"Lawsuit For Sale": An Analysis of the Assignability of Legal Malpractice Claims

An issue with potentially far-reaching implications for all practicing attorneys was addressed in a recent Indiana Court of Appeals decision. In *Picadilly, Inc. v. Raikos*[1] the plaintiff-assignee, Charles Colvin, was injured in an automobile accident with a drunk driver who became intoxicated while patronizing Picadilly's bar. Colvin brought a dram shop action against Picadilly and was awarded $150,000 in punitive damages. While the appeal of the judgment of the dram shop action was pending, Picadilly filed a legal malpractice complaint against its attorneys, Raikos and Thomas. The theory in the malpractice action was "failure to exercise proper care in defending Picadilly [in the dram shop trial], 'including but not limited to a failure to properly preserve any objection to the Court's improper jury instructions on punitive damages.'"[2]

Shortly after the court of appeals affirmed the punitive damage award in the dram shop action, the trial court entered summary judgment in favor of the attorneys in the legal malpractice action and the attorneys appealed. Subsequently, a United States Bankruptcy Court entered an order confirming Picadilly's reorganization plan under Chapter 11 bankruptcy. The plan included a full discharge of the punitive damages debt to Colvin on the condition that Picadilly pay Colvin $5,000 and transfer its legal malpractice claim against Raikos and Thomas to him. The trial court's decision in the malpractice claim was on appeal at the time of the assignment. Consequently, when the legal malpractice action appeared before the court of appeals, Charles Colvin, as assignee, was the plaintiff.

Although the court of appeals affirmed the summary judgment in favor of the attorneys,[3] this Note focuses on the assignability of the malpractice claim. The issue of whether legal malpractice claims are assignable was one of first impression in Indiana.[4] After reviewing the arguments that have been advanced in other jurisdictions, the court of appeals held that such an assignment is valid under the circumstances.[5]

The purpose of this Note is to evaluate the various arguments and considerations regarding the assignability of legal malpractice claims.

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1. 555 N.E.2d 167 (Ind. Ct. App. 1990), *argued*, No. 41A01-8908-CV-311 (Ind. Feb. 20, 1991).
2. *Id.*
3. *Id.* at 170.
4. *Id.* at 168.
5. *Id.* at 169.

Section I reviews the background of legal malpractice and discusses the relevant characteristics of malpractice actions. Section II discusses the law of assignment and identifies the factors employed in determining whether a particular action is assignable. Arguments advanced by courts opposing the assignability of legal malpractice actions are described in Section III, and the arguments in support of these assignments are identified in Section IV. Section V proposes a resolution to the controversy surrounding this issue. This Section also suggests that encouraging the assignment of the judgment, rather than the legal malpractice action, is a viable compromise worthy of serious consideration.

I. The Law of Legal Malpractice

In order to recover on a claim of legal malpractice, a litigant must plead and prove every essential element thereof: duty, breach of duty, proximate cause, and damages.[6] With respect to the first element, a contractual relationship between the attorney and client is the usual basis for establishing a duty owed by the attorney.[7] It is possible, however, for nonclients to have standing to sue for legal malpractice. Many jurisdictions permit a plaintiff to assert a claim against an attorney despite the lack of an attorney-client relationship. In these jurisdictions, the duty owed by an attorney does not depend upon privity of contract between the plaintiff and the attorney.[8] Furthermore, several courts allow nonclients to assert legal malpractice claims by permitting the assignment of such actions.[9] These theories of extended liability stem from the erosion of the traditional theory that privity of contract is required to show that a duty is owed by the attorney.

A. Development of the Privity Requirement

Historically, courts did not allow the assertion of negligence actions in the absence of privity. The origin of this common-law rule dates back to the 1842 English decision, *Winterbottom v. Wright*.[10] In *Winterbottom*, a coach manufacturer was found not liable to a driver who suffered personal injuries because of a manufacturing defect.[11] The court

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6. D. Horan & G. Spellmire, Attorney Malpractice: Prevention and Defenses 11-1 (1987). *See also* Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 392, 394, 133 Cal. Rptr. 83, 85 (1976); Fiddler v. Hobbs, 475 N.E.2d 1172, 1173 (Ind. Ct. App. 1985).

7. *See, e.g.*, McGlone v. Lacey, 288 F. Supp. 622 (D.S.D. 1968); Bloomer Amusement Co. v. Eskenazi, 75 Ill. App. 3d 117, 394 N.E.2d 16 (1979).

8. *See infra* notes 33-43 and accompanying text.

9. *See infra* notes 119-23.

10. 152 Eng. Rep. 402 (1842).

11. *Id.* at 405.

reached its conclusion because privity of contract did not exist between the manufacturer and the driver:

> If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favour of the action is that this is a case of hardship; but that might have been obviated, if plaintiff had made himself a party to the contract.[12]

The privity requirement in the context of an attorney malpractice action was first addressed in *National Savings Bank v. Ward*.[13] The attorney in *Ward* negligently overlooked a previously recorded deed when he examined the title to real estate that was offered by his client as collateral for a loan. After the client defaulted on the loan payments, the bank tried unsuccessfully to obtain the property. The bank was subsequently precluded from recovering damages from the attorney even though it relied on his performance. The United States Supreme Court held that a legal malpractice action cannot be maintained by someone outside the attorney-client relationship, even if the third party's injury was proximately caused by the attorney's negligence.[14] As the Supreme Court stated:

> Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition [that there can be no liability in the absence of privity] of the defendant [attorney] must be sustained.[15]

The Supreme Court also acknowledged that neither fraud nor collusion was alleged by the plaintiff.[16] This recognition suggested an exception to the strict privity rule.

Currently, the rule followed in many states is that, in the absence of fraud or collusion, privity of contract is required to maintain a cause of action for legal malpractice.[17] Other states have expanded the scope

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12. *Id.*
13. 100 U.S. 195 (1879).
14. *Id.*
15. *Id.* at 200.
16. *Id.* at 199.
17. *See, e.g.*, Pelham v. Greisheimer, 92 Ill. 2d 13, 19, 440 N.E.2d 96, 99 (1982)

of the legal malpractice action, however, and have found liability in the absence of privity.[18]

B. Demise of the Privity Requirement

The privity requirement was first eroded in products liability actions. The court in *MacPherson v. Buick Motor Co.*[19] was the first to expressly disregard the privity rule. In *MacPherson*, the plaintiff purchased a car from a retail dealer and was injured when one of the wheels fell off. The plaintiff sued the car manufacturer for negligent inspection. Although a contractual relationship did not exist between the parties, the manufacturer was found to owe a duty to the plaintiff:[20]

> We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.[21]

The court reasoned that, by placing the product in the free flow of commerce, Buick Motor Company assumed responsibility based on the foreseeability of harm, rather than on contract principles.[22]

Courts quickly followed suit in other areas of the law. For example, the New York Court of Appeals found liability in the absence of privity in the area of negligent misrepresentation in *Glanzer v. Shepard*.[23] The court in *Glanzer* held a public weigher liable to a buyer who relied on a negligently issued certificate of weight, even though the seller hired

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("[t]he concept of privity has long protected attorneys from malpractice claims by non-clients"); Flaherty v. Weinberg, 303 Md. 115, 121, 492 A.2d 618, 620 (1985) (a "majority of American courts evidently continue to adhere to the view expressed . . . that absent fraud, collusion, or privity of contract, an attorney is not liable to a third party for professional malpractice"); Clagett v. Dacy, 47 Md. App. 23, 420 A.2d 1285 (1980); Eustis v. David Agency, Inc., 417 N.W.2d 295, 298 (Minn. Ct. App. 1987) ("an attorney will not be liable to a non-client third-party for negligence. Liability arises only if that attorney acted with fraud, malice, or has otherwise committed an intentional tort."); Council Commerce Corp. v. Schwartz, Sachs & Kamhi, P.C., 144 A.D.2d 494, 534 N.Y.S.2d 1 (1988); Scholler v. Scholler, 10 Ohio St. 3d 98, 462 N.E.2d 158 (1984); Dickey v. Jansen, 73 S.W.2d 581, 582-83 (Tex. Ct. App. 1987) ("Texas authorities have consistently held that third parties have no standing to sue attorneys on causes of action arising out of their representation of others.").

18. *See infra* notes 27-43 and accompanying text.
19. 217 N.Y. 382, 111 N.E. 1050 (1916).
20. *Id.* at 394, 111 N.E. at 1055.
21. *Id.* at 390, 111 N.E. at 1053.
22. *Id.*
23. 233 N.Y. 236, 135 N.E. 275 (1922).

the weigher to issue the certificate.[24] The court imposed liability in the absence of privity because the defendent-weigher knew that the buyer would rely on his certification.[25]

The privity requirement has also been overcome in attorney malpractice actions in several states.[26] California was the first to hold an attorney liable for negligence in the absence of privity. In *Biakanja v. Irving*,[27] the Supreme Court of California allowed recovery by a third party who was an intended beneficiary of a will that was never probated because of improper attestation.[28] This holding was followed three years later in *Lucas v. Hamm*,[29] in which the Supreme Court of California stated:

> As in *Biakanja*, one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of preventing future harm would be impaired.[30]

As a result of *Biakanja* and *Lucas*, attorneys are on notice of their potential liability to nonclients. *Heyer v. Flaig*,[31] another will-drafting case in California, further defined this extended liability. In *Heyer*, the court expressly recognized that a separate and distinct duty is owed to an intended beneficiary who is afforded all the remedies available in tort.[32] When such a duty arises, the attorney is liable for any breach which proximately caused the injuries suffered. Other jurisdictions followed California's lead and have found attorneys liable to nonclients when the action is based on one of the theories discussed below.

