issues raised by the plaintiff's assertions concerning corruption of the doctor-patient relationship and the California Supreme Court's half-hearted attempt to provide a remedy demonstrate why a separate claim for betrayal of trust for non-financial injury is needed.

Plaintiff Moore made the following allegations: He consulted with Dr. Golde at UCLA Medical Center because he was suffering from hairy cell leukemia, Golde recommended that Moore's spleen be removed, and Golde informed Moore "that he had reason to fear for his life, and that the proposed splenectomy operation . . . was necessary to slow down the progress of his disease."¹¹⁷ Based upon Golde's representations, Moore signed a written consent form authorizing the splenectomy.¹¹⁸

At the time Golde made this recommendation, he had a personal and scientific interest in Moore's spleen and already had made arrangements to do research on it that was unrelated to Moore's medical care.¹¹⁹ Golde did not reveal these non-therapeutic interests to Moore. Following the surgery, Golde also arranged for Moore's return to UCLA Medical Center from his home in Seattle about twice a year over the course of seven years.¹²⁰

116. There are a few cases involving sexual relations between physician and patient where a medical malpractice claim has been proven through showing a breach of fiduciary duty. *See Hoopes v. Hammargren*, 725 P.2d 238, 242-243 (Nev. 1986) (patient allowed to sue doctor for malpractice for taking sexual advantage of her in violation of fiduciary duty); *Roy v. Hartogs*, 366 N.Y.S.2d 297, 298-301 (Civ. Ct. 1975) (sexual relationship as treatment for sexual problems as breach of fiduciary duty is basis for malpractice); *Omer v. Edgren*, 685 P.2d 635, 636-37 (Wash. Ct. App. 1984) (finding sexual relationship in breach of fiduciary duty as basis for malpractice by psychiatrist).

There is also one case involving a chiropractor who routinely administered and charged patients for unnecessary procedures. The court, while finding verdicts for fraudulent misrepresentation and breach of fiduciary duty to be duplicative, ended up allowing the breach of fiduciary duty claim instead of the fraudulent misrepresentation claim because the punitive damages under breach of fiduciary duty were greater than those under fraudulent misrepresentation. *Garcia v. Coffman*, 946 P.2d 216, 223 (N.M. Ct. App. 1997).

A few courts have framed claims involving release of confidential information without the patient's consent as breach of fiduciary duty claims. *See Mull v. String*, 448 So.2d 952, 953 (Ala. 1984) ("Alabama recognizes causes of action for breach of fiduciary duty . . . resulting from a physician's *unauthorized disclosure* of information."); *Doe v. Roe*, 588 N.Y.S.2d 236, 240 (S. Ct. 1992) ("Plaintiff has made out a case for breach of fiduciary . . . duty . . .").

117. 793 P.2d at 481.

118. *Id.*

119. *Id.*

120. LORI ANDREWS & DOROTHY NELKIN, *BODY BAZAAR I* (2001 Crown).

During these visits, Golde took samples of Moore's "blood, blood serum, skin, bone marrow aspirate, and sperm."¹²¹ He claimed that these procedures had a therapeutic basis as well as serving purely academic research. In fact, during this time period, Golde and others conducted research on Moore's cells and developed "a cell line from Moore's T-lymphocytes."¹²² Patent #4,438,032¹²³ was granted to Golde and he shared in the profits derived from it. Golde also negotiated for commercial development of the "Mo-cell line"¹²⁴ and became a paid consultant for a substantial sum of money.¹²⁵

Moore sued Golde and others for this commercial use of his bodily material without his knowledge or consent. The three claims that the California Supreme Court addressed were conversion, lack of informed consent, and breach of fiduciary duty. Moore's essential allegation was that his doctor surreptitiously planned to and did use his bodily materials for research and financial gain over the course of a multi-year doctor-patient relationship. The allegation evokes strong emotions that Moore's own words support:

My doctors are claiming that my humanity, my genetic essence, is their invention, their property. They view me as a mine from which to extract biological material. I was harvested.¹²⁶

Moore also said he felt "'violated for dollars,' 'invaded,' and 'raped.'"¹²⁷

121. *Moore*, 793 P.2d at 481. These frequent trips to UCLA were "both expensive and time consuming" yet Golde insisted that it was "not in [Moore's] best interest" to have the tests done in Seattle. Adam Stone, *The Strange Case of John Moore and His Splendid Stolen Spleen: A Case Study in Science, Technology, and American Courts* (1996), (unpublished M.A. thesis, University of California, Berkeley), available at http://www.biology.buffalo.edu/courses/bio129/medler_lectures/visuals/John_Moore.html. Golde even suggested that "if money were a problem, [Moore] could be compensated by money from Dr. Golde's research grant." *Id.* Additionally, Golde "offered to put Moore up at the Beverly Willshire Hotel." *Id.*

122. *Moore*, 793 P.2d at 481.

123. According to Andrews & Nelkin, things were so weird that Moore contacted a lawyer, Jonathan Zackey, about it. When Zackey went online to learn more, he read Golde's scientific publications. One, in *Science*, described patenting nine products from the "Mo-cell line" based on the bodily materials of "a 37-year-old white male from Seattle whose blood contained unusual and valuable viral antibodies." ANDREWS & NELKIN, *supra* note 120, at 27-28.

124. *Id.* at 28.

125. *Moore*, 793 P.2d at 482.

126. ANDREWS & NELKIN, *supra* note 120, at 1.

127. *Id.* at 28.

The injuries that Moore suffered at the hands of Golde do not fit easily under traditional tort theories.¹²⁸ Two camps have vied over what is the essence of the harm in *Moore*. The case involved property-based and dignity-based claims, neither of which the majority adequately addresses.¹²⁹ Some, including the intermediate appellate court¹³⁰ and Justice Mosk in dissent,¹³¹ view the central harm as proprietary and property-based. They argue that the majority erred in denying a property-based claim for the unauthorized conversion of Moore's bodily material into a patented cell line for which he received no compensation.¹³² Others view the essence of the harm as dignity-based and therefore assert that a breach of fiduciary duty or similar claim such as the proposed tort of betrayal of trust is appropriate.¹³³ The *Moore* decision disappointed both camps.

128. The original lawsuit included thirteen different legal claims: "(1) '[c]onversion'; (2) 'lack of informed consent'; (3) 'breach of fiduciary duty'; (4) 'fraud and deceit'; (5) 'unjust enrichment'; (6) 'quasi-contract'; (7) 'bad faith breach of implied covenant of good faith and fair dealing'; (8) 'intentional infliction of emotional distress'; (9) 'negligent misrepresentation'; (10) 'intentional interference with prospective advantageous economic relationships'; (11) 'slander of title'; (12) 'accounting'; and (13) 'declaratory relief.'" *Moore*, 793 P.2d at 482 n.4.

