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## Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff's Case

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# LEGAL MALPRACTICE—A CONSIDERATION OF THE ELEMENTS OF A STRONG PLAINTIFF'S CASE

RICHARD D. BRIDGMAN\*

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### I. AN OVERVIEW

Historically, the existence of legal malpractice was appar-  
ently a judicial embarrassment if the scant appellate authority is

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any guide.<sup>1</sup> In the forties and fifties appellate courts forged comprehensive rules governing the missteps of the medical profession. Until the seventies, however, courts generally took a protective and paternalistic approach to the legal profession.<sup>2</sup> Since the early seventies, though, there has been a ground swell toward narrowing the gap. The ground swell has been viewed with alarm by lawyers—as well it might. Whereas the doctor, at least in his own mind, is encumbered by onerous and unfair legal restrictions, he nevertheless enjoys in the community a godlike stature that severely blunts the edge of the judicial sword. The lawyer, on the other hand, enjoying community stature somewhere between that of an automobile salesman and an undertaker,<sup>3</sup> has needed all the protection the law could muster about him. As legal privileges and immunities have eroded, the lawyer has viewed with horror the submission of his fate to a jury of twelve laymen.

We have arrived at the end of the era of privilege. Legal malpractice litigation is with us. The purpose of this article is to view the panorama of legal negligence from the eyes of the plaintiff's lawyer. There will be no in-depth discussion of the history and development of the law in the field, for that would encompass a volume in itself.<sup>4</sup> Rather the purpose is to strip away the mystique that inevitably surrounds any recently expanded body of law and to apply the already at-hand skills of the contemporary lawyer to the particularities of legal malpractice litigation. The article is designed for the general practitioner as well as the specialist. Not only is consideration given to techniques helpful to

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1. Evidence of the relative scarcity of appellate authority is seen in the treatment of the subject in legal encyclopedias. For example, in 7 CAL. JUR. 3d *Attorneys at Law* §§ 278-285 (1973), under the sub-heading, "Malpractice," there are 26 cases cited from the years 1870 to 1969 and 23 cases cited for the nine years since 1969. By comparison, from 1870 to 1969 the California Supreme Court Reports encompasses 291 volumes, while only 20 volumes have been published since 1969.

2. Early case law often held that an attorney must be found to have been "grossly negligent" or shown "gross ignorance" before he could be found to be professionally negligent. *E.g.*, *W.L. Douglas Shoe Co. v. Rollwage*, 187 Ark. 1084, 63 S.W.2d 841 (1933). See also King, *Legal Malpractice—The Coming Storm*, 50 CAL. B.J. 362, 363 (1973); Wallach & Kelley, *Attorney Malpractice in California—A Shaky Citadel*, 9 CAL. TRIAL LAW. A.J. 89, 91 (1971).

3. Although the author must plead guilty to hyperbole with intent to jest, a recent (1977) survey by pollster Mervyn Field actually reported that public confidence in the legal profession ranked just below that in Congress and just above that of the insurance industry. Of ten institutions that were the subject of that survey, the legal profession ranked eighth.

4. For a full volume treatment of the subject, see generally R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* (1977).

the lawyer representing the plaintiff, but, hopefully, valuable assistance will also be given to the practitioner who must determine which cases offered him are nonmeritorious and should be rejected. Most experts agree that the secret to a successful professional liability practice is meticulous screening of cases well in advance of filing suit.

## II. A PHILOSOPHIC EXAMINATION OF THE PLAINTIFF'S LAWYER'S ROLE IN LEGAL MALPRACTICE LITIGATION

Twenty years ago the lawyer who undertook to sue a colleague for malpractice was granted full pariah status in the local legal community. At the same time, our colleagues bemoaned loudly, and justifiably, the "Conspiracy of Silence" within our sister profession, medicine. Paradoxically, the most strident voices condemning the hypocrisy of those bound by the Hippocratic Oath were often the most vociferous in damning the rascal who represented a plaintiff against one of the club. Dedicated malpractice counsel overcame the refusal of physicians to testify against each other by skillfully cross-examining them and by persuading courts to expand the *res ipsa loquitor* doctrine.<sup>5</sup> Seminars, law review articles, and trial practice symposia exhorted the profession to acquire these skills—and acquire them we did.

The plight of the legal malpractice victim, of course, was ameliorated not one whit by the medical malpractice explosion, for the strong voice of the trial bar against the miscreant physician was virtually unavailable to the victim of legal incompetence. During that halcyon era before the seventies, the boast of the plaintiff's bar that it "comforted the afflicted by afflicting the comfortable" apparently did not extend to bringing its substantial talent to bear on behalf of those "afflicted" by a lawyer.

Do not forget that the fifties and sixties saw not only the medical profession brought to task. These were also the nascent decades of consumerism. The manufacturer's shield was stripped away with the judicial announcement of the enlightened doctrine of strict liability in tort.<sup>6</sup> Archaic immunities of landowners, which had descended from the ancient English law, were pushed

5. Compare *Robinson v. Wirts*, 387 Pa. 291, 127 A.2d 706 (1956) (refusing to apply the doctrine) with *Quintal v. Loral Grove Hospital*, 62 Cal. 2d 154, 397 P.2d 161, 41 Cal. Rptr. 577 (1964).

6. E.g., *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

to the wayside.<sup>7</sup> Shabby practices of insurance adjusters were exposed and prohibited.<sup>8</sup> Safety orders to protect workers were spewed forth by legislatures. The polluters of our environment were brought to their knees. Ralph Nader preached the dogma of consumers' rights. The consumer was king—except against his attorney. The lawyer still enjoyed relative immunity—at least compared to the rest of society—from his misdeeds. By its very nature, though, our adversary system always results in a winner and a loser so that every case has malpractice potential. This once served as a justification for the attorney's privileged position.

Whether it was the embarrassment of having one's hypocrisy exposed, the emergence of a new breed of consumer-oriented lawyer or merely that our time had come, the worm turned in the late sixties and early seventies. Suddenly, the lawyer was, despite himself, in the midst of the age of consumerism.<sup>9</sup> Legal malpractice insurance rates soared.<sup>10</sup>

Although an attorney who regularly represents plaintiffs in legal malpractice cases may suffer a degree of enmity from some colleagues, particularly those he names as defendants, he is not now in jeopardy of losing all friendship, nor of losing his license. Much of the bar has belatedly accepted that lawyers are not, and ought not be, above the law. We, like all persons, should be accountable for our neglect. In these times when our image is tarnished by the aftermath of Watergate, this accountability is a healthy sign. To regain the public trust, it is fitting that the profession say a *mea culpa*.

It is not suggested here that the profession should be subjected to a higher standard of care. The present laws are generally adequate, and, heaven knows, juries do not show great mercy to the lawyer-defendant. This, of course, presents a dilemma for a plaintiff's counsel. The quantum of neglect that would never result in a verdict against a doctor, nor, for that matter, a bus driver, may well convince a jury to bring in a verdict against a lawyer. Lawyers are not only poor witnesses, but unloved witnesses as well. In evaluating a potential legal malpractice case,

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7. *E.g.*, *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

8. *E.g.*, *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (1957).

9. See Zelle & Stanhope, *Lawyer Malpractice: The Boomerang Principle*, 13 TRIAL 16 (1977).

10. For example, between 1975 and 1977 Traveller's Insurance Company, under a contract with the State Bar of California to provide malpractice insurance for members, raised their premiums by nearly 500% and in 1978 raised them again by 35%.

the plaintiff's lawyer is on the horns of a dilemma. He may well prevail in a shabby case of liability, but knows that there but for the grace of God goes he. The duty to the client and the lawyer's self-interest are inexorably drawn into conflict. It is hoped that the thoughts in this article will help resolve the conflict.