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24. *Id.* at 238, 135 N.E. at 275.

25. *Id.*

26. Many states still adhere to the strict privity requirement, however. *See supra* note 17 and accompanying text.

27. 49 Cal. 2d 647, 320 P.2d 16 (1958).

28. *Id.* at 650, 320 P.2d at 19.

29. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

30. *Id.* at 589, 364 P.2d at 688, 15 Cal. Rptr. at 824.

31. 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

32. *Id.* at 232-33, 449 P.2d at 167, 74 Cal. Rptr. at 231.

C. Theories of Liability in the Absence of Privity

Courts have recognized two theories for allowing recovery by third parties in legal malpractice actions. Some courts use a "balance of factors" test when determining attorney liability,[33] and others use an intended beneficiary theory of recovery.[34] Each theory works as a substitute for privity and gives rise to a duty owed by the attorney.

California has been the forerunner in establishing attorney liability to third parties under the "balance of factors" test. The following factors are considered:

> [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.[35]

This test determines whether the lawyer owes a duty to the nonclient and dictates the extension of liability.[36] Although other jurisdictions have adopted California's "balance of factors" test, it has been speculated that the test is nothing more than a rule of liability based on third party beneficiary theory.[37]

Many courts recognize the intended beneficiary exception to privity.[38] In rejecting California's balance of factors test, the Pennsylvania Supreme Court in *Guy v. Liederbach*[39] expressly adopted the intended beneficiary rule.[40] In *Guy*, the defendant-attorney was employed by the testator to

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33. *See* Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (1966); McAbee v. Edwards, 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976); Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354 (1984); Auric v. Continental Casualty Co., 111 Wis. 2d 507, 331 N.W.2d 325 (1983); Cifu, *Expanding Legal Malpractice to Nonclient Third Parties - At What Cost?*, 23 COLUM. J.L. & SOC. PROBS. 1, 11 n.63 (1989) (citing Franko v. Mitchell, 158 Ariz. 391, 762 P.2d 1345 (1988)).

34. *See, e.g.*, Pelham v. Griesheimer, 92 Ill. 2d 13, 440 N.E.2d 96 (1982); Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983). *See also* Davis, *Lawyers' Negligence Liability to Nonclients: A Texas Viewpoint*, 14 ST. MARY'S L.J. 405 (1983); Note, *Extending Legal Malpractice Liability to Nonclients - The Washington Supreme Court Considers the Privity Requirement,* 61 WASH. L. REV. 761 (1986).

35. Heyer v. Flaig, 70 Cal. 2d 223, 227, 449 P.2d 161, 164, 74 Cal. Rptr. 225, 228 (1969).

36. Baldock v. Green, 109 Cal. App. 3d 234, 239, 167 Cal. Rptr. 157, 160 (1980).

37. Note, *The Pelham Decision, Attorney Malpractice and Third Party Nonclient Recovery: The Rise and Fall of Privity,* 3 N. ILL. L. REV. 357 (1983).

38. *See supra* note 34.

39. 501 Pa. 47, 459 A.2d 744 (1983).

40. *Id.* at 59, 459 A.2d at 751.

prepare his will in which the plaintiff was named as a beneficiary. The plaintiff was barred from inheriting under the will, however, because she served as a witness to the document pursuant to the attorney's instructions. The Pennsylvania Court of Common Pleas sustained the attorney's demurrer and dismissed the complaint because of the lack of an attorney-client relationship.[41] In reversing the judgment of the Court of Common Pleas, the Superior Court of Pennsylvania stated, "[t]he better view, we believe, is that, under certain circumstances, an attorney may be liable for damage caused by his negligence to a person intended to be benefitted by his performance irrespective of any lack of privity."[42] The Supreme Court of Pennsylvania affirmed the judgment of the superior court and noted that the attorney and client must have intended to conduct the transaction for the benefit of the third party in order for him to qualify as an intended beneficiary.[43]

These two exceptions to the privity requirement enable nonclients to prove the element of duty owed by the attorney when asserting legal malpractice actions. Consequently, nonclients are no longer precluded from bringing such claims. After this extended liability was established, some jurisdictions began to allow nonclients to bring the action *on behalf* of the clients.[44] In these jurisdictions, clients can assign claims against their attorneys to a third party. Although such an arrangement differs from the exceptions to privity, the practice of assigning claims to nonclients could never have begun under the strict privity rule that only clients have standing to sue. Jurisdictions disagree as to whether legal malpractice claims should be assignable, and much of the debate revolves around the characteristics of the claim.

D. Characteristics of the Legal Malpractice Action

Usually, it is the attorney-client relationship that satisfies the element of duty owed by the attorney in a claim for legal malpractice.[45] A breach of that duty occurs when an attorney fails "to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."[46]

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41. *Id.* at 50, 459 A.2d at 746.

42. Guy v. Liederbach, 279 Pa. Super. 543, 546, 421 A.2d 333, 335 (1980), *modified*, 501 Pa. 47, 459 A.2d 744 (1983).

43. Guy Liederbach, 501 Pa. 47, 62, 459 A.2d 744, 752 (1983).

44. *See infra* notes 119-23 and accompanying text.

45. *But see supra* notes 33-43 and accompanying text (identifying two theories that give rise to a duty in the absence of an attorney-client relationship).

46. Lucas v. Hamm, 56 Cal. 2d 583, 591, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961).

> When such failure proximately causes damage, it gives rise to an action in tort. Since in the usual case, the attorney undertakes to perform his duties pursuant to a contract with the client, the attorney's failure to exercise the requisite skill and care is also a breach of an express or implied term of that contract. . . .[47]

Courts have asserted many different considerations in determining whether legal malpractice is a tort claim or a contract claim. Some jurisdictions focus on the uniquely personal nature of legal services and the highly personal relationship between attorneys and their clients. Consequently, these jurisdictions equate legal malpractice actions with torts involving personal injury or "wrongs done to the person of the injured party or his reputation or feelings."[48] Other courts focus on the damages suffered and recognize that legal malpractice does not result in personal injury, but concerns purely pecuniary interests.[49] These courts concentrate on the contractual nature of the action. Additionally, legal malpractice actions survive the death of either party.[50] Although not determinative, this feature is interesting given the common-law rule that "a cause of action in tort abates on death, but an action for breach of contract survives."[51]

The waiver of the attorney-client privilege is one final characteristic of legal malpractice claims that is vital to the issue of assignment:

> In the ordinary malpractice action brought by a client, the client may not sue for breach of the attorney's duties and also simultaneously prevent the attorney from defending himself by invoking the [attorney-client] privilege. The holder of the privilege, the client, implicitly waives the privilege by filing such a suit.[52]

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47. Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 392, 394, 133 Cal. Rptr. 83, 85 (1976).

48. *Id.* at 397, 133 Cal. Rptr. at 87. *See also* Clement v. Prestwich, 114 Ill. App. 3d 479, 480, 448 N.E.2d 1039, 1041 (1983) ("A client's claim for malpractice arises from this personal relationship and is a claim that his attorney has breached a personal duty owed to the client.").

49. *See, e.g.*, Thurston v. Continental Casualty Co., 567 A.2d 922, 923 (Me. 1989); Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 536, 539 A.2d 357, 359 (1988).

50. *See, e.g.*, Newman v. Gates, 165 Ind. 171, 72 N.E. 638 (1904); Saltmarsh v. Burmard, 151 Mich. App. 476, 391 N.W.2d 382 (1986); Citizens State Bank v. Shapiro, 575 S.W.2d 375 (Tex. Ct. App. 1978); Nellas v. Loucas, 156 W. Va. 77, 191 S.E.2d 160 (1972).

51. North Chicago St. Ry. v. Ackley, 171 Ill. 100, 105, 49 N.E. 223, 225 (1897). *See also* 1 R. MALLEN & J. SMITH, LEGAL MALPRACTICE 366 (3d. ed. 1989).

52. Kracht v. Perrin, Gartland & Doyle, 219 Cal. App. 3d 1019, 1024 n.6, 268 Cal. Rptr. 637, 641 n.6 (1990).

Thus, in defending against a legal malpractice claim, attorneys can reveal details of their interactions with clients, seemingly abrogating the attorney-client privilege. Such revelations may be critical in justifying the conduct of the attorney; therefore, this implied waiver of the attorney-client privilege affords the attorney a fair opportunity to assert a defense.

The characteristics of the legal malpractice action will aid in analyzing whether the claim should be assignable. Before embarking on that discussion, however, a review of the law of assignment is useful.