129. Justice Broussard's concurring and dissenting opinion in *Moore*, 793 P.2d at 498–506, comes closest to recognizing the two important harms that the law should remedy. He would have allowed the conversion claim. *Id.* at 499. He also explicitly noted that the informed consent/fiduciary duty claim here should differ from the traditional negligence-based claim by not mandating that Moore prove that, had he been informed, a reasonable person in his position would not have agreed to go forward with the procedures. *Id.* at 500. However, his agreement with the majority's view that the essence of the harm here is that the doctor's conflict of interest "may potentially affect his . . . professional judgment" fails to take into account the bodily integrity and betrayal harms involved. *Id.* at 499.

130. *Moore v. Regents of Univ. of Cal.*, 249 Cal. Repr. 494 (Ct. App. 1988).

131. *Moore*, 793 P.2d at 506–523 (Mosk, J., dissenting).

132. See Laura Ivey, *Moore v. Regents of the University of California: Insufficient Protection of Patients' Rights in the Biotechnological Market*, 25 GA. L. REV. 489, 498–99, 512–32 (1991); Jeffrey Potts, *Moore v. Regents of the University of California: Expanded Disclosure, Limited Property Rights*, 86 NW. U. L. REV. 453, 478–88 (1992).

133. A new common law claim, described as breach of the right to be treated with dignity, has been asserted in a few cases. This claim was alleged in *Diaz v. Hillsborough County Hospital Authority*, 165 F.R.D. 689 (M.D. Fla. 1996), a class action against Tampa General Hospital and the University of South Florida for performing experimental procedures on poor pregnant women without informing them. The parties settled in 2000 for \$3.8 million. Stephen F. Hanlon & Robyn S. Shapiro, *Ethical Issues in Biomedical Research: Diaz v. Hillsborough County Hospital Authority*, A.B.A. HUM. RTS. MAG. 7 (Spring 2003). Since then this claim has also been alleged in a number of lawsuits brought by attorney Allen Milstein alleging misconduct by researchers and hospitals in relation with clinical trials. See Marie McCullough, *Lawyer Sees His Role as Warning to Clinical Researchers*, <http://sskrplaw.com/publications/5-20allan.html> (last visited Feb. 20, 2009). No appellate court has yet approved this claim.

Many commentators have unsuccessfully urged that courts allow a dignity-based claim when doctors fail to provide their patients with material facts concerning medical treatment. See articles proposing a new tort in Morris, *supra* note 50, at 342 n. 162.

The *Moore* majority rejected the property-based conversion claim. And although they allowed the breach of fiduciary duty claim, the majority held that in this instance it was interchangeable with the lack of informed consent claim.¹³⁴ Tying breach of fiduciary duty to lack of informed consent, and failing to elaborate on what the plaintiff needed to prove before damages could be recovered under these theories, effectively gutted the fiduciary duty claim. As Justice Mosk said in his dissent, this claim is “largely a paper tiger.”¹³⁵

Regardless of whether property-based compensation for the unauthorized use of Moore’s cells had been allowed, an independent dignity-based claim for betrayal of trust, instead of the traditional negligence-based lack of informed consent claim, should have been provided for Golde’s clear disloyalty to his patient/entrustor. Dr. Golde’s alleged conduct severely compromised Moore’s bodily integrity, his ability to determine what was in his own best interests, and his right to expect that his doctor would place Moore’s interests ahead of his own.

The conduct involves two distinct acts of disloyalty. First, Dr. Golde failed to reveal his preexisting research and potential economic interest at the time he advised Moore to have his spleen removed. Even though this procedure appears to have been medically necessary and competently performed, the doctor intentionally failed to reveal a conflict of interest.

Dr. Golde’s later conduct in having Moore return to Los Angeles from Seattle over the course of a number of years was a betrayal of a different order of magnitude. During that time, Golde mined Moore’s body for economically valuable cells while denying that this was his real purpose for arranging these visits. Instead, while acknowledging that Moore’s bodily materials were helpful in Golde’s “strictly academic and purely scientific medical research,”¹³⁶ Golde insisted that taking Moore’s bodily materials was “necessary for his health and well-being”¹³⁷ and, in response to Moore’s specific inquiries, denied the cells had any “commercial or financial value.”¹³⁸ The *Moore* court does not focus on this alleged intentional misrepresentation beyond describing it and concluding

134. The court said that “[t]his cause of action can properly be characterized either as the breach of fiduciary duty to disclose facts material to the patient’s consent or, alternatively, as the performance of medical procedures without first having obtained the patient’s informed consent.” *Moore*, 793 P.2d at 483.

135. *Id.* at 520.

136. *Id.* at 487.

137. *Id.* at 486.

138. *Id.*

“the allegations state a cause of action for breach of fiduciary duty or lack of informed consent.”¹³⁹ Such affirmative misconduct is an extraordinary transgression, involving exploitation and deceit. It is an outrageous abuse of the doctor-patient relationship that in no way resembles the negligence claim of lack of informed consent. Betrayal, disloyalty and taking advantage are at the heart of the *Moore* allegations and merited a specific remedy for the dignitary injury apart from, and instead of, lack of informed consent.

The non-property-based interests deserving of legal protection that Golde’s conduct jeopardized included bodily integrity, self-determination, and the right to undivided loyalty concerning medical treatment. The majority, however, failed to meaningfully acknowledge these interests. For the *Moore* court the only harm that deserved a legal remedy was the possibility that self-interest might adversely affect medical treatment.¹⁴⁰ It commented that, “[t]he reason why a physician must disclose possible conflicts is . . . because certain personal interests may affect professional judgment.”¹⁴¹ The majority further noted that such interests may cause the doctor to provide treatment “that offers marginal, or no, benefits to the patient.”¹⁴²

The majority is correct, as far as it goes. The follow-up visits that, although “based upon the trust inherent in and by the virtue of the physician-patient relationship,”¹⁴³ appeared to have no therapeutic value, starkly illustrate how financial gain can corrupt a professional’s judgment. Had Moore been informed of the real purpose of those visits he might have chosen not to proceed or might have negotiated for a share in the commercial benefits. However, even if a recommended treatment was medically necessary, a betrayal of trust claim should still be available for disloyalty and intentional failure to provide the patient with material facts needed for making a meaningful choice. The *Moore* court acknowledged this in reference to the medically necessary and competently performed removal of Moore’s spleen when they noted:

Even if the splenectomy had a therapeutic purpose, it does not follow that Golde had no duty to disclose his additional research and economic interests . . . [T]he existence of a motivation for a medical procedure unrelated to the patient’s

139. *Id.*

140. *Id.* at 483.

141. *Id.* at 485 n.10.

142. *Id.* at 484.

