

Winter 1980

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ATTORNEY MALPRACTICE IN ILLINOIS: AN EARLY CHAPTER IN A BOOK DESTINED FOR GREAT LENGTH

CARL E. KASTEN*

INTRODUCTION

Across America, the filing of legal malpractice suits is proliferating. Recognized as a tort nearly a century ago in Illinois, legal malpractice as a cause of action was rarely used by consumers of legal services until its rebirth in the late 1960's and the 1970's. The reasons advanced for the dramatic increase in legal malpractice suits are both numerous and varied.

While it is beyond the scope of this article to determine whether or to what extent a given factor has caused this increase, the numerous rationales include: (1) American society is becoming increasingly litigious; (2) publicity, advertising, and the media have created client expectations of the specialist's expertise even though specialties are not officially recognized; (3) the better-educated client is more aware of the competence or incompetence of his lawyer; (4) lawyers, while greater in number, are generally not as adequately trained; (5) the bar has failed to require continuing legal education; (6) the bar has failed to adopt specialization; (7) the number of cases has greatly increased, burdening both the bench and bar; (8) attorneys are more willing to bring suit or testify against a fellow lawyer; and (9) the law, to lawyers and laymen alike, has become extremely complex.

Whatever the underlying causes of legal malpractice actions, their manifestations now surround us. They affect every sector of the legal community, including attorneys filing and defending malpractice suits or appearing as expert witnesses, and those fearful of their own liability who seek and purchase malpractice insurance. Because malpractice claims are increasingly successful,¹ and the recovery amount on the average claim

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1. See Luvera, *Avoiding Legal Malpractice*, CASE & COM. 3 (Sept.-Oct. 1975): "Successful claims against attorneys have increased by twenty-five (25%) percent in the last five years."

is growing,² the rise in malpractice premiums has been dramatic.³

The growth of legal malpractice is also revealed by the wealth of legal literature it has spawned. Prior to 1970 there was a paucity of articles on the subject. In a decade's time, numerous works have discussed both the rebirth of malpractice actions and the reasons underlying their renewed application.⁴ Some authors and jurists have expressed fears that malpractice does not accomplish that which it was designed to prevent, in that it erects a barrier to practice (in the form of ability to pay premiums) and insulates attorneys from their defalcations.⁵

Although the rebirth of legal malpractice began in the 1960's in California, its re-emergence in Illinois became the subject of concern for the bar by 1970.⁶ The midwest's prior insulation from widespread malpractice actions has begun to deteriorate.⁷ It is apparent, therefore, that whatever the sources of or reasons for legal malpractice,⁸ such actions have been accepted and will be pursued by members of the Illinois bar.

2. The N.Y. Times, June 18, 1975, at 44, col. 1, reported that Continental National American Insurance Company had processed about double the number of claims over the previous 4 years and that the average claim had gone from \$4,500 to \$7,000.

3. The cost of basic malpractice protection afforded the author has increased 400% since 1971 and 278% since 1975. See Braverman, *The Cost of Mistake May Go Higher*, 65 ILL. B.J. 196 (1976); Nitz, *The Cause and Prevention of Increasing Professional Liability Insurance Premiums for Lawyers*, 54 CHI. B. REC. 390 (1973). In certain states, attorneys have experienced cost increases of more than 600% over the past several years. Stern, *Legal Malpractice: Are You Really Protected By Your Malpractice Policy?*, 14 TRIAL 23 (Dec. 1978).

4. R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* (1977).

5. See generally Schnidman & Salzler, *The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist?*, 45 U. CIN. L. REV. 541, 560-61 (1976).

6. See Blaine, *Professional Liability Claims: An Increasing Concern for Lawyers*, 59 ILL. B.J. 302 (1970) [hereinafter cited as *Increasing Concern for Lawyers*].

7. Mossner, *The Legal Malpractice Case*, 14 TRIAL 18 (Sept. 1978).

8. See *Increasing Concern for Lawyers*, *supra* note 6, at 305, which indicates that approximately 43% of the malpractice claims processed in 1970 in Illinois arose from and involved the "time-element" category, such as limitations and filing dates, 21% involved contractual agreements and 20% involved real estate transactions, while 16% made up all other areas of malpractice. In 1977, 46.3% of Illinois malpractice claims arose from the "time-element" lapse. Braverman, *How About Reducing Lawyer Malpractice Claims By 50 Percent*, 67 ILL. B.J. 365 (1979). A 1978 study of eleven southern states reveals that only 24% of the malpractice claims were in the areas of personal injury representation, appellate practice, and other trial work. The study also revealed that of those claims against trial lawyers, 82% occur because of administrative and clerical errors. Only 4.82% were attributable to skill or ability in trials or appeals. See Stern, *Legal Malpractice: Are You Really Protected By Your Malpractice Policy?*, 15 TRIAL 37 (Jan. 1979) [hereinafter cited as Stern].

