

UIC John Marshall Journal of Information Technology & Privacy Law

Volume 11
Issue 2 *Computer/Law Journal - Spring 1991*

Article 7

Spring 1991

Computer Malpractice: Two Alternatives to the Traditional "Professional Negligence" Standard, 11 *Computer L.J.* 323 (1991)

Joseph Condo

Follow this and additional works at: <https://repository.law.uic.edu/jitpl>



Part of the [Computer Law Commons](#), [Internet Law Commons](#), [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Joseph Condo, *Computer Malpractice: Two Alternatives to the Traditional "Professional Negligence" Standard*, 11 *Computer L.J.* 323 (1991)

<https://repository.law.uic.edu/jitpl/vol11/iss2/7>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC John Marshall Journal of Information Technology & Privacy Law by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

COMPUTER MALPRACTICE: TWO ALTERNATIVES TO THE TRADITIONAL "PROFESSIONAL NEGLIGENCE" STANDARD

I. INTRODUCTION

This Note considers the potential liability of a computer consultant. Specifically, the Note explores the liability of a computer consultant who fails to competently advise a client on a system, thereby undermining the client's needs. The underlying question of the Note is simply whether the plaintiff client should be able to recover from the defendant consultant on a malpractice/professional negligence tort theory.

Prior to 1989, a computer consultant had never been held liable for professional negligence. Throughout the early-to-mid eighties, many in the consulting and other computer-related fields speculated on whether a computer malpractice standard would begin to emerge from the courts, and, if so, when it would emerge. Most commentators simply found too many difficulties with a professional standard of care in the computer field to fully consider it to be a genuine possibility, at least until the industry was given a better chance to develop.

The problems with transforming the computer consulting industry into a profession under the traditional terms that define the term "profession" are numerous. One major difficulty is that there is no uniform certification procedure for data processors. Many feel that issuing licensing requirements would create an unacceptable barrier to entry. If a code of ethics is issued, how specific must it be? How flexible must it be to not be broken by the onslaught of rapid change which the computer industry undergoes?

Two cases cast a new light on the issue. Each solves the "professional" vs. "non-professional" distinction in its own way. First, in 1987, the Texas Supreme Court held that providers of services, and not merely manufacturers of goods, could be sued on a tort-based theory of implied warranty that the services would be performed in a good and workmanlike manner. Previously, a plaintiff could sue under implied warranty only when dealing with goods.¹

1. Comment, *Expansion of Implied Warranty Coverage Under the DTPA (Deceptive Trade Practices Act): Service Contracts*, 17 TEX. TECH. L. REV. 917 (1986).

Second, in 1989, the Court of Appeals for the Eighth Circuit held that a computer consultant was in fact liable under a professional negligence theory, despite the fact that the computer consulting industry was not in compliance with the long-accepted rules defining a "profession."²

This Note concludes that the best course of action would be to follow the lead of either case, rather than waste more energy on trying to determine whether the computer consultant is a professional under traditional terms. Clearly, according to the black-letter rule, a computer-consultant is not a professional. Nonetheless, the Eighth Circuit declared that imposing professional liability on computer consultants was justified.

One possible solution to the problem of computer consultant liability is to simply avoid traditional definitions of the term "profession," as the Eight Circuit did, and base the "professional vs. non-professional" criteria on the subject matter of the transaction and the degree of reliance of the customer. A second possible solution is to apply the relatively new idea of implied warranties described in the Texas *Melody Home* case to providers of data processing and computer services, as well as to all professional services. The trend of the law may eventually follow the *Melody Home* lead, encompassing services anyway.

Both theories have answers to the most commonly heard criticism of a "computer malpractice" standard. They would avoid forcing licensing requirements and other regulation on the computer consulting industry. An industry does not necessarily need licensing and certification to be a "profession." The degree of reliance by the average consumer can potentially go a long way to help determine a standard of care. However, even the Texas court stopped short of declaring professional services subject to the *Melody Home* rule.

An independent problem is that many consultants are also vendors, and so in the computer field it is often hard to determine a clear line between sellers of goods and mere service providers. Some say, as did the Texas court, that there should be no line between the two at all, and that implied warranties should apply to services as well as goods.

Finally, the Note points out a basic inadequacy in the current definition of the term "profession." Other commentators have written at length regarding the question of whether the computer consultant fits into the established, common-law black-letter definition of the term "profession." Rather than expound on that issue, this Note takes the more practical direction of generalizing the term "profession" down to an examination of the relationship between the customer and the provider, and of the reliance the customer places in the consultant.

2. *Diversified Graphics, Ltd. v. Groves*, 868 F.2d 293 (8th Cir. 1989).