143. *Id.* at 481.

health is a potential conflict of interest and a fact material to the patient's decision.¹⁴⁴

As the majority acknowledged, a doctor's conflict of interest is a material fact that the doctor is legally obligated to reveal. The fiduciary relationship's demand of undivided loyalty is the source of this obligation. Unfortunately, the *Moore* court conflated a lack of informed consent claim—involving failure to disclose material medical risks in breach of the physician's duty of care¹⁴⁵—and a breach of fiduciary duty claim—involving failure to disclose a conflict of interest in breach of the duty of undivided loyalty. Mixing these two disparate claims left unresolved what this court required Moore to prove before recovery would be allowed and what kind of damages were recoverable. Justice Broussard, in concurrence, said that all Moore should have to prove is that Golde's failure to disclose his conflict of interest "caused the plaintiff some type of compensable damage."¹⁴⁶ But, without a legally recognized remedy for betrayal of trust, that begged the question.

The California Supreme Court's allowance of both a claim for lack of informed consent and breach of fiduciary duty as alternative, seemingly fungible claims for the same conduct—failure to reveal economic and research interests—highlights problems that have plagued breach of fiduciary duty claims against doctors and why a separate claim for betrayal of trust is needed. If the court intended that the elements of a traditional lack of informed consent claim had to be shown in order for Moore to recover for "breach of fiduciary duty," his chances of recovery were almost nil.

It is highly improbable that Moore could have established the essential elements of a lack of informed consent claim.¹⁴⁷ First, the removal of his spleen was medically necessary and a reasonable person in Moore's position would likely have consented to the surgery even with knowledge of Golde's financial interest. Only if, for example, in addition to hiding his financial interest in Moore's bodily materials, Golde had failed to inform him of a risk of blood-

144. *Id.* at 486.

145. This duty to inform of medical risks has been codified. *See* CAL. WELF. & INST. CODE § 5326.2 (d) ("The nature, degree, duration, and probability of the side effects and significant risks, commonly known by the medical profession . . .")

146. *Moore*, 793 P.2d at 500.

147. *See* *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972). *Cobbs*, the case that sets out the necessary elements for the negligence claim of lack of informed consent, is referred to eight times in the course of the *Moore* majority's discussion of the lack of informed consent and breach of fiduciary duty claims. This strongly suggests that Moore was expected to prove the usual elements of the informed consent negligence claim before he could recover for breach of fiduciary duty.

poisoning from removal of the spleen and Moore then experienced blood-poisoning, might the negligence claim of lack of informed consent have been permitted.

When assessing the harm resulting from the seven years of active deception following the original procedure, the concept of informed consent seems nonsensical. If the treatment was not even medically necessary and therefore was solely conducted for Golde's financial gain, his deception simply does not fit within the realm of negligent medical treatment. Instead it is a straightforward intentional betrayal of trust for which the proposed statutory tort provides an appropriate remedy.

Moore involves allegations that a fiduciary's intentional failure to inform his entrustor of his economic conflict of interest injured the entrustor's interest in undivided loyalty and corrupted the fiduciary's medical judgment. Golde's intentional nondisclosure of his financial interests in Moore's cells was the means by which his duty to Moore was breached. The patient's trust was betrayed when the doctor failed to disclose his personal interests that were unrelated to Moore's medical well-being, thereby violating his rights to bodily integrity and self-determination.

The *Moore* court's provision of a lack of informed consent claim in the alternative to a breach of fiduciary duty claim added nothing but confusion. Since the allegations concern disloyalty and self-dealing, only one claim—betrayal of trust as a form of breach of fiduciary duty—should have been allowed. The *Moore* majority's express approval of breach of fiduciary duty as an alternative claim should have meant that the usual causation and damages elements of a lack of informed consent claim were not required.

While aptly describing the claim as a breach of fiduciary duty, the *Moore* majority failed to expressly allow Moore to recover damages even if he were unable to show any physical injury resulted, and even if the fact finder concluded that Moore would have consented to the treatment had he been properly informed. Most likely the court chose not to do this for fear that such a holding could not be limited in some reasonable way. A statutory tort for betrayal of trust that incorporates a damage cap is therefore appropriate to assure that disloyalty is compensated as harm in itself.

Conduct such as that alleged in *Moore* calls for such a prophylactic response. Money damages should be awardable in order to deter such conduct even where no physical or severe emotional harm results. In addition, if Moore was able to prove that Golde planned from the start to use his cells for Golde's research and financial interests and then lied to Moore when asked about this,

punitive damages would be appropriate based on clear and convincing evidence of subjective intentional bad faith, something that almost never can be shown in an ordinary informed consent or medical malpractice claim.¹⁴⁸

Under the proposed statute outlined above, if Moore had proved that Golde intentionally withheld information about his financial interest in Moore's bodily material, he could have recovered for both the original deception at the time his spleen was removed and for the later deceptions that continued over the seven-year period before he discovered what was going on. He could have recovered the maximum of \$100,000 for the numerous separate acts of betrayal. Possibly punitive damages would also have been recoverable. While all this might add up to a substantial sum, the specific statutory dollar limits keep the possible recovery from becoming over-deterrence.

One hopes that extreme facts like those in *Moore* are rare. They are not, however, unique. For example, news reports describe a betrayal of a much greater magnitude. A fertility doctor in California stole one woman's egg and successfully implanted it in another woman, who later gave birth.¹⁴⁹

There is evidence that some doctors perform unnecessary surgeries and prescribe unneeded medications because of financial conflicts of interest.¹⁵⁰ Betrayals of trust such as these deserve their own remedy, separate from those for any other claims of injury. In the next Section, the Illinois court refuses to recognize that the dignitary harm resulting from betrayal of trust is separate from medical malpractice.

2. Neade v. Portes

Perhaps the case that best illustrates the need for a limited statutory tort for betrayal of trust is *Neade v. Portes*,¹⁵¹ out of Illinois. The *Neade* facts illustrate a clear harm in search of a remedy and a court that was unwilling to use its common law power to find one.

In *Neade*, the estate of Anthony Neade sued his doctor, Dr. Steven Portes, and his primary care center for medical negligence

148. Justice Broussard agreed that "in appropriate circumstances, punitive . . . damages would clearly be recoverable." *Moore*, 793 P.2d at 500.

149. Donna Alvarado, *California Egg Case Sparks Debate on Infertility Clinics*, SUNDAY OREGONIAN, May 28, 1995, at A17; see also ANDREWS & NELKIN, *supra* note 120, at 157-58.