II. The Law of Assignment

A. Assigning Choses of Action

According to *Corbin on Contracts*, "[a]ssignments are transfers that substitute 'a new party as the focus of legal relations' with respect to the thing assigned."[53] Therefore, the assignment of a chose of action is a transfer of the legal right to assert a claim. Under early common law, a chose of action could not be assigned.[54] As a result of modern legislation and judicial interpretation, however, "[a]ssignability . . . is now the rule; nonassignability, the exception."[55]

The simultaneous expansion of assignment of claims and the demise of the privity requirement created favorable conditions for their combination in the assignment of legal malpractice claims. Although both enable a nonclient to bring the lawsuit,[56] the two concepts differ, as was indicated by the Supreme Court of Pennsylvania: "[p]rivity is *not* an issue in cases involving an assigned claim because the assignee stands in the shoes of the assignor and does not pursue the cause of action in the assignee's own right."[57] Consequently, the assignee acquires no more rights than were possessed by the assignor.[58] In determining whether an action is assignable, courts have examined several different considerations.

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53. 4 A. Corbin, Corbin on Contracts § 861 (1951), *quoted in* Essex v. Ryan, 446 N.E.2d 368, 374 (Ind. Ct. App. 1983).

54. *See, e.g.*, Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 392, 393, 133 Cal. Rptr. 83, 84 (1976); Annotation, *Assignability of Claim for Legal Malpractice*, 40 A.L.R. 4th 684, 685 (1985).

55. *Goodley*, 62 Cal. App. 3d at 393, 133 Cal. Rptr. at 84 (citations omitted).

56. *See generally* Clement v. Prestwich, 114 Ill. App. 3d 479, 480-81, 448 N.E.2d 1039, 1041 (1983).

57. Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 525, 539 A.2d 357, 358 (1988) (citing Gray v. Nationwide Mut. Ins. Co., 422 Pa. 500, 223 A.2d 8 (1966)).

58. *See, e.g.*, Essex v. Ryan, 446 N.E.2d 368, 374 (Ind. Ct. App. 1983).

B. Factors to Determine if Action is Assignable

When determining whether a particular action is assignable, courts consider factors such as the survivability of the action, the nature of the claim, and public policy. The survivability of the action is relevant because, "[a]s a general rule, actions which are deemed to survive death are assignable under the common law."[59] Courts have further established that actions arising from a contract or those arising from a tort to real or personal property survive the death of either party.[60] Conversely, claims involving torts against a person generally do not survive.[61] Therefore, under the survivability test, contract claims and claims for torts against property are assignable. The test also prescribes that claims for torts against a person are not assignable.

Another approach is to bypass the survivability test and to determine assignability according to the nature of the claim. The result, however, is essentially the same:

> [C]auses of action for personal injuries arising out of a tort are not assignable nor are those founded upon wrongs of a purely personal nature such as to the reputation or the feelings of the one injured. Assignable are choses of action arising out of an obligation or breach of contract as are those arising out of a violation of a right of property . . . or a wrong involving injury to personal or real property.[62]

In addition to the survivability test and the nature of the claim, courts also consider public policy in deciding whether to allow the assignment.[63] This additional element permits the court to consider the equities involved in the proposed assignment.[64] Consequently, when deciding whether a chose of action is assignable, courts look to the

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59. Joos v. Drillock, 127 Mich. App. 99, 102, 338 N.W.2d 736, 738 (1983). *See also* North Chicago St. Ry. Co. v. Ackley, 171 Ill. 100, 108, 49 N.E. 222, 225 (1897); Christison v. Jones, 83 Ill. App. 3d 334, 337, 405 N.E.2d 8, 10 (1980).

60. *See, e.g., North Chicago St. Ry. Co.*, 171 Ill. at 105, 49 N.E. at 225.

61. *Id.*

62. Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 392, 393-94, 133 Cal. Rptr. 83, 85 (1976). *See also* Oppel v. Empire Mut. Ins. Co., 517 F. Supp. 1305, 1307 (S.D.N.Y. 1981); Hedlund Mfg. Co., Inc. v. Weiser, Stapler & Spivak, 517 Pa. 522, 525-26, 539 A.2d 357, 358 (1988).

63. *Joos*, 127 Mich. App. at 104, 338 N.W.2d at 739. *See generally* Clement v. Prestwich, 114 Ill. App. 3d 479, 448 N.E.2d 1039 (1983); Picadilly, Inc. v. Raikos, 555 N.E.2d 167 (Ind. Ct. App. 1990), *argued*, No. 41A01-8908-CV-311 (Ind. Feb. 20, 1991); Chaffee v. Smith, 98 Nev. 222, 645 P.2d 966 (1982); Collins v. Fitzwater, 277 Or. 401, 560 P.2d 1074 (1977).

64. For a discussion of the public policy considerations regarding the assignment of legal malpractice claims, see *infra* notes 82-118 and 133-42 and accompanying text.

survivability of the action, the nature of the claim, and public policy concerns. The issue of whether a legal malpractice claim is assignable has only recently received attention.[65] Jurisdictions addressing the issue are divided on the propriety of such an assignment.

III. Arguments in Opposition to the Assignment of Legal Malpractice Claims

As stated above, actions which are deemed to survive death are generally assignable.[66] Furthermore, legal malpractice actions survive the death of either party.[67] Thus, the survivability test supports the theory that legal malpractice actions are assignable. The following jurisdictions have overcome this argument, however, in their assertion that such actions are not assignable: Arizona,[68] California,[69] Connecticut,[70] Florida,[71] Illinois,[72] Kentucky,[73] Michigan,[74] and Nevada.[75] Courts in these jurisdictions look beyond this common-law test of survivability and base their decisions on the two remaining factors that determine assignability: the nature of the claim and, more importantly, public policy.[76]

A. Nature of the Legal Malpractice Claim

The claim of legal malpractice resembles both a tort claim and a contract claim.[77] The basis for this disparity has been identified as follows:

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65. 1 R. Mallen & J. Smith, Legal Malpractice 368 (3d ed. 1989).

66. *See supra* note 59 and accompanying text.

67. *See supra* note 50 and accompanying text.

68. Schroeder v. Hudgins, 142 Ariz. 395, 690 P.2d 114 (1984).

69. Kracht v. Perrin, Gartland & Doyle, 219 Cal. App. 3d 1019, 268 Cal. Rptr. 637 (1990); Jackson v. Rogers & Wells, 210 Cal. App. 3d 336, 258 Cal. Rptr. 454 (1989); Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 392, 133 Cal. Rptr. 83 (1976).

70. Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves, 709 F. Supp. 44 (D. Conn. 1989) (supporting the nonassignment of legal malpractice claims in dicta).

71. Mickler v. Aaron, 490 So. 2d 1343 (Fla. Dist. Ct. App. 1986); Washington v. Fireman's Fund Ins. Co., 459 So. 2d 1148 (Fla. Dist. Ct. App. 1984).

72. Brocato v. Prairie State Farmers Ins. Ass'n, 166 Ill. App. 3d 986, 520 N.E.2d 1200 (1988); Clement v. Prestwich, 114 Ill. App. 3d 479, 448 N.E.2d 1039 (1983); Christison v. Jones, 83 Ill. App. 3d 334, 405 N.E.2d 8 (1980).

73. Coffey v. Jefferson County Bd. of Educ., 756 S.W.2d 155 (Ky. Ct. App. 1988).

74. American Employer's Ins. Co. v. Medical Protective Co., 165 Mich. App. 657, 419 N.W.2d 447 (1988); Moorhouse v. Ambassador Ins. Co., 147 Mich. App. 412, 383 N.W.2d 219 (1985); Joos v. Drillock, 127 Mich. App. 88, 338 N.W.2d 736 (1983).

75. Chaffee v. Smith, 98 Nev. 222, 645 P.2d 966 (1982).

76. Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 392, 133 Cal. Rptr. 83 (1976); *Christison*, 83 Ill. App. 3d at 334, 405 N.E.2d at 8; *Joos*, 127 Mich. App. at 99, 338 N.W.2d at 736; *Chaffee*, 98 Nev. at 222, 645 P.2d at 966.

77. *See supra* notes 48-49 and accompanying text.

> [The legal malpractice claim] is primarily a tort action for negligence based upon an attorney's failure to exercise a reasonable degree of skill and care in representing his client. Yet, the duty allegedly breached in such an action arose out of the establishment of the attorney-client relationship by a contract for legal services. As was noted previously, the injuries resulting from legal malpractice are not personal injuries, in the strict sense of injuries to the body, feelings or character of the client. Rather, they are pecuniary injuries to intangible property interests. While focus on these aspects of the malpractice cause of action might indicate placement of it under the class of tort actions for injury to personal property, such placement overlooks the personal nature of the relationship, with attendant duties, that exists between an attorney and client. It is a breach of those duties within the relationship which forms the real basis and substance of the malpractice suit.[78]

Although recognizing the dual nature of the claim, these courts maintain that it more closely resembles a tort action for purposes of assignment. For example, an appellate court in Illinois stated, "[t]he cause of action based upon legal malpractice is, in its essence, a tort action for negligence premised upon breach of the attorney's duties to his client."[79] Similarly, a California Court of Appeals noted, "the gravamen of [a legal malpractice action] is the negligent breach by defendants of a duty to plaintiff's assignor."[80]

The nature of the claim is only one reason these courts prohibit assignability. As one court stated, "the assignability of a cause of action must be based upon an analysis of the claim sought to be assigned as well as upon the public policy considerations involved."[81] In fact, public policy arguments are the primary focus in these jurisdictions.[82]

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78. Christison v. Jones, 83 Ill. App. 3d 334, 338, 405 N.E.2d 8, 10 (1980) (citation omitted). *See also* Schroeder v. Hudgins, 142 Ariz. 395, 399, 690 P.2d 114, 118 (1984); Kracht v. Perrin, Gartland & Doyle, 219 Cal. App. 3d 1019, 1024, 268 Cal. Rptr. 637, 640 (1990); Jackson v. Rogers & Wells, 210 Cal. App. 3d 336, 342, 258 Cal. Rptr. 454, 457 (1989); *Goodley*, 62 Cal. App. 3d at 397, 133 Cal. Rptr. at 87; *Joos*, 127 Mich. App. at 105-06, 338 N.W.2d at 739.

