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COMMENT

MINNESOTA ADOPTS SLIDING SCALE APPROACH TO DETERMINE DAMAGES FOR AN ATTORNEY'S BREACH OF FIDUCIARY DUTY

[Gilchrist v. Perl, 387 N.W.2d 412 (Minn. 1986)]

INTRODUCTION

Attorney misconduct and discipline has become an increasingly important public issue in Minnesota and nationwide. The number of ethical complaints filed with the Minnesota Lawyer's Board of Professional Responsibility exceeded 400 in 1986. The Minnesota Supreme Court has publicly disciplined more attorneys in the last three years than in the previous seven. The increased number of complaints asserted against attorneys has brought the issue of attorney discipline into the public limelight.

The result has been a further erosion of the integrity of the bar in the perception of the public. Critics of the attorney discipline system contend that the system is too lenient. One critic has argued that "[t]he bar seems unwilling to correct disciplinary shortcomings, which one day may cost the profession its prized self-regulation." The Minnesota Supreme Court's disposition of Gilchrist v. Perl may provide such critics with additional fuel for the fire.

The disciplining of Norman Perl has been a thorn in the side of the Minnesota Supreme Court. Perl's conduct has been the subject of seven opinions of the court in the last five years. Gilchrist is one of

3. The number of ethical complaints against lawyers has tripled in the last 15 years. However, there has been a corresponding increase in the number of practicing lawyers during the same period. Id.
4. Id. (quoting comments made in Gannett Newspaper articles regarding attorney discipline).
5. 387 N.W.2d 412 (Minn. 1986).
6. Aside from the three cases discussed in this article, Rice v. Perl, 320 N.W.2d 407 (Minn. 1982), Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209 (Minn. 1984), and Gilchrist, Perl's conduct has been the subject of various disciplinary opinions of the court. In response to an investigation instigated by the Director of the Lawyer's Professional Responsibility Board, Perl petitioned the court for relief from the investigation. In Re Charges of Unprofessional Conduct Against N.P., 361 N.W.2d 386 (Minn. 1985) appeal dismissed, 106 S. Ct. 375, 88 L. Ed.2d 330 (1985).
three cases concerning the amount of fees Perl must forfeit for breach of fiduciary duty to his clients.\textsuperscript{7}

In \textit{Gilchrist}, the court held that an attorney who breaches a fiduciary duty to several clients may forfeit less than the total fee paid by those clients as damages.\textsuperscript{8} The amount to be forfeited for constructive fraud under \textit{Gilchrist} is determined by applying the Minnesota punitive damages statute.\textsuperscript{9} By considering the factors set forth in the statute,\textsuperscript{10} the trier of fact is required to scale the amount of forfeiture to the degree of misconduct.

The \textit{Gilchrist} court adopted the sliding scale approach notwithstanding a previous decision of the court imposing total forfeiture of fees to remedy Perl's breach of fiduciary duty to a single client.\textsuperscript{11} The \textit{Gilchrist} court held that the presence of several client claims mitigated against total forfeiture and in favor of a sliding scale. This requires calculation of the forfeiture in the same manner as punitive damages.\textsuperscript{12}

This Comment will attempt to show that the total forfeiture rule, abandoned in \textit{Gilchrist}, is the better approach to remedy constructive
fraud committed by an attorney. The strong policy of protecting the integrity of the bar together with the inappropriateness of using the punitive damages statute, supports total forfeiture of fees regardless of the number of potential claims.

The starting point of this Comment is an examination of the law of constructive fraud. Specifically, how constructive fraud differs from actual fraud with emphasis on fraud in the attorney-client relationship. Gilchrist is best examined in its context as the last in a series of three cases addressing Norman Perl's conduct towards his clients. Therefore, an examination of the first two cases, informally entitled Perl I and Perl II, precedes discussion of Gilchrist. The final section critically analyzes the Gilchrist decision, and advocates a return to the total forfeiture rule.

I. BACKGROUND: CONSTRUCTIVE FRAUD

Fraud is generally categorized into two distinct types: actual fraud and constructive fraud. Although the elements of each type are different, constructive fraud has the same legal effect and consequences as actual fraud.

Actual fraud requires a misrepresentation made with intent to deceive which is relied upon to the detriment of the victim. The victim must suffer actual harm proximately caused by the misrepresentation. Scienter, or the intent to deceive, is therefore an essential element of actual fraud. Fraudulent intent is in essence, dishon-


16. The elements of fraud may be stated differently in various jurisdictions. In Minnesota, actual fraud consists of five elements:

1. False representation;
2. made with intent to deceive;
3. action or forebearance on the part of the victim in reliance on the misstatements;
4. resulting in damages;
5. which are proximately caused by the misstatements.

Atcas v. Credit Clearing Corp. of America, 292 Minn. 334, 349, 197 N.W.2d 448, 457 (1972); Hay v. Dahle, 386 N.W.2d 808, 811 (Minn. Ct. App. 1986).

17. See Florenzano v. Olson, 387 N.W.2d 168, 173 (Minn. 1986). Scienter, however, is not required in Minnesota for fraudulent misrepresentation. The intent to deceive may be satisfied if the actor asserts a representation without knowing if the representation is true or false. The representer's knowledge or disregard of the truthfulness of the statement, combined with the intent to induce action or forbearance, is sufficient. See Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169, 175 (8th Cir. 1971) (applying Minnesota law); Hansen v. Ford Motor Co., 278 F.2d
esty or bad faith.18

In contrast, constructive fraud19 arises by operation of law regardless of the mental state of the actor.20 Constructive fraud is generally defined as a breach of a legal or equitable duty which the law declares fraudulent because it tends to deceive others, violate public or private confidence, or injure public interests.21

Whereas motive or intent is required for actual fraud,22 constructive fraud is characterized by an act, within the context of the relationship of the parties, which the law deems fraudulent regardless of the mental state of the actor.23 The actor is charged with the consequences of the act as if he acted fraudulently, even though “his conduct does not merit this opprobrium.”24

Constructive fraud does not require actual harm to the victim;25 the injury caused is the violation of confidence or injury to public interests.26 The victim need not incur actual damages as a result of the fraudulent act to seek a remedy for constructive fraud.