150. GROOPMAN, *supra* note 21, at 203-212, 223-233.

151. 739 N.E.2d 496 (Ill. 2000).

and breach of fiduciary duty after Neade died of heart failure.¹⁵² Neade had classic symptoms of heart problems, including a family history of heart disease, hypertension, and high cholesterol. He was overweight and a heavy smoker.¹⁵³ At age 37, he went to see Dr. Portes because he was experiencing chest pain extending into his arm and shortness of breath.¹⁵⁴ During this initial visit, he was hospitalized for three days and diagnosed with “hiatal hernia and/or esophagitis” after Dr. Portes ran a “thallium stress test” and an electrocardiogram (EKG).¹⁵⁵ Neade returned to his doctor complaining of the same symptoms three times within the two months after his hospitalization. During each of these visits, Dr. Portes informed Neade that, based on the tests run when he was hospitalized initially, his symptoms were not cardiac-related. Neade returned again shortly thereafter complaining of “stabbing chest pain.”¹⁵⁶ At that time, Dr. Portes’s associate, Dr. Huang, recommended that Neade be given an angiogram to check for more specific coronary artery disease than a thallium stress test provides. Dr. Portes refused to authorize the test.¹⁵⁷ About eight months later, Neade presented himself with the same symptoms.¹⁵⁸ Yet another doctor recommended an angiogram and Dr. Portes once again refused to authorize the test.¹⁵⁹ Neade died that year after suffering a massive heart attack.¹⁶⁰

Neade’s estate uncovered facts relating to Dr. Portes’s relationship with Neade’s HMO, Chicago HMO, that were not disclosed to Neade and that indicated an economic conflict of interest.¹⁶¹ Under the terms of a contract between Dr. Portes, his primary care clinic, and Chicago HMO, Neade stood to benefit financially from a \$75,000 per year “Medical Incentive Fund.”¹⁶² The fund covered the cost of patient referrals and outside medical tests such as the angiogram Dr. Portes refused to authorize.¹⁶³ The physicians at Dr. Portes’s practice divided 60% of the money remaining in the fund at the end of each year, and if the fund was depleted before year’s end, Dr. Portes and his group of doctors would be required to fund

152. *Id.* at 498.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 499.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

the tests themselves.¹⁶⁴ The contract therefore provided a powerful financial disincentive to doctors contemplating ordering certain tests.

Neade's estate first alleged that Dr. Portes's refusal to order an angiogram and reliance on the thallium stress test constituted medical negligence that proximately caused Neade's death.¹⁶⁵ Neade's estate also alleged that Dr. Portes breached his fiduciary duty toward Neade by refusing to authorize further testing, by refusing to refer Neade to a specialist, and by failing to disclose his relationship with Chicago HMO.¹⁶⁶ The estate claimed that Portes' contract with Chicago HMO conflicted with Neade's physical well-being, subrogating it to Dr. Portes's financial gain.¹⁶⁷ The trial court held that evidence relating to the fund was irrelevant to the question whether Dr. Portes deviated from the correct standard of care in the medical negligence claim and that Illinois courts did not recognize a cause of action for breach of fiduciary duty against a physician.¹⁶⁸ The Illinois intermediate appellate court reversed the trial court as to the breach of fiduciary duty claim, holding that plaintiff could proceed against defendants on both medical negligence and breach of fiduciary duty.¹⁶⁹

The majority Illinois Supreme Court sided with the trial court by rejecting the breach of fiduciary duty claim. Its opinion framed the primary issue as whether Illinois plaintiffs can state a cause of action for breach of fiduciary duty against doctors for failure to disclose financial ties such as Dr. Portes's financial tie to Chicago HMO.¹⁷⁰ The court held that Neade's estate would have to prove that the medical care was substandard in both the malpractice and the breach of fiduciary duty claims and therefore because the claims were "duplicative," the breach of fiduciary duty claim should not be recognized.¹⁷¹ As further support for this conclusion, the court noted that plaintiff pled that the damages for both claims was death.¹⁷² Therefore, "though [Neade's estate] attempt[ed] to

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 500.

170. *Id.*

171. *Id.* at 503. The Illinois Supreme Court did not recognize the inconsistency of its holding with *Doe v. Roe*, 681 N.E.2d 640 (Ct. App. Ill. 1997), an attorney sex case, where the Illinois Court of Appeals held that a plaintiff had a valid cause of action for breach of fiduciary duty against an attorney who used his position as attorney and his knowledge of his client's dependence upon him to gain sexual favors. *Id.* 649-51.

172. *Neade*, 739 N.E.2d at 503.

couch the claim in different terms, [it was] essentially pleading the same cause of action which caused the same damages."¹⁷³

In a compelling dissent, Chief Justice Harrison took the majority to task for, in essence, barring a breach of fiduciary duty claim against doctors when Illinois courts provide a breach of fiduciary duty claim for clients suing lawyers.¹⁷⁴ The dissent agreed that when the *same* operative facts support both a negligence cause of action and a breach of fiduciary duty cause of action, the fiduciary duty claim ought to be dismissed.¹⁷⁵ However, he demonstrated that the breach of fiduciary duty claim was for a different kind of wrongdoing and could justifiably provide relief even where a plaintiff could not prove that a doctor's conduct fell below the medical profession's standard of care. As he aptly explained, the breach of fiduciary duty would be based on proving a conflict of interest, Dr. Portes's failure to disclose the financial incentives offered by Chicago HMO.¹⁷⁶

This case provides a disturbing portrait of how financial incentives in the form of financial gain can potentially cloud a doctor's judgment. The *Neade* decision meant that a serious betrayal would be without a remedy even though the patient/entrustor suffered the most egregious of harms. If the Neade estate was unable to prove that Dr. Portes committed malpractice by his actions (for example, by relying on the thallium stress test), then the plaintiff would be barred from any recovery.

By failing to disclose the financial ties (and perhaps even by having those ties at all), Dr. Portes likely betrayed his patient Neade's trust. Our proposal would have provided Neade's estate with a statutory claim for betrayal of trust that would not have faced the same "duplicative" scrutiny by the Illinois Supreme Court because it is a stand-alone claim requiring the estate to set forth clear and convincing evidence of disloyalty regardless of whether other harm is proved. Dr. Portes's act of placing his financial interest ahead of the medical well-being of Neade would be enough—the estate would not have to prove that Dr. Portes's behavior fell below the standard of care. Of course, if the estate could meet its burden in

173. *Id.*

174. *Id.* at 506 (Harrison, J., dissenting).

175. *Id.*

176. *Id.* ("It is conceivable that a trier of fact could find both that Dr. Portes was within the standard of care and therefore not negligent in relying on the thallium stress test and the EKG in deciding that an angiogram was not necessary and also that Dr. Portes did breach his fiduciary duty in not disclosing his financial incentive arrangement and, as a proximate result thereof, Neade did not obtain a second opinion, suffered a massive coronary infarction, and died.") (quoting appellate court decision).

the malpractice claim, it could recover an additional damage amount for that as well.

B. Resolving Common Law Inconsistencies

Courts have not only struggled to apply existing legal theories to betrayals, but as demonstrated above, they have also applied legal standards inconsistently, leading to lopsided results. In the *Perl* line of cases and in *D.A.B. v. Brown*, discussed below, the Minnesota Supreme Court came to very different results when considering betrayals of trust made by a lawyer and a doctor. Our proposed tort would have given the Minnesota court a uniform approach for dealing with both professionals.