II. THE GENERAL HISTORY OF PROFESSIONAL NEGLIGENCE: DEFINITIONS OF "PROFESSIONAL" AND "MALPRACTICE"

In Black's Law Dictionary, the term "malpractice" is defined as "professional misconduct or unreasonable lack of skill. . . . Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances . . . with the result of injury, loss, or damage."³

A profession has several factors that it may encompass:

- 1) the requirement of extensive learning and training;
- 2) a code of ethics imposing standards above those normally tolerated in the marketplace;
- 3) a disciplinary system for members who breach this code;
- 4) a primary emphasis on social responsibility over strictly individual gain;
- 5) the prerequisite of a license prior to admission to practice.⁴

The general rule as to whether a breach of contract is also a tort states that a breach is also a tort if the relationship between the parties is a "professional relationship."⁵ How the term "professional relationship" is defined is therefore crucial in determining whether the consultant/client relationship can in fact give rise to a malpractice claim, because a "professional" is more easily reached by a tort suit than a simple provider of services would be.

A key problem with the "five-point" plan for professional status is that everything depends on the requirement of a license to practice. If there is no state-authorized board to answer to in case of a violation, then having entrance requirements, ethical codes, etc. is useless, because there is absolutely no enforcement power.

The professional relationship between a professional practitioner and his or her client has been found to sound in tort. The term often used by courts is "professional malpractice."⁶ Over time, the professional negligence standard has branched out, encompassing far more than it did at the beginning. At that time, physicians were the main fo-

3. BLACK'S LAW DICTIONARY 864 (5th ed. 1979). The two explanatory definitions that follow are "medical malpractice" and "legal malpractice."

4. Note, *Computer Malpractice: Are Computer Manufacturers, Service Bureaus, and Programmers Really the Professionals They Claim to Be?*, 23 SANTA CLARA L. REV. 1065, 1078 (1983) (citing *Lincoln Rochester Trust v. Freeman*, 355 N.Y.S.2d 336, 339 (1971)).

5. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 745 (2d Cir. 1979).

6. PROSSER AND KEETON ON THE LAW OF TORTS, § 32, at 185 (5th ed. 1984).

cus of the rule.⁷

Today, in addition to physicians, "dentists, pharmacists, psychiatrists, veterinarians, lawyers, architects and engineers, accountants, abstractors of title, and many other professions and skilled trades" are all under the professional negligence rubric.⁸

Thus, an important question for today's computer system consultant is whether or not the consultant/client relationship fits the framework just described. Under the five requirements listed *supra*, should a computer consultant be considered to be a "professional," like a doctor or attorney, or rather to be merely a simple service provider? The answer to that question is clearly that computer consultants should be considered to be non-professionals because they do not meet any of the five requirements. The next section examines how the Eighth Circuit decided that professional negligence was nevertheless a proper cause of action against a computer consultant despite the fact that the consultant did not meet those five standards.

III. THE CASE HISTORY OF COMPUTER PROFESSIONAL NEGLIGENCE

A. THE "PRE-DIVERSIFIED" RULE

Until February of 1989, the general rule was that professional malpractice liability was not proper in the computer consultant/client relationship context. The closest any court had come to holding computer consultants liable for professional malpractice was in 1977, when the District Court for the Southern District of New York decided the case of *F&M Shaefer Corp. v. Electronic Data Systems*.⁹

In *F&M*, Electronic Data Systems (EDS) was hired by the F&M Shaefer Corporation (F&M) to develop a new computer system. The system never worked properly, and F&M sued EDS. In its decision, the court stated that there was substantial reliance on the part of F&M because the technical language used by the programmers failed to allow F&M to give informed consent to EDS' work. The court further stated that since the language used by the programmers was difficult for lay people to understand, and since any potential problem would not be found until after the business relationship had ended, a special relationship existed between the parties.

However, the court did not decide the case on a professional negligence basis. The court simply held that the statute of limitations for

7. *Id.* at 185-86 ("[m]ost of the decided cases have dealt with surgeons and other doctors. . .").

8. *Id.*

9. No. 76-3982 (S.D.N.Y. Mar. 28, 1977).

F&M's cause of action began to run at the point when the relationship ended. The parties ended up settling out of court.

The result of this case favored the consumer, in that if the statute of limitations were to run from the beginning of the consulting relationship, i.e. installation, the consumer might not even have time to realize that the program or system is bad before the statute runs out. However, the *F&M* case did not add to the traditional tort remedies already available to a plaintiff.¹⁰

Only a 1986 Indiana Court of Appeals decision, *Data Processing Services, Inc. v. L.H. Smith Oil Corp.*,¹¹ had gone against the stated general rule, holding that a computer consultant was in fact liable for professional negligence.

B. THE *DIVERSIFIED* DECISION

In February of 1989, the U.S. Court of Appeals for the Eighth Circuit, in *Diversified Graphics, Ltd. v. Groves*, decided that the defendant consultant committed professional malpractice by making a "wrong" system decision.¹²

The *Diversified* decision goes directly against decisions from both the Second and the Third Circuit on this issue. The Second Circuit, in 1979,¹³ and the Third Circuit, in 1982,¹⁴ declared that computer consultants would not be subject to suits relating to professional malpractice.