Good faith or honest intention will negate the mental state required for actual fraud.27 Yet under constructive fraud the actor’s good faith is not a defense because the mental state or motive of the actor is irrelevant.28 The element of scienter is replaced by the existence of a special relationship between the parties which warrants the trusting party to repose confidence in the fiduciary. The fiduciary relationship thus created, allows the trusting party to relax the

18. Florenzano, 387 N.W.2d at 173.
20. See St. Paul Fire, 345 N.W.2d at 213; MALLEN & LEVIT, LEGAL MALPRACTICE §
grounds, 104 Wis. 2d 592, 312 N.W.2d 773 (1981) (passive fraud).
22. See supra note 17.
23. See St. Paul Fire, 345 N.W.2d at 213. See also Carr-Consolidated Biscuit Co. v. More, 125 F. Supp. 423, 433 n.28 (M.D. Pa. 1954); Asleson v. West Branch Land Co., 311 N.W.2d 533, 544 (N.D. 1981); MALLEN & LEVIT, supra note 20, at 188.
24. 37 AM.JUR. 2D Fraud and Deceit § 4 at 23 (1968) (citing Salter v. Salter, 80 Ga. 178, 4 S.E. 391 (1887)).
25. See St. Paul Fire, 345 N.W.2d at 212.
26. See supra note 21 and accompanying text.
27. See MALLEN & LEVIT, supra note 20, at 186. See also Florenzano, 387 N.W.2d at 173. (“A good faith non-negligent mistake is not the basis of liability for misrepresentation in this state.”)
28. See authorities cited supra note 23.
care and vigilance one would ordinarily exercise under the circumstances.29

Constructive fraud is found most often in the context of a fiduciary relationship because it is dependent upon the special relationship of the parties.30 A fiduciary relationship arises when one reposes confidence, faith and trust in the judgment, skill and advice of another.31 The fiduciary has a duty to act with the utmost good faith and with absolute fidelity to the interests of the one to whom the fiduciary duty is owed.32 The fiduciary has a duty to disclose all material facts and the failure to do so is fraudulent.33 It is the breach of the fiduciary duty which the law characterizes as constructive fraud.34

It is well established that the attorney-client relationship is a fiduciary relationship.35 The attorney as a fiduciary owes to the client the duty to represent the client with undivided loyalty, to preserve the

29. Brown, at 731, 432 N.Y.S.2d at 193-94. As the court stated in Sanders, “intent to deceive is not required because the parties involved are not at arm’s length. The element of intent is replaced by the element of the special relationship between the parties...” 509 N.E.2d at 866.

30. Mallen and Levi assert that constructive fraud reposes exclusively in the context of the fiduciary relationship. MALLEN & LEVIT, supra note 20, at 188.

31. See Williams v. Griffin, 35 Mich. App. 179, 183, 192 N.W.2d 283, 285 (1971). This is a general definition of a fiduciary relationship, however, and variations can be found in different jurisdictions. See, e.g., In the Matter of Heilman’s Estate, 37 Ill. App. 3d 390, 396, 345 N.E.2d 536, 540 (1976) (relationship exists when confidence is reposed on one side and domination and influence result on the other); Mobil Oil Corp. v. Rubenfeld, 72 Misc. 2d 392, 399, 339 N.Y.S.2d 623, 632 (1972) (fiduciary relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another).


Certain relationships have long been established in Minnesota as fiduciary relationships. See generally Cardenas v. Ramsey County, 322 N.W.2d 191, 194 (Minn. 1982) (attorney and client); Sundberg v. Lampert Lumber Co., 390 N.W.2d 352, 357 (Minn. Ct. App. 1986) (corporate directors and their corporation); In re Estate of Kroyer, 385 N.W.2d 31, 35 (Minn. Ct. App. 1986) (trustee and beneficiary); High Forest Truck Stop v. LaCrosse Petroleum Equip. Corp., 364 N.W.2d 810, 812 (Minn. Ct. App. 1985) (principal and agent); Braaten v. Midwest Farm Shows, 360 N.W.2d 455, 457 (Minn. Ct. App. 1985) (partnership and partners).


34. See MALLEN & LEVIT, supra note 20 and accompanying text. See also Baker v. Humphrey, 101 U.S. 494, 502 (1879).

35. See MALLEN & LEVIT, supra note 20, at 208; Rice, 320 N.W.2d at 408. See also 7 AM. JUR. 2D Attorneys at Law § 119 (1980).
client’s confidences, and to disclose any material matter bearing upon the representation of these obligations.36 The fiduciary obligation contemplates a standard of conduct as opposed to a standard of care.37 Therefore, an action for constructive fraud sounds in tort but is distinct from an action for legal malpractice based on negligence.38

An attorney who commits actual fraud forfeits the right to compensation.39 In Minnesota this rule was established in 1899.40 Total forfeiture for actual fraud is thought to be necessary to insure the integrity of the attorney-client relationship,41 and to insure an attorney’s absolute fidelity to his or her client.42 As the court recognized in Rice v. Perl, absolute fidelity is fundamental to establishing the trust necessary to the proper functioning of fiduciary relationships.43

The law is traditionally unyielding in assessing penalties against an attorney who breaches a fiduciary duty because of the strong policy of protecting his or her client.44 In addition, the forfeiture remedy serves an admonitory function since it has a punitive effect on the unfaithful attorney. Thus, the forfeiture remedy is characterized by dual purposes: to provide reparation to the aggrieved client, and to punish and deter the unfaithful fiduciary.45

The primary issue in Gilchrist is whether the total forfeiture rule, imposed to remedy actual fraud, is also appropriate to remedy constructive fraud. Prior to deciding Gilchrist, the Minnesota Supreme Court applied the total forfeiture rule to constructive fraud.46 In Gilchrist, the court held that the rule does not apply to constructive fraud.47

36. See infra note 70 and accompanying text.
37. St. Paul Fire, 345 N.W. at 213 (citing MALLEN & LEVIT, supra note 20, at 3-4).
38. The elements of an action for legal malpractice based on negligence are the same as for negligence against non-lawyer defendants: employment of the attorney or some other basis which creates a duty, failure to exercise reasonable care, and proximate cause of the damage to the client. MALLEN & LEVIT, supra note 20, at 204-06.
39. “The courts appear to agree that the attorney will forfeit any right to compensation if his acts or omissions were fraudulent.” Id. at 26.
40. Davis v. Swedish-American Nat'l Bank, 78 Minn. 408, 81 N.W. 210 (1899). In Davis, the court stated “if an attorney is guilty of actual fraud or bad faith toward his client in the matter of his employment, he is not entitled to any pay for his services.” Id. at 418, 81 N.W. at 212. Accord, In re Estate of Lee, 214 Minn. 448, 460, 9 N.W.2d 245, 246 (1943); Faber v. Enkema, 180 Minn. 493, 493, 231 N.W. 410, 410 (1930); Blackey v. Alexander, 156 Minn. 478, 482-83, 195 N.W. 455, 456 (1923).
41. MALLEN & LEVIT, supra note 20, at 27.
42. Id. at 26-27.
43. Rice, 320 N.W.2d at 411.
44. Id.
45. See infra text accompanying notes 113-19.
46. See supra notes 39-40 and accompanying text.
47. Gilchrist, 387 N.W.2d at 417.
II. PRIOR CASES ARISING FROM PERL'S CONDUCT: PERL I AND PERL II