1. Lawyers' Divided Loyalty: The Perl Trilogy

This Section examines a series of cases involving divided loyalties and conflicts of interest where the Minnesota Supreme Court concludes that clients can sue lawyers for breach of fiduciary duty without proof of pecuniary or other traditional forms of harm. The Minnesota court therefore approves of something akin to the proposed betrayal of trust claim, at least for lawyer disloyalty. In this respect, Minnesota has taken the lead on such common law claims with a trilogy of cases involving the same lawyer and the same conflict of interest: *Rice v. Perl*¹⁷⁷ (*Perl I*); *Perl v. St. Paul and Marine Ins. Co.*¹⁷⁸ (*Perl II*); and *Gilchrist v. Perl*¹⁷⁹ (*Perl III*).

In the next Section, however, this string of cases involving a lawyer is contrasted with the Minnesota Court of Appeals' conclusion, ten years later, that a pediatrician's acceptance of substantial kickbacks in exchange for prescribing an expensive and powerful drug to children was not a compensable breach of fiduciary duty, independent of medical malpractice. The different outcomes are indefensible but typical. Perhaps that is because the kinds of harm doctors and lawyers cause are usually quite different. Injuries to patients are usually physical; when attorneys harm their clients, the harm is often economic.

177. *Perl I*, 320 N.W.2d at 407.

178. *Perl II*, 345 N.W.2d at 209.

179. 387 N.W.2d 412 (Minn. 1986).

For attorney breach of fiduciary duty cases involving economic harm,¹⁸⁰ such claims are usually subsumed under another tort, most notably fraud.¹⁸¹ In some jurisdictions, courts have also allowed full or partial forfeiture of the attorney's fees where a conflict of interest existed, even if no "actual harm" beyond the betrayal itself was proved.¹⁸² Although malpractice damages for attorney betrayals are different than malpractice damages for betrayal by doctors, each betrayal deserves a unifying statutory remedy.

In the Minnesota lawyer cases, Norman Perl represented more than one hundred women¹⁸³ in their claims for injuries caused by A. H. Robbins' notorious Dalkon Shield intrauterine device.¹⁸⁴ Aetna Casualty & Surety Company was Robbins' insurer.¹⁸⁵ The Aetna claims adjuster with whom Perl negotiated these Dalkon Shield claims was Willard Browne. At the same time that Perl, representing plaintiffs, negotiated settlements with Browne, representing Robbins' insurance company, Perl also employed Browne. In addition, Browne was Perl's personal friend.¹⁸⁶ The Minnesota Supreme Court noted:

It is undisputed that from 1976 through 1979, Browne was simultaneously employed and paid as a claims adjuster by Aetna and by the Perl firm on a part-time basis. Therefore, during the same period of time that Browne was supposed to be vigorously representing Aetna in [the] Dalkon Shield claims . . .

180. See, e.g., *Millbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537 (2d Cir. 1994) (involving a lawyer's conflict of interest causing substantial economic harm); *Goldman v. Kane*, 329 N.E.2d 770 (Mass. App. Ct. 1975) (involving lawyer overreaching client in business transaction).

181. See, e.g., *Ball v. Posey*, 222 Cal. Rptr. 746 (Cal. Ct. App. 1986); *Blackey v. Alexander*, 195 N.W. 455, 456 (Minn. 1923); *Anderson v. Anderson*, 197 N.W.2d 720 (Minn. 1972). Since fraud is an intentional tort that requires actual harm, typically any damages that would be recoverable under a common law breach of fiduciary duty claim are already recoverable under fraud including punitive damages.

Of course, some attorney betrayals do result in physical harm or incarceration. For example, in *Barbara A. v. John G.*, the California courts applied fraud to a case where an attorney intentionally misrepresented his fertility to a family-law client and then impregnated her, resulting in an ectopic pregnancy. 193 Cal. Rptr. 422 (Cal. Ct. App. 1983).

182. See, e.g., *Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996); *Eriks v. Denver*, 824 P.2d 1207, 1213 (Wash. S. Ct. 1992).

183. *Perl III*, 387 N.W.2d at 419.

184. See MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (Pantheon Books 1985); RICHARD SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991).

185. *Perl I*, 320 N.W.2d at 408.

186. *Id.* at 408.

he was receiving payments from the Perl firm, an adversary as to those claims.¹⁸⁷

In this situation, Perl clearly breached his fiduciary duty by not informing his clients of this conflict of interest.¹⁸⁸

Perl and Browne settled the Dalkon Shield claims. The plaintiff in *Perl I*, Cecelia Rice, accepted \$50,000; the cases do not reveal what the other women received. There was no allegation that any of the women were dissatisfied with their settlement amounts; however, there was evidence of client dissatisfaction with amount of the attorney fee.¹⁸⁹

When Rice found out about Browne's relationship to Perl, she sued Perl for fraud, legal malpractice, and breach of fiduciary duty. After Rice prevailed on her breach of fiduciary duty claim, a class action by other similarly situated former clients was brought for breach of fiduciary duty.¹⁹⁰ In *Perl III* the court allowed members of that class to seek fee forfeiture against Perl as well.

In *Perl I*, the issue was whether Perl's breach of fiduciary duty justified requiring him to forfeit his entire attorney's fee where there was no "actual injury."¹⁹¹ The Minnesota Supreme Court concluded that "an attorney . . . who breaches his duty to his client forfeits his right to compensation."¹⁹² "[T]hese consequences follow even though the [client], ignorant of the duplicitous agency, cannot prove actual injury to himself or that the agent committed an intentional fraud."¹⁹³ *Perl II* addressed the question of whether Perl's malpractice insurer was obligated to cover the cost of Perl's forfeited attorney's fees. The court concluded that while the policy did cover this, for public policy reasons the malpractice insurance company should not be required to pay.¹⁹⁴ Finally, *Perl III* addressed

187. *Id.*

188. Browne's employment with Perl's firm was not routine and his role was subject to dispute by the parties. Perl claimed Browne was a consultant who prepared medical files for the firm's specialty, FELA cases; plaintiffs claimed that "Browne and Perl were engaged in a secret scheme to settle Dalkon Shield cases *en masse*." *Id.* at 409 n.2.

189. Rice disputed the amount of Perl's contingency fee at the time she settled with A. H. Robbins. She claimed that the printed figure of 33.3 percent was what she owed Perl while he claimed it was the 50 percent that was handwritten over the printed figure. Perl received 50 percent but Rice then sued Perl over the fee. She settled that claim for \$5000. *Id.* at 408, n.1.

190. *Perl III*, 387 N.W.2d 412 (1986).

191. *Perl I*, 320 N.W.2d at 411. The term "actual injury" would include traditional injuries for which compensatory damages are allowed: physical injury, economic loss, and emotional harm.

192. *Id.*

193. *Id.* (quoting *Anderson v. Anderson*, 197 N.W.2d 720, 724 (Minn. 1972)).

194. While Perl's malpractice insurance company was not required to cover Perl's fee forfeiture, it was required to cover the same fee forfeiture for Perl's law firm that was liable

the question of whether less than full fee forfeiture could be awarded when there are multiple claims. The court, analogizing to punitive damage awards, found the punitive aspect of the forfeiture remedy sometimes made partial rather than total forfeiture appropriate.