Obviously, the practitioner is free to accept or reject legal malpractice litigation.<sup>11</sup> The latter approach resolves the conflict, but, if widespread, it exacerbates the underlying problems. If a client relates facts that indicate a meritorious case, misadvising the client that no malpractice exists would be reprehensible and, of course, malpractice itself. It is a mere truism to say that, here, honesty is the *only* policy. The profession has an obligation to its victims, and an attorney confronted with such a situation has a public duty<sup>12</sup> either to represent the client or refer him to competent counsel less squeamish about doing so.

### III. PRELIMINARY INVESTIGATION OF THE LEGAL MALPRACTICE CASE: DOES THE CASE WARRANT PROCEEDING FURTHER?

As previously indicated, preliminary screening of any potential legal malpractice suit is the *sine qua non* of a successful practice. Not only does it shield the would-be plaintiff's counsel from unnecessary time, effort, and expense in prosecuting worthless cases, but it is also a matter of professional courtesy to the attorney-defendant against whom there may not be a viable cause of action.

Clearly every litigant conceives of his cause as the epitome of justice. Absent avarice, he would not come to the lawyer in the first place unless motivated by self-righteousness. He is prone to make light of any equities flowing in his opponent's direction, and he can rationalize with Houdini-like facility any weakness in his own case. Therefore, when judgment goes against the forces of right and for the forces of evil, the litigant is preconditioned to bitter nonacceptance. Who is in a better position to be the new whipping boy than the lawyer whose bumbling ineptitude lost the litigant's air-tight case? The author has personally heard the following indictments:

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11. Although the ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION No. 2-28 states in part that "the personal preference of a lawyer to avoid adversary alignment against . . . other lawyers . . . does not justify his rejection of tendered employment," as a practical matter, of course, no lawyer can be forced to take a case.

12. *Id.* This public duty is embodied in the ethical obligation.

*"He was drunk all through the trial." (He was a notorious teetotaler.)*

*"He didn't take any depositions before trial." (He did—twice as many as the author would have taken.)*

*"The kid was just out of law school." (The kid was—ten years out.)*

*"The judge was in cahoots with the other attorney and he didn't do anything about it." (As if he could.)*

The thrust of these statements is, of course, that the losing litigant will understandably suffer disappointment. Many people accept the judgment of their peers, but some do not. Therefore, counsel must exercise caution in undertaking representation of the losing party of a lawsuit. Remember, if the desired result is not produced, you might be next. If the old trial lawyers' admonition to "check your own client's story first" is valid, it is doubly so in these situations.

The first step in the lawyer's investigation of a potential legal malpractice case is a meticulous interview of the client, which should be prepared for in advance and documented with accurate notes. The initial interview of any potential client is of course crucial to the lawyer's determination of whether he has a case, and each lawyer must develop his own techniques and style for eliciting the information necessary for that decision. The following observations are intended to serve as possible guidelines in preparing for and conducting the initial interview in this area of plaintiff's litigation.

The client should be instructed to bring to the first interview any documentation that he has relating either to the underlying matter or to the handling of his lawsuit by the potential defendant. Scanning these papers at the beginning of the interview can save substantial time because of the clarity they may lend to the client's story. We should not forget that many clients are relatively inarticulate and, of course, unschooled in the law. Therefore, their explanations may create more mystery than enlightenment.

Also, it is helpful if a brief version of the client's complaint is available prior to the first appointment so that preliminary legal research may be undertaken before the interview. A general observation is that many disgruntled clients tend to have a monumental appetite for minutia and a healthy disregard for the relevant. Research serves as a guidepost for directing the client's version of the facts in a relevant direction.

The absolute necessity of a thorough initial interview cannot be emphasized too strongly. If possible, it is good policy to allocate at least two hours for it. Not only must the interview be thorough, but it should also disclose any potential weakness in the client's version of the facts. A thorough cross-examination is necessary to ensure that the client is not merely feeding the attorney information he believes the attorney wants to hear. Generally, a wise initial approach is to view everything the client says with skepticism and, to the extent feasible, to investigate every material detail of his story. At the outset it is helpful to find out *exactly* what about the previous lawyer's conduct leads the client to feel that he has been the victim of legal malpractice. In many instances a nonmeritorious case will be disclosed at this point and the otherwise lengthy interview may be terminated.

The client interview should include a detailed and exhaustive inquiry into all the facts of the underlying legal matter about which the client now complains. Obviously, unless the underlying matter had merit, the legal malpractice suit is of dubious value. Sufficient detail should be developed about the names of the attorneys involved for the various parties and, if litigation is involved, the court in which the matter was filed, and the dates and times of filings, trial, discovery proceedings, and so forth as far as the client is able to give this information.

After the initial interview, the second step will generally be a review of the official files of the court, escrow, recorder's office, or any public agency that may have had contact with the subject matter of the client's claim. All relevant records should be copied and made part of the permanent file. The contents of these records should be compared with the version tendered by the client and, as with any stage of the investigation, if there is a discrepancy between the client's version and matters disclosed from subsequent investigation, the client should be brought back into the office either to reconcile or explain the discrepancy.

Plaintiff's counsel should research the legal aspects of both the underlying matter and the probable basis of the potential defendant's liability. Needless to say, the research should be documented, at least in the form of handwritten notes, for future reference. As noted earlier, some preliminary research is desirable prior to the client's first appointment. But, relatively early legal research is essential once employment seems likely so that further investigation may be meaningful and directed towards reconciliation of facts and law.

Many legal malpractice cases are referred to lawyers with a



good background in general litigation. The potential malpractice, however, may arise from a particular speciality of the law with which the general trial practitioner has little or no familiarity. In that case, consultation with an expert in the particular field of law at the earliest opportunity is essential. In those states in which an expert's consultation may be obtained and not disclosed to the adversaries under the protection of the work product rule, it is preferable to employ the expert initially as a consultant so that his opinion need not be disclosed. An additional advantage to this technique is that, particularly in a smaller locality, an attorney may be willing to give a frank, but private, appraisal of the nature of the malpractice and yet not wish to become involved as a witness or have his identity disclosed because of a personal relationship with the defendant.

If the potential malpractice arises from trial, contacting the adverse attorneys to get their version of the case may be advisable.<sup>13</sup> This serves a two-fold purpose. First, it is a good check on the client's version, and, second, it provides a valuable insight into the conduct of the potential defendant-attorney. This invaluable contact will also frequently provide insight into some of the nuances of the litigation that might never be apparent from the client interview, a naked review of the court file, or even the trial transcript itself, and that might explain why the litigation was lost. On the other hand, if the adverse attorney tells you the potential plaintiff made an excellent impression at trial, this is also a substantial factor in evaluating the case.

A substantial division of opinion exists on the question of whether the potential defendant should be contacted prior to filing suit.<sup>14</sup> On the positive side, this contact has the advantage of serving to confirm again the facts presented by the client—at least to the degree that the defendant's integrity is greater than his self-righteousness. Frequently, the defendant may well be aware that his conduct amounted to malpractice and would prefer to refer the matter to his carrier immediately and attempt to bring about a settlement. Contacting the potential defendant may also create a more favorable climate for the ultimate litiga-

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13. Obviously, opposing counsel is under no compulsion to discuss the case, and certainly no effort should be made to have him divulge matter that would invade the attorney-client privilege. Similarly, care should be taken not to violate your own client's confidences.