79. *Christison*, 83 Ill. App. 3d. at 336, 405 N.E.2d at 9.

80. *Goodley*, 62 Cal. App. 3d at 395, 133 Cal. Rptr. at 86.

81. Joos v. Drillock, 127 Mich. App. 99, 104, 338 N.W.2d 736, 739 (1983).

82. *See generally* Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 392, 133 Cal. Rptr. 83 (1976); Washington v. Fireman's Fund Ins. Co., 459 So. 2d 1148 (Fla. Dist. Ct. App. 1984); Clement v. Prestwich, 114 Ill. App. 3d 479, 448 N.E.2d 1039 (1983); *Christison*, 83 Ill. App. 3d at 334, 405 N.E.2d at 8; Moorhouse v. Ambassador Ins. Co., 147 Mich. App. 412, 383 N.W.2d 219 (1985); *Joos*, 127 Mich. App. at 99, 338 N.W.2d at 736.

B. Public Policy Considerations

Courts opposing the assignment of legal malpractice claims assert several public policy concerns in support of their position including: (1) the sanctity of the attorney-client relationship; (2) the preservation of the attorney-client privilege; (3) the potential for commercialization; (4) the risk of collusion; and (5) the illogical arguments asserted by the assignee.

1. Sanctity of the Attorney-Client Relationship.—The relationship between an attorney and a client has been the primary focus of courts opposing assignment. These courts cite the "uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises."[83] This concern was apparent in *Goodley v. Wank & Wank, Inc.*[84] In *Goodley*, the assignor, Eleanor Katz, was represented by the law firm of Wank & Wank in a divorce proceeding. Wank & Wank negligently advised Katz that she need not give her husband's life insurance policies to them for safekeeping or obtain a court order precluding her husband from changing the terms. Her husband subsequently found and cancelled the policies. Shortly thereafter, he died. Katz then assigned her legal malpractice action against Wank & Wank to Harry Goodley.[85] In sustaining the defendants' motion for summary judgment, the California Court of Appeals recognized the importance of the attorney-client relationship, stating, "[t]he relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity. . . ."[86]

The Illinois Court of Appeals in *Christison v. Jones*[87] asserted the same sentiment. Christison was a trustee in bankruptcy and claimed ownership to any cause of action for legal malpractice which the bankrupt might have against the attorney, Jones. Jones was allegedly negligent in his representation of the bankrupt in litigation prior to the bankruptcy. In ruling against the assignability of the legal malpractice claim, the *Christison* court cited public policy concerns regarding the fiduciary relationship between the attorney and the client and stated, "[t]he relationship is a confidential one to be highly honored and guarded by

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83. *Joos*, 127 Mich. App. at 103, 338 N.W.2d at 738 (quoting *Goodley*, 62 Cal. App. 3d at 395, 133 Cal. Rptr. at 86). *See also* Jackson v. Rogers & Wells, 210 Cal. App. 3d 340, 342, 258 Cal. Rptr. 454, 457 (1989).

84. 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (1976).

85. *Id.* It is unclear from the opinion why Katz assigned her claim to Harry Goodley.

86. *Id.* at 395, 133 Cal. Rptr. at 86 (quoting Cox v. Delmas, 99 Cal. 104, 123, 33 P. 836, 839 (1893)).

87. 83 Ill. App. 3d 334, 405 N.E.2d 8 (1980).

the attorney."[88] Courts have also illustrated the uniquely personal nature of the attorney-client relationship by noting that legal services performed by an attorney are not delegable without the client's prior consent.[89] In reality, the confidential and highly personal nature of this relationship has been of paramount concern when courts disallow assignment.[90]

The apparent looseness of a particular attorney-client relationship may be irrelevant. An appellate court in Michigan expressly recognized this irrelevancy by refusing to examine the closeness of the particular attorney-client relationship at issue.[91] According to the court in *Moorhouse v. Ambassador Insurance Co.*,[92] such an approach would lead "to the impossible task of dissecting the closeness of an attorney-client relationship in evaluating the validity of every assignment of a cause of action for legal malpractice."[93]

Some courts state that the decision to assert a legal malpractice claim is uniquely within the discretion of the client.[94] This principle also underlies the decision of the Supreme Court of Nevada in *Chaffee v. Smith*.[95] In *Chaffee*, the assigned claim had not yet been asserted by the client-assignor. The court disallowed the assignment stating, "[t]he decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client."[96] The court expressly reserved its opinion regarding the assignment of a previously asserted legal malpractice claim.[97] The preservation of the attorney-client privilege is another public policy consideration used by some courts that disallow assignment.

2. Preservation of the Attorney-Client Privilege.—Clients who bring legal malpractice actions implicitly waive the right to assert the attorney-

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88. *Id.* at 338, 405 N.E.2d at 10-11.

89. *See, e.g.*, Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 389, 396, 133 Cal. Rptr. 83, 86 (1976); *Christison*, 83 Ill. App. 3d at 338, 405 N.E.2d at 11.

90. *See generally* Schroeder v. Hudgins, 142 Ariz. 395, 399, 690 P.2d 114, 118 (1984); Mickler v. Aaron, 490 So. 2d 1343, 1344 (Fla. Dist. Ct. App. 1986); Washington v. Fireman's Fund Ins. Co., 459 So. 2d 1148, 1149 (Fla. Dist. Ct. App. 1984); Brocato v. Prairie State Farmers Ins. Ass'n, 166 Ill. App. 3d 986, 989, 520 N.E.2d 1200, 1201 (1988); Moorhouse v. Ambassador Ins. Co., 147 Mich. App. 412, 414, 383 N.W.2d 219, 221 (1985) ("the entire *Joos* decision hinged on just such a close, personal relationship"); Joos v. Drillock, 127 Mich. App. 99, 105, 338 N.W.2d 736, 739 (1983).

91. Moorhouse v. Ambassador Ins. Co., 147 Mich. App. 412, 383 N.W.2d 219 (1985).

92. *Id.*

93. *Id.* at 414, 383 N.W.2d at 221.

94. *See, e.g.*, Christison v. Jones, 83 Ill. App. 3d 334, 339, 405 N.E.2d 8, 11 (1980).

95. 98 Nev. 222, 645 P.2d 966 (1982).

96. *Id.* at 224, 645 P.2d at 966.

97. *Id.*

client privilege.[98] This privilege is not waived, however, when someone other than the client files the suit.[99] Consequently, the attorney-client privilege is preserved when the malpractice claim is involuntarily assigned.

For example, in *Kracht v. Perrin, Gartland & Doyle*,[100] Brenda Kracht, the nonclient-assignee, filed a complaint against Charles Hogue, the client-assignor. Hogue retained the services of the law firm Perrin, Gartland & Doyle to defend him against Kracht's lawsuit. During the course of the proceedings, the opposing attorneys failed to adequately respond to discovery requests made by Kracht. As a result of this failure to respond, judgment was entered in favor of Kracht.[101]

Kracht contended that the deficient discovery responses by Hogue were proximately caused by the negligence of Hogue's attorneys and that if the attorneys had exercised proper skill and care in their representation, the judgment in favor of Kracht would not have been entered. Kracht subsequently sought and won a court order compelling Hogue to assign the choses of action he held against his attorneys to Kracht. Kracht then filed a claim for legal malpractice against Hogue's attorneys. Because Hogue did not bring the legal malpractice action, his attorneys were bound by their privileged relationship with him. In ruling against the assignment of the claim, the *Kracht* court focused on the involuntary nature of the assignment: "[a]n involuntary assignment thus unfairly prejudices either the attorney (by precluding any defense based on privileged communications) or the client (by permitting the assignee to waive the privilege without the client's consent)."[102] In addition to considering the importance of the attorney-client relationship and privilege, courts cite the problems of potential commercialization as a rationale for opposing the assignment of legal malpractice actions.

3. Potential for Commercialization.—The court in *Goodley v. Wank & Wank, Inc.*[103] identified potential abuses due to assignment:

> The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The

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98. *See supra* note 52 and accompanying text.

99. Kracht v. Perrin, Gartland & Doyle, 219 Cal. App. 3d 1019, 1024 n.6, 268 Cal. Rptr. 637, 641 n.6 (1990).

100. 219 Cal. App. 3d 1019, 268 Cal. Rptr. 637 (1990).