The Minnesota Supreme Court's analysis in the three *Perl* decisions contributes to understanding the rationales for our proposed betrayal of trust claim. It highlights the importance of recognizing the betrayal of trust itself as an injury worthy of its own separate legal remedy. As in *Moore*, disloyalty, not incompetence, was alleged. While negligence "in the air" does not justify a remedy, disloyalty, even without financial loss or physical injury, sometimes does.

The conduct of attorney Perl in the *Perl* cases, although blatantly inappropriate, was not necessarily detrimental to Perl's clients. An attorney's close friendship with and employment of the opposing side's negotiator may be more detrimental to the opposing side than to the clients. The fact that none of the 100-plus clients claimed they were dissatisfied with their settlements suggests that Perl's disloyalty did not harm their economic interests. Even when describing the kinds of actual injuries Perl's clients were at risk of suffering, the court was unconvincing. All it could suggest in the way of potential harm was that "[i]f Aetna later rescinded the agreement, [the client's] reputation might suffer simply from having been a party, albeit an innocent party, to this arrangement."¹⁹⁵

In the *Perl* cases, there was no physical or economic injury and the risk of financial harm was small. Nevertheless, the court required attorney Perl to forfeit his fee because he was disloyal. The court found that disloyalty itself was an injury the law should remedy. In *Perl I* the court noted that an "attorney is under a duty to represent the client with undivided loyalty, to preserve the client's confidences, and to disclose any material matters bearing upon the representation of these obligations."¹⁹⁶ The importance of loyalty to the outcome in these cases was further highlighted in *Perl II*. In justifying the fee forfeiture, despite the lack of pecuniary or other "actual damages," the court described attorney loyalty as "a kind of

along with Perl under respondeat superior. The court noted, however, that Perl might still end up bearing the loss because the insurance company could seek indemnification from Perl for its payment of the fee on behalf of the law firm. *Perl II*, 345 N.W. 2d at 214–17. *But see* St. Paul Fire & Marine Ins. Co. v. Perl, 415 N.W.2d 663 (Minn. S. Ct. 1987) (indemnification agreement between attorney and his law firm extinguished insurer's subrogation rights for claims paid as a result of attorney's breach of fiduciary duty).

195. *Perl I*, 320 N.W.2d at 411.

196. *Id.* at 410 (emphasis omitted) (quoting R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* § 121, at 208 (2nd. ed. 1981)).

'absolute' right."¹⁹⁷ If this right is violated "the client is deemed injured even if no actual loss results."¹⁹⁸ The court compared the remedy of fee forfeiture for disloyalty to other tort claims that entitle a plaintiff to damages, regardless of the lack of a financial, physical or emotional injury.¹⁹⁹

The *Perl II* court made clear that the fee forfeiture awarded to Rice in *Perl I* was not restitution but instead was compensation for an injury.²⁰⁰ The court described the injury as "the client's justifiable perception that . . . she has or may have received less than the honest advice and zealous performance to which a client is entitled."²⁰¹ They later added that the aim of fee forfeiture for breach of fiduciary duty is "to make amends to the client—to 'put right' the attorney-client relationship that has been tainted."²⁰² Thus, the court asserted that loyalty itself is a legally protected interest and that disloyalty is a compensable injury.

The *Perl II* court went on to point out that deterrence and punishment also justify awards for breaches of fiduciary duty without proof of pecuniary harm. The court noted: "The fee forfeiture serves to provide the injured client with a remedy, but it also has the effect of punishing the attorney for the breach of fiduciary duty and deterring further lapses in professional conduct."²⁰³

In *Perl III*, the court discussed the "subtle, dual nature of the fee forfeiture remedy, with its punitive and nonpunitive aspects," which it described as "reparational and admonitory."²⁰⁴ In reaching the conclusion that in some cases partial rather than complete fee

197. *Perl II*, 345 N.W.2d at 212.

198. *Id.* at 212.

199. *Id.* The court cited cases involving damages for dissection of plaintiff's deceased husband's body and for trespass to land. Certain intentional torts, such as offensive battery and false imprisonment, where the harm compensated is often purely dignitary, are other prime examples. DOBBS, *supra* note 106, at 281 (2d Ed. 1993). See, e.g., *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905) (awarding more than \$14,000 for medical battery); *Blume v. Fred Meyer, Inc.*, 963 P.2d 700 (Or. Ct. App. 1988) (awarding \$25,000 compensatory damages for 15 to 20 minutes wrongful detention). See also Tamar Lewin, *Ignoring 'Right to Die' Directives, Medical Community Is Being Sued*, N.Y. TIMES, June 2, 1996, § 1, at 1.

While the *Perl II* court described such damage awards as "nominal" large dollar amounts are often involved. Juries have awarded substantial damages in false imprisonment and offensive battery cases where the harm was the indignity or offense itself. Similarly, forfeiture of attorney fees can involve a large amount of money. Thus, when *Perl III* concluded that partial forfeiture of the fees for the 100-plus plaintiffs was appropriate, the term "nominal" most likely did not accurately describe the aggregate amount of such forfeiture.

200. *Perl II*, 345 N.W.2d at 212-13. The court explained that "[a] sum usually equivalent to the fee is awarded to the client, not to restore the client to any status quo because of any unjust enrichment, but because the client has been injured."

201. *Id.* at 213.

202. *Id.* at 214.

203. *Id.*

204. *Perl III*, 387 N.W.2d at 416.

forfeiture is the appropriate remedy the court concluded, "the predominant functions of any fee forfeiture are punishment and deterrence."²⁰⁵ This conclusion was used to distinguish *Perl I* from *Perl III*. In the former, complete fee forfeiture was awarded to one plaintiff, whereas in the latter, for the identical breach of fiduciary duty, only partial forfeiture was to be awarded to a class of plaintiffs.

The *Perl* trilogy is representative of how one jurisdiction treats claims of attorney breach of fiduciary duty involving disloyalty or dishonesty.²⁰⁶ Fee forfeiture is viewed as both compensating the client for the attorney's disloyalty and punishing the lawyer for this betrayal of trust; the disloyalty itself is a legally recognizable injury. The importance of maintaining the integrity of the professional fiduciary relationship supports this response to fiduciary disloyalty. The Minnesota courts' treatment of the breach of fiduciary duty claim in the attorney cases was correct and should apply equally to physicians and other professionals who betray their entrustors' trust. When loyalty is betrayed through self-dealing, regardless of proof of other harm, there is an injury to the professional relationship that should be compensable. If a jurisdiction consistently provided the fee forfeiture remedy for this form of betrayal of trust, a statutory tort would not be necessary. Unfortunately, as set forth in the next section, the Minnesota Court of Appeals took a different approach when assessing a doctor's egregious betrayal.