The *Data Processing* case, decided in Indiana three years prior to *Diversified*, was generally considered by those in the field to be simply an anomalous decision by a state appellate court.¹⁵ However, the language which the court used in that opinion provided the basis for the *Diversified* decision from the Eighth Circuit.

The Indiana court said "[t]hose who hold themselves out to the world as possessing skill and qualifications in their respective trades or professions impliedly represent they possess the skill and will exhibit the diligence ordinarily possessed by well informed members of the trade or profession. . . . We hold these principles apply to those who contract to develop computer programming."¹⁶

Among the court's finding in *Data Processing* were:

-
10. Note, *supra* note 4, at 1077.
 11. 492 N.E.2d 314 (Ind. Ct. App. 1986).
 12. 868 F.2d 293 (8th Cir. 1989).
 13. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. 1979).
 14. *Chatlos Sys., Inc. v. National Cash Register Corp.*, 670 F.2d 1304 (3d Cir. 1982).
 15. *Westermeier & Porter, Computer Consultant's Liability*, SOFTWARE PROTECTION, Apr.-May 1989, at 1, 2.
 16. *Data Processing Serv., Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 314-30 (Ind. Ct. App. 1986).

- 1) that the defendant consultant represented that it had the requisite expertise to properly develop a system to meet plaintiffs needs;
- 2) that defendant knew it did not have such skills;
- 3) that defendant knew plaintiff was relying on defendant's representations.¹⁷

The facts in the *Diversified* case differ somewhat from those of the *Data Processing* case. In *Diversified*, there was no evidence presented that the consultant actually knew that it lacked the knowledge necessary to properly advise the client.

Diversified is a screen printer and apparel manufacturer. The company needed a computer system which would fit its data processing needs, and to that end, it hired Ernst and Whinney (E&W), a partnership which is involved in public accounting and other related fields,¹⁸ including management advisory services.¹⁹

Diversified stated that E&W had promised to locate a "turnkey" system, i.e., a system that does not require extensive training, but rather only that the user "turn the key."²⁰ Instead, the system Diversified received was "difficult to operate and failed to adequately meet its needs."²¹

The court stated that "[p]rofessional persons *and* those engaged in any work or trade requiring special skill must possess a minimum of special knowledge and ability as well as exercise reasonable care."²² The court went on to state that "E&W failed to act reasonably in light of its superior knowledge and expertise in the area of computer systems."²³

The fundamental basis which the court articulated for holding E&W to a professional standard of care is simple, and is the same rationale for any type of malpractice standard. As stated by the court, "E&W possessed superior knowledge in this area; [Diversified] contracted for the benefit of E&W's expertise. Based on [Diversified's] allegations, E&W was properly held to a professional standard of care."²⁴

The fact that E&W is primarily engaged in the business of accounting is not relevant. For the purposes of this Note, E&W acted purely as a computer consultant, and not as an accountant. The court did not ad-

17. *Id.* at 320.

18. *Diversified Graphics Ltd. v. Groves*, 868 F.2d 293, 294 (8th Cir. 1989).

19. *Id.* at 296.

20. *Id.* at 297.

21. *Id.* at 295.

22. *Id.* at 296 (emphasis in original) (quoting *LeSueur Creamery, Inc. v. Haskon, Inc.*, 660 F.2d 342, 348 (8th Cir. 1981)).

23. *Diversified Graphics Ltd. v. Groves*, 868 F.2d 293, 296 (8th Cir. 1989).

24. *Id.* at 296.

dress the claim by Diversified that E&W breached a fiduciary duty, but instead only addressed the negligence claim.

In doing this, the Eighth Circuit went around the old black-letter definition of "professional," and looked to the degree of reliance that the customer places on the service provider. The concept which the court articulated is short and simple: Because computer systems are a very complex subject which laymen cannot fully, or perhaps even partially, understand, a "professional" relationship is created between the computer consultant and the customer despite the absence of the traditional requirements such as licensing, etc.

In *Chatlos*, National Cash Register Corp. (NCR) sold Chatlos Systems a business computer system. The program never fully worked properly, and up to a year after the initial installation, NCR had still not "worked the bugs out." The court stated that "[s]imply because an activity is technically complex does not mean that greater potential liability must attach."²⁵ This rationale disregards the fact that as a business activity becomes more complex, the possibility that a plaintiff business will rely on the vendor's expertise in selling it the right system increases proportionally.