101. *Id.* at 1021, 268 Cal. Rptr. at 638.

102. *Id.* at 1024 n.6, 268 Cal. Rptr. at 641 n.6.

103. 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (1976).

> commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.[104]

According to the *Goodley* court and the other courts that have cited this language with approval,[105] legal malpractice actions will become commercialized if they are made assignable. Malpractice claims will become a commodity to be bought and sold to the highest bidder, malpractice litigation will increase, and attorneys will be forced to defend against strangers.[106] Furthermore, there will be a decrease in the availability of legal services because attorneys will be more selective in accepting new clients. Assignment will thereby render a disservice to both the profession and the public.[107] Malpractice premiums might also rise.[108] In addition to commercializing legal malpractice actions, assignments may encourage collusion.

4. Risk of Collusion.—At least one court has disallowed the assignment of legal malpractice claims because of the risk of collusion.[109] In *Coffey v. Jefferson County Board of Education*,[110] the client-assignor was a defendant in a negligence action brought by the nonclient-assignee.

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104. *Id.* at 397, 133 Cal. Rptr. at 87.

105. Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves, 709 F. Supp. 44, 50-51 (D. Conn. 1989); Jackson v. Rogers & Wells, 210 Cal. App. 3d 340, 343, 258 Cal. Rptr. 454, 458 (1989); Brocato v. Prairie State Farmers Ins. Ass'n, 166 Ill. App. 3d 986, 989, 520 N.E.2d 1200, 1202 (1988); Clement v. Prestwich, 114 Ill. App. 3d 479, 481, 448 N.E.2d 1039, 1041-42 (1983); Joos v. Drillock, 127 Mich. App. 99, 103, 338 N.W.2d 736, 738 (1983).

106. *Goodley*, 62 Cal. App. 3d at 397, 133 Cal. Rptr. at 87.

107. *Id.*

108. Kracht v. Perrin, Gartland & Doyle, 219 Cal. App. 3d 1019, 1023, 268 Cal. Rptr. 637, 640 (1990); *Jackson*, 210 Cal. App. 3d at 348, 258 Cal. Rptr. at 461.

109. Coffey v. Jefferson County Bd. of Educ., 756 S.W.2d 155 (Ky. Ct. App. 1988).

110. *Id.*

On the day of the trial, the client-assignor appeared before the court and confessed a judgment of $1,000,000. At the same time, he attempted to assign all claims he had for legal malpractice against his former attorneys to the nonclient-assignee. Because the court did not enter a judgment in the original action, it found that there was no proof that the client-assignor suffered actual damage from the alleged malpractice.[111] The court went on to say, "[i]n addition, it appears to us that this transaction is so collusive that same should be held to be against public policy."[112]

As *Coffey* illustrates, the nonclient-assignee and the client-assignor may enter into a collusive agreement whereby the client admits liability or agrees to settle, in exchange for which the nonclient accepts the assignment of a legal malpractice action as satisfaction of that judgment. Relief from the costs and inconveniences of defending a lawsuit gives the client-assignor an incentive to enter the agreement, even in the absence of actual negligence by the attorney. Because the client-assignor may be insolvent or have limited assets, the nonclient-assignee will have a similar incentive to enter the agreement. Consequently, because the assignor and the assignee may engage in collusion when assigning the action, assignment has been held to violate public policy.[113]

5. Illogical Arguments Asserted by Assignee.—The context of the proposed assignment is often one in which the nonclient-assignee has brought an action and has prevailed against the client-assignor.[114] In these situations, the assignor's action for legal malpractice involves alleged negligence by the attorney in defending the client in the action brought by the nonclient.[115] Such an assignment produces illogical and contradictory arguments by the nonclient-assignee in the subsequent legal malpractice lawsuit. These arguments may directly contradict those advanced in the original lawsuit against the client-assignor. As the California Court of Appeals stated in *Kracht*:

> [A] malpractice suit filed by the former adversary is "fraught with illogic" and unseemly arguments: In the former lawsuit [the nonclient-assignee] judicially averred and prove she *was*

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111. *Id.* at 156-57.

112. *Id.* at 157.

113. *Id.*

114. *See, e.g.*, Kracht v. Perrin, Gartland & Doyle, 219 Cal. App. 3d 1019, 268 Cal. Rptr. 637 (1990); Jackson v. Rogers & Wells, 210 Cal. App. 3d 340, 258 Cal. Rptr. 455 (1989); Clement v. Prestwich, 114 Ill. App. 3d 479, 448 N.E.2d 1039 (1983); Picadilly, Inc. v. Raikos, 555 N.E.2d 167 (Ind. Ct. App. 1990); Moorhouse v. Ambassador Ins. Co., 147 Mich. App. 412, 383 N.W.2d 219 (1985); Chaffee v. Smith, 98 Nev. 222, 645 P.2d 966 (1982).

115. *See supra* note 114.

> *entitled* to recover against [the client-assignor]; but in the legal malpractice lawsuit [the nonclient-assignee] must judicially aver that, but for attorney's negligence, she *was not entitled* to have recovered against [the client-assignor]. Reduced to its essence, [the nonclient-assignee's] argument in the malpractice action is "To the extent I was not entitled to recover, I am now entitled to recover."[116]

This problem was also recognized in the concurring opinion in *Picadilly, Inc. v. Raikos*.[117] This opinion noted that to allow such a collateral attack against a judgment may lead to a practice whereby defeated defendants routinely assign legal malpractice claims as a means of satisfying the judgments against them.[118] Illogical arguments and collateral attacks against judgments will be eliminated if the assignment of legal malpractice claims is not allowed.

The above considerations are used to varying degrees by courts that oppose assignability, but the courts all agree that public policy prohibits such a practice. These arguments are found unpersuasive, however, by those courts that allow such assignments.

IV. Arguments in Support of the Assignment of Legal Malpractice Claims

Courts consider three factors in determining whether a chose of action is assignable: the survivability of the action, the nature of the claim, and public policy concerns. Although the test of survivability supports the assignment of legal malpractice claims, it is rarely cited by those courts allowing such assignments. Instead, courts ruling in favor of the assignability of the actions have focused on the nature of the claim and public policy considerations. The following states have allowed the assignment of legal malpractice actions: Indiana,[119] Maine,[120] New York,[121] Oregon,[122] and Pennsylvania.[123]

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116. *Kracht*, 219 Cal. App. 3d at 1025, 268 Cal. Rptr. at 641 (emphasis in original).

117. 555 N.E.2d 167, 171 (Ind. Ct. App. 1990) (Baker, J., concurring), *argued*, No. 41A01-8908-CV-311 (Ind. Feb. 20, 1991).

118. *Id.*

119. *Id.* at 167.

120. Thurston v. Continental Casualty Co., 567 A.2d 922 (Me. 1989).

121. Oppel v. Empire Mut. Ins. Co., 517 F. Supp. 1305 (S.D.N.Y 1981); American Hemisphere Marine Agencies, Inc. v. Kreis, 40 Misc. 2d 1090, 244 N.Y.S.2d 602 (1963).

122. Collins v. Fitzwater, 277 Or. 401, 560 P.2d 1074 (1977).

123. Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 539 A.2d 357 (1988).

A. Nature of the Legal Malpractice Claim

Most jurisdictions favoring assignability cite the nature of the claim in their analyses.[124] These courts note the economic, rather than personal, nature of the harm alleged.[125] The court in *Hedlund Manufacturing Co. v. Weiser, Stapler & Spivak*[126] expounded upon this theory. The dispute arose after Mervin Martin sold his business to Hedlund Manufacturing Company. Along with his business, Martin turned over his rights to use and license a pending patent he owned on a manure spreader that he invented and manufactured. After the sale was complete, the parties learned that the patent was denied because Martin's attorneys neglected to file the application on time. Subsequently, Martin assigned his cause of action for legal malpractice to Hedlund Manufacturing.

In deciding whether to allow the assignment, the *Hedlund* court recognized that "the court must determine whether the claim is for damages or personal injury. This inquiry is critical to the viability of the assigned cause of action in that we do not permit the assignment of a cause of action to recover for personal injuries."[127] The court concluded that the assignment was valid because the damages resulting from legal malpractice were pecuniary in nature.[128] The claim asserted more closely resembled an action involving property rights than one for personal rights.[129]

Similar reasoning was used in *Oppel v. Empire Mutual Insurance Co.*[130] In *Oppel*, the assignee's young son was seriously injured when he was struck by the assignor's car. The nonclient-assignee offered to settle for the $10,000 limit on the client-assignor's car insurance policy with Empire Mutual Insurance Company. Empire Mutual expressed a willingness to settle for about $500 less than the policy limit. The nonclient-assignee alleged that the settlement amounted to bad faith and thus, brought an action against the client-assignor resulting in an award of $420,850 in damages.[131]

Subsequently, the client-assignor transferred his malpractice actions against Empire Mutual and his attorney to the nonclient-assignee. In approving the assignment, the court noted, "[h]ere there is no allegation

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124. *See, e.g.*, *Oppel*, 517 F. Supp. at 1307; *Thurston*, 567 A.2d at 923; *American Hemisphere*, 40 Misc. 2d at 1092, 244 N.Y.S.2d at 604; *Hedlund Mfg. Co.*, 517 Pa. at 525, 539 A.2d at 358-59.