THE ELEMENTS OF LEGAL MALPRACTICE

The elements of the tort of legal malpractice are widely recognized as: (1) the presence of an attorney-client relationship; (2) a duty owed to the plaintiff; (3) a breach of that duty through the attorney's failure to exercise the proper degree of care; (4) a proximate causal connection between the attorney's negligent conduct and the resulting injury; and (5) an injury or damage to the plaintiff.⁹ While the elements of the cause of action are not in dispute, their ascertainment and application often create confusion and conflict. A review of each separate element is therefore necessary in order to understand the tort of legal malpractice.

The limited scope of this article does not permit a comprehensive consideration of all of these elements as interpreted in other jurisdictions or as applied to other professions. Insofar as it is helpful or necessary to define the issues or provide guidelines for Illinois attorneys, however, there will be an examination of the law of other jurisdictions and other professional malpractice actions.

Attorney-Client Relationship

The existence of an attorney-client relationship is readily ascertainable when an attorney accepts a fee or executes a contract of employment with a client. But what of other, less clear situations? The mere offer of retainer by a client consummates such a relationship,¹⁰ and the payment of money is not essential to create the "retainer"¹¹ or offer of employment. Even a gratuitous rendition of services gives rise to an attorney-client relationship.¹² An attorney's statement that he will "look into the matter" and then advise the consumer on whether he will accept the case creates a relationship during the pendency of the "inquiry."¹³ Once a legal consumer has sought an attorney for his advice, opinion, or services, no express "acceptance" by the at-

9. *Connelly v. Wolf, Block, Schorr & Solis-Cohen*, 463 F. Supp. 914 (E.D. Pa. 1978) (attorney-client relationship must exist); *Hoppe v. Ranzini*, 158 N.J. Super. 158, 385 A.2d 913 (1978) (elements of cause of action); *Hansen v. Wightman*, 14 Wash. App. 78, 538 P.2d 1238 (1975) (same).

10. *DeWolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371 (1861); 4 ILL. L. PRAC. *Attorneys and Counselors* § 9, at 149 (1953 & Supp. 1979).

11. *Johnston v. Brown*, 51 Ill. App. 549 (1893); see *Ferri v. Ackerman*, 100 S. Ct. 402 (1979) (indigent criminal defendant stated cause of action in Pennsylvania state court for professional malpractice of court-appointed counsel in federal criminal trial; the attorney not being entitled to an absolute immunity arising out of his appointment).

12. *Fort Meyers Seafood Packers, Inc. v. Steptoe & Johnson*, 381 F.2d 261, 262, 18 A.L.R.3d 974, 976 (D.C. Cir. 1967).

13. *Tormo v. Yormak*, 398 F. Supp. 1159 (D.N.J. 1975).

torney is required to create a fiduciary relationship.¹⁴

Although the cases defining the inception of the attorney-client relationship are over a century old, the policy reasons supporting them are valid, perhaps even more so, in today's consumer-oriented world. Because an attorney is in the business of dispensing legal advice and taking legal action, he is presumably in a better position to determine whether immediate steps are required, and if so, which ones. A client, having chosen to employ a particular attorney, presumably anticipates paying for the reasonable value of services rendered even if there is no express contract. A client is therefore justified in expecting that his attorney will take appropriate and immediate action if the facts warrant it.

Once a relationship is created, the attorney's employment ordinarily continues during the pendency of the matter for which he was engaged, unless the attorney or his client dies in the interim.¹⁵ A client may discharge his attorney at any time with or without cause. However, an attorney who accepts employment cannot, without just cause, abandon his client before resolution of the matter, and even with just cause, must provide his client reasonable opportunity to procure other counsel.¹⁶ The following have been held to be "good cause," sufficient to justify an attorney's termination of the relationship: the existence of irreconcilable differences between the attorney and client regarding the conduct of the client's case;¹⁷ the failure to pay fees which are both agreed to and accrued, so long as trial is not imminent;¹⁸ discovery of a conflict of interest not reasonably discernible at the commencement of the relationship;¹⁹ and the client's failure to heed his lawyer's advice.²⁰

Even when an attorney has just cause to terminate the rela-

14. Generally, the burden is on the alleged client to prove that a relationship existed, for purposes of a legal malpractice action. *E.g.*, Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975). See Neville v. Davinroy, 41 Ill. App. 3d 706, 355 N.E.2d 86 (1976), where legal advice and other services rendered over the course of several years by an attorney to his friend, without an agreement as to compensation, was held to create an attorney-client relationship.

15. See notes 106-08 and accompanying text *infra*.

16. Bergman v. Hedges, 111 Ill. App. 2d 35, 38, 249 N.E.2d 666, 668 (1969); accord, Goldberg v. Goldberg, 27 Ill. App. 3d 94, 99, 327 N.E.2d 299, 303 (1975).