C. THE VENDOR-CONSULTANT DISTINCTION: IS ANY DISTINCTION JUSTIFIED?

In *Triangle*, the plaintiff (Triangle) had agreed to buy a brand new processing system from the defendant (Honeywell), after active solicitation by the defendant. As in *Diversified*, the system failed, and in this case, the plaintiff ended up going out of business.²⁶ Additionally, as in *Diversified*, the plaintiff stated that the defendant had promised to locate a turnkey system with immediate function, etc.²⁷

Essentially, then, the material facts in *Triangle* are almost identical to those in *Diversified*, with the sole exception being that Honeywell actually sold the system itself to Triangle, rather than merely advising Triangle to buy it.

The *Triangle* court blurred this distinction by stating, Triangle stresses that Honeywell knew more about computer equipment than it did, and that Triangle relied on Honeywell's expertise. But there is nothing novel in this. The manufacturer of a large, complicated, and expensive piece of machinery may be presumed to know more about its workings than the purchaser, at least in most cases.²⁸

25. *Chatlos Sys., Inc. v. National Cash Register Corp.*, 479 F. Supp. 738, 740 n.1 (D.N.J. 1979).

26. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 739 (2d Cir. 1982).

27. *Id.* at 742.

28. *Id.* at 746.

This language would seem to lead to the same result that occurred in *Diversified*, yet the opinion was written several years before the Eighth Circuit heard *Diversified*.

The court is certainly correct when it stated that there is nothing novel in the reliance of Triangle. As far back as 1937, Carl Llewellyn, the so-called "father of the U.C.C.," wrote, "This is a question of consumer. Of helpless consumer. Of consumer who takes what he gets, because *he* does not know enough, technically, to test even what is before his eyes."²⁹

However, the court in *Triangle* did not find any similarity between an outside consultant and Honeywell, finding that "there is wholly lacking in the case at bar that professional relationship . . . it was never contemplated that Honeywell would undertake the continuous running of a (malfunctioning) data processing system for Triangle."³⁰

A major question in this case is why the court uses the commercial sales area to disguise the true relationship and reliance between Triangle and Honeywell.³¹ The only surface difference between Honeywell and E&W (the defendant in *Diversified*) is that Honeywell actually sold the computer, while E&W did not.

Also, the *Diversified* court seems to be drawing a clear distinction between an outside computer consultant and a system vendor when it delineates the professional negligence standard. "[T]o procure this type of customized and fully operational system, great care must be taken to carefully detail a business' needs and to properly develop specifications for the computer system. Potential *vendors* must be carefully scrutinized (by the consultant) to discover all the inadequacies of their data processing systems."³² This unfortunate comment seems to indicate that the "new" definition of "professional," despite all its advantages, may not apply to a vendor/consultant, although it did apply to E&W.

In today's business world, business computer system users have many requirements that are unique to the user's particular business.³³ Quite often, a business will contract with a vendor to both design and sell to them a custom-made rather than mass-produced computer system,³⁴ as was the case in *Triangle*. It seems strange that a consultant

29. Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341, 404 (1937).

30. *Triangle*, 606 F.2d at 745.

31. *Id.* at 746.

32. *Diversified Graphics, Ltd. v. Groves*, 868 F.2d 293, 297 (8th Cir. 1989) (emphasis added).

33. Note, *A Comprehensive Statute of Limitations for Litigation Arising from Defective Custom Computer Systems*, 37 STAN. L. REV. 1539, 1543 (1985). Many customers are perhaps in a business where there is no such thing as a ready-to-order "canned" system.

34. *Id.*

selected by a company to pick out the best system is considered fair game for a professional negligence suit, while a company selected to design and sell a system is not. Seemingly, the same amount of expertise would be expected from each.

To completely separate vendors and consultants is to draw a line which in real life is often not present at all. The *Triangle* case provides the most telling example of this separation. The argument against such a separation is two-tiered.

First, in the computer field, sellers of computers very often act as the consultants for their buyers, as did the defendant in *Triangle*. In any context, a seller of a product that a layman cannot fully understand must act as a consultant in some way, because otherwise the customer would have absolutely no basis upon which to choose a product. Simply because the vendor/consultant sells a tangible good in addition to consulting does not diminish the reliance a customer has on it, especially in a situation where perhaps even the most basic terminology sounds foreign. This concept of the large degree of reliance that computer consumers place upon vendors and consultants arose as far back as 1961, in *Strand v. Librascope, Inc.*³⁵ The court stated that "where reliance was placed upon the expertise of an established concern that had the required information in its exclusive possession, the manufacturer was under an obligation to . . . avoid misleading impressions."³⁶

Second, what this view fails to take into account is the fact that professions that in fact meet the black-letter definition, such as doctors, attorneys, and accountants, all provide a service and sell it as well.³⁷ One good example is that of an attorney hired to draft a will. On the surface, it would seem as though only a service is provided, but a strong argument can be made for the proposition that the customer is in fact buying the will as well as the service of drawing it up.