2. Doctors' Divided Loyalty: *D.A.B. v. Brown*

Doctors, like lawyers, are fiduciaries. They are expected to place their patients' interests ahead of their own when providing them with medical treatment or advice.²⁰⁷ Yet, regardless of how outrageous the betrayal, courts often refuse to provide a remedy for the breach of this fiduciary duty.²⁰⁸ A few, like the *Moore* majority, feign concern that "certain personal interests may affect professional

205. *Id.*

206. A few other jurisdictions have responded similarly. See, e.g., *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999); see also Errin Martin, Comments, *The Line Has Been Drawn on the Attorney-Client Relationship: The Implications of Burrow v. Arce to Texas Practitioners*, 32 TEX. TECH. L. REV. 391 (2001).

207. "A physician shall, while caring for a patient, regard responsibility to the patient as paramount." AM. MED. ASS'N, PRINCIPLES OF MEDICAL ETHICS, Principle VIII (adopted by the AMA's House of Delegates, June 17, 2001), available at <http://www.ama-assn.org/ama/pub/category/2512.html>.

208. See *Hales v. Pittman*, 576 P.2d 493 (Ariz. 1978); *Spoor v. Serota*, 852 P.2d 1292 (Colo. Ct. App. 1992); *Neades v. Portes*, 739 N.E.2d 496 (Ill. 2000); *Garcia v. Coffman*, 946 P.2d 216 (N.M. Ct. App. 1997).

judgment”²⁰⁹ but leave the status quo intact. However, most courts do not even pretend to recognize that a doctor’s self-dealing and disloyalties are harms, independent of competence-based medical malpractice, for which patients can seek a remedy. A stark example is the Minnesota Court of Appeals decision, *D.A.B. v. Brown*.²¹⁰

D.A.B. involved allegations of egregious self-dealing and disloyalty by the defendant doctor. David Brown, a pediatric endocrinologist, was sued by six of his minor patients and their parents for having accepted kickbacks for prescribing the powerful growth hormone drug, Protropin.²¹¹ According to news reports, Brown was federally prosecuted for receiving over one million dollars in kickbacks from the drug’s manufacturer and distributor.²¹² The appellate court in *D.A.B.* noted that a federal jury convicted him of violating the Anti-Kickback Statute.²¹³

Over an eight-year period, Brown prescribed Protropin for more than 200 of his child patients whom he diagnosed as having hormonal deficiencies that made them abnormally short. The cost of this treatment ranged from \$20,000 to \$30,000 per patient per year. The kickbacks gave Brown a strong personal economic incentive to prescribe Protropin to as many patients as possible. This is exactly the kind of problem the majority in *Moore* recognized when they noted that a financial conflict of interest could cause a doctor to provide treatment “that offers marginal, or no, benefits to the patient.”²¹⁴ Regarding Protropin, medical experts were already “concerned that children who have a normal amount of human growth hormone and no medical problems but are simply short

209. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 485 n.10 (Cal. 1990).

210. 570 N.W.2d 168 (Ct. App. Minn. 1997). The plaintiffs did not seek review of the decision by the Minnesota Supreme Court.

211. Kickbacks from pharmaceutical companies to physicians are a serious problem. See generally MARC A. RODWIN, *MEDICINE, MONEY & MORALS: PHYSICIANS’ CONFLICTS OF INTEREST* 57–67, 98–100 (1993); Ericka Jonietz, *Of Doctors, Drugs and Trust*, TECHNOLOGY REVIEW, November 16, 2004, http://www.techreview.com/articles/04/11/wo_jonietz111604.asp (last visited Feb. 20, 2009). See also *supra* note 58 and accompanying text (discussing the federal Anti-Kickback Statute).

212. Gina Kolata, *Selling Growth Drug for Children: The Legal and Ethical Questions*, N.Y. TIMES, August 15, 1994, at A1.

The arrangement between Brown and the producer of Protropin was anything but subtle:

[A] Caremark employee sent a memo . . . stating that Dr. Brown would receive 5 percent of revenues from the Protropin he prescribed and calculating that he was owed, at that time, \$101,551. Dr. Brown wrote a letter . . . saying he wanted to make sales of \$2.3 million for 1987 and \$1.35 million for 1986 the “bases for our program.”

Id.

213. *D.A.B.*, 570 N.W.2d at 169. Brown was granted a new trial “because [he] was denied his Sixth Amendment right to an impartial jury.” *Id.*

214. *Moore*, 793 P.2d at 484.

are being given the drug despite a lack of convincing evidence that it increases their final adult height.”²¹⁵ Nationally, Brown was one of the doctors who prescribed Protropin most frequently.²¹⁶

Brown’s former patients and their parents tried to bring a class action suit for breach of fiduciary duty. This was a situation where the conflict of interest itself—the acceptance of kickbacks—was the sole injury for which they sought recovery. Thus, relying on the *Perl* decisions, they sued for money damages even though they did not allege that the drug caused the children any physical harm.²¹⁷ The trial judge dismissed their claim because of this failure to allege any injury beyond the misconduct itself. The court of appeals affirmed this dismissal, finding that breach of fiduciary duty in this case was substantively identical to the malpractice claim of lack of informed consent that required proof of physical injury.

The appellate court found “the gravamen of the complaint sounds in medical malpractice”²¹⁸ and “the essence of the allegations”²¹⁹ to be “a classic informed consent issue” involving the “duty to disclose.”²²⁰ In support of this conclusion, they cited Minnesota’s leading lack of informed consent decision.²²¹ That case involved failure to disclose a material risk of death;²²² *D.A.B.* involved illegal financial benefits from prescribing a prescription drug. It is very hard to see the connection.

The *D.A.B.* court’s finding that failure to disclose the acceptance of kickbacks was a “classic informed consent issue” indicates that loyalty was not viewed as a distinct aspect of the doctor-patient relationship, separate from the right to receive adequate information about the risks surrounding and alternatives to a particular medical procedure. Instead it was treated as merely a risk that arose out of a medical procedure.

215. Kolata, *supra* note 212. A BBC report notes that in England more than one fifth of children receiving synthetic human growth hormone treatment are “given it for unlicensed reasons such as short stature with no obvious cause.” BBC News, *Concern Over Growth Drug Use*, Mar. 21, 2002, <http://news.bbc.co.uk/1/hi/health/1885064.stm> (last visited Feb. 20, 2009).

216. Kolata, *supra* note 212.

217. *D.A.B.*, 570 N.W. 2d at 172. Unlike the *Perl* cases, ordinary money damages rather than fee forfeiture were sought. This is not surprising since doctors’ fees are often covered by medical insurance or Medicaid. In order to provide a remedy for the doctor’s disloyalty as an injury, money damages payable to the patients to compensate for and punish that disloyalty were appropriate.

218. *D.A.B.*, 570 N.W.2d at 171.

219. *Id.* at 170.

220. *Id.*

221. *Id.* at 171 (citing *Cornfeldt v. Tongen*, 262 N.W.2d 684 (Minn. 1977)).

222. *Cornfeldt v. Tongen*, 262 N.W.2d 684 (Minn. 1977).