14. Whether the potential defendant is contacted at all depends on whether he is then represented by counsel. If he is, it goes without saying that it would be a serious breach of ethics to do so. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-104 (1976).

tion since telephone notice of the intention to file suit is substantially softer than the harsh service of unexpected suit papers. On the other hand, the advance warning may conceivably do nothing more than evoke abuse.

The key to legal malpractice litigation (or to any litigation) is careful and meticulous presuit investigation of the client's cause: this cannot be overemphasized. Knowing what facts are reasonably provable at the time of trial is essential, just to plead the action properly. More importantly, however, as a matter of professional courtesy, one owes to one's colleagues the duty of a thorough investigation before subjecting them to a legal malpractice action.

#### IV. EVALUATING THE ACTION: IS THERE LEGAL MALPRACTICE LIABILITY?

Like other professional negligence actions the basic elements of legal malpractice are: (1) a duty owed to the injured party arising out of the contract for professional services, (2) a breach of that duty by failure to exercise professional skill, and (3) damage caused by the failure to exercise the requisite skill.<sup>15</sup> Although the elements of the cause of action are clear, courts have not always clearly delineated the guidelines for proving each element. Nonetheless, this section of the article presents an analysis of whether legal malpractice liability will attach to a particular type of lawyers' conduct within the familiar framework of those basic elements.

##### A. *Establishing the Duty of Care*

If the plaintiff was the client of the defendant-attorney, the duty of care clearly arises out of the contract for professional services. Cases in which the duty is not so easily established are those that are brought by a party other than the defendant-attorney's immediate client. When will a third party have standing to sue the negligent attorney?

Formerly, most jurisdictions adhered to the rule that *only* the client could be a party plaintiff because the action derived from

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15. Although the concepts of cause in fact, proximate cause of injury, and provable damages are separate theoretical concepts, in practice they blend together—especially in legal malpractice cases. The injury will be an economic injury, and the case will turn on whether the plaintiff suffered a loss, which in turn will hinge on whether that loss was proximately caused by the defendant-attorney's negligence. For that reason, this aspect of the plaintiff's case is discussed as one element.

a contractual relationship, and no one else was in privity.<sup>16</sup> The more modern approach has been, however, that those parties whom the attorney's services were intended to benefit have standing to sue.<sup>17</sup> For example, standing has been granted to beneficiaries under a will,<sup>18</sup> to the ward of a misappropriating guardian,<sup>19</sup> to the deceased client's administrator,<sup>20</sup> and to the client's creditor when the attorney volunteered to file and protect the creditor's security agreement arising from a loan to the client.<sup>21</sup>

Although not yet a majority rule, the growing trend seems to be to abolish the privity requirements in legal malpractice cases as in other areas of the law.<sup>22</sup> Generally, whether a third party has standing to sue depends on a balancing of factors. In determining whether privity should be required, the courts have pointed to considerations such as the extent to which the transaction was intended to benefit the third party, the foreseeability of harm, the degree of certainty that the third party suffered injury, the moral blame attached to the defendant's conduct, and the public policy of preventing future harm.<sup>23</sup>

### *B. Establishing a Breach of the Duty of Care*

An unfavorable result in itself is not legal malpractice. The California Supreme Court expressed the general rule as follows:

The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for

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16. See, e.g., *Buckley v. Gray*, 110 Cal. 339, 42 P. 900 (1895), *overruled in part*, *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958). See also Annot., 45 A.L.R.3d 1181 (1972).

17. E.g., *Fickett v. Superior Court, Pima Co.*, 27 Ariz. App. 793, 558 P.2d 988 (1976); *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976).

18. *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958); *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976).

19. *Fickett v. Superior Court, Pima Co.*, 27 Ariz. App. 793, 558 P.2d 988 (1976).

20. *Jones v. Siesennop*, 55 Ill. App. 3d 1037, 371 N.E.2d 892 (1977).

21. *Schwartz v. Greenfield, Stein & Weisinger*, 90 Misc. 2d 882, 396 N.Y.S.2d 582 (Sup. Ct. 1977).

22. Annot., 45 A.L.R.2d 1181, 1185 (1972). This trend has not been adopted in every modern decision. E.g., *Metzker v. Slocum*, 272 Or. 313, 537 P.2d 74 (1975). After holding that under state law privity of contract was required, the court did go on to state, however, that even if privity were not required the foreseeability of harm and the causal connection between the injury and the negligence were too tenuous to support liability.

23. See cases and annotations cited in notes 17-22.

being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers.<sup>24</sup>

Only when the unfavorable result is proximately caused by the lawyer's substandard skill or care, fraud, or other malfeasance may it be characterized as malpractice.<sup>25</sup> Rather than explore the theoretical underpinnings of what is the standard of care, an examination of some typical situations that may or may not be characterized as legal malpractice may be more useful at this point. The following situations are frequently presented to the legal malpractice specialist by disgruntled clients seeking economic comfort from their former counsel.

1. *Time Limitations.*—It has been estimated that 45% of all claims presented against attorneys concern missing time limitations, often the statute of limitations.<sup>26</sup> It is difficult to envision an excuse for missing a statute of limitations or other time limit. Therein, of course, lies the trap for the uninitiated. At least in the hands of competent counsel, the case that is never filed or that is dismissed for failure to prosecute, is often not of the highest quality. Thus, even though the action is barred by the lawyer's failure to observe the statute, did any damage flow therefrom? A thorough investigation of the merits of the underlying case is imperative, for a mere professional mistake does not the proverbial silk purse from a sow's ear make.

Many a trial is lost that could be characterized a winner. The lawyer, assuming he exercised the requisite skill and care, is not rendered liable per se for the foibles of the bench and jury. But should the case present grounds for appeal or other posttrial relief, counsel is most certainly liable to his client if he fails to protect the rights to appeal by *timely* notice and other procedural requirements. Again, liability flows only from the loss of what would probably have been a more favorable result to the client, in other words, from a reversal and a different result on retrial.<sup>27</sup>

2. *Trial Error.*—The second most prevalent source of disenchantment, at least in the author's experience, is the wide-

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24. *Lucas v. Hamm*, 56 Cal. 2d 583, 591, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961), *cert denied*, 368 U.S. 987 (1962).

25. *Id.*; *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966); *Ward v. Arnold*, 52 Wash. 2d 581, 328 P.2d 164 (1958).

26. *Levit & Mallen, Legal Malpractice* 4 (1974) (materials used in California CLE program).

27. *Pete v. Henderson*, 124 Cal. App. 2d 487, 269 P.2d 78 (1954); *Pusey v. Reid*, 258 A.2d 460 (Del. Super. Ct. 1969); *C/M of Baton Rouge v. Wood*, 341 So. 2d 1181 (La. Ct. of App. 1977); *Cornelissen v. Ort.*, 132 Mich. 294, 93 N.W. 617 (1903).

ranging field of trial error. Although in England the barrister is virtually immune from liability for any act or omission that occurs at trial,<sup>28</sup> this is not true in the United States. The general rule is that the trial lawyer is liable for failure to possess the requisite skill or to exercise standard care in the trial of his client's cause.<sup>29</sup>

This is not to say, however, that *any* shortcoming at trial may be a basis for a viable cause of action. For instance, reasonable lawyers and judges would certainly agree that a trial lawyer totally ignorant of the hearsay rule falls short of the mark of possessing the standard of learning and skill ordinarily possessed by other lawyers in good standing in any community. Likewise, reasonable lawyers and judges would also agree that the attorney who, though technically correct, objects to every questionable statement at trial, soon paints himself as an obfuscator in the eyes of the jury and thereby jeopardizes his case. Obviously the lawyer is not liable for judgment calls at trial merely because, in retrospect, they may not have been the best choice.