Thus, a major problem in the field today is the distinction between a consultant and a vendor/consultant. Because the nature of business computer systems is rather complex, very often a vendor is relied upon by a plaintiff business in much the same, if not exactly the same manner as a separate consultant, very much like the fact pattern in *Triangle*.

On a fundamental fairness basis, it does not seem fair to treat an outside consultant as having a professional duty, as in *Diversified*, while treating a seller, who performs perhaps the exact same function in addition to selling the system, as not having a similar duty.

35. 197 F. Supp. 743 (E.D. Mich. 1961).

36. *Id.* at 752, cited in Note, *supra* note 4, at 1081 n.90.

37. See Singal, *Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services*, 12 NEW ENG. 859, 912-13 (1977).

D. THE PROBLEM OF WARRANTIES AND A CONTRACT THEORY

One theory that could rationalize the competing positions is to say that Triangle had sellers' warranties as a potential cause of action while Diversified did not, and that to establish a rule subjecting a seller of a good to a professional standard of care would, in the words of the *Triangle* court, "open Pandora's box."³⁸

There is an inherent problem in this theory, however, in that a seller's warranty can be disclaimed. The Uniform Commercial Code states that a seller may disclaim a warranty if merchantability is mentioned and the disclaimer is conspicuously in writing.³⁹

Further, the U.C.C. states that a manufacturer may limit a consumer's remedies through a limitation in the contract of sale.⁴⁰

However, not all sellers of goods have the relative superiority in expertise that a vendor such as Honeywell has in computers. A grocer cannot be said to be an "expert" in groceries, only a vendor. A car dealer cannot realistically be said to be an "expert" in cars, but is rather only a vendor. But Honeywell's involvement with the defective system went far beyond that of an ordinary vendor. Honeywell installed the system. Honeywell fully trained Triangle employees in the operation of the system, as would any competent outside consultant. Moreover, for over a year after the system began to malfunction, Honeywell personnel remained on the premises at Triangle in an attempt to cure the problem.⁴¹

Because of these representations, it is possible to state that the defendant had in fact given the plaintiff an express warranty that defendant would perform the consulting services in a competent manner. The problem then becomes one of line-drawing. Any service provider, whether a doctor or a plumber, is going to make some kind of representation relating to the competence of the work to come. Certainly a buyer of a service expects the service to be provided skillfully.

The *Triangle* court, however, firmly stated that the contract was one for the sale of goods and not for one of services. "A contract is for 'service' rather than 'sale' when 'service predominates,' and the sale of items is 'incidental.'"⁴² Also, Honeywell never billed for the services it performed on the computer system, which is recognized as indicating a sale of goods rather than services.⁴³

The next section of this Note will examine an entirely different al-

38. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 746 (2d Cir. 1979).

39. U.C.C. § 2-316 (1990).

40. U.C.C. § 2-719 (1990).

41. *Triangle*, 604 F.2d at 739-40.

42. *Id.* at 742.

43. *Id.* at 743.

ternative to the traditional notion of the idea of a "profession." In *Melody Home Manufacturing Co. v. Barnes*,⁴⁴ the Texas court stated that regardless of what the provider says or does not say with regard to competence, a warranty is held out to and accepted by the consumer.

IV. AN ENTIRELY DIFFERENT ALTERNATIVE: THE MELODY HOME RULE

In 1987, the Supreme Court of Texas took a major leap in the service liability area in the case of *Melody Home Manufacturing Co. v. Barnes*.⁴⁵ In this case, the court declared that services should carry with them an implied warranty that they will be performed in a "good and workmanlike" manner.⁴⁶ The result is basically to generalize the fundamental concept of "malpractice" to any and all types of non-professional service.

In *Melody*, the plaintiff purchased a motor home from the defendant, Melody Home. The plaintiffs experienced puddles and leakage inside the home, and eventually found that a sink was not connected to the drain in one of the interior walls. As a result of this defect, the motor home was severely damaged. When the plaintiff told Melody Home of the problem, workmen came out to the home twice, but failed to fix the defects, and in fact caused additional damage.⁴⁷

Previously, the tort-based doctrine of implied warranty only applied to a purchased good, and not to a repair service. The general rule in Texas prior to the case was that a good itself carried with it an implied warranty that it was manufactured in a good and workmanlike manner, but repair services did not.⁴⁸

There were two reasons given by the court for expanding the doctrine that also relate to the computer consultant issue. The first of these is that the provider of the service "is in a much better position to prevent loss than is the consumer of the service."⁴⁹ Secondly, a consumer "should be able to rely upon the expertise of the service provider," causing an increase in the quality of services due to the strict liability risk.⁵⁰ The court here describes a situation that perhaps conforms to the computer malpractice problem more so than almost any kind of service, including medical and legal services. As stated *supra*, it perhaps can be said that a general layman may have some knowledge

44. 741 S.W.2d 349 (Tex. 1987).