17. Custom Builders, Inc. v. Clemons, 52 Ill. App. 3d 399, 367 N.E.2d 537 (1977).

18. Cairo & St. L. R.R. v. Kroerner, 3 Ill. App. 248 (1878).

19. Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958).

20. The individual lawyer is given the choice of continuing to represent his client, or of telling the client that he cannot, so that new counsel may be obtained. Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 582 (1961).

tionship, sufficiency of notice of termination and the client's opportunity to procure other counsel are taken into account by courts before an attorney is released from his obligations. The proximity of trial or other proceeding substantially affecting the client's rights is largely determinative. As a general rule, courts will not permit withdrawal during or on the eve of trial; withdrawal is granted more freely when the time of notice to the client and the motion to withdraw greatly antedates the time of trial. The trial court is vested with great discretion in this area and is expected to consider all relevant facts and the complexity of the particular case before reaching its decision.²¹

Liability may attach if an attorney abandons his client in contravention of court order. In *Public Taxi Service, Inc. v. Barrett*,²² an attorney's motions for leave to withdraw were denied. The attorney nonetheless abandoned his clients and permitted their adversaries to obtain default judgments which were not vacated. In those circumstances, the court found that the abandoned clients had a cause of action against the attorney.

Similarly, liability may attach when an attorney gives ineffective notice of termination to his client. In *Central Cab Co. v. Clarke*,²³ a Maryland court held that when a defense attorney accepts a file from an insurance company, an attorney-client relationship is created not only with the referring insurer but also with the insured.²⁴ In *Clarke*, the attorney had decided not to proceed because he could not be assured of payment. He sent effective notice of termination to the insurer. He also sent a copy of that letter to the insured, but it was misdirected and returned to the attorney who sought no further contact with the insured. The court found that the attorney-client relationship continued under those circumstances, and the attorney was held liable to the insured.

Case law in Illinois and elsewhere indicates that whenever there is doubt as to the efficacy of termination of the relationship, resolution will normally be against the attorney. This is at least partially attributable to the fiduciary nature of the relationship. An attorney owes his client the duty of loyalty, at least until the relationship is properly terminated and the client is protected. Courts rationalize the imposition of this duty on the basis that since an attorney knows the facts and has superior knowledge of their legal effect, the burden of effectuating an adequate termination of the relationship should rest with the at-

21. *Bergman v. Hedges*, 111 Ill. App. 2d 35, 38, 249 N.E.2d 666, 668 (1969).

22. 44 Ill. App. 3d 452, 357 N.E.2d 1232 (1976).

23. 259 Md. 542, 270 A.2d 662 (1970).

24. *Id.* at 547, 270 A.2d at 666.

torney.²⁵

The Duty Owed

Illinois courts apply the standard of care enunciated in 1934 in *Olson v. North*.²⁶ The *Olson* court held that when a person adopts the profession of law and performs duties on behalf of another, he will be held to employ in his undertakings a reasonable degree of skill and care.²⁷ He must possess the ordinary legal knowledge and skill common to members of the legal profession and act with the reasonable care and diligence usually exercised by lawyers.²⁸ While liability will attach for breach of this duty, courts distinguish between negligent errors and those of mere mistaken judgment, the latter not constituting a basis for malpractice.²⁹ Additionally, the fact that an attorney was unsuccessful in an undertaking creates no presumption of negligence; on the contrary, the rule is that practitioners are presumed to have properly discharged their duties until the contrary has been proved.³⁰

Locality Rule

While many principles of "duty" created in medical mal-

25. The ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2) imposes a duty to protect the welfare of a client by giving due notice, allowing time for employment of other counsel, and cooperating with new counsel by delivering all papers and property to which the client is entitled. In light of the fiduciary nature of an attorney-client relationship, the protection of the client's interests is properly of paramount concern.

26. 276 Ill. App. 457 (1934).

27. *Id.* at 473.

28. *Id.* In *Olson*, among other claims made by the plaintiff was the failure of the attorney to properly present evidence and to conduct proper cross-examination. In some states, and in England, such claims, as a matter of law, are inadequate to state a cause of action. See *Meagher v. Kauli*, 256 Minn. 54, 97 N.W.2d 370 (1959); *Stricklan v. Koella*, 546 S.W.2d 810 (Tenn. App. 1977) (citing *Rondel v. Worsley*, 1 All E.R. 467 (1966 C.A.), 3 All E.R. 657 and (1967 H.L.) 3 All E.R. 993). For further discussion regarding liability for trial tactics, see text accompanying notes 51-56 *infra*.

29. In *Morrison v. Burnett*, 56 Ill. App. 129 (1894), the standard was declared as follows:

An attorney is required to use such skill and prudence as lawyers of ordinary ability and care would exercise, and for failing therein, he is liable to his client for any proximate loss thereby occasioned; but, he is not answerable for an error of judgment upon nice or difficult points, nor for every mistake which may occur in practice.