Where then, between the extremes, does the line of demarcation between culpable and nonculpable conduct lie? Merely to state that the test is that set forth by the courts—the use of the degree of judgment, care, skill, and diligence commonly possessed by lawyers of ordinary skill and capacity—provides little concrete guidance for the practitioner. The standard seems to point to a *fact* situation, the impact of which must be determined by the trier of fact. Appellate authority is of little help in precisely defining the line of demarcation.

A recent case, pointing up at least an extreme at which the court was critical of an attorney's judgment call involves convicted mass-slayer Juan Corona. Although *People v. Corona*<sup>30</sup> was an appeal from Corona's conviction for multiple murders, not a malpractice case, the court directly addressed the issue of judgment calls. Corona was accused of the murder of twenty-five itin-

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28. *Baikie v. Chandless*, 3 Camp. 17; *Rondel v. Worsley*, [1967] 3 All E.R. 993 (H.L.).

29. *E.g.*, *Campbell v. Magana*, 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (1961). Commentators have urged that the English Rule be adopted for trial errors. *E.g.*, Thomason, *A Plea for Absolute Immunity for Errors in Trial Judgment*, 14 WILLAMETTE L. REV. 369 (1978). As of now, however, only one American jurisdiction has followed the English Rule. See *Woodruff v. Tomlin*, 423 F. Supp. 1284 (W.D. Tenn. 1976); *Stricklan v. Koella*, 546 S.W.2d 810 (Tenn. App. 1976). These decisions are limited to situations dealing with the trial lawyer's judgment on how he will present his case to the trier of facts.

30. 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978).

erant farm workers, and the case received nationwide publicity. Corona had a long and documented history of mental illness. The evidence pointing to Corona as the killer was overwhelming. Corona's counsel had the reports of three psychiatrists, one of whom gave defendant a clean bill of mental health, although none tended to bring Corona within the purview of the M'Naghten rule.<sup>31</sup> All three psychiatrists, however, recommended further psychiatric observation.

The trial judge implored counsel to submit defendant for further examination to determine whether he was mentally capable of assisting counsel at trial. Counsel, an experienced trial lawyer, insisted that defendant was competent and suggested that he could exonerate his client *on the facts*. The cause proceeded. The defense not only failed to plead legal insanity as a defense, but produced *no* evidence of mental illness that would tend to show Corona suffered from "diminished capacity," a partial defense under California law. The defense rested the case solely upon cross-examination of the State's witnesses without calling a single witness, including defendant. The jury convicted Corona on twenty-five counts of first degree murder.<sup>32</sup>

On appeal and a separate writ of habeas corpus, consolidated, Corona contended that he was deprived of effective assistance of counsel in violation of the sixth and fourteenth amendments of the United States Constitution. The appellate court agreed, reversing and remanding for retrial on grounds that Corona lacked effective counsel for the following reasons:

(1) In spite of the overwhelming evidence of guilt and the weak (if not nonexistent) defense, counsel failed to raise the various defenses relating to defendant's mental status. Defense counsel, at the evidentiary hearing, stated

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31. M'Naghten's Case, 8 Eng. Rep. 718 (1843), set the standard test for insanity that is followed in most jurisdictions in this country. Under that test the accused is not criminally responsible if he was laboring under such a defect of reason, from disease of the mind, that he did not know the nature and quality of his act, or, if he did know, that he did not know his act was wrong. For a general discussion of the history and application of the M'Naghten rule, see W. LAFAVE & A. SCOTT, CRIMINAL LAW 274-86 (1972).

32. During a special evidentiary hearing before a referee appointed by the court of appeal, it developed that Corona's counsel had, in lieu of a fee (Corona was impecunious) received a grant of exclusive rights to Corona's life story and the story of the trial. Prior to commencement of trial counsel had entered a contract with MacMillan Publishing Company to publish the book. The Court held, with obvious justification, that an unreconcilable conflict of interest existed since counsel's economic interests were served by a protracted trial with lurid publicity while Corona's interests obviously were not. *Id.* at 712, 145 Cal. Rptr. at 910.

that he *deliberately* did not raise the defenses because he thought his client was innocent, that the prosecution had at best a flimsy, circumstantial case, and, to raise the defenses of insanity would provide the prosecution with a motive.<sup>33</sup> (In California the insanity issue is tried bifurcated, *only* after a finding of guilty in the case-in-chief.)

(2) Counsel erred tactically in making an opening statement (the crux of which was not borne out by the evidence) prior to conclusion of the prosecution's evidence, when the defense was inherently weak.<sup>34</sup>

(3) Counsel, by failure to move to sequester the jury, did not ameliorate the disastrous effect of adverse media publicity.<sup>35</sup>

(4) Counsel failed to prepare adequately for trial by thorough pretrial investigation.<sup>36</sup>

The court acknowledged that the matter of judgment in trial tactics and strategy ought not be viewed with hindsight or second-guessing, as long as counsel's determination had some rational support founded on reasonable, sound, legal principles and fully developed facts.<sup>37</sup> In short, on matters of trial tactics, the attorney's judgment must be tested against a standard of reasonable lawyers. Between the extremes the test would, as in all negligence actions, appear to be one of fact.

In Tennessee, however, the federal district court in *Woodruff v. Tomlin*,<sup>38</sup> granted a judgment n.o.v. for the attorney in a legal malpractice case in which plaintiffs contended that they lost the underlying personal injury action because of their attorney's inadequate investigation, preparation, trial, and appeal of the case. The court reasoned that any jury verdict in the malpractice action would necessarily be predicated upon speculation about what the personal injury jury might have found, but for the alleged neglect of the attorney. The court further asserted that it would be unwise to permit a jury to second-guess a lawyer's exercise of professional judgment at trial.<sup>39</sup>

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33. *Id.* at 717, 145 Cal. Rptr. at 913.

34. *Id.* at 725, 145 Cal. Rptr. at 918.

35. *Id.* at 706, 145 Cal. Rptr. at 905.

36. *Id.*

37. *Id.* As Judge Hufstедler noted in *Pineda v. Craven*, 424 F.2d 369, 372 (9th Cir. 1970), "There is nothing strategic or tactical about ignorance. . . ."

38. 423 F. Supp. 1284 (W.D. Tenn. 1976).

39. *Id.* at 1288. As stated in note 24, *supra*, Tennessee seems to be following the English Rule on immunity from trial error.

Can the viewpoints of *Woodruff* and *Corona* toward “judgment calls” be reconciled? Clearly the plaintiff in *Woodruff*, a civil action, did not have the extraordinary protection of the sixth and fourteenth amendments critical to *Corona*’s rights in a criminal case. Also, the *Corona* court was not addressing itself to a malpractice case.<sup>40</sup> Whereas, perhaps, neither counsel did an optimal investigation and preparation, *Corona*’s counsel’s conduct was so outrageous that it constituted dereliction as a matter of law.

From a pragmatic viewpoint, although “trial error,” with the remarkable attributes of 20/20 hindsight, may bring many potential clients to the door, it is more often than not a rather slender reed to lean on. Absent outrageous circumstances, such as *Corona* presents, it usually is not the foundation of a strong plaintiff’s case.