45. *Id.*

46. *Id.* at 352.

47. *Id.* at 351.

48. Comment, *supra* note 1, at 938.

49. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 353 (Tex. 1987).

50. *Id.*

about the human body, and some knowledge about the law, and perhaps some about his car, but almost none about the inner workings of a business-size computer system. As stated by the court in *Melody*, "[m]any services are so complicated and individually tailored that a consumer is unable to independently determine quality and must depend on the experience, skill, and expertise of the service provider."⁵¹

In addition to expanding the doctrine of implied warranty to all non-professional services in Texas, the *Melody* court declared that the implied warranty cannot be disclaimed by the service provider. "When disclaimers are permitted, adhesion contracts . . . limit the duties and liabilities of the stronger party . . . a disclaimer allows the service provider to circumvent this expectation and encourages shoddy workmanship."⁵²

The issue of an implied warranty for service transactions has necessarily taken on a greater importance due to the transformation of the American economy over the last few decades from a manufacturing-based economy to a service-based economy. The *Melody* court used statistics to show how the purchase of services has grown dramatically since the 1960's relative to the purchase of goods. In 1950, services held 30.9% of the GNP, and goods 56.6%. By 1984, services held a 48.1% share, and goods only a 41.1% share.⁵³ Simple protection of the consumer seems to dictate a response to the changing nature of transactions.

On the surface, the case seems to keep things simple, by just lumping services together with goods. However, the question of whether the holding in the case should apply to professional services was dodged by the Texas court. "The question whether an implied warranty applies to services in which the essence of the transaction is the exercise of the professional judgment by the service provider is not before us."⁵⁴

Technically, that statement effectively means that there still exists no implied warranty for professional services in Texas, only the traditional professional negligence cause of action. Two years before *Melody Home*, in 1985, the Texas Supreme Court held, in *Dennis v. Allison*,⁵⁵ that an implied warranty was not available to a patient injured by improper treatment on the part of a physician. In *Dennis*, a psychiatrist beat and raped his patient, who then sued and lost on the theory that there was an implied warranty that the doctor would abide by the ethi-

51. *Id.*

52. *Id.* at 355.

53. *Id.* at 353.

54. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987).

55. 698 S.W.2d 94 (Tex. 1985).

cal restraints on psychiatrists. The dissent in *Melody Home* voices this concern:

The court's opinion is especially disturbing in light of the fact that we so recently refused to create an implied warranty for professional service transactions. Under much more compelling facts than are present here, we concluded that the creation of an implied warranty was unnecessary because the plaintiff already possessed adequate remedies to redress the wrong. How is the present case any different?⁵⁶

The issue of whether professional service providers should be exempt from an implied warranty standard and held to one of negligence has been addressed before. The most persuasive argument states that "the resolution should hinge not on the title of the transaction but on its nature. . . . That the courts have generally declined to subject professional transactions to this [implied warranty] analysis, while they have consistently done so for 'goods' transactions and some commercial services, is due more to historical accident than to sound policy or legal considerations."⁵⁷ This relates to the idea that "professional services" maintain a preferred status under the law as opposed to mere commercial transactions.⁵⁸ Two cases in particular, however, have undermined this concept.⁵⁹

As mentioned *supra*, the regulatory problems with declaring the computer consulting industry a bona-fide, full-fledged "profession," as the term is commonly used (i.e. ignoring the *Diversified* reliance-based analysis) are quite prohibitive. Described *infra* is the uncertainty with which the *Diversified* decision burdens consultants as well as judges. The *Melody Home* implied warranty approach, if applied to professional services, would make things much simpler by not basing an outcome exclusively on an absolute black-letter definition of the term "profession," and it would also do away with the uncertainty created in a reliance-based approach. The service provider would know that there is an implied warranty of good and workmanlike conduct attached to the service in every case. The obvious drawback of such an approach for a consultant or any other professional service provider is the burden of guaranteeing one's work. The problem with a guarantee in a professional context has been stated with the maxim that people who hire professionals "purchase service, not insurance."⁶⁰

To that end, common sense is a good guide here. It is not possible

56. *Melody Home*, 741 S.W.2d at 358.

57. Singal, *supra* note 37, at 912-13.

58. *Id.* at 913.

59. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

60. Singal, *supra* note 37, at 911 (quoting *Gagne v. Bertram*, 43 Cal. 2d 481, 275 P.2d 15 (1954)).

to suggest that an attorney will breach an implied warranty if a case is lost, or a doctor if an operation is unsuccessful. But an attorney could feasibly be required to guarantee that a will is drawn up in agreement with the proper laws, just as a computer consultant could be required to guarantee that a computer works for the purposes for which it was purchased. Good and workmanlike conduct does not always equate with total success. Again, the "resolution should not hinge on the title of the transaction but on its nature."⁶¹

V. PROBLEMS WITH THE UNCERTAINTY CREATED BY *DIVERSIFIED*

A primary difference between a computer systems consultant and a practitioner of a "commonly realized" profession is that unlike those professionals who are normally subject to malpractice liability, such as physicians and attorneys, computer consultants do not have any kind of uniform certification whatsoever.⁶² Hence, it is not possible to know exactly what constitutes a reasonable course of action for a systems consultant, according to one commentator.⁶³

One potentially bad result from the *Diversified* "reliance-based" approach to professional liability is that degrees of reliance on the part of the customer will differ from case to case, and therefore courts would be required to examine each case on its own facts. In other words, tremendous uncertainty could be created because a consultant could be considered to be a professional on one job, and therefore be held liable for professional negligence, but if on another job the client knew a good deal about computer systems, then a court might not consider the consultant to be a professional for the purposes of that job. This "part-time professional" problem would clearly create uncertainty on the part of consultants.

A problem that has already been discussed is the idea that laymen may very possibly know more about such fields as medicine and law than about computers. The same can be said for judges. A judge is an expert in law, but may only as much about computers as the two parties to the computer-related case tell him or her.

However, all professional standards have some generality to them. There are two responses to the problem of uncertainty. The first of

61. *Id.* at 924.

62. Note, *Damage Awards and Computer Systems—Trends*, 35 EMORY L.J. 255, 286 (1986).

63. *Id.* See also Tannebaum, *User-Vendor Litigation from the User's Perspective*, in *COMPUTER LITIGATION 1984: RESOLVING COMPUTER RELATED DISPUTES AND PROTECTING PROPRIETY RIGHTS* 475, 503 (W. Fenwick ed. 1984).

these is to simply say to the consultant, "Don't be negligent, or you'll be liable as a professional under *Diversified*."

A second response, one that is perhaps more palatable to consultants, states that "'due professional care' is to be exercised in providing management advisory service."⁶⁴ This standard comes out of the *Diversified* case. E&W incorporated the Management Advisory Services Practice Standards, which had already been adopted by the American Institute of Certified Public Accountants, Inc. (AICPA Standards) into its "Guidelines to Practice."⁶⁵ Specifically, these standards require that "[d]ue professional care is to be exercised in the performance of a management advisory services engagement."⁶⁶ Although these standards are general, if a consulting company were to voluntarily adopt the standards, as did E&W (perhaps to their chagrin), both the consultant and the court would have something on which to base a judgment.

To promulgate such voluntarily adoptable standards, perhaps the best suggestion would be for an industry advisory committee to meet and propose a list of acceptable standards for consultants. If the committee were comprised of academics, consultants, and vendor/consultants, a set of voluntary standards for consulting companies could possibly be produced which would show more expertise in their drafting, and which would be more specific than the standards which a court, acting without any guidance, might produce.

The AICPA Standards cited in the *Diversified* case perhaps could be used as a good starting point. Among the AICPA Standards for consultants that could be considered, either in whole or in part, are:

- 1) "Engagements are to be performed by practitioners having competence in the analytical approach and process, and in the technical subject matter under consideration."⁶⁷
- 2) "Due professional care is to be exercised in the performance of a [computer system consulting] services agreement."⁶⁸
- 3) "Sufficient relevant data is to be obtained, documented, and evaluated in developing conclusions and recommendations."⁶⁹

Right now, the only equation for a consultant in the jurisdiction of the Eighth Circuit is that as the amount the client relies on you for your services increases, the chance of a court finding a professional relationship that could give rise to a professional negligence claim also in-

64. *Id.*

65. *Diversified Graphics, Ltd. v. Groves*, 868 F.2d 293, 296 (8th Cir. 1989).

66. *Id.*

67. *Id.* (quoting American Institute of Certified Public Accountants, Inc. (AICPA) Standards Nos. 1-8).

68. *Id.*

69. *Id.*

creases.⁷⁰ This is especially important for systems consultants, because in a computer consultant/client relationship, there is perhaps the same amount of "blind reliance" as there is in a doctor/patient or attorney/client relationship, due to the complex nature of modern business computer systems. As one commentator has stated, "[computers] remain a mystery to the public, who may fail to distinguish between competence and incompetence, between honorable and dishonorable programmers, or to recognize fraud."⁷¹

Most likely, a large degree of uncertainty is here to stay for consultants. Commentators have listed three problems that would be the most troublesome in establishing a computer-industry-specific standard of care, rather than a more general one such as AICPA:

- 1) the problem of what exactly the standards should be;
- 2) the problem of keeping a standard current in a field that is as fast moving as the computer technology field;
- 3) the problem of positing a standard that is too restrictive, and therefore perhaps driving people away from a field that is already short of people.⁷² There are perhaps more than enough computer salespersons to go around, but not enough computer professionals.