125. *See, e.g.*, Thurston v. Continental Casualty Co., 567 A.2d 922, 923 (Me. 1989).

126. 517 Pa. 522, 539 A.2d 357 (1988).

127. *Id.* at 525, 539 A.2d at 358.

128. *Id.* at 526, 539 A.2d at 359.

129. *Id.*

130. 517 F. Supp. 1305 (S.D.N.Y. 1981).

131. *Id.* at 1306.

that the attorney's acts caused any personal injury, only pecuniary. This claim is also assignable."[132] Jurisdictions allowing the assignment of legal malpractice actions also justify their conclusions by citing public policy considerations.

B. Public Policy Considerations

The public policy considerations articulated by jurisdictions allowing the assignment of legal malpractice claims differ from those used by the states opposing it. Efficiency and equity are the chief policy considerations expressed by courts that allow assignment.

1. Efficiency.—The Supreme Court of Maine in *Thurston v. Continental Casualty Co.*[133] recognized efficiency as an advantage of assigning legal malpractice claims. In *Thurston*, the nonclient-assignee brought a products liability action against 3K Kamper Ko., the client-assignor. Inadequate legal representation and misconduct on the part of 3K's attorneys allegedly caused the nonclient-assignee to be awarded an amount in excess of 3K's insurance policy limit. Because 3K could not pay the excess judgment, it agreed to assign all its choses of action against its attorney to the nonclient-assignee.

In rejecting an argument regarding the sanctity of the attorney-client relationship, the court stated:

> The argument that legal services are personal and involve confidential attorney-client relationships does not justify preventing a client like 3K from realizing the value of its malpractice claim in what may be the most efficient way possible, namely, its assignment to someone else with a clear interest in the claim who also has the time, energy and resources to bring the suit.[134]

The court was persuaded that the expenditures required to maintain a malpractice action should be incurred by the party most able to afford them.[135] The court also considered the equities involved before ruling in favor of the proposed assignment.[136]

2. Equity.—The *Thurston* court dismissed the concern that legal malpractice actions would become commercialized[137] by noting that the nonclient-assignee had an "intimate connection with the underlying lawsuit."[138] The *Picadilly* court similarly disregarded this concern by noting

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132. *Id.* at 1307.
133. 567 A.2d 922 (Me. 1989).
134. *Id.*, *quoted in* Picadilly, Inc. v Raikos, 555 N.E.2d 167 (Ind. Ct. App. 1990).
135. *Id.* at 923.
133. *Id.*
137. *See supra* notes 103-08 and accompanying text.
138. Thurston v. Continental Casualty, Co., 567 A.2d 922, 923 (Me. 1989).

that the client-assignor asserted the legal malpractice claim before assigning it and that the discovery process had already factually developed the case.[139]

In addition to rejecting the public policy concerns professed by other jurisdictions about the potential for commercialization, these jurisdictions considered equitable policy concerns of their own. For example, in *Collins v. Fitzwater*,[140] an attorney negligently drafted the interest-bearing promissory notes issued by a corporation for which the client-assignor served as a director. It was later determined that the notes qualified as unregistered securities. Consequently, the client-assignor was held liable under the Blue Sky Law to the purchasers of these unregistered securities. As a means of avoiding bankruptcy, the client-assignor negotiated covenants not to execute them with the purchasers, in exchange for an assignment of the legal malpractice action against his attorney.

In allowing the assignment of the action, the *Collins* court focused on the inequities of the situation:

> As a matter of necessity, laymen who act as corporate directors must often rely upon the expertise and diligence of corporate counsel when intricate legal questions are at issue. When a corporate attorney errs in the performance of his legal duties, we can think of no reason why the laymen rather than the attorney should bear the ultimate burden of the error. Therefore, we conclude that public policy does not prohibit a nonculpable director from seeking indemnification from a culpable attorney through a suit for legal malpractice, or otherwise. Similarly, since [the client-assignor] had a valid claim against the [attorney], we believe that [the nonclient-assignees'] assignment gave them an enforceable right of action, and that that assignment is not void as against public policy.[141]

This equitable sentiment was also expressed by the court in *Hedlund*:

> We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected.[142]

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139. Picadilly, Inc. v. Raikos, 555 N.E.2d 167, 169 (Ind. Ct. App. 1990), *argued*, No. 41A01-8908-CV-311 (Ind. Feb. 20, 1991).

140. 277 Or. 401, 560 P.2d 1074 (1977).

141. *Id.* at 406, 560 P.2d at 1078.

142. Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 517 Pa. 522, 526, 539 A.2d 357, 359 (1988).

These courts allow the assignment of legal malpractice claims as a means of holding attorneys accountable for their malpractice. These public policy concerns, the advantage of efficiency, and the inherent nature of the claim, constitute the reasons asserted by those jurisdictions in the minority that allow legal malpractice actions to be assigned.

V. Suggested Resolution: Assignment of Judgments

Courts deciding against the assignability of legal malpractice actions, as well as those deciding in favor of it, have identified compelling arguments in support of their respective positions. A viable compromise is to assign the resulting *judgments* of legal malpractice actions, rather than assigning the choses of action.

A. Background on the Assignment of Judgments

Under early common law, judgments could not be assigned.[143] As with the assignment of choses of action,[144] however, this rule was often modified by legislation and judicial interpretation.[145] Indiana Code section 34-1-31-1 provides an example of legislation that establishes the propriety of the assignment of judgments:

> Vesting of title in assignee: Judgments and decrees of a court of record for the recovery of money may be assigned by the plaintiff or complainant. The assignees successively on or attached to the entry of the judgment or decree and the assignment, when attested by the clerk of the court, or vests the title to the judgment or decree in each assignee successively.[146]

The assignee succeeds to the ownership of the judgment and to all of the rights of the assignor therein.[147] Statutory provisions, such as Indiana Code section 34-1-31-4, enable assignees to assert actions on the judgment in their own names.[148] Similarly, the assignee takes the judgment subject to the defenses that could have been used against the judgment when it was owned by the assignor.[149] The assignor is divested of all rights and interests in the judgment.[150]

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143. Baker v. Wood, 157 U.S. 212 (1895).

144. *See supra* notes 54-55 and accompanying text.

145. *See, e.g.*, Boyd v. Sloan, 335 Mo. 163, 71 S.W.2d 1065 (1934).

146. Ind. Code § 34-1-31-1 (1988).

147. *See, e.g.*, Moorman v. Wood, 117 Ind. 144, 19 N.E. 739 (1888).

148. Ind. Code § 34-1-31-4 (1988) ("Any action which the plaintiff of complainant in such judgment or decree might have thereon, may be maintained in the name of the assignee.").

149. *See, e.g.*, Frankel v. Garrard, 160 Ind. 209, 66 N.E. 687 (1902).

150. *Moorman*, 117 Ind. at 144, 19 N.E. at 739.

A judgment may be assigned any time after it is entered in the trial court, even if an appeal is pending.[151] It is not enforceable, however, until it is final.[152] An assigned *judgment* would be effective even in those jurisdictions that have ruled against the assignability of legal malpractice *claims* because "[e]ven though a cause of action is one which is not deemed to be assignable, a final judgment into which such cause of action in tort is merged may be assigned."[153]

The assignability of a legal malpractice judgment was recently addressed in Michigan in *Weston v. Dowty*.[154] In *Weston*, the Michigan Court of Appeals allowed the assignment of the *judgment* even though Michigan consistently rules against the assignability of legal malpractice *choses of action*.[155] In *Weston*, the assignor was a defendant in a personal injury lawsuit in which he was represented by attorneys Dowty and Schlussel. Because the attorneys failed to comply with discovery orders, a default judgment was entered against the client-assignor. Before a trial was held on the issue of damages, the client-assignor and the plaintiffs to the personal injury action entered into a consent judgment in the amount of $200,000. In the consent judgment, the client-assignor agreed to file a legal malpractice claim against his attorneys and to give any monies awarded to him in a judgment to the nonclient-assignees, less costs and attorney fees. The attorneys filed a motion for summary judgment in the legal malpractice action, asserting that the consent judgment was the assignment of a legal malpractice claim and was, therefore, invalid. The court disagreed with the attorneys and upheld the assignment of the judgment pursuant to the terms of the consent judgment.[156]

The *Weston* court acknowledged that *Joos v. Drillock*[157] and *Moorhouse v. Ambassador Insurance Co.*[158] prohibited the assignment of legal malpractice actions.[159] It distinguished the case at bar stating, "In the instant case, [the client-assignor] did not assign the claim or cause of action to [the nonclient-assignee]. [The client-assignor] merely agreed to give [the nonclient-assignee] any proceeds recovered."[160] Additionally,

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151. *See, e.g.*, Bias v. Ohio Farmers Indem. Co., 28 Cal. App. 2d 14, 81 P.2d 1057 (1938).

152. *See, e.g.*, Pacific Gas & Elec. Co. v. Nakano, 12 Cal. 2d 711, 87 P.2d 700 (1939).

153. 46 AM. JUR. 2D *Judgments* § 884 (1969).