Id. at 135. See also *Dorf v. Relles*, 355 F.2d 488, 492 (7th Cir. 1966); *House v. Maddox*, 46 Ill. App. 3d 68, 71, 360 N.E.2d 580, 583 (1977); *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 1020, 313 N.E.2d 180, 182 (1974); *Mecartney v. Wallace*, 214 Ill. App. 618, 624 (1919).

30. *Priest v. Dodsworth*, 235 Ill. 613, 617, 85 N.E. 940, 942 (1908).

practice have been applied to legal malpractice,³¹ disparities do exist. One major difference concerns the locality rule, which in medical malpractice actions requires that the physician use that "skill and care ordinarily used by reasonably well-qualified doctors in the locality in which he practices."³² It had been assumed that the locality rule would be inapplicable to legal malpractice, thereby resulting in a state-wide standard, because the only admission requirement was a test administered on a state-wide basis.³³ However, some courts seem to have implicitly accepted the locality rule in legal malpractice actions.³⁴

Specialization

Another distinction between medical and legal malpractice concerns specialization. Specialization has been recognized in the medical profession for decades but has not yet been accepted by the legal profession. A step in this direction has been taken by permitting attorneys to publish the fact that they "concentrate" or "limit" their practices to specific areas of the law; however, they may not refer to themselves as "specialists."³⁵ In addition, attorneys must indicate that "the State of Illinois does not provide for recognition or certification as a specialist in such area or field of law."³⁶ Because Illinois does not recognize legal specialization, it is doubtful whether the specialist's duty can be applied to an attorney's actions, even when he "concentrates" his practice in one particular field.³⁷

In *Olson v. North*,³⁸ it was claimed that the attorney represented himself as "especially qualified in the defense of criminal cases, including murder cases."³⁹ Nevertheless, the court held the attorney only to the standard of reasonable and ordinary care common to the legal profession in general.⁴⁰ It appears that two of *Olson's* underlying assumptions are currently in conflict:

31. *Olson v. North*, 276 Ill. App. 457, 475 (1934).

32. I.P.I. 2d § 105.01, *Duty of Physician, Surgeon, Dentist* (1971).

33. ILL. REV. STAT. ch. 110A, § 704 (1977); Mossner, *The Legal Malpractice Case*, 14 TRIAL 20, 21 (Sept. 1978). It should be noted, however, that those experts testifying in *Olson v. North* and *Smiley v. Manchester Ins. & Indem. Co.*, 49 Ill. App. 3d 675, 364 N.E.2d 683 (1977), *aff'd*, 71 Ill. 2d 306, 375 N.E.2d 118 (1978), testified as to the standards of attorneys in the community.

34. *Olson v. North*, 276 Ill. App. 457 (1934); *accord*, *Smiley v. Manchester Ins. & Indem. Co.*, 49 Ill. App. 3d 675, 364 N.E.2d 683 (1977), *aff'd*, 71 Ill. 2d 306, 375 N.E.2d 118 (1978).

35. ISBA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 617 (1978).

36. *Id.*

37. I.P.I. 2d § 105.02, *Duty of Specialist* (1971).

38. *Olson v. North*, 276 Ill. App. 457 (1934).

39. *Id.* at 461.

40. *Id.*

(1) the rules of law and evidence regarding liability of lawyers should be the same as those for doctors, surgeons, and dentists; and (2) even if a professional claims to be a specialist, he will only be held to the standard of care of a general practitioner.⁴¹

In the context of the largely unspecialized bar and less regulated society of the 1930's, *Olson* and its statement of the attorney's duty was correct. However, the passage of one half century, and the development of a more specialized bar and a regulated society, have brought the viability of *Olson* into question. The informal development of legal specialties creates a strong argument that those who specialize should be held to a specialist's standard of care, rather than the standards required of a general practitioner.

Legal advertising is *fait accompli*.⁴² Across the nation, attorneys increasingly hold themselves out to both the public and the bar as possessing expertise. National and international law firms grow in size and number by the day. Despite laudable efforts to simplify government rules and regulations, the complexity of federal and state laws and regulations increases.

In this environment, if the lawyer specializes, holding himself out as "concentrating" in a given area, and is viewed by the public and the bar as a specialist, why should he not be held to a specialist's standard of care? It has been held that a lawyer accepting a case with out-of-state consequences must maintain and exercise the skill of one practicing in the state of occurrence.⁴³ It would seem that *Olson's* general holding that the rules of law and evidence should be identical in medical and legal malpractice requires that the standard of care for a legal "specialist" parallel that of his medical counterpart, even though he is not formally certified or recognized as a "specialist."⁴⁴

41. While it may be assumed that the standard of care of a general practitioner may be less than of the legal specialist, it is not necessarily true in practice. In my own observation, many times general practitioners who adequately prepare in a given area perform even better services than some who claim to be specialists. The general practitioner does not seem to suffer the legal myopia of the specialist and sometimes perceives other effects of a transaction or outcome more clearly.