The three cases discussed in this Comment arose from Norman Perl's relationship with an adverse insurance adjuster. Perl's failure to disclose this relationship to his Dalkon Shield clients constituted a breach of fiduciary duty and constructive fraud.48

Between 1976-80, Norman Perl represented approximately 300 Dalkon Shield claimants against the manufacturer, A.H. Robins Company (Robins) and its insurer, Aetna Casualty & Surety Company (Aetna).49 Perl settled 174 of the claims directly with Willard Browne, the Aetna claims adjuster responsible for all claims in Minnesota.50

During the same period, Perl maintained a business and social relationship with Browne.51 Perl and his law firm52 made payments to Browne of approximately $42,000.53 Perl claimed the payments were compensation for work Browne performed on unrelated cases for the firm.54 The supreme court, however, found that the payments were not connected with any work Browne may have performed for the firm.55

48. Id.
49. The Dalkon Shield was an intrauterine device (IUD) manufactured and aggressively marketed by the A.H. Robins Co. Several thousand claims were asserted by women who were injured because of a defect in the string attached to the IUD. Due to improper sealing, the string acted like a wick causing bacteria to be carried through the string and into the uterus resulting in pelvic infection and possible sterility.

The controversy was aggravated by several factors: there was evidence showing Robins knew of the wicking effect, Robins' legal counsel attempted to prove the women were sexually promiscuous, the national publicity given to the controversy, and the severity of the injuries suffered by the claimants. In the matter of Norman Perl, Fin. & Comm., Aug. 1, 1986, vacated, 394 N.W.2d 487 (Minn. 1986).

50. Brief for Appellant Cecilia Rice, at 8, Rice v. Perl, 320 N.W.2d 407 (Minn. 1982).
51. Rice 320 N.W.2d at 408.
52. Perl was a partner and owner of 50% of the beneficial stock in the firm of DeParcq, Anderson, Perl, Hunegs, & Rudquist, P.A. Brief for Appellant Cecilia Rice, supra note 50.
53. Rice at 408, 409. In addition, Browne was receiving payments from at least one other Minneapolis law firm during the same period. From 1975 to 1979, the law firm of Cloutier & Musech provided Browne with the use of a Cadillac and paid him $142,751. Cloutier & Musech also represented several Dalkon Shield claimants. In Essner v. A.H. Robins Co. Inc., 537 F. Supp. 197, 203-04 (Minn. 1982), the firm was disqualified because of its relationship with Browne.
54. Rice at 409-10. Perl and his firm represented several claimants for claims brought under the Federal Employers Liability Act (FELA) as well as railroad benefit claims. Perl contended that the payments to Browne were for work on the FELA files and that Browne never worked on the firm's Dalkon Shield cases. Id.
55. Id. The court accepted the deposition of the law firm's bookkeeper concerning the usual bookkeeping procedure used to account for the payments to Browne.
Perl never disclosed to his Dalkon Shield clients that he was making payments to an adversary insurance adjuster. The failure to disclose this relationship to his clients constituted a breach of fiduciary duty. After the relationship was discovered, Perl's clients sought to recover the fees they paid for Perl's representation. The first case to reach the Minnesota Supreme Court was *Rice v. Perl*.

### A. Perl I: Rice v. Perl

Cecilia Rice retained Norman Perl in 1977 to prosecute her Dalkon Shield claim against Robins. Perl settled her claim with Willard Browne for $50,000. Initially, Perl retained fifty percent of the settlement as his fee, but later returned $5,000 to Rice.

After discovering the relationship between Perl and Browne,
Rice brought suit to recover the $20,000 fee paid to Perl.63 Rice alleged, inter alia,64 that the failure to disclose the relationship was a breach of fiduciary duty warranting total forfeiture of the fee.65 Perl contended that he did not have a duty to disclose the relationship, arguing that his arrangement with Browne was not adverse to Rice’s claim.66

The trial court found for Rice and held that the Perl-Browne relationship was a “material matter” bearing upon Perl’s representation of Rice.67 The court held that the failure to disclose the relationship required total forfeiture of the fee and granted summary judgment for Rice.68

The supreme court affirmed the trial court on appeal and upheld the total forfeiture.69 The court addressed the fiduciary duty to disclose and the penalty to be imposed when the duty is breached, holding that an attorney has a duty to disclose any material matter bearing upon the representation of the client.70 The court stated that Perl’s relationship with Browne created a “substantial appearance of impropriety” and that a “reasonable client would certainly wish to know, and has a right to [know of the relationship], before proceeding with settlement negotiations.”71 The court also stated

63. Rice, 320 N.W.2d at 408. Also named as defendants were Richard Hunegs, individually and DeParq, Anderson, Perl, Hunegs & Rudquist, P.A., Perl’s law firm. Id.

64. Rice also alleged actual fraud and malpractice against Perl and the firm, civil conspiracy against Perl, the firm, Browne and Aetna, and negligent entrustment against Aetna alone. The trial court summarily dismissed all of these claims. The court held that Rice did not meet the burden of proving actual harm - an element of each claim. Id. at 410.

65. Id.

66. Id. at 411.

67. Id. at 409-10.

68. Id.

69. Id. at 411.

70. The supreme court stated that the trial court’s formulation of the disclosure rule is the dominant one in the United States:

The fiduciary obligations which are the premise of trust may be simply stated. The 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. Although the phrasing of this definition of fiduciary obligations is varied and often dependent upon the context of particular circumstances, this rule exists in virtually every jurisdiction in the United States.

Rice, 320 N.W.2d at 410 (quoting R. Mallen & V. Levit, Legal Malpractice § 121 at 208 (2d ed. 1981) (emphasis added by the court)).

71. Rice, 320 N.W.2d at 411. See Model Code of Professional Responsibility Canon 9 (1970) which states that “[a] lawyer should avoid even the appearance of professional impropriety.” The Model Rules of Professional Conduct, adopted in Minnesota, do not contain a similar provision. The drafters of the Model Rules criticized the provision of the model code for failing to define impropriety, noting that many definitional issues would arise. Mallen & Levit, supra note 20, § 156 at 252.
that the relationship with Browne created risks to Rice that could be “serious.”

Leaving no doubt as to Perl’s duty to disclose, the court reasoned that Rice “was unfairly put in some jeopardy by her fiduciary. An attorney has an obligation to prevent placing his client in a position which might well taint a settlement transaction.”

The court held that total forfeiture of fees was the penalty to be imposed for failure to disclose a material matter. The court observed:

[t]his court has repeatedly stated that an attorney (or any fiduciary) who breaches his duty to his client forfeits his right to compensation . . . ‘[w]hen a breach of faith occurs, the attorney’s right to compensation is gone. . . .’ Furthermore, ‘these consequences follow even though . . . [the client]. . . cannot prove actual injury to himself or that the . . . [attorney] committed an intentional fraud.’

The Rice court applied the total forfeiture rule even absent a showing of actual fraud or harm. The court held that constructive fraud warrants total forfeiture of fees as necessary to insure an attorney’s absolute fidelity to his client and to protect the integrity of the legal profession. The court later reaffirmed the total forfeiture rule in St. Paul Fire.


While the appeal of Rice was pending in the supreme court, Perl and his firm commenced an action for declaratory judgment against their malpractice liability carrier, St. Paul Fire & Marine Insurance Company (St. Paul Fire). St. Paul Fire refused to represent the Rice defendants on appeal and denied policy coverage for the forfeiture award in Rice.

St. Paul Fire argued that the fee forfeiture for breach of fiduciary duty did not constitute “money damages” within the meaning of the policy. Alternatively, the insurer contended that the forfeiture fell

These authors argue that the criticism is unfounded and that the rule against impropriety “exists independently as American common law.”

72. 320 N.W.2d at 411.
73. Id.
74. Id. (citing In re Estate of Lee, 214 Minn. 448, 460, 9 N.W.2d 245, 251 (1943)).
75. See id. at 410.
76. Id. at 411.
77. See St. Paul Fire, 345 N.W.2d at 212.
78. Id. at 211.
79. See id.
80. Id. The policy obligated St. Paul Fire & Marine:

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as money damages (other than exemplary or punitive dam-
within the actual fraud and punitive damages exclusions of the policy.\textsuperscript{81}

The trial court granted summary judgment for Perl. St. Paul Fire appealed from that part of the decision which obligated it to provide coverage for the forfeited fee.\textsuperscript{82}

When the appeal reached the supreme court, \textit{Rice} had been decided. Based on \textit{Rice}, the court upheld the insurer's obligation to provide coverage.\textsuperscript{83} However, the court held that public policy precluded enforcement of the insurance policy with respect to Perl.\textsuperscript{84}

The court first determined that fees forfeited to a former client for breach of a fiduciary duty are "money damages."\textsuperscript{85} Noting that money damages are awarded to compensate for loss or injury, the court stated that although Rice suffered no actual loss, she nevertheless was injured.\textsuperscript{86} The court held "[t]he injury lies in the client's

\textit{Id.} (emphasis added).

\textsuperscript{81} The exclusion stated: "[c]overage is excluded . . . if . . . the claim arises out of or in connection with any dishonest, fraudulent, criminal or malicious act." \textit{Id.} at 212.

\textsuperscript{82} \textit{Id.} at 211. St. Paul Fire did not appeal from the trial court's ruling that they were obligated to provide a defense for Perl and the firm. \textit{Id.}

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} The court held that public policy precludes an attorney from insuring himself against misconduct. \textit{Id.} at 216.

The court upheld the policy as it applied to the firm, reasoning that since the fee forfeiture "is primarily to penalize the attorney, we see no reason why the law firm should not be free to acquire insurance . . . protecting itself from vicarious liability for the misconduct." \textit{Id.}

The court recognized that allowing coverage for the firm does not necessarily defeat the effect of the forfeiture since the firm may use the proceeds to pay Perl's obligations. The court stated that the insurer maintains a right of indemnification against Perl. \textit{Id.}

\textsuperscript{85} The court held that constructive fraud is based on an "absolute" right that a fiduciary "shall refrain from acting in a given manner under any circumstances, regardless of whether loss or detriment would result." \textit{Id.} at 212. Normally, nominal damages are awarded for a breach of an absolute right. The court stated, however, that when an attorney breaches a fiduciary duty, the client not only recovers nominal damages, but also recovers the compensation paid to the attorney. \textit{Id.} The court held "[c]onsequently, when St. Paul Fire and Marine uses the unqualified term 'money damages' in its policy, we think it refers to all money damages whether or not awarded to compensate for actual harm." \textit{Id.}

\textsuperscript{86} \textit{Id.} at 213. In November, 1987, however, the court held that the indemnification and "hold harmless" clause in the firm's by-laws precluded St. Paul Fire from obtaining indemnification from Perl. St. Paul Fire & Marine Ins. Co. v. Perl, 415 N.W.2d 663 (Minn. 1987). Although the insurance contract reserved the right of subrogation, the court held that the by-law operated as an exculpatory agreement which extinguished the subrogation rights. The court noted that this result did not conflict with Perl v. St. Paul Fire:

The [Perl v. St. Paul Fire] court, in \textit{dicta}, noted that St. Paul may have a right
justifiable perception that he or she has or may have received less than the honest advice and zealous performance to which the client is entitled."

In reaffirming the Rice decision, the court stated in St. Paul Fire that breach of fiduciary duty is a breach of a "standard of conduct, as distinguished from a breach of a standard of care." When the fiduciary duty is breached "the law, in this instance, says that the attorney is not entitled to compensation for services rendered, and the client is entitled to recover, as damages, the compensation paid." Again, the court emphasized the strong public policy supporting total forfeiture "since fidelity to the client's interests is basic to the trust which characterizes the attorney-client relationship." The court restated the holding of Rice recognizing that "even though the client had shown no loss due to the attorney's failure to disclose and even though the nondisclosure was unintentional, the attorney fees were to be forfeited."

Together with Rice, St. Paul Fire established the total forfeiture rule in general for breach of a fiduciary duty and constructive fraud. More specifically, the court held that Norman Perl's failure to disclose to his clients the relationship with Willard Browne forfeited Perl's right to any compensation for services rendered. The bright line regarding fee forfeiture drawn in Perl I and Perl II became substantially blurred in Gilchrist.

III. Gilchrist v. Perl

After the Rice decision was handed down, several of Perl's clients sought to recover their fees. Patricia Klein brought a class action suit on behalf of 141 former clients, and Susan Gilchrist brought suit on her own behalf. Both suits alleged that Perl's failure to disclose

of subrogation and that "any rights" of the firm would seem to inure to St. Paul. However, the by-law requiring indemnification was not before the court at that time. If the firm had inure any rights, they would presumably inure to St. Paul.

Id. at 666 n.2 (emphasis in the original).

87. St. Paul Fire, 345 N.W.2d at 213.

88. Id. (emphasis added by the court) (citing MALLEN & LEVIT § 718 at 900). Mal len & Levit also note that among professionals, only attorneys are commonly sued for breach of a standard of conduct. MALLEN & LEVIT, supra note 20, at 4.

89. 345 N.W.2d at 212 (citing In re Estate of Lee, 214 Minn. 448, 460, 9 N.W.2d 245, 251 (1943)) (emphasis added).

90. St. Paul Fire at 215 (citing Rice v. Perl, 302 N.W.2d 407, 411 (Minn. 1982)).

91. Id.

92. 387 N.W.2d at 414. The class action was originally certified for 204 members. The trial court dismissed the claims of some class members because they had not paid any fees to Perl nor had they been reimbursed by Perl beforehand. See Brief for Appellant Patricia Klein, at 4 n.2, Gilchrist v. Perl, 387 N.W.2d 412 (1986).

93. Gilchrist, 387 N.W.2d at 414.
his relationship with Browne was a breach of fiduciary duty. The total amount of fees sought to be recovered exceeded $600,000 plus prejudgment interest and attorney fees.\footnote{Brief for Appellant at 3, Gilchrist v. Perl, 387 N.W.2d 412 (Minn. 1986); Brief for Appellant Patricia Klein, supra note 92, at 4.}

In \textit{Klein v. Perl},\footnote{\textit{Klein} and \textit{Gilchrist} were consolidated for hearing before the Minnesota Supreme Court. \textit{See} \textit{Gilchrist v. Perl}, 387 N.W.2d 412, 414 (Minn. 1986).} the trial court, on the authority of \textit{Rice}, granted summary judgment for 128 class members for total recovery of the fees paid.\footnote{Of the 141 claims adjudicated by the trial court, judgments in favor of plaintiffs were awarded on 128 claims, and in favor of Perl on 13 claims. \textit{Gilchrist}, 387 N.W.2d at 414 n.1.} The court denied the plaintiffs' request for treble damages\footnote{Class counsel requested a trebling of damages in accord with \textsc{Minn. Stat.} \S 481.07 (1984). The statute provides for treble damages where a client is injured by an attorney's deceit or collusion.} and an increased lodestar amount of attorney's fees.\footnote{Class counsel also requested an increase of the lodestar to 1.75 because of the "complex, hotly disputed, and protracted nature" of the class action. Reply Brief and Supplemental Appendix of Appellant Patricia Klein, at 1, \textit{Gilchrist} v. Perl, 387 N.W.2d 412 (Minn. 1986).} Both parties appealed.

In \textit{Gilchrist v. Perl}, the trial court refused to grant partial summary judgment for the plaintiff.\footnote{See \textit{Gilchrist}, 387 N.W.2d at 414.} Relying on a footnote in \textit{St. Paul Fire},\footnote{\textit{See} \textit{Gilchrist v. Perl}, 363 N.W.2d 904, 906 (Minn. Ct. App. 1985), \textit{aff'd}, 387 N.W.2d 412 (Minn. 1986).} the trial court held that \textit{St. Paul Fire} did not decide as a matter of law that Gilchrist was entitled to partial summary judgment.\footnote{In footnote 5 of \textit{St. Paul Fire}, the court suggested an alternative to total forfeiture in special circumstances: Ordinarily it would seem breach of the fiduciary duty results in complete forfeiture damages, but it is unclear if there may be exceptions in some situations where actual fraud is absent, where no actual damages are sustained, and where there are multiple client claims. If forfeiture of fees for breach of a fiduciary duty are damages, as we here hold, and if these damages have a punitive content, as we here declare, it is at least arguable that the trier of fact in awarding such damages might consider much the same factors as the trier of fact considers in making a standard punitive damages award. \textit{See} \textsc{Minn. Stat.} \S 549.20, subd. 3 (1983) (emphasis added).} Gilchrist appealed.

The Minnesota Court of Appeals reversed,\footnote{387 N.W.2d at 214 n.5.} holding as a matter of law, that \textit{Rice} requires total forfeiture of the fee.\footnote{387 N.W.2d at 414.} However, the court recognized the inconsistency created by the footnote and certified the case for accelerated review to the supreme court. The court cited the need for the supreme court to "reconcile and clarify its in-
tentions in *Rice* and *St. Paul Fire*.”

**A. The Court’s Decision**

The supreme court granted review of *Gilchrist* and consolidated the appeal with *Klein* directly from the trial court. The court held that the total forfeiture rule of *Rice* did not apply when multiple claims are involved. The court adopted a sliding scale approach to determine the forfeiture award. By applying the Minnesota punitive damages statute, the amount of fees to be forfeited for breach of fiduciary duty is scaled to the degree of misconduct.

**B. The Court’s Analysis**

To distinguish *Gilchrist* from *Rice*, the court relied on the footnote in *St. Paul Fire*. Justice Simonett noted that the possibility of less than total forfeiture, as suggested in the footnote, was not an issue in *Rice*. The court stated that *Rice* involved a single client’s claim and the “presence of the claims of other clients was not considered, it

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104. *Id.*


106. *See Gilchrist*, 387 N.W.2d at 414. The trial court also addressed the issues of whether the class action certification was proper, whether the trial court in the *Klein* action erred in awarding interim attorney fees, and whether Perl should be required to pay the attorney’s fees to cure the breach of fiduciary duty. *Id.* at 417-19.

The supreme court held that the class action was ideally suited to this type of case since commonality of questions of law and fact predominated over questions affecting only individual plaintiffs. The court also held that the breach of fiduciary duty was identical to each member of the class. *Id.* at 417.

The class argued that an award of attorney fees was necessary to make the class whole. The court rejected this argument stating that the class members did not allege actual harm and therefore were not entitled to restitution. In fact, the court stated that “several of the class plaintiffs, as shown by their affidavits, apparently thought their fee forfeiture recovery [to be] an unexpected windfall.” *Id.* at 418 n.4.

The supreme court did allow the class to recover a portion of its legal fees. In response to the class request that defendants admit to the failure to disclose the relationship with Browne, the defendants answered with a general denial. The court held that this denial was “vexatious” and warranted a recovery of attorney fees required to prove the failure to disclose. *Id.* at 419.

107. *Id.* at 414.


109. *See supra* note 100 and accompanying text.

110. *Gilchrist*, 387 N.W.2d at 416. Justice Wahl filed a dissenting opinion in which Justice Kelley joined. *Id.* at 419 (Wahl, J., dissenting). Justice Wahl argued there was no need to discuss the issue in *Rice*:

Certainly Perl, aware of his potential exposure could have raised this issue in *Rice*. Certainly the *Rice* court could have discussed the issue had it been thought necessary to do so. Instead, the court in *Rice* determined without hesitation that this particular misconduct warranted total forfeiture of the attorney’s right to compensation.

*Id.* at 420.
was simply assumed if there was to be any forfeiture for Ms. Rice, it was of the entire fee.”

Freed from the total forfeiture rule of Rice and St. Paul Fire, the supreme court was able to address the issue of fee forfeiture when multiple clients are involved as one of first impression.

The adoption of the sliding scale approach is derived from the court’s analysis of the forfeiture remedy. The court stated that forfeiture damages are both “reparational and admonitory.” In Gilchrist, the court stated that in St. Paul Fire “we relied on the reparational nature of the forfeiture in deciding that the punitive damages policy exclusion did not apply [to the forfeiture award of Rice].” The court added that because the client has an “absolute right” to the attorney’s undivided loyalty, the client is entitled to reparation of at least nominal damages.