A set of more general standards would solve these problems. First, they are already there and do not have to be originated and extensively debated over. Second, as for keeping the standard current, a general set of standards including the MASPS/AICPA principles would not require continued revision in order to keep up with technology, because the standards themselves are written in general language and could encompass the current knowledge of the field. To have more specific standards would not be feasible, due to the pace of computer technology. One commentator has stated that if flight had grown at the speed at which computers and data processing have, man would have walked on the moon less than one year after the Wright Brothers flew at Kitty Hawk.⁷³

The decisions that a consultant would make would be based on his or her knowledge of the new technology, and if a consultant were to fail to know the current state-of-the-art in the industry, standards similar to the ones above, in particular AICPA #3, would cover this omission.

Finally, the AICPA standards are not so open-ended that an indi-

70. Westermeier & Porter, *supra* note 15, at 3.

71. Note, *supra* note 4, at 1069 (quoting Palmer, *Programming: The Profession That Isn't*, DATAMATION, Apr. 1975, at 171).

72. Note, *supra* note 62, at 286-87.

73. *Dynamic Growth Seen Continuing*, COMPUTERWORLD, June 14, 1976, at 1, col. 1, cited in Note, *supra* note 4, at 1066 n.3.

vidual or business would shy away from the field for that reason alone. People become professional accountants every day, with the full knowledge that they, as professionals, are subject to AICPA standards. If someone were to pass up a career in the consulting field, it is unlikely that it would be due to the presence of such standards alone.

VI. CONCLUSION

To base the definition of the term "profession" on the relationship between two parties, rather than on a set of black-letter principles, is a fair development. The *Diversified* court was correct in using a test of reliance to determine the true role of the computer consultant.

At this point, the inquiries of the mid-eighties into whether or not the computer consultant is a professional are no longer especially relevant. To the Eighth Circuit, computer malpractice is not a thing of the future, but of the present, suggesting that the five-point definition of "profession" is not necessarily the last word. It is perhaps not possible to propose as specific a set of rules for the computer industry as exist for the medical or legal fields, but the key to a profession lies not in black-letter rules and licensing, but rather in the relationship between the two parties.

Certainly the computer consultant's relative expertise ranks him or her on at least a par with an attorney, and perhaps close to a physician. A client walks into an attorney's office and probably knows some rudimentary facts about the law. The same can be said for professionals such as accountants. A potential computer customer, however, may perhaps know nothing about a computer system at the point of initial hiring.

Judge Edenfield, in *Honeywell, Inc. v. Lithonia Lighting, Inc.*,⁷⁴ had his pulse on the issue of reliance best of all, when he wrote that

[t]he misnomers and industrial shorthand of the computer would make the most esoteric legal writing seem as clear and lucid as the Ten Commandments or the Gettysburg Address; and to add to this Babel, the experts in the computer field, while using exactly the same words, uniformly disagree as to precisely what they mean.⁷⁵

Because of the difficulties in proposing a specific standard that have been listed throughout this Note, any posited standard would most likely have to be a general one. However, there is nothing wrong with a general standard for the computer consulting industry. The more specific a malpractice standard is, the less leeway a consultant has in the exercise of his or her professional judgment. Using a general "profes-

74. 317 F.Supp. 406 (N.D. Ga. 1970), cited in Note, *supra* note 4, at 1082.

75. *Id.* at 408.

sional" duty of care standard, as in the AICPA example, gives those in the field at least some idea of what is to be expected of them.

One key distinction that is peculiar to the computer field is the vendor/consultant tie. Very few professionals sell tangible goods as part of their professional services. The fact that a computer is hardware and legal or medical services are generally not does nothing to change the degree of reliance on the part of the consumer. Unfortunately, the courts have magnified the vendor/professional line, rather than erased it. This artificial distinction should not carry the same weight in a professional negligence analysis as does the degree of reliance.

Finally, there is the *Melody Home* idea. Simply allowing a non-disclaimable implied warranty cause of action for consumers of all services, professional or otherwise, would in a sense render all the debate about the definition of "profession" moot. Due to the fact that the law has for years contained implied warranty causes of action in the sale of goods, it makes sense in today's service-oriented economy to add a similar cause of action for all services. Also, it is the clearest method of analysis. It places less importance on deciding whether a service or relationship is "professional," and instead provides a clear guideline for consultants and a fair protection for consumers.

Whether for not the implied warranty for services rationale ever makes its way out of Texas and into professional services across the United States perhaps does not even matter for computer consultants, due to the *Diversified* decision. The best advice for consultants would be to simply think of the work as being professional. That concept keeps the consultant on his or her toes, and is a correct assessment of the relationship and degree of reliance between the consultant and the customer.

*Joseph Condo**

* Copyright 1991 © Joseph Condo. All Rights Reserved. Mr. Condo was graduated in May 1991 from the Law Center, University of Southern California, Los Angeles.