42. *Bates & O'Steen v. State Bar of Ariz.*, 433 U.S. 350 (1977). See *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), for first amendment claims relating to solicitation of and information provided for clients. Not all advertising is protected in Illinois, even for chiropractors. See *Talsky v. Department of Regist. & Educ.*, 68 Ill. 2d 579, 370 N.E.2d 173 (1977).

43. *Dorf v. Relles*, 355 F.2d 488, 491-92 (7th Cir. 1966) (citing *Mock v. Higgins*, 3 Ill. App. 2d 281, 292, 121 N.E.2d 865, 870 (1954)).

44. Interestingly, two recent California cases seemingly so indicate. In *Wright v. Williams*, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975), a maritime case, the plaintiffs lost their lawsuit because they failed to sustain their burden of proof; but the court said: "[A] lawyer holding himself out to the pub-

Referral

In this era of informal specialization and increased government regulation, there are few practitioners who possess detailed knowledge of the many increasingly complex areas of the law. Referrals to and associations with other attorneys have become prevalent. Despite this practice, Illinois courts have not as yet addressed the issue of whether an attorney has a legal duty to refer a client to an attorney with expertise in a particular legal field. The disciplinary rules state that "[a] lawyer shall not handle a legal matter which he knows that he is not competent to handle without associating with him a lawyer who is competent to handle it,"⁴⁵ but the lack of recognized specialists makes the selection process difficult.

In medical malpractice actions, the plaintiff is entitled to an instruction which provides that:

If in the treatment of a patient a doctor realizes or in the exercise of that care and skill which a reasonably well-qualified doctor would ordinarily use in the locality in which he practices should realize that the nature of the patient's condition requires the services of a physician skilled in a special branch of medical science, then the doctor is under a duty to advise the patient to consult a specialist.⁴⁶

Therefore, if the general standards of professional malpractice apply to both legal and medical negligence, as *Olson* indicates,⁴⁷ the duty to refer or associate should attach to legal malpractice as well.

Except for those few specialties recognized under Illinois law,⁴⁸ there are no *de jure* specialists—only *de facto* or self-declared experts. Since there are currently no minimum competency examinations, mandatory continuing legal education programs, or other standards for specialty certification in Illinois, a referring attorney has no clear guidelines to assist him in selecting a competent specialist. The duty to refer would be

lic and the profession as specializing in an area of the law must exercise the skill, prudence and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." *Id.* at 809, 121 Cal. Rptr. at 199.

Id. at 805, 121 Cal. Rptr. at 196. In *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), no officially recognized legal specialty was involved, yet the court made note of the defendant-lawyer's experience in community property pension matters and examined his conduct in light of the activities of those in his profession similarly situated.

45. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1975).

46. I.P.I. 2d § 105.03, *Duty to Refer Patient to Specialist* (1971).

47. See text accompanying notes 38-45 *supra*.

48. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105 (1975). This section permits a lawyer to hold himself out as specializing in the fields of patents, trademarks, or admiralty.

more readily fulfilled if certified specialists were available.⁴⁹

Trial Tactics

A 1978 study disclosed that less than 5% of all claims against trial lawyers result from a lack of skill or ability at trial or on appeal.⁵⁰ However, the theoretical difficulties present in this small number of cases are very real. Some of the instances of malpractice alleged in *Olson v. North* were the failures to call certain witnesses and properly cross-examine others, and the refusal to ask certain questions. When expert testimony indicates such nonfeasance was negligent, Illinois allows recovery for the injury caused.⁵¹

This rule has been criticized. In *Stricklan v. Koella*,⁵² a Tennessee court ruled that while a lawyer is liable for professional negligence, a cause of action does not arise when the alleged negligence is in the attorney's choice of trial tactics or conduct of the case. The court, noting that Great Britain had rejected the imposition of liability for a claim of negligent trial strategy, quoted at length from the observations of an English judge:

Every counsel in practice knows that daily he is faced with the question whether in his client's interest he should raise a new issue, put another witness in the box, or ask further questions of the witness whom he is examining or cross-examining. That is seldom an easy question but I think that most experienced counsel would agree that the golden rule is—when in doubt, stop. Far more cases have been lost by going on too long than by stopping too soon. But the client does not know that. To him brevity may indicate incompetence or negligence and stopping too soon is an error of judgment. So I think it not at all improbable that the possibility of being sued for negligence would at least subconsciously lead some counsel to undue prolixity, which would not only be harmful to the client but against the public interest in prolonging trials.⁵³

The *Stricklan* court concluded that in all negligence cases there must be a causal connection between the alleged negligence and the injury. In a suit where the alleged negligence is manifested in the attorney's presentation of proof, "only by pure

49. In August, 1977, the Association of Trial Lawyers of America established a National Board of Trial Advocacy which has proposed national standards for certification of civil and criminal trial advocates. The applicant would have to meet all state requirements as a prerequisite to compliance with NBTA standards. For a full discussion of this effort to establish a national trial competency standard and certification program in 1978, see Koskoff, *Specialization Update*, 14 TRIAL 21 (Feb. 1979).