154. 163 Mich. App. 238, 414 N.W.2d 165 (1987).

155. *See supra* note 74.

156. *Weston*, 163 Mich. App. at 241, 414 N.W.2d at 166.

157. 127 Mich. App. 99, 338 N.W.2d 736 (1983).

158. 147 Mich. App. 412, 383 N.W.2d 219 (1985).

159. Weston v. Dowty, 163 Mich. App. 238, 241-42, 414 N.W.2d 165, 166-67 (1987).

160. *Id.* at 242, 414 N.W.2d at 167.

the client-assignor maintained the legal malpractice lawsuit himself. For these reasons, the court found that it was not bound by the holdings in *Joos* and *Moorhouse*.[161] Because the right to assert the action was vested in the client-assignor, the assignment of the judgment was upheld.[162]

The result in *Weston v. Dowty* illustrates a viable compromise to the issue of whether legal malpractice actions should be assignable. Courts have analyzed three factors in deciding the assignability of particular actions: the survivability of the action, the nature of the claim, and public policy considerations. Currently, little emphasis is placed on the survivability of the action. The nature of the claim is also nondeterminative because legal malpractice claims resemble both negligence claims and actions for breach of contract.[163] Thus, courts have difficulty labeling the action as either a tort or contract claim. Because of these deficiencies, most decisions are based on public policy considerations. Michigan prohibits the assignment of legal malpractice actions and allows the assignment of legal malpractice judgments.[164] This approach addresses the public policy concerns advanced by both courts that oppose the assignability of the claim and those that support it.

B. Public Policy Considerations in Opposition to the Assignment of the Action

1. Sanctity of the Attorney-Client Relationship.—The importance of the attorney-client relationship is the primary reason the court disallowed the assignment of the legal malpractice claim in *Goodley v. Wank & Wank, Inc.*[165] The attorneys in *Goodley* breached their fiduciary duty when they gave the client-assignor erroneous advice. The court ruled against the assignment of the claim because the personal nature of the attorney-client relationship gave rise to the duty that was breached.[166] Because the attorneys did not owe a duty to the nonclient-assignee, the nonclient was not allowed to bring the action.[167] If the judgment is assigned, however, the client-assignor will maintain the malpractice claim through its final disposition. The attorneys will then be defending against

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161. *Id.*
162. *Id.*
163. *See supra* notes 48-49 and accompanying text.
164. *See supra* note 74 (legal malpractice claims are not assignable). *But see* Weston v. Dowty, 163 Mich. App. 238, 414 N.W.2d 165 (1987) (legal malpractice judgments are assignable).
165. 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (1976).
166. *Id.* at 395, 133 Cal. Rptr. at 86.
167. *Id.*

the party to whom they owed the fiduciary duty, rather than defending against strangers.

Another advantage to the assignment of the judgment is its consistency with the common-law rule that only those in privity with the attorney can sue for legal malpractice.[168] Unlike *Goodley,* in which a nonclient maintained the action, this proposed resolution ensures that only a client will assert a malpractice claim.[169] Furthermore, the decision whether to pursue the action will remain with the client. Assigning the judgment satisfies these objectives because nothing is transferred until a judgment is entered in favor of the client-assignor. Therefore, this suggested resolution respects the importance of the attorney-client relationship.

2. Preservation of the Attorney-Client Privilege.—The court in *Kracht v. Perrin, Gartland & Doyle*[170] held that legal malpractice claims may not be involuntarily assigned because the attorney-client privilege has not been waived.[171] In *Kracht*, the nonclient-assignee sought a court order compelling the client to assign all actions against his attorneys to the nonclient-assignee. In ruling against the assignability of the claim, the court focused on preserving the attorney-client privilege. Had the assignment been upheld, the attorney would have been bound by the privilege and unable to put forth a fair defense.

Assigning the judgment will alleviate this policy concern. Because the malpractice action against the attorney will be brought by the client-assignor, the attorney-client privilege will be impliedly waived. For example, in *Kracht,* the attorney could have used previously privileged information to assert a fair defense against his former client. Because the attorney-client privilege is not preserved when the judgment is assigned, this policy consideration will not be at issue.

3. Potential for Commercialization.—Assigning a judgment does not generate the same potential abuses that may result from assigning the action. The inherent risks in the assignment of the claim were identified by the court in *Goodley v. Wank & Wank, Inc.*[172] The court in *Goodley* was concerned that assignments will create an economic market in which legal malpractice actions will serve as commodities.[173] According to the

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168. *See supra* note 17 and accompanying text.

169. A nonclient may be able to assert such a claim, however, if the theory falls into one of the two exceptions to privity: the "balance of factors" test or the third party beneficiary theory. *See supra* notes 33-43 and accompanying text.

170. 219 Cal. App. 3d 1019, 268 Cal. Rptr. 637 (1990).

171. *Id.* at 1025, 268 Cal. Rptr. at 641.

172. 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (1976).

173. *Id.* at 397, 133 Cal. Rptr. at 87.

court, such a market could result in an increase in unjustified lawsuits and a decrease in available legal services.[174]

An assignment of the judgment does not take place until the judgment is final. The nonclient-assignee will agree to the assignment only if the final judgment is in favor of the client-assignor. Prevailing in the legal malpractice action is a prerequisite for the client-assignor to be able to use the assignment to satisfy a debt owed to the nonclient. Consequently, the malpractice action will be instituted only if the client-assignor has a fair chance of prevailing. Unlike the assignment of the claim, assigning the judgment places the risk of losing the malpractice lawsuit on the client-assignor. This decreases both the number of assignments and the number of malpractice lawsuits litigated. Therefore, the overburdened judicial system will be afforded some relief if the judgment, rather than the action, is assigned. Unjustified lawsuits will also decrease because the client-assignor will not bring the malpractice suit unless the chances of prevailing are favorable.

Legal malpractice claims will not become a commodity to be sold to the highest bidder because only clients will be able to bring the actions. Furthermore, the decrease in the number of lawsuits will mean that attorneys will not have to be more selective in accepting clients than they would be if no assignment was allowed. Thus, the availability of legal services will not diminish. A rise in malpractice insurance will not be as inevitable as it would be if actions were assigned. For all of these reasons, assigning the judgment from a legal malpractice action results in fewer potential abuses than assigning the action itself.

4. Risk of Collusion.—The court in *Coffey v. Jefferson County Board of Education*[175] disallowed the assignment of a legal malpractice claim because of the risk that the client-assignor and the nonclient-assignee would enter a collusive agreement to the detriment of the attorney.[176] In *Coffey*, the client was the defendant in a personal injury action brought by the nonclient. The assignment of the legal malpractice claim was part of a pretrial settlement between the client-assignor and the nonclient-assignee. In these situations, the danger is that the client will offer to settle for a high amount and then assign the legal malpractice claim in satisfaction of that debt. The client-assignor will agree to the assignment because it will satisfy the obligation owed, and the nonclient-assignee will agree to the assignment because such a large amount may not be recoverable from the client-assignor. Therefore, a collusive agreement may be entered even if the attorney was not negligent.

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174. *Id.*
175. 756 S.W.2d 155 (Ky. Ct. App. 1988).
176. *Id.* at 157.

This type of collusive agreement will not be possible if the judgment is assigned. Under this suggested resolution, an assignment cannot take place until the attorney's liability is established by a final judgment. Consequently, there is no risk that the parties to the assignment will enter a collusive agreement that will result in a lawsuit against a faultless attorney. An assignment may occur only if the court finds that the attorney committed legal malpractice. Any subsequent agreement to assign the judgment will not be collusive because the client-assignor will incur actual damages as a result of the attorney's negligence. Therefore, the assignment of the judgment removes the incentive and opportunity for collusion.

5. Illogical Arguments Asserted by the Assignee.—Some courts recognize the illogical arguments asserted by the nonclient-assignee as a reason for disallowing the assignment of legal malpractice claims. These courts disapprove of malpractice claims in which the nonclient-assignee argues that the attorneys are liable because the nonclient should not have prevailed in the original action against the client-assignor.

Because the nonclient-assignee would not be maintaining the legal malpractice action if the judgment was assigned, these contradictory arguments would not be asserted. Furthermore, the arguments asserted by the client-assignor will be consistent with those made in the original action against the nonclient-assignee. For example, if the judgment was assignable in *Picadilly, Inc. v. Raikos*,[177] Picadilly, as the client-assignee, would be the plaintiff throughout the entire trial against its attorneys. Picadilly's contention would be that it should have prevailed in the original action brought by Colvin and that it lost because of its attorneys' inadequate representation. Picadilly would assert its nonculpability regarding the dram shop claim in both the original action and the malpractice action.

C. Public Policy Considerations in Support of the Assignment of the Action

1. Efficiency.—One reason for assigning the action is efficiency.[178] Because the nonclient-assignee may have more time, energy, and resources to bring the suit, it should be assignable. This argument was advanced by the court in *Thurston v. Continental Casualty Co.*[179] In *Thurston*, the client-assignor was a corporation that had suffered financial hardships making its ability to institute a lawsuit tenuous. The efficiency argument

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177. 555 N.E.2d 167, 169 (Ind. Ct. App. 1990), *argued*, No. 41A01-8908-CV-311 (Ind. Feb. 20, 1991).