The criminal self-dealing involved in the acceptance of kickbacks in no way resembles the negligent failure to inform of a risk that might result from a medical procedure. Kickbacks involve taking advantage of a patient for unlawful economic gain. Failure to inform of a risk from a surgery is about failure to meet the standard of care for competent medical treatment. It is senseless to assert that there was a duty to inform patients of acceptance of kickbacks. Informing his patients would not have cured this flagrant breach of fiduciary duty. Not accepting the kickbacks in the first place was the only way for this defendant to avoid breaching this duty and betraying his patients' trust.

Conflicts of interests and self-dealing in the doctor-patient relationship such as those in *D.A.B.* have recently received increased scrutiny.²²³ Particularly, some worry that doctors who receive kickbacks from drug manufacturers, in one form or another, will put their wallet before a patient's best interests. Legal scholars have suggested requiring informed consent as an appropriate remedy.²²⁴ However, where there is a clear betrayal of trust, *D.A.B.* demonstrates the inadequacy of that remedy.

The Minnesota Court set forth certain rationales for its conclusion that a claim for breach of fiduciary duty for accepting kickbacks is a subset of traditional lack of informed consent. All of the rationales are equally problematic. First, the court simply concluded that any injury or misconduct that involved "examining, diagnosing, treating, or caring" for patients is by definition medical malpractice, subject to this claim's substantive and procedural requirements, including proof of physical harm.²²⁵ It seems patently absurd to assert that all conduct involving medical treatment must be treated as a form of negligence-based medical malpractice. If the Minnesota court really meant this, medical batteries without physical harm would not be recognized as a separate claim either. Yet Minnesota continues to recognize the venerable medical battery case of *Mohr v. Williams*,²²⁶ in which a doctor was found liable for competently operating on one diseased ear when he had only received consent to operate on the other ear.²²⁷ In *Mohr* liability was based solely on the dignitary injury that occurs any time there is

223. See, Alex Berenson & Andrew Pollack, *Doctors Reap Millions for Anemia Drugs*, N.Y. TIMES, May 9, 2007, at A1; Harris, Carey & Roberts, *supra* note 20; Gardiner Harris & Janet Roberts, *Doctors' Ties to Drug Makers are Put on Close View*, N.Y. TIMES, Mar. 21, 2007, at A1.

224. Margaret Z. Johns, *Informed Consent: Requiring Doctors to Disclose Off-Label Prescriptions and Conflicts of Interest*, 58 HASTINGS L. J. 967 (2007).

225. *D.A.B.*, 570 N.W.2d at 172.

226. 104 N.W. 12 (Minn. 1905).

227. *Mohr* is cited with approval in Minnesota's leading lack of informed consent decision, *Cornfeldt v. Tongen*, 262 N.W.2d 684, 699 (Minn. 1977).

nonconsensual offensive touching rather than any physical harm or malpractice.

The second and more persuasive rationale given by the court for denying a separate claim for breach of fiduciary duty/betrayal of trust is the slippery-slope argument. The court darkly warned that allowing an independent claim for breach of fiduciary duty where kickbacks have been accepted would “permit avoidance of every statute defining the physician/patient relationship.”²²⁸ Raising the ante, the court continues: “Indeed, it is difficult to imagine any medical malpractice claim that would not be pleaded as a breach of fiduciary duty claim in order to bypass legislative procedures aimed at implementing the common law.”²²⁹ Certainly the same could be said concerning breach of fiduciary duty and legal malpractice. Yet the *Perl* decisions have not resulted in an avalanche of breach of fiduciary duty claims against lawyers because there are obvious distinctions courts can draw between cases involving legal incompetence and cases involving disloyalty. A statutory tort for betrayal of trust makes these distinctions even clearer.

In cases such as *D.A.B.*, where neither incompetence nor harm beyond the disloyalty itself is alleged, fear of unlimited compensatory damages makes the statutory tort of betrayal of trust especially appealing. Under the facts of *D.A.B.* the maximum compensatory damages to the class would be \$500,000. Punitive damages could still be permitted if the disloyal conduct was sufficiently egregious.

Some situations involving physician disloyalty and kickbacks might merit additional damages for physical injury. For example, if one of Brown’s patient’s had suffered a harmful side effect from Protropin which Brown failed to inform the patient about, a claim for traditional lack of informed consent might have been brought. If the patient could prove that a reasonable person, knowing of the risk of this side effect, would not have taken Protropin, the patient could recover for the harm suffered. Even if the patient could also establish that the doctor was accepting kickbacks, thereby betraying his trust, compensatory damages for that conduct would be limited to the statutory maximum. Punitive damages might also be available.

228. *D.A.B.*, 570 N.W.2d at 171.

229. *Id.*

V. CONCLUSION

To date, most appellate courts that have addressed whether to allow a claim for betrayal of trust in the form of breach of fiduciary duty in settings where betrayal has caused dignitary rather than purely economic harm have refused to do so. While a few courts have attempted to bend existing common law breach of fiduciary duty claims to fit varied factual contexts where the essential harm is not financial, most courts have found various excuses not to do so.

Disturbingly, however, in areas of legal practice such as family law, personal injury practice, and criminal defense work, the most serious injuries to betrayed entrustors are frequently non-economic. Similarly, in the medical setting, the harm to patients caused by betrayal will usually be dignitary and will often (but not always) be accompanied by physical or emotional rather than purely economic harm. Because of the inapplicability of remedies such as malpractice, lack of informed consent, and breach of fiduciary duty where the harm is solely to an entrustor's dignitary interests, and because of the failure to adequately compensate when both dignitary and other harm is involved, legislatures should enact a statutory remedy for betrayal in order to give the entrustors a legal remedy for this distinctive and important harm. Such a remedy would serve the dual purposes of deterring future betrayals and providing justice by compensating betrayed entrustors.

While not all betrayals and conflicts of interest are as glaring as *Moore*, the dignitary harm from betrayal still deserves a remedy. We have demonstrated that the remedies currently available to those who have been harmed by a fiduciary are simply inadequate. Rather than expecting courts to bend the existing remedies to fit betrayals of trust, the legislature should provide a limited monetary remedy, along the lines of the proposed statutory tort set forth above. In such situations, a limited monetary remedy, set forth by statute, is one way to at least partially make the entrustor whole again. Adopting the proposed statutory tort of betrayal of trust would enable courts to provide such compensation while alleviating their concerns about turning every medical negligence claim into a breach of fiduciary claim, thereby risking double recovery and runaway juries.

The need for a limited statutory remedy grows more compelling every day. Doctors accepting illegal kickbacks and extravagant gifts from the pharmaceutical industry or investing in the medical technology they then recommend to their patients are one target.

Lawyers betraying the trust of clients by conditioning legal services on sexual favors or putting their own financial interest ahead of the physical freedom of their clients is another. Legislatures should enact our proposed statute in order to provide justice for those harmed by fiduciaries who have a mandate to be loyal and who betray their entrustors. Otherwise, victims of fiduciary disloyalty will continue to be left with no legal recourse. This grave injustice cries out for a remedy, for a tort of betrayal of trust.