50. Stern, *supra* note 9, at 37.

51. I.P.I. 2d § 105.01, *Duty of Physician, Surgeon, Dentist* (1971). This instruction should be readily amenable to application to legal malpractice.

52. 546 S.W.2d 810 (Tenn. App. 1977).

53. *Id.* at 813 (citing *Rondel v. Worsley*, 1 All. E.R. 467 (1966 C.A.), 3 All E.R. 657 and (1967 H.L.) 3 All E.R. 993).

guesswork can the verdict be examined and a so-called cause for that verdict be determined."⁵⁴ The court held that there can be no cause of action against an attorney arising out of the manner in which "he honestly chooses to present his client's case to the trier of the facts."⁵⁵

The rule announced in *Stricklan* optimally balances the client's interests with those of his attorney. It allows a lawyer to serve as both advocate and officer of the court. Additionally, it permits him to develop his own style without concern as to what his client might claim he could, might, or should have done.

However, the *Stricklan* rule should not be used to shield attorneys from all of their negligent acts. When an attorney fails to adduce evidence, known by him to exist, which is probative of an essential element of his client's case not otherwise established, this negligence should be the basis of liability. Adequate protection for the attorney would be afforded by the necessity of expert witnesses produced by the plaintiff. A causal connection between negligence and damages would, of course, have to be established before liability would be imposed.

Settlement

Another area of potential liability for the litigation attorney is the process of settlement and compromise.⁵⁶ In *Smiley v. Manchester Insurance & Indemnity Co.*,⁵⁷ the attorney failed on several occasions to communicate to his adversaries that he had authority to settle the wrongful death and personal injury actions. Additionally, he refused to settle for specific amounts within the policy limits. The Illinois Appellate Court concluded that the attorney's inaction caused the insurer to incur liability for bad faith negotiations in attempting to settle the disputed claims within the policy limits, and held the attorney liable.⁵⁸

The question of the adequacy of a settlement has not arisen in Illinois. The Minnesota Supreme Court, however, recently rejected clients' claims that their attorney had recommended settlement for an insufficient amount.⁵⁹ That court held that when an attorney is fully informed of the factors in the decisionmak-

54. *Stricklan v. Koella*, 546 S.W.2d at 813.

55. *Id.* at 814.

56. See Annot., 87 A.L.R.3d 168 (1978).

57. 49 Ill. App. 3d 675, 364 N.E.2d 683 (1977).

58. *Id.* at 680, 364 N.E.2d at 687; cf. *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (1979) (law firm, which represented both insured and insurer without disclosing conflict of interest in that insurer wanted to settle and insured did not, breached duty to insured).

59. *Glenna v. Sullivan*, 245 N.W.2d 869, 87 A.L.R.3d 160 (Minn. 1976).

ing process and acts in the honest belief that his advice is well founded and in the best interests of his clients, he will not be held liable for an error or mistake in judgment.⁶⁰

Research

The extent of a lawyer's duty to research has yet to be determined in Illinois. While it is clear that a lawyer cannot be required to forecast developments in Illinois law,⁶¹ our courts have not discussed the duty to adequately research novel or unresolved issues. In *Smith v. Lewis*,⁶² however, the California Supreme Court held that an attorney is not only expected to "possess knowledge of those plain and elementary principles of law which are commonly known by well-informed lawyers," but also "to discover those additional rules of law, which, although not commonly known, may readily be found by standard research techniques" even in unsettled areas of the law.⁶³

To Whom Is the Duty Owed?

Obviously, a lawyer owes a duty to his client.⁶⁴ Is that the extent of his obligation? Illinois has not yet provided an answer. Although contractual privity has traditionally been deemed necessary,⁶⁵ the modern trend indicates that if the transaction was intended to affect third persons, and if an injury to a non-client was reasonably foreseeable at the time the legal services were performed, the attorney can be held liable to one he technically was not representing.

One area in which this duty has been extended to third persons is testamentary dispositions. An attorney has been held to owe a duty to beneficiaries under a will prepared by him, and the lack of privity did not automatically operate as a bar to the plaintiffs' recovery.⁶⁶ A beneficiary may proceed either in tort or for breach of contract as a third-party beneficiary.⁶⁷ The only

60. *Id.* at 872-73, 87 A.L.R.3d at 166.

61. *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 1021, 313 N.E.2d 180, 183 (1974).

62. 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

63. *Id.* at 358, 530 P.2d at 595, 118 Cal. Rptr. at 627.