178. *See supra* note 134 and accompanying text.

179. 567 A.2d 922 (Me. 1989).

recognizes the costs that the client-assignor must incur in maintaining a legal malpractice claim against its attorneys.

This efficiency objective could be equally satisfied under this proposed resolution. As in *Weston v. Dowty*, the nonclient-assignee could be assigned the judgment, less costs and attorney fees.[180] This procedure financially enables clients to assert legal malpractice actions, provided they feel their claim has merit. Furthermore, the assignment can be attached to the entry of the judgment, so that it is effective as soon as the judgment is final.[181] Therefore, efficiency will be as well-served with the assignment of the judgment as with the assignment of the action.

2. Equity.—Some courts allow the assignment of legal malpractice actions citing the objective that culpable attorneys should be held liable for their negligence.[182] For example, in *Hedlund Manufacturing Co. v. Weiser, Stapler & Spivak*,[183] one reason that the court allowed the assignment of the claim was to ensure that the attorney would bear the cost of failing to file the patent application on time.[184] Permitting the client-assignor to transfer the legal malpractice action to the nonclient-assignee was apparently regarded as a means of realizing this end.

Assigning the judgment, instead of the action, also serves this objective. Although the plaintiff to the action will be the client-assignor rather than the nonclient-assignee, attorneys will still be made to pay for their misconduct. Additionally, the nonclient-assignee will not be left without a means of recovery under this suggested resolution. Recovery will be to the same extent as if the nonclient-assignee brought the malpractice action. Thus, the equitable concerns maintained by the courts that allow the assignment of claims will be favorably addressed if the judgments are assigned.

Although it has not been addressed by the courts, another equitable goal will be achieved under this suggested resolution. As between the client-assignor and the nonclient-assignee, it is equitable that the former bear the risk of losing the legal malpractice action. When the malpractice action is transferred by the client-assignor, it is often done to satisfy a previous judgment owed to the nonclient-assignee.[185] Therefore, if the court in the legal malpractice action finds in favor of the attorney, the nonclient-assignee is left without compensation.

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180. Weston v. Dowty, 163 Mich. App. 238, 239-40, 414 N.W.2d 165, 166 (1987).
181. For a statutory example, see *supra* text accompanying note 146.
182. *See supra* notes 141-42 and accompanying text.
183. 517 Pa. 522, 539 A.2d 357 (1988).
184. *Id.* at 526, 539 A.2d at 359.
185. *See supra* note 114 and accompanying text.

Conversely, when the *judgment* of the malpractice action is assigned, it is the client-assignor who bears the risk of losing. Because the assignment of the judgment is not effective until it is final, it will transpire only if the client-assignor prevails against the attorney. Consequently, there will be nothing to assign if the court determines that malpractice was not committed. Such a decision would establish that it was the client-assignor's wrongful conduct, and not the attorney's representation, that led to the disposition of the original suit in favor of the nonclient-assignee. In this situation, it is equitable that the client-assignor will be unable to use assignment of the action to relieve the obligation owed to the nonclient-assignee.

An equitable argument for assigning the judgment can also be made when there was no prior lawsuit between the client and nonclient. In *Hedlund*, neither the client-seller of the company nor the nonclient-buyer acted wrongfully. The attorney had the sole responsibility for filing the patent application. Nevertheless, equity requires that the client-assignor bear the risk of losing the legal malpractice action against his attorney. The client selected the attorney to handle the affairs of the business and should therefore bear the consequences of this choice.

D. Possible Disadvantages to Assigning the Judgment

One potential problem with assigning the judgment is that the client-assignor is forced to remain in the legal malpractice action for its duration. This differs from the assignment of the claim in which the client-assignor is relieved of all liability before the trial begins. Because the lawsuit against the attorney could take years before its final disposition, the client-assignor bears an additional burden. Meanwhile, the nonclient-assignee must wait to receive the money that is owed him by the client.

On the other hand, it is equitable for the client-assignor to bear the risk of losing the malpractice action. Thus, the client should be the one who brings the claim, no matter the duration. Furthermore, the release of liability afforded the client-assignor when the claim is transferred creates an incentive to assign unjustified claims against the attorney. As for the disadvantage to the nonclient-assignee of having to wait for the compensation, this is not as significant after examining the realities of the alternative.

A nonclient-assignee will probably not accept *any* assignment unless it is the only means of recovery. If the client-assignor is able to satisfy the obligation to the nonclient-assignee without an assignment, then the nonclient will insist on such reimbursement. Consequently, the assignment usually takes place because it is the best means of recovery for the assignee. Because someone must prevail against the attorney before the nonclient-

assignee can be compensated, a trial is unavoidable. The length of the trial will be no greater if the client-assignor maintains the action than if the nonclient-assignee maintains it. Therefore, this disadvantage to the assignment of the judgment is not persuasive.

Furthermore, in the event that the attorney prevails in the malpractice action, the nonclient-assignee will still own the outstanding debt owed by the client-assignor under this proposed resolution. If the client subsequently acquires assets, the nonclient will still have a legal right to the sum that was awarded. Such protection of the nonclient will not be available if the unfounded malpractice action is assigned because the client's obligation will be satisfied before the malpractice trial begins.

Another potential disadvantage of assigning the judgment is that the nonclient-assignee may have more of an incentive to pursue the malpractice claim than the client-assignor because the latter will be seeking a recovery for someone else. This contention is unfounded, however, because the nonclient-assignee will have an incentive to prevail even though the proceeds will go to the nonclient. If the client-assignor is able to effectuate an assignment of the judgment, the client's obligation to the nonclient is discharged. Any assets obtained by the client-assignor thereafter will not be subject to the debt previously owed to the nonclient-assignee.

In addition, it may be alleged that the nonclient-assignee will have an incentive to recover a greater amount, while the client-assignor will try to obtain the amount owed to the nonclient. Although differing objectives from the assignor and assignee may be inherent, they will probably not result in greatly different awards. The amount of damages in the legal malpractice lawsuit will be the economic harm incurred by the client which was proximately caused by the attorney's negligence.[186] Consequently, no matter how great the nonclient-assignee's incentive to get more, the amount of the recovery will be limited. For example, in *Picadilly, Inc. v. Raikos*, a judgment of $150,000 was entered against Picadilly in the dram shop action brought by the nonclient-assignee. The theory in the subsequent legal malpractice action against Picadilly's attorneys was that the attorneys proximately caused an erroneous judgment to be entered against Picadilly. The damages sought would be equal to that incurred by Picadilly. Therefore, regardless of whether the malpractice action was brought by Picadilly or by the nonclient-assignee, the amount of the recovery would be limited to $150,000. Accordingly, the greater incentive of the nonclient-assignee would probably not result in a significantly higher award.

Although assigning the judgment of a legal malpractice action may result in certain disadvantages, these are negligible when compared to the

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186. *See, e.g.*, Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524 (Iowa 1983); Collins *ex rel.* Collins v. Perrin, 108 N.M. 714, 778 P.2d 912 (1989); Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989); Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989).

problems inherent in assigning the action. Assigning the judgment is preferable because it furthers the public policy concerns advanced by the courts on both sides of the issue. It addresses both the advantages and disadvantages that accompany the assignment of legal malpractice actions. The Indiana Court of Appeals in *Picadilly* could have encouraged such a resolution by first denying Charles Colvin, the nonclient-assignee, the right to sue Picadilly's attorneys. The court could then have established in dicta that any judgment obtained against the attorneys by Picadilly could have been properly assigned to Colvin after it became final. If Indiana and other jurisdictions were to encourage the assignment of judgments, they would be acknowledging the dual nature of the claim as well as competing public policy considerations.

VI. Conclusion

For approximately the last thirty years, statutes and judicial decisions have suppressed the strict rule that privity is required in legal malpractice actions. As an extension of this expanded liability, courts began to decide whether legal malpractice actions should be assignable. The majority of the courts that have spoken on this issue have held that public policy prohibits such assignment. The following policy concerns have been advanced in opposition to the assignability of the claims: the sanctity of the attorney-client relationship, the preservation of the attorney-client privilege, the potential for commercialization, the risk of collusion, and the illogical arguments asserted by the assignee. The minority view allows the assignment of legal malpractice actions. These courts maintain that the claim resembles a contract action, which is assignable at law. The courts that support the assignment of legal malpractice actions also maintain that two public policy considerations are furthered: efficiency and equity.

The court of appeals in Michigan has established a precedent that favorably addresses the concerns advanced by both the majority and the minority jurisdictions on this issue. Michigan prohibits the assignment of legal malpractice actions, but allows the resulting judgments from such actions to be assigned. This type of resolution favorably addresses the public policy considerations that have been advanced by both sides. Furthermore, the assignment of the judgment puts the risk of losing the legal malpractice action on the client-assignor rather than on the nonclient-assignee. This arrangement results in an equitable outcome. Potential disadvantages to this type of assignment are relatively insignificant when compared to the assignment of the chose of action. Courts in other jurisdictions should follow Michigan's approach of allowing the assignment of the legal malpractice judgment because it is a viable compromise to the present controversy.

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