3. *Competence.*—A different situation presents itself when the attorney trying the case was simply beyond his capabilities. This is particularly so in the metropolitan areas where the bar has to a large degree turned toward specialization. Some jurisdictions have recognized lack of competence as a breach of professional competence and grounds for disciplinary action.<sup>41</sup> The test, apparently, is not whether *more* competent counsel was available, but whether the lawyer simply *did not have* the particular skills demanded by the litigation. In short, would general practitioners or inexperienced counsel in good standing have ordinarily referred the matter to a competent specialist? Again, the case law does not aid us. As a practical matter, as good a guideline as any seems to be that the client’s rights be adequately served and not subordinated to the lawyer’s economic interest in his fee. The amount at stake in the case should also be a factor, for it is unlikely that

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40. It is an interesting fact that no cases have yet been located that have upheld a legal malpractice claim based on negligent representation in a criminal trial. *See generally* Annot., 53 A.L.R.3d 731 (1973).

41. *E.g.*, CAL. R. PROFESSIONAL CONDUCT 6-101. This rule, entitled “Failing to Act Competently” states:

A member of the state Bar shall not wilfully or habitually:

(1) Perform legal services for a client or clients if he knows or reasonably should know that he does not possess the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in similar services practicing in the same or similar locality and under similar circumstances unless he associates or, where appropriate, professionally consults another lawyer who he reasonably believes does possess the requisite learning and skill.

*See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-101 (1976).



the top flight personal injury lawyers are available for referral of a \$1500.00 whiplash.

Failure to know, or to learn through research, the law applicable to the client's problems is a frequent basis for legal malpractice suits. In California, the "*Smith v. Lewis Syndrome*" has become a veritable gold mine of litigation. The California Supreme Court decided *Smith v. Lewis*<sup>42</sup> in 1975. Lewis, a lawyer, failed to research the community property nature of his client's husband's military retirement pension before advising her in a divorce action. The status of military pensions as community or separate property was anything but clear under California law at the time.<sup>43</sup> The court held that Lewis' *failure to research* the matter was malpractice, even though after thorough research his professional judgment may reasonably have led to a contrary opinion. One may well imagine that the court has awakened a slumbering giant. Nonetheless, every *Smith* situation is not malpractice. If the attorney considered the problem in formulating his advice to the client, even though, in retrospect, he erroneously failed to prophesy accurately the court's decision, he did all that could be demanded at the time.<sup>44</sup>

The vice of Lewis' research was not in what he failed to discover or anticipate, but in his *total* failure to consider or research the point, as Lewis admitted at trial. The court merely stated that the attorneys' duty encompassed a duty to "discover those additional rules of law which, although not commonly known, may readily be found by *standard* research techniques."<sup>45</sup> Again we are given no judicial guidelines on what constitutes "standard" research techniques.<sup>46</sup> Is a cursory review of Corpus Juris Secundum sufficient, or is the standard that for writing exhaustive law review articles on a minute point of law? Again, since we dwell upon such loose phrases as "standard" and "reasonable," must not the answer lie in an examination of all the

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42. 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

43. Some three years after Mrs. Smith's divorce, the courts resolved the question in a manner that would have been favorable to Ms. Smith. *In re Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974).

44. See *Smith v. Lewis*, 13 Cal. 3d at 358, 530 P.2d at 595, 118 Cal. Rptr. at 627.

45. *Id.* (emphasis added).

46. Although the court in *Smith v. Lewis* did not specify what research techniques are standard, it did point out that the information Mr. Lewis needed was available from "the major authoritative reference works which attorneys routinely consult for a brief and reliable exposition of the law . . . (See, e.g., . . . A.L.R. . . . Am. Jur. 2d . . . Cal. Jur. 2d . . . Cal. Family Lawyer . . . C.J.S. . . .)" 13 Cal. 3d at 356, 530 P.2d at 593, 118 Cal. Rptr. at 625.

surrounding facts and circumstances? What may well suffice as research for a small claims court appeal would certainly fall short when Ms. Smith's interest in General Smith's rather substantial military pension is in dispute. A comparison with medical malpractice law might be useful on this point. Reasonably, the physician could hardly be faulted for failure to subject the patient to a \$450.00 bone scan when the complaint is a hangnail, even though by hindsight, only through bone scan could an otherwise hidden malignancy have been detected. Conversely, if a patient presents himself with monumental right lower quadrant pain, the failure to take his temperature and a standard blood count to diagnose or rule out appendicitis is inexcusable. In the final analysis, are not the situations analogous? As with the use of diagnostic aids, the duty to research should depend on the difficulty of the legal question and the expense of the research when compared to the client's stake in the outcome. That in turn must be factually determined on a case-by-case basis. Suffice it to say, the failure to do *any* research on a novel point is fraught with danger for the practitioner.

A corollary problem arises when, through inadequate research, lack of basic knowledge, or oversight, the attorney advises the client and fails to anticipate all the lurking liabilities facing the client. This is a particular hazard to the attorney in the role of advisor as contrasted to advocate. Tax law and securities law, which, to the average practitioner, possess the same degree of clarity and logic as the old English land law, are particular pitfalls. Counseling a client on the glorious advantages of an accelerated depreciation tax shelter, but omitting the woes of recapture comes to mind as an example of the type of advice that may bring the counselor to the brink of disaster.

Corporate counsel may incur malpractice liability of monumental proportions from erroneous advice and opinions.<sup>47</sup> Particularly, they are vulnerable if opinions adversely affect those outside the corporate inner circle. While the dimensions of damages to the individual purchaser may be modest, they are enormous when applied to an entire class of purchasers of a large issue of corporate securities. This exposure has become so frightening that most commercial carriers exclude coverage for any legal work involving securities unless the insured pays a substantial premium surcharge and accepts a substantial deductible clause. If the

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47. See Smith, *Preventing Errors in Securities Transactions*, 30 S.C.L. Rev. 243 (1979).

claimed malpractice touches upon the Securities Exchange Act of 1934, the attorney may also find himself a defendant in an action by the S.E.C.<sup>48</sup>

Failure to exercise standard care or possess requisite skill in carrying out the client's desires, as, for instance, frustrating the client-testator's intent by ignoring the Mortmain Act, is a singularly insidious example of malpractice.<sup>49</sup> It is insidious, because it may only strike forty years in the future when the client dies and the lawyer has retired and let his malpractice insurance lapse.<sup>50</sup> Although, traditionally, the privity of the attorney-client relationship was a necessary element to a cause of action in legal malpractice, the general rule now seems to be that the beneficiaries of a will are proper parties plaintiff without resort to any fictional basis of privity.<sup>51</sup>

4. *Informing the Client.*—Although the doctrine of informed consent, which has been well known to the medical profession for years<sup>52</sup> has not had currency in legal malpractice, by analogy it should apply equally to both professions. While no cases have been found applying informed consent to the attorney-client relationship, likewise none has been found denying applicability. In general terms the physician must have the consent of his patient for any procedure he intends to perform. Not only must the patient consent, but the consent must be "informed"; that is, the patient must be advised of the common risks and hazards of the procedure so that the decision to accept the procedure or opt for an alternative is an intelligent one. If the physician fails to so advise the patient and the risk occurs, the physician may be held liable for damages flowing from that risk, even though the actual cause is not the doctor's fault, *and* if a reasonable patient, possessed of the knowledge would have refused the

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48. *E.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968); SEC v. Universal Major Indus. Corp., [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,804 (2d Cir. Dec. 16, 1976).

49. The Mortmain Act, which literally means "dead hand," promotes the free alienation of property by putting limitations on transfers of land to perpetual organizations. For a collection of cases dealing with legal malpractice in connection with estate, will, or succession matters, see Annot., 55 A.L.R.3d 977 (1974).

50. Increasingly insurance companies have been changing the form of their coverage from an item coverage (such as a will drawn during the period of time in which his insurance is actively in force).