64. Wade, *Public Responsibilities of the Learned Professions*, 21 LA. L. REV. 130, 131-35 (1960).

65. *See Olson v. North*, 276 Ill. App. 457 (1934).

66. *Lucas v. Hamm*, 56 Cal. 2d 583, 588, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 824 (1961). *Lucas* involved a doctrine close to the hearts of all lawyers and law students; namely, the Rule Against Perpetuities. The court stated that attorneys are "not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers" and ruled for the defendant-attorney. *Id.* at 589, 364 P.2d at 689, 15 Cal. Rptr. at 825.

67. *Id.* at 588, 364 P.2d at 688, 15 Cal. Rptr. at 824; *accord*, *Licata v. Spector*, 26 Conn. Supp. 378, 225 A.2d 28 (1966); *see* *W.L. Douglas Shoe Co. v.*

conditions that must be met before liability may be imposed are that the plaintiff must have been an intended beneficiary, the transaction must have been intended to affect him, and the harm suffered must have been reasonably foreseeable.⁶⁸

Proof of Breach of Duty

Generally, the rules of evidence governing the trial of medical malpractice actions are applicable in legal malpractice suits.⁶⁹ Evidentiary rules are modified only when it is necessary to accommodate differences in the two professions. The standard of care against which a professional's actions are measured must generally be based on expert testimony.⁷⁰ In fact, failure to supply expert testimony may be a "death knell" for the plaintiff.⁷¹

One exception to the general rule requiring expert testimony was recognized in medical malpractice actions involving negligence "so grossly apparent or in the treatment of such a common occurrence that a layman would have no difficulty appraising it."⁷² This "gross negligence" rule was accepted in legal malpractice actions in *House v. Maddox*,⁷³ where the court determined that the attorney's failure to file within the applicable statute of limitations was so grossly apparent that laymen would have no difficulty in appraising it.⁷⁴ By analogy, it is arguable that failure to timely file tax returns on routine transactions and the passing of other widely-recognized time deadlines would fall within the "gross negligence" rule.

In questioning expert witnesses, the relevant inquiry is not whether the actions of an attorney were negligent, but whether his conduct was that which other reputable lawyers would have

Rollwage, 187 Ark. 1084, 63 S.W.2d 841 (1933); *Woodfork v. Saunders*, 248 So. 2d 419 (La. App. 1971); *McEnvoy v. Helikson*, 227 Or. 781, 562 P.2d 540 (1977); *Schirmer v. Nethercutt*, 157 Wash. 172, 288 P.2d 265 (1930).

68. See *Ventura County Humane Soc'y v. Holloway*, 40 Cal. App. 3d 897, 903, 115 Cal. Rptr. 464, 468 (1974).

69. *Olson v. North*, 276 Ill. App. 457 (1934).

70. *Id.*; accord, *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1974).

71. *Bonhiver v. Rotenberg, Schwartzman & Richards*, 461 F.2d 925 (7th Cir. 1972); *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966); *Walski v. Tiesenga*, 72 Ill. 2d 249, 381 N.E.2d 279 (1978); *Schmidt v. Hinshaw, Culbertson, Melolmann, Hoban & Fuller*, 75 Ill. App. 3d 516, 394 N.E.2d 559 (1979); *Brainerd v. Kates*, 68 Ill. App. 3d 781, 386 N.E.2d 586 (1979).

72. *Graham v. St. Luke's Hosp.*, 46 Ill. App. 2d 147, 158, 196 N.E.2d 355, 360 (1964); accord, *Dimitrijevic v. Chicago Wesley Mem. Hosp.*, 92 Ill. App. 2d 251, 259, 236 N.E.2d 309, 313 (1968).

73. 46 Ill. App. 3d 68, 360 N.E.2d 580 (1977).

74. *Id.* at 73, 360 N.E.2d at 584; accord, *Butts v. Watts*, 290 S.W.2d 777 (Ky. 1956); *Watkins v. Shepard*, 278 So. 2d 890 (La. App. 1973); *Central Cab Co. v. Clarke*, 259 Md. 542, 270 A.2d 662 (1970).

pursued under similar circumstances.⁷⁵ In *Bonhiver v. Rotenberg, Schwartzman & Richard*,⁷⁶ the court rejected the assumption that judges, being lawyers, could take judicial notice of how other reputable practitioners would have acted under the circumstances. Relying on *People v. Wallenberg*,⁷⁷ the *Bonhiver* court held that a judge could not rely on his independent knowledge of facts, and that if he did utilize that knowledge, it would constitute a denial of due process.⁷⁸ Therefore, it appears that any judicial notice based on a judge's prior legal experience would be improper.

In medical malpractice actions, expert witnesses may be cross-examined regarding the views of recognized authorities expressed in professional treatises or periodicals. The author's competence can be established by an expert witness or by judicial notice.⁷⁹ While the use of treatises and periodicals in legal malpractice litigation has not been discussed by Illinois courts, there is no valid reason why they should not constitute evidence if they are subject to the limitations employed in medical malpractice actions.