With regard to the punitive content of the forfeiture remedy, the supreme court first reiterated the distinction recognized in St. Paul Fire between punitive damages and fee forfeiture.

We said [in Perl II] that while both punitive damages and a fee forfeiture served to deter and punish, the two types of damages were distinct: “While a forfeiture may punish, the aim is to make amends to the client—to ‘put right’ the attorney-client relationship that has been tainted.”

Nevertheless, the court went on to state that “undeniably, the predominant functions of any fee forfeiture are punishment and deterrence.” A damage award intended to punish or deter should not exceed the level necessary to serve that purpose. Therefore, if fee forfeiture is akin to punitive damages, the court stated that the amount of forfeiture should be determined in the same manner that punitive damages are determined.

111. Id. at 416. The court’s assumption is not supported by the language in Rice. See supra text accompanying note 74; see also Justice Wahl’s dissent in Gilchrist, supra note 110.

112. The court stated that the issue of whether the forfeiture may be less than total “remains to be decided here.” 387 N.W.2d at 416.

113. Id.

114. Id.

115. Id. Accord, C. McCormick, McCormick on Damages 86 (1935). McCormick states that “absolute” rights require that the person subject to the duty does not act or refrain from acting in a given manner. If an absolute right is breached and no loss results, the person aggrieved will get a judgment, but only for nominal damages. Nominal damages are given “since practically the only kind of judgment against a party the common law knew was a . . . money recovery . . . .” (cited by the court in St. Paul Fire, 345 N.W.2d at 212).

116. Gilchrist, 387 N.W.2d at 416 (emphasis added).

117. Id.

118. Id. at 417 (citing Melina v. Chaplin, 327 N.W.2d 19, 20 n.1 (Minn. 1982)).

119. Id.
The court noted that in Minnesota the amount of a punitive damages award is determined by the punitive damages statute. 120 That statute sets forth several factors used by the trier of fact to calculate the amount of the award. 121 The court emphasized that one of the factors to be considered in applying the statute is the presence of multiple claims against the defendant. 122

In recognizing that total forfeiture maximizes the punitive function of fee forfeiture, Justice Simonett stated:

This absolutist view emphasizes the importance of strict fidelity to one’s client and to the Rules of Professional Conduct. . . . Total fee forfeiture has a symbolic or cautionary value. It teaches a lesson. Total forfeiture also carries an added sting because it requires a return not just of the attorney’s net fee, but of all the fee, including that part covering office overhead. 123

The court believed, however, that absent actual harm, fraud, or bad faith, and particularly when there are multiple claimants, 124 the “better approach” 125 is to determine the amount of forfeiture by

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120. Id. Minnesota’s punitive damages statute is MINN. STAT. § 549.20 (1986).
121. The statute provides in part:
Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant’s misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant’s awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject. MINN. STAT. § 549.20, subd. 3 (1986) (emphasis added).
122. Gilchrist, 387 N.W.2d at 417.
123. Id.
124. Id.
125. Id. The court cited with approval Crawford v. Logan, 656 S.W.2d 360 (Tenn. 1983). In Crawford, the attorney failed to return to the client all the “papers and property” after the client discharged the attorney. The Tennessee Supreme Court found that the attorney breached an ethical duty to the client. Id. at 362-63. The Crawford court cited Rice as an example of the total forfeiture rule but held that forfeiture should not automatically be imposed for any misconduct of an attorney. Id. at 365. The Tennessee court stated that the “better view” is to determine the amount of forfeiture in light of the facts and circumstances of each case. Id. (relying on Frank v. Bloom, 634 F.2d 1245 (10th Cir. 1980)).

It is unclear whether the Crawford court rejected the total forfeiture rule or found that the attorney’s violation of a disciplinary rule did not constitute a breach of fiduciary duty. The Crawford court relied on Frank v. Bloom, where the 10th Circuit Court of Appeals held that the attorney charged with misconduct did not breach a duty to the client. The Frank court stated there was no “evidence evaluating . . . [the attorney’s] . . . course of conduct so as to establish that he conducted himself contrary to law or in an unethical way.” Frank, 634 F.2d at 1256. The client in Frank asserted that the
considering the several factors enumerated in the punitive damages statute. 126

C. Interpreting Gilchrist

Although the Minnesota Supreme Court attempted to clarify the inconsistency created by the footnote in St. Paul Fire, 127 it is difficult to state the precise holding in Gilchrist. Since the court did not expressly overrule Rice, it is unclear when, and if, the total forfeiture rule will apply. At least two possible answers may be derived from Gilchrist.

First, the total forfeiture rule may apply when only one claimant is before the court. This would require the use of the sliding scale approach in class actions only. This application of the Gilchrist holding is supported by the court’s unwillingness to expressly overrule Rice.

This interpretation is at odds with the actual result in Gilchrist, however. Although the Klein action was consolidated with the Gilchrist action, it does not appear that Susan Gilchrist was a member of the class represented by Patricia Klein. 128 The court applied the sliding scale to both suits. The court refused to apply the total forfeiture rule to either the Gilchrist or the Klein action.

A better interpretation is that the total forfeiture rule will still apply when there is only one possible plaintiff. When the facts and circumstances indicate there are multiple potential claimants, the trial court must apply the sliding scale approach. 129

This interpretation is consistent with the language used in the St. Paul Fire footnote. 130 The footnote suggests that the presence of multiple claimants creates a special circumstance warranting an exception to the total forfeiture rule. This is also consistent with the court’s reference to “multiple potential plaintiffs” in Gilchrist. 131

fee should be forfeited mainly because the attorney refused to follow the directions of the client. Id. at 1257.

126. See supra note 121.
127. See supra note 104 and accompanying text.
128. Certification of the class action occurred after Gilchrist filed suit. The court stated that Gilchrist was apparently “not a member of the class, although this is not clear.” Gilchrist, 387 N.W.2d at 414 n.1. Whether she was a member of the class had no bearing on the disposition of her claim. One might speculate that Gilchrist’s attorney, anticipating the court’s adoption of the St. Paul Fire footnote as law, thought it best not to join the class.
129. The presence of multiple claims is a factor to be considered in awarding punitive damages. See supra text accompanying note 121. Gilchrist, however, requires the trial court to first determine whether the factor is satisfied, i.e., that there are several potential claimants, and then decide whether the statute will apply to the case at bar. See infra text accompanying note 145 for further discussion.
130. See supra note 100 and accompanying text.
131. 387 N.W.2d at 417.
In addition, one of the factors to be considered under the punitive damages statute is the “total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons.” 132

The holding in Gilchrist, therefore, appears to be that the total forfeiture rule will apply when only one claim is likely to be asserted. When several clients are likely to present claims based on constructive fraud, the sliding scale is used to determine the amount of forfeiture.

IV. CRITICISM OF THE GILCHRIST DECISION

In light of the policy reasons supporting total fee forfeiture, the court’s decision in Gilchrist is subject to criticism on at least two grounds. First, the court’s emphasis on the admonitory function of forfeiture fails to sufficiently protect the integrity of the legal profession in the public’s perception. Second, the punitive damages statute is intended to determine damages for breach of a standard of care, thus, its use is inappropriate in determining damages for breach of a standard of conduct. 133

A. Failure to Protect the Integrity of the Bar and the Attorney-Client Relationship

In St. Paul Fire, the court held that the aim of the forfeiture remedy is to “put right the attorney-client relationship that has been tainted” by the breach of fiduciary duty. 134 The court stated that the purpose of forfeiture is to “make amends to the client.” 135 The court’s analysis of the nature of the forfeiture remedy supports the total forfeiture rule. The breach of the client’s “absolute right” 136 to an attorney’s undivided loyalty is best remedied by absolute forfeiture when the reparational function of forfeiture is emphasized as it was in Rice and St. Paul Fire. 137

In contrast, the Gilchrist court emphasized that the predominant functions of fee forfeiture are punishment and deterrence. 138 It follows that if the main purpose of forfeiture is to punish and deter, and if the forfeiture should not exceed the amount necessary to punish and deter, 139 then the use of the punitive damages statute will reflect

133. See supra text accompanying note 37.
134. St. Paul Fire, 345 N.W.2d at 214.
135. Id.
136. Id. at 212.
137. See supra note 87 and accompanying text.
138. 387 N.W.2d at 416.
139. Id. at 417.
This emphasis.

The inconsistency between Gilchrist, Rice, and St. Paul Fire is a result of shifting the emphasis from the reparational function of the forfeiture remedy to the punitive function. But Gilchrist fails to sufficiently consider the need to protect the integrity of the legal profession in the perception of the public. When this factor is given weight, the emphasis of forfeiture should be on providing reparation to the client and requiring total forfeiture as a matter of law.

The sliding scale approach, while insuring the forfeiture will not exceed the amount necessary to punish and deter, nevertheless may allow an attorney to profit from his or her misconduct. One federal court has stated, upon facts very similar to Gilchrist, that to allow the attorney to profit from this misconduct "would be to make a mockery of the ethical standards . . . and further impair the integrity of and the public confidence in the legal system." In addition, little consolation is given to the aggrieved client who nevertheless must still pay the unfaithful attorney. Total forfeiture of fees for breach of the client's absolute right to an attorney's loyalty is required to insure the integrity of the attorney-client relationship.

Furthermore, the need to protect the integrity of the bar in the public perception should require greater, not lesser remedies when multiple clients are involved. When several claims are asserted against an attorney, it is more likely to attract media attention. The court has recognized that "negative media attention may discourage those needing legal assistance from seeking it." To the public, already skeptical of a self-regulating profession, the court should be willing to impose severe remedies for misconduct that impairs public confidence in the bar. The Gilchrist decision offers no persuasive reason why the attorney who breaches a duty to several clients should benefit over the attorney who breaches the same duty to only one client.

140. This argument was also advanced in Justice Wahl's dissent where she stated that "[t]he concept of a sliding scale for forfeiture of attorney fees for breach of a fiduciary duty to a client does not, in my view, sufficiently protect the integrity of the legal profession in the perception of the public." Gilchrist, 387 N.W.2d at 420 (Wahl, J., dissenting).

Wahl proposed the total forfeiture rule for "actual fraud and breaches of fidelity to the client which, like that of Perl's we find to endanger the trust necessary to the proper functioning of the attorney-client relationship . . . ." Id. Less serious offenses presenting a minimal threat to the attorney-client relationship would warrant a less severe remedy. In that case, the attorney should be allowed to retain that part of the fee covering costs, expenses, and office overhead only. Id.


142. In re the Discipline of Norman Perl, CX-86-343, slip op. at 7 (Minn. Aug. 1, 1986), vacated, 394 N.W.2d 487 (Minn. 1986).

143. Justice Wahl observed that "[t]his is a strange concept of logic and justice." 387 N.W.2d at 420 (Wahl, J., dissenting).
a rule that protects all clients equally.

B. Inappropriateness of the Punitive Damages Statute to Remedy Constructive Fraud

The use of the punitive damages statute to determine the amount of fee forfeiture for constructive fraud is inappropriate. Exemplary damages are awarded for breach of a standard of care. The requirement of willful indifference to the rights of others and the defense of good faith, combined with the presumption that reparation is made prior to the award, makes the statute ill suited to determine damages for constructive fraud. Constructive fraud is a characterization of a breach of a standard of conduct. A forfeiture award for constructive fraud is premised on different requirements than a punitive damage award.

In Gilchrist, the court held that the punitive damages statute will be used to determine the amount of forfeiture if multiple potential claims are present. Gilchrist triggers the statute by satisfying one of the factors of the statute. The language of the statute, however, clearly indicates that the use of the statute is triggered "only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." The statute allows punitive damages to penalize the defendant because of the defendant's bad faith or intent.

In contrast, constructive fraud occurs irrespective of the attorney's motive or intent. It is a characterization of conduct which the law treats as fraudulent without regard to intent or motive. It is the act and not the actor's state of mind which is fraudulent.

Because the statute seeks to punish the actor's intent or motive, good faith is a proper defense to a punitive damages award. The

144. See supra text accompanying note 37.
145. See supra note 131 and accompanying text.
146. Id.
147. MINN. STAT. § 549.20, subd. 1 (1986). Accord, McGuire v. C & L Restaurant, Inc., 346 N.W.2d 605, 615 (Minn. 1984) (punitive damages must be based on conduct willfully indifferent to the rights or safety of others); Wilson v. City of Eagan, 297 N.W.2d 146, 150 (Minn. 1980) (punitive damages allowed only where harm is a result of malicious, willful or reckless disregard for rights of others). In addition, mere negligence is not sufficient to warrant punitive damages, Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232, 237 (Minn. 1980), but a finding of actual malice is not required, Hawkinson v. Geyer, 352 N.W.2d 784, 788 (Minn. Ct. App. 1984).
148. MALLEN & LEVIT, supra note 20, § 108 at 188. In Rice, the court specifically rejected Perl's contention that his nondisclosure was unintentional. The court noted that intent or motive is irrelevant to finding a breach of fiduciary duty. Rice, 320 N.W.2d 407, 411.
149. See supra note 20 and accompanying text.
150. See supra note 23 and accompanying text.
151. See Peterson v. Sorlien, 299 N.W.2d 123, 129 (Minn. 1980). See also Roworth
actor is afforded the opportunity to reduce the award which seeks to
punish the actor’s bad faith. On the other hand, good faith is not a
defense to fee forfeiture for constructive fraud. Since forfeiture
seeks to compensate the client, the unfaithful attorney will forfeit
part or all of the fee even if he or she acted in good faith.152 The
reason for the breach of fiduciary duty is irrelevant and will not re-
duce the forfeiture. The harm to the client, which the forfeiture
seeks to compensate, is the same regardless of good or bad faith.
Furthermore, good faith cannot remedy the impact of a fiduciary
breach upon the integrity of the profession.153