51. *E.g.*, Kronzer v. First Nat'l Bank, 305 Minn. 415, 235 N.W.2d 187 (1975). See also cases cited note 18 *supra*; Annot., 45 A.L.R.3d 1181, 1195 (1972).

52. See generally, Plante, *An Analysis of Informed Consent*, 36 FORDHAM L. REV. 639 (1968).

procedure. By analogy, since the legal affairs of the client are his, the risks should be his to evaluate. He should be apprised of viable alternatives and of the relative risks of each. In short, he should be given the final choice.

If the analogy is valid, then, as with the physician, only those risks of substantial magnitude that would reasonably affect the client's determination need be discussed. For instance, disclosure of the risk of liability for substantial court costs in the event of a defense verdict on a personal injury case of modest proportions may clearly be appropriate while the conceivable risk that the legislature may, years in the future, alter the law relating to pretermitted heirs may not be relevant to a seventy-year old childless woman about to write a will. The "reasonable patient" doctrine would seem to require disclosure of only those risks that are acknowledged to exist and carry substantial probable detriment when compared to the benefit sought.

Apropos to informed consent is the situation in which before or during litigation an offer of settlement is tendered to counsel, who fails to communicate the offer to his client and then suffers a less favorable judgment. If the client would have accepted the offer (and in hindsight, after an adverse judgment, who would not) the lawyer may well be liable if the jury accepts that a reasonable client, possessed with the same facts and offer, would have opted for settlement.

For example, a plaintiff's attorney received a \$250,000.00 settlement offer from the defense during the trial of a medical malpractice action. The attorney decided to risk a better verdict (and larger fee) and failed to convey the offer. The jury returned a verdict for the doctor. In the legal malpractice action that followed, the jury not only returned a verdict in excess of the offer but also awarded \$140,000 punitive damages.<sup>53</sup>

Even if the settlement offer is communicated, does the attorney have the obligation to advise the client of the risks of going to verdict? If so, is his judgment subject to hindsight if it proves erroneous? Although we find no specific authority on point, the thoughts expressed generally on trial judgment and informed consent seem appropriate. In other words, at all stages, is not the client entitled to the benefit of reasonable professional judgment? Note that we comment only on *advice* on whether to settle—not on the *guarantee* of a verdict.

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53. Aiken v. Vletas, No. SEC 17634 (Los Angeles Super. Ct., filed August, 1978).

5. *Abandonment.*—Although the general rule, in civil actions at least, is that the attorney-client relation may be terminated at will by either the attorney or client,<sup>54</sup> the timing of an attorney-originated termination may be of some moment. The abandonment of the client's cause on the eve of the expiration of the statute of limitations, immediately before trial, or at a time when the action will be soon subject to dismissal for lack of prosecution, may well be beyond the realm of propriety. Abandonment of the client under these circumstances risks leaving him to secure substitute counsel and, thus, carries a high risk of malpractice liability and probably disciplinary proceedings.<sup>55</sup> Even if the underlying action was not of the highest quality, the effect of the lawyer's blatant abandonment will surely adversely affect, if not inflame, the jury.

6. *Conflicts of Interest.*—The concept of conflict of interests is known by every lawyer and understood by few. The rule that one may not represent conflicting interests is simple, but the bar, through ignorance, inattention, or greed, shows an appalling ability to disregard it.

A recent trial in California serves as a particularly good example of a conflict of interests situation.<sup>56</sup> The underlying case was a medical malpractice action brought by a patient against a neurosurgeon and an orthopedic surgeon who had serially performed two successive lumbar surgeries on plaintiff. Both surgeons were insured by the same insurance carrier. Plaintiff had a strong liability case against the orthopedist and a weak case against the neurosurgeon. The carrier retained the same defense counsel to represent both defendants. Apparently, the theory was that the use of a single counsel would avoid mutual recriminations and enhance the chances for a defense verdict for each defendant. In keeping with the "game plan," the neurosurgeon was dissuaded from giving an opinion that would have directly scuttled the orthopedist's defense, but, in all probability, would have exonerated himself. The jury returned a verdict against both defendants. The neurosurgeon then sued his attorney for malpractice, claiming as damages, his loss of reputation and the increased

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54. CAL. CIVIL PROC. CODE § 284 (West 1954); *Fracasse v. Brent*, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972). Most jurisdictions, however, require either client consent or a court order to withdraw once suit is filed.

55. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110 (1976).

56. *Spindler v. Kirtland & Packard*, No. SEC 13505 (Los Angeles Super. Ct., filed March, 1978).

cost of insurance in the future.<sup>57</sup>

The suit was predicated upon the attorney's ignoring the obvious conflict of interest. Apparently, the jury was more cognizant of the conflict of interests rule than was the erstwhile defense lawyer; they awarded the neurosurgeon-plaintiff damages of \$130,000.00.<sup>58</sup>

7. *Proof of the Standard of Care.*—These examples, though not exhaustive, illustrate situations that might point to lawyer malpractice. The degree of skill that should be exercised in each situation must still be proved at trial. The standard of care required of attorneys is proved much the same as it is in any tort case. Since lay jurors will not be as aware of the niceties of law practice as they are of the traffic code, it is wise to spend a little time enlightening them. Although the rule varies in different jurisdictions, the burden of proving the standard may be met by one of three means: as a matter of law, as a matter of expert testimony, or as a matter of violation of statute, rule of professional conduct, or canon of ethics.

Traditionally, it was thought that the trial judge, himself a lawyer, should set the standard of care as a matter of law, leaving only the question of adherence to the standard as a matter of fact for the jury. This rule apparently developed during the era before specialization became widespread. As society and law become more complex and legal specialization grows, it becomes rather naive to expect even the most learned jurist to understand the nuances and subtleties of specialized practice. Therefore, the standard must more and more be subject to proof by expert testimony, just as one proves the standard in medical malpractice.<sup>59</sup>

As the rules of practice and professional conduct become increasingly codified, there seems no logical reason why proof of violation of the rules ought not be negligence *per se*, as in any other action sounding in negligence.<sup>60</sup>

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57. *Id.*

58. This case is an example of the attorney's owing allegiance to conflicting interests other than his own. For a conflict arising between the attorney's personal interests and those of his client, see, e.g., *Public Taxi Service, Inc. v. Barrett*, 44 Ill. App. 3d 452, 357 N.E.2d 1232 (1976). See generally Annot., 28 A.L.R.3d 389 (1969).

59. See generally, Comment, *The Use of Expert Testimony in Actions Against Litigation Attorneys*, 14 WILLIAMETTE L.J. 425 (1978); Annot., 17 A.L.R.3d 1442 (1968).

60. See Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281 (1979).

### C. *Proximate Cause and Damages—A Major Stumbling Block*

Of course, "negligence in the air" is legally inadequate to perfect a cause of action. Plaintiff must plead and prove damages proximately caused by the negligence. In many cases of relatively clear-cut negligence, particularly those in which a statute of limitations has run, the defense will admit negligence, but deny that the neglect proximately caused any damages. Essentially, the defense's posture is, "we let the statute of limitations run, but the plaintiff could not have prevailed anyway." The general defense attitude is that if plaintiff claims injury, let him try and win his case against the original defendant. If he fails to convince the jury that his underlying action would have been decided in his favor, he should not recover. This is sometimes referred to as the "case within a case" doctrine.

Obviously, the defendant desires the tactical advantage of forcing the plaintiff to try the "case within a case" so that any defensive matter in the underlying suit is available in the malpractice action. The legal authority is less than clear, however, that strict application of the doctrine is warranted.<sup>61</sup> Unquestionably, no matter how gross the attorney's neglect, the client suffers no damage if the underlying matter was totally devoid of merit. For instance, if the underlying matter were one that would have terminated as a matter of law by way of nonsuit, summary judgment, directed verdict, or judgment n.o.v., then obviously the errant defendant-lawyer should prevail. In such a case, the strict application of the "case within a case" concept is logical. Parenthetically, one questions why any attorney would bring the malpractice case in the first place.

The vast majority of cases litigated, however, are neither totally devoid of merit nor totally meritorious. This is particularly true in tort litigation. Recent studies have shown, for instance, that 92.9% of personal injury suits filed are settled without trial.<sup>62</sup> Presumably many, if not most, of those cases were settled by compromise on the issue of liability. Since proof in civil actions is predicated upon probability and not certainty, logic dictates that it should be sufficient for plaintiff to show the probability of favorable settlement rather than having to win

61. See *Christy v. Saliterman*, 288 Minn. 144, 179 N.W.2d 288 (1970); *Gay & Taylor v. American Cas. Co.*, 53 Tenn. App. 120, 381 S.W.2d 304 (1964). See generally, R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* §§ 420-26 (1977).

62. Drayton, *No-Fault, An Idea Whose Time Has Gone* (1978) (Pamphlet published by the California Trial Lawyers Association).

the “case within a case” to prevail. A rule to the contrary seems devoid of logic and smacks of reconstruction of the citadel of privilege.

Plaintiff's counsel should resist strict application of the “case within a case” rule, although many trial judges will treat the doctrine as though carved in marble. A comprehensive trial brief stating the cogent reasons for not applying the rule should be prepared in advance of trial, in anticipation that the defense will be raised. The brief should review the local authorities on “case within a case,” much in line with the thoughts herein. If the defense predicates its position on the case authority that “plaintiff must prove that but for defendants' negligence, he would have achieved a more favorable result,” plaintiff should demonstrate that this language does not compel trying the underlying case to verdict for the plaintiff. He must convince the court that, verdict aside, defendant's negligence precluded a favorable disposition by way of settlement. These thoughts may be helpful in drafting such a trial memorandum.

In those cases in which the defendant's inactivity, ineptitude, or ignorance has precluded the client, because of lapse of time, loss of physical evidence, or whatever, from proving the underlying case, the “case within a case” rule ought never to apply. The rule that one whose wrongful conduct renders the ascertainment of damages difficult cannot complain that the trier of fact must merely estimate the damages, should control.<sup>63</sup> In other words, why should the attorney who renders proof of the client's underlying case impossible by failure to preserve evidence or locate witnesses, be permitted to use his own negligence as a shield against the innocent client?<sup>64</sup> The law is clear that one ought not profit by his own wrong.

The plaintiff, however, must prove sufficient facts to make his plea for “reasonable settlement value” persuasive. In other words, to overcome strict application the plaintiff must indeed try the “case within a case” to a rather significant extent. Thus when the rule is not strictly applied, counsel should consider the use of experts, such as prominent plaintiff and defense counsel and insurance claims personnel, to establish probable settlement

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63. *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); *Bernard v. Walkup*, 272 Cal. App. 2d 595, 77 Cal. Rptr. 544 (1969). See also Annot., 45 A.L.R.2d 62, 65 (1956).

64. See, e.g., *Guiffra v. St. Paul Fire & Marine Ins. Co.*, 293 So. 2d 518 (La. App. 1974); *Collier v. Pulliam*, 81 Tenn. 114 (1884).



value. The usual defense objection is that such testimony is speculative or conjectural. The answer to that objection is that experts make these professional evaluations daily and settle cases for hard cash based upon those evaluations. Bearing in mind that a very high percentage of tort lawsuits settle short of trial, the testimony is not speculative, but solidly based upon probability.

The authority is divided, however, on whether expert testimony is admissible to prove either the probable outcome or reasonable settlement value of the underlying case. Those cases holding that such expert testimony is inadmissible have reasoned that it would invade the province of the jury<sup>65</sup> or consume too much time.<sup>66</sup> Some have refused admission because there had been no evidence that the case would have been settled.<sup>67</sup> It would seem that the latter objection, at least, could be easily cured by testimony on the prevalence of settlement. Other cases have admitted expert testimony on the reasoning that it is an aid to the trier of fact not elsewhere available.<sup>68</sup>

The plaintiff's burden is to show that not only would he have achieved a more favorable outcome but for the defendant-attorney's neglect, but also that any judgment would have been collectible either through insurance or the prior defendant's personal assets.<sup>69</sup> When the defendant is insolvent, has no assets not exempt from levy sufficient to satisfy judgment, nor has any insurance, the plaintiff will be denied recovery. By the same token if the defendant were underinsured, plaintiff would seem limited in his recovery to the amount of the policy (and any other assets subject to execution). We find no cases commenting on whether plaintiff would be permitted to bring in facts that would set up the theory of excess liability of the defendant's carrier for failure to settle in good faith within their policy limits. Needless to say, plaintiff's counsel should ascertain that a meritorious and collectible underlying case exists before plunging onto the primrose path of legal malpractice litigation.

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65. *Shouse v. Consolidated Flour Mills Co.*, 132 Kan. 108, 294 P. 657 (1931).

66. *E.g.*, *Fuschetti v. Berman*, 128 N.J. Super. 290, 319 A.2d 781 (1974).

67. *Id.*

68. *Duncan v. Lord*, 409 F. Supp. 687 (E.D. Pa. 1976); *Warwick v. Dotter*, 190 So. 2d 596 (Fla. App. 1966); *Shields v. Campbell*, 277 Or. 71, 559 P.2d 1275 (1977).

69. *Floro v. Lawton*, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960); *Priest v. Dodsworth*, 235 Ill. 613, 85 N.E. 940 (1908); *Eccles v. Stephenson*, 6 Ky. (3 Bibb) 517 (1814); *Vooth v. McEachen*, 181 N.Y. 28, 73 N.E. 488 (1905); *Hammons v. Schunk*, 409 Or. 127, 305 P.2d 405 (1956).

## V. A BRIEF CONSIDERATION OF PROCEDURAL ASPECTS— PLEADING, DISCOVERY, MOTIONS, AND TRIAL

Legal malpractice is regarded as a matter arising out of a contractual relationship, that of attorney and client. The actual conduct causing the malpractice, however, is generally characterized as tortious.<sup>70</sup> The complaint, then, should set forth the underlying attorney-client relationship, the defendant-attorney's failure to possess the requisite level of learning, skill, and knowledge ordinarily possessed by other attorneys in good standing, and his negligent failure to apply this skill, knowledge, and learning to his client's affairs. Although negligence is the gravamen of most legal malpractice suits, one must not forget that if the attorney has guaranteed a result he may, indeed, have liability arising from warranty or a frank breach of contract. In the event that there is fraud or misrepresentation, of course, these are likewise additional bases for the action against the attorney. If the latter exists, punitive damages should be considered.

The injured client is always a proper plaintiff. But, as noted earlier, the trend is to allow third party nonclients to bring suit in a growing number of situations.<sup>71</sup> If the plaintiff is not the attorney's client, facts necessary to show the plaintiff's status as a proper party plaintiff should be pleaded.

The parties defendant, other than the attorney guilty of the malfeasance, are essentially the same parties that would be the defendants in any tort action. If the defendant is a member of an incorporated law firm or partnership, the corporation or partnership and each individual partner should be named as parties defendant. The reason for this, obviously, is to broaden the base of liability and potential insurance coverage and ability to respond in damages. If the matter was one that was referred to the principal defendant by another attorney and the other attorney shared in the fees generated or had a right to share in fees, if generated, it appears that on a joint venture theory, such an attorney is likewise a proper defendant.<sup>72</sup>

The statute of limitations applicable in actions for legal malpractice varies among jurisdictions. Some jurisdictions have a

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70. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

71. See cases cited and discussed notes 17-22 and accompanying text *supra*.

72. *Floro v. Lawton*, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960); *Senneff v. Healy*, 155 Iowa 82, 135 N.W. 27 (1912); *Hill v. Curtis*, 154 A.D. 662, 139 N.Y.S. 428 (1913).

statute specifically naming legal malpractice<sup>73</sup> and some have professional malpractice statutes.<sup>74</sup> Other courts use statutes written for tort, contract, or fraud cases.<sup>75</sup> If the statutory or common-law statute of limitations has expired local authorities must then be checked to ascertain whether the doctrine of postponed accrual applies. This appears to be more or less the general rule in the United States.<sup>76</sup> Essentially, since the attorney-client relationship is one of the highest fiduciary order, it is held that even though the attorney's malpractice may have been committed sufficiently far in the past for the statute of limitations to run, the accrual of the cause of action does not take place for the purpose of the statute's running until the client knows or, in the exercise of reasonable care, should have known of the malpractice. In cases in which the attorney's efforts contemplate some future event, as for instance, in the preparation of a will, the statute of limitations generally does not commence running until the death of the testator. If the plaintiff relies on postponed accrual to overcome the effect of the statute of limitations, this should be pleaded with specificity in the complaint.

The pleading of a legal malpractice action is not substantially different from the pleading of any other tort action and local practice should be the guideline. The above suggestions merely point out some special instances that the practitioner may wish to consider in a legal malpractice action.

Discovery practices vary considerably from jurisdiction to jurisdiction and it is not within the scope of this article to probe into those differences; nor is it the intent to exhaust the subject of pretrial discovery and motions. Those discovery techniques available in any litigation are available in legal malpractice and, to the extent warranted, should be utilized. As early as is permissible after filing suit, a motion should be made to produce, inspect, and copy the defendant-attorney's file. Not only should the motion encompass the file, but it should also encompass all other

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73. *E.g.*, ALA. CODE tit. 6, § 2-34 (1975); TENN. CODE ANN. § 28-304 (Supp. 1977).

74. *E.g.*, FLA. STAT. ANN. § 95.11 (West Supp. 1977); IDAHO CODE § 5-229 (Supp. 1978); IND. CODE ANN. § 34-4-19-1 (Burns 1973); NEB. REV. STAT. § 25-208 (1975); N.D. CENT. CODE § 28-01-18 (1974).

75. California, by statutory construction, uses CAL. CIV. PROC. CODE § 339(1) (West 1954) providing a two-year limitation on contracts and obligations not in writing. For a general summary and discussion of the applicability of various statutes of limitations, see R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* §§ 192-198 (1977).

76. *Mumford v. Staton, Whaley & Price*, 254 Md. 697, 255 A.2d 359 (1969). *See also* cases discussed in R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* § 204 (1977).

documents in the attorney's office relating to the plaintiff's matter such as time records, telephone messages, accountings, and any other document touching on the case.

The need to use interrogatories and depositions to discover further evidence is self-evident. The order in which depositions and interrogatories are used is a matter that essentially must be determined on a case-by-case basis. Generally, however, before other interrogatories are posed or depositions are scheduled a thorough review of all documentary matter should be undertaken. This is particularly true for the plaintiff's deposition. Whereas the defendant-attorney will always have his file in possession to refresh his memory, most clients seem to be poverty stricken when it comes to documentation. Therefore, to prepare the plaintiff properly for his deposition, he should have available all correspondence to and from the attorney and any other documentation that would refresh his recollection.

The defendant's deposition in a legal malpractice action is of considerable importance. It provides plaintiff's counsel with an excellent opportunity to evaluate the defendant's credibility as a witness. It is particularly important to note his reaction to embarrassing questions and his general attitude toward giving testimony. The deposition should be as thorough as possible and should cover, with great detail, his education, training, qualifications, his membership in organizations, the legal publications he regularly reads, and the details of the nature of his practice. His entire handling of the plaintiff's legal affairs should be carefully explored. If any of the documents in his file are ambiguous he should be called upon to explain that ambiguity.

Since the subjective quality of the attorney's advice may well be an issue, his thought processes in arriving at his opinions and judgments that he made during the handling of the client's affairs should be thoroughly dissected. He should, likewise, be asked to explain what, in his opinion, the precise standard of care under the circumstances of the client's case would have been. Obviously, if the standard of care that is opined by the defendant is greater than his own conduct, the plaintiff's case takes on rather heroic proportions. If, on the other hand, he establishes a standard of care that is demonstrably inadequate, he can be impeached by other experts in the field.

Whether counsel should depose adverse counsel in the underlying litigation is a matter of choice. The author's personal choice has been not to depose these attorneys unless they show a bias

and favor the defendant or refuse to discuss the case at all. If the opposing counsel is well known to plaintiff's counsel and willing to cooperate without the necessity of a deposition, it seems preferable not to depose him.

In those jurisdictions where it is possible to obtain a protective order compelling both parties to disclose their expert witnesses prior to trial, that order should be obtained and experts for both sides should be deposed. In the first place, it is good to know the defendant's theory of the case and, second, it is essential that one's own experts be apprised of those opinions so that a proper rebuttal may be prepared.

Presumably because lawyers tend to get rough treatment from lay juries, it can be anticipated that every possible pretrial and trial motion that could take the matter away from a jury will be made by the defense. It is thus necessary that the plaintiff's counsel have his file documented and fortified to withstand the onslaught of demurrers, motions to strike, motions for summary judgment, motions for judgment on the pleadings, motions for nonsuit, motions for directed verdict, and motions for judgment non obstante verdicto. On the other hand, if the neglect of the defendant-attorney appears to be established as a matter of law, plaintiff's counsel should utilize these motions to eliminate those issues from the case.

Again, it must be obvious that the proper and diligent use of discovery is as essential, if not more so, in legal malpractice litigation as it is in any litigation, if one hopes to be successful.

From the plaintiff's viewpoint, there would seem to be no real question but that a jury trial is preferable to a trial to the court. The obvious risk of favoritism by a local judge cannot be ignored, although most judges will disqualify themselves if they know the defendant. Judges and lawyers are colleagues, however, and even at the subconscious level, the mere risk of bias against the plaintiff is unacceptable. On the other hand, the tendency of a lay jury to identify with the lay plaintiff is an advantage that must be preserved. It must likewise not be ignored that, albeit unjust in most instances, lawyers are generally not trusted. Thus, it is essential that plaintiff's counsel meticulously preserve his client's right to trial by jury, for, if waived, you may be assured that the defense will not reinstate the jury.

## VI. CONCLUSION

Every lawsuit is unique and has its own personality. The art

of advocacy is not equated to computer science. Success in legal malpractice litigation, like all litigation hinges upon meticulous preparation and forensic skill. It is no more clothed in mystique than a rear end collision on the freeway—but it does demand more preparation.

In these brief pages, an attempt has been made to put the panorama of legal malpractice in the perspective of the plaintiff's lawyer. The task, properly done, would require a volume or two. If one key point should be selected to impress upon the practitioner, it is this: select your cases with the degree of care that you would have a colleague select a case if you were the potential defendant. If you do, you need apologize to no one for suing another lawyer.