Finally, the questions arise whether, in the absence of formal specialization, a general practitioner could testify as an expert witness against a *de facto* specialist and whether this *de facto* specialist could testify against the general practitioner. In medical malpractice actions, courts have held that a doctor otherwise qualified by experience or training in the field of medicine involved is not barred from testifying as an expert merely because he is not a certified specialist in that field.⁸⁰ Once specialization is recognized among lawyers, the same test should be used. The determinative factor should be experience or training in the problem area litigated.

75. *Olson v. North*, 276 Ill. App. at 458.

76. 461 F.2d 925 (7th Cir. 1972).

77. 24 Ill. 2d 350, 181 N.E.2d 143 (1962).

78. 461 F.2d at 928. In *Wallenberg*, the Illinois Supreme Court held that in a criminal case any determination made by a trial judge based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination or any of the rules of evidence, denied due process. 24 Ill. 2d at 354, 181 N.E.2d at 145.

79. *Darling v. Charleston Community Mem. Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253, 14 A.L.R.3d 860 (1965).

80. Annot., 31 A.L.R.3d 1163, 1167 (1965); *cf. Dolan v. Galluzzo*, 77 Ill. 2d 279, 396 N.E.2d 13 (1979) (physician could not testify as to podiatrist's standard of care unless he was also a licensed podiatrist; non-specialist could testify as to diagnosis of plaintiff's present condition and prognosis for recovery).

Causation

The majority of states, including Illinois, adhere to the "case within a case" requirement. For a plaintiff to prevail, he must prove not only that his attorney was negligent, but also that disregarding the negligence, the plaintiff had a meritorious claim.⁸¹ Therefore, he must prove the elements of the underlying cause of action. If the plaintiff would have been unsuccessful on the merits of the underlying action, the attorney will not be held liable, regardless of the extent of his negligence.⁸² In addition to proving both the attorney's negligence and the merits of the underlying action, Illinois law requires proof that the original defendant was solvent.⁸³ If the plaintiff could not have collected on the judgment from the original defendant, it is reasoned that the attorney's negligence could not have caused the plaintiff any damage.

Because the objective of reviewing the underlying action is to prove what would have occurred had the attorney not been negligent, the original trial must be recreated as accurately as possible. While Illinois courts have not yet passed on the question, it is arguable that if the original action was tried before a jury, the subsequent trial on the underlying action should also be heard by a jury. Similarly, if a jury was waived in the original action, the court should decide the merits of the underlying action.

Because legal malpractice actions essentially consist of two separate actions, authors have suggested that separate trials be held, one for the underlying action and one to resolve the negligence issue.⁸⁴ Evidentiary divisions would be less complicated because the purpose for which evidence would be offered would already be defined by the scope of the trial.⁸⁵ Also, bifurcated

81. *Priest v. Dodsworth*, 235 Ill. 613, 85 N.E. 940 (1908); *Piper v. Green*, 216 Ill. App. 590 (1920). One caveat to the general rule that the client has the burden of showing proximate cause should be noted. In cases arising from lawyer-client transactions, the burden of proof is always on the lawyer to show the fairness of the transaction. *Vrooman v. Hawbaker*, 387 Ill. 428, 56 N.E.2d 623 (1944); *Jacobsen v. National Bank of Austin*, 8 Ill. App. 3d 135, 289 N.E.2d 253 (1972); *Gromer v. Hahn*, 97 Ill. App. 2d 276, 240 N.E.2d 138 (1968). This rule is not unlike other fiduciary cases requiring the fiduciary to exercise loyalty and fidelity to his principal.

82. *Trustees of Schools of Township 42 N. v. Schroeder*, 2 Ill. App. 3d 1009, 1013, 278 N.E.2d 431, 433 (1971); *accord*, *Chicago Red Top Cab Ass'n v. Gaines*, 49 Ill. App. 3d 332, 364 N.E.2d 328 (1977).

83. *See Piper v. Green*, 216 Ill. App. 590 (1920); *Goldzier v. Poole*, 82 Ill. App. 469 (1898).

84. *E.g.*, R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* § 432 (1977).

85. *See Smiley v. Manchester Ins. & Indem. Co.*, 49 Ill. App. 3d 675, 364 N.E.2d 683 (1977), *aff'd*, 71 Ill. 2d 306, 375 N.E.2d 118 (1978). The *Smiley* court struggled with two conflicting rules: (1) offers of compromise are inadmissi-

trials would be less cumbersome and would be easier for the jury to understand. Bifurcation would tend to provide a distinct definition of damages. While opponents of bifurcated trials claim that clarity may be furnished in a single trial via special interrogatories, the potential for jury misunderstanding is greater in a single trial of all issues.

Of primary concern to the defendant-lawyer is the possibility that his former client may obtain a larger verdