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## Professional Responsibility

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## PROFESSIONAL RESPONSIBILITY

### I. FAILURE TO INFORM CLIENT TO EXPECT ADDITIONAL PLEADINGS IS NOT ATTORNEY MALPRACTICE

In a trio of recent cases, *Floyd v. McFadden*,<sup>1</sup> *Floyd v. Kosko*,<sup>2</sup> and *Floyd v. St. Paul Fire and Marine Insurance Co.*,<sup>3</sup> the South Carolina courts demonstrated a lack of guidance in the area of attorney malpractice. The Supreme Court of South Carolina in *McFadden* and the court of appeals in *Kosko* and *St. Paul Fire and Marine* discussed the issues in general terms, rather than setting forth any specific guidelines for attorney conduct. In each instance a grant of summary judgment for the defendant was affirmed.

The cases arose as a result of a medical malpractice suit filed against Dr. Jesse J. Floyd in 1976.<sup>4</sup> Floyd was insured by St. Paul Fire and Marine Insurance Company (St. Paul), which retained J. Means McFadden to defend him. When Floyd received his suit papers, he forwarded them to both McFadden and his personal attorney, George Kosko. The initial suit was dismissed for lack of jurisdiction, but an identical suit was subsequently brought in the appropriate court.<sup>5</sup> Although Floyd was allegedly served with papers for the second suit, he never forwarded them to either attorney. After a default judgment was entered against Floyd in this second suit, he filed suits against Kosko, McFadden, and St. Paul, alleging breach of contract and professional malpractice. In each case the trial court granted the defendants' summary judgment motions and the appellate court affirmed.

In all three cases, Floyd argued that Kosko and McFadden

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1. 284 S.C. 428, 327 S.E.2d 73 (1985).

2. 285 S.C. 390, 329 S.E.2d 459 (Ct. App. 1985).

3. 285 S.C. 148, 328 S.E.2d 132 (Ct. App. 1985).

4. See *Stewart v. Floyd*, 274 S.C. 437, 265 S.E.2d 254 (1980), for additional discussion concerning this suit.

5. The plaintiff's first suit involved a prayer for damages that exceeded the jurisdictional limits of the county court in which it was filed. The second suit was properly brought in the Richland County Court of Common Pleas. *Id.* at 439, 265 S.E.2d at 254.

(individually and as agents of St. Paul) negligently failed to inform Floyd that he should expect additional pleadings after the first suit was dismissed.<sup>6</sup> Nevertheless, both appellate courts refused to hold the defendants liable, instead noting the fact that Floyd had maintained by affidavit and deposition that he was never served with the second suit papers. Thus, the courts concluded that any breach of duty by Kosko or McFadden was not the proximate cause of Floyd's injury.<sup>7</sup>

These decisions are interesting since in *Stewart v. Floyd*,<sup>8</sup> Floyd's appeal of the default judgment, the Supreme Court of South Carolina affirmed a trial court decision that implicitly held that Floyd had been served in the second suit. If either court had followed the *Stewart* reasoning,<sup>9</sup> it would have had an ample basis for reaching the question of whether Kosko or McFadden had a duty to inform Floyd that he should expect additional pleadings. Nevertheless, both courts declined to use this opportunity to set forth guidelines for determining when an attorney owes a duty and at what point that duty is breached.

Although the South Carolina courts have not addressed this question in attorney malpractice cases,<sup>10</sup> specific guidelines have been set forth in other areas, most notably medical malpractice. For example, it is well established in South Carolina that in a medical malpractice case, an expert familiar with local standards must testify as to the standard of care owed by a physician and what constitutes a breach of that duty.<sup>11</sup> Numerous other jurisdictions, noting a need for uniformity among malpractice claims, have established similar guidelines for attorney malpractice

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6. Other arguments put forth by Floyd included: (1) failure by Kosko to perfect an appeal of the trial court's order refusing to vacate the initial default judgment, *Kosko*, 285 S.C. at 392, 329 S.E.2d at 460; (2) breach of contract by St. Paul for failing to exercise reasonable care in anticipating the initiation of the second suit, *St. Paul Fire and Marine*, 285 S.C. at 149, 328 S.E.2d at 132.

7. *Kosko*, 285 S.C. at 392, 329 S.E.2d at 460; *St. Paul Fire and Marine*, 285 S.C. at 149, 328 S.E.2d at 132.

8. 274 S.C. 437, 265 S.E.2d 254 (1980).

9. Inconsistent with its ultimate decision, the *Kosko* court stated that Floyd was, in fact, estopped by *Stewart* from asserting that he had not been served. *Kosko*, 285 S.C. at 392 n.3, 329 S.E.2d at 460 n.3.

10. Notable South Carolina cases dealing with attorney malpractice include *Frist v. Leatherwood, Walker, Todd & Mann*, 433 F.2d 11 (4th Cir. 1970), and *Shealy v. Walters*, 273 S.C. 330, 256 S.E.2d 739 (1979).

11. *Green v. Lilliewood*, 272 S.C. 186, 249 S.E.2d 910 (1978); *Welch v. Whitaker*, 282 S.C. 251, 317 S.E.2d 758 (Ct. App. 1984).

claims.<sup>12</sup> Nevertheless, *McFadden*, *Kosko*, and *St. Paul Fire and Marine* illustrate the failure of the South Carolina courts to offer any similar guidance in the area of attorney malpractice.

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12. See, e.g., *Kirsch v. Duryea*, 21 Cal. 3d 303, 578 P.2d 935, 146 Cal. Rptr. 218 (1978); *Lenius v. King*, 294 N.W.2d 912 (S.D. 1980); *Olfe v. Gordon*, 93 Wis. 2d 173, 286 N.W.2d 573 (1980).