Most important, an award of punitive damages requires proof of
actual harm.154 Since nominal damages will not support an award of
punitive damages,155 punitive damages are given in excess of repar-
tional damages. The law presumes the client has been compensated
for the injury and the punitive damages are allowed, in a sense, as a
reward to the plaintiff for “bringing the wrongdoer to account.”156

In contrast, actual harm is not a required element of constructive
fraud.157 The absence of actual harm is one of the factors which dis-
tinguishes constructive fraud from actual fraud.158 The aggrieved
client is deemed injured by the breach of fiduciary duty even if no
actual loss results.159 The client’s reparation and the penalty im-
posed on the fiduciary are both extracted from the forfeiture award.
 Whereas the punitive damages statute presumes the plaintiff has re-
ceived reparation prior to the punitive award, here the client’s only
remedy is forfeiture. In addition, the amount of the forfeiture can-

152. See MAlLEN & LEVIT, supra note 20, § 159 at 256. In discussing the fiduciary
duty to avoid conflicting interests, the authors state that “[t]he unavailability of good
faith as a defense to a lawyer is based upon the public policy to protect the public's
confidence in the integrity of the legal profession.” Id. See generally id., § 9 at 25-27;
id. § 165 at 272-73 (discussing the different jurisdictional views concerning representa-
tion of conflicting interests).

153. Id., § 124 at 217.

154. Meixner v. Buecksler, 216 Minn. 586, 591, 13 N.W.2d 754, 757 (1944);
The only exception to this rule is in a defamation action where damages are assumed
and need not specifically be found. If the words are defamatory per se, then actual
harm will be assumed. Id. at 741 (citing National Recruiters, Inc. v. Cashman, 323
N.W.2d 736, 741 (Minn. 1982)). Accord, C. McCORMICK, McCORMICK ON DAMAGES,
§ 83 at 295 (1955).

155. MAlLEN & LEVIT, supra note 20, § 315 at 366.

156. MCCORMICK, supra note 154, § 77 at 278 n.12 (quoting Neal v. Newburger
Co., 154 Miss. 691, 700, 123 So. 861, 863 (1929)).

157. St. Paul Fire, 345 N.W.2d at 212.

158. See supra text accompanying notes 23-26.

159. See supra text accompanying notes 25-34.
not exceed the fee paid. Punitive damages, however, have no fixed limit.\textsuperscript{160}

The distinctions between punitive damages and fee forfeiture are more than just academic. The punitive damages statute was enacted to limit the amount and frequency of awards.\textsuperscript{161} It seeks to reduce the amount given to the plaintiff in excess of compensatory damages. The plaintiff who seeks a forfeiture award, however, looks to forfeiture as the sole remedy to provide compensation for his or her injury.\textsuperscript{162} Therefore, because the factors enumerated in the statute\textsuperscript{163} are intended to limit punitive damages, they should not be used to limit compensatory damages for breach of a fiduciary duty.

The injury to the client who receives less than the undivided loyalty and zealous representation to which he or she is absolutely entitled,\textsuperscript{164} should be compensated by total forfeiture. To fully compensate the aggrieved client, this remedy should be imposed as a matter of law.

\textbf{CONCLUSION}

The court's decision in \textit{Gilchrist} is inconsistent with the prior cases concerning Norman Perl's breach of fiduciary duty to his clients. In \textit{Rice} and \textit{St. Paul Fire}, the court held that Perl's misconduct warranted total forfeiture of his fee. In \textit{Gilchrist}, the court held that the presence of multiple potential plaintiffs created an exception to the total forfeiture rule. In determining the amount of forfeiture, the court applied the punitive damages statute, reasoning that this was a better approach. Under the statute, damages less than total forfeiture may be awarded to the injured client.

The inconsistency between the three cases is a result of shifting the emphasis from the reparational function of forfeiture to the punitive function. However, when the policy of protecting the integrity of the legal profession is given sufficient weight, the emphasis should be on compensation to the client. The sliding scale approach favors the attorney who breaches a fiduciary duty to several clients instead of one. In this instance, the law should impose absolute forfeiture for a breach of the client's absolute right.

\textsuperscript{160} \textit{St. Paul Fire}, 345 N.W.2d at 214.

\textsuperscript{161} MINN. STAT. § 549.20 (1986). The statute was enacted in response to growing concerns about the amount of punitive damage awards in products liability suits. Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297, 310-11 (Minn. 1980).

\textsuperscript{162} As illustrated in \textit{Rice}, breach of fiduciary duty is remedied by forfeiture only. 320 N.W.2d at 411. All of Rice's claims requiring actual harm were dismissed. Her sole remedy for Perl's misconduct was forfeiture. \textit{Id}.

\textsuperscript{163} \textit{See supra} note 121.

\textsuperscript{164} \textit{See supra} notes 85-87 and accompanying text.
Furthermore, the punitive damages statute is an inappropriate method of determining damages for constructive fraud. The premises upon which the statute is based are inapplicable to breach of fiduciary duty. Whereas punitive damages are awarded in excess of reparational damages, the forfeiture remedy must serve both purposes. Therefore, the statute aimed at limiting punitive damages should not be used to limit reparational damages.165

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165. In January 1987, Perl settled out of court with the Gilchrist plaintiffs. The settlement, as approved by the Hennepin County District Court, obligates Perl to pay $318,000 to his former clients. Assuming that one third will be retained by the attorneys who brought the Gilchrist and Klien actions, the claimants will receive about $212,000 for Perl's breach of fiduciary duty. This amount is slightly less than half of the fees originally paid to Perl. Minneapolis Star and Tribune, Jan. 19, 1987, at 1B.

In November, 1987, the Minnesota Supreme Court decided the most recent case involving Perl's conduct. St. Paul Fire & Marine Co. v. Perl, 415 N.W.2d 663 (Minn. 1987). See supra note 86. The court noted its displeasure with the number of cases arising out of Perl's representation of his Dalkon Shield clients. The court stated, "[w]e trust that this case will end almost 9 years of litigation arising out of the alleged Perl misconduct and that we shall not see another case before this court on the incidents giving rise to the Perl litigation." Id. at 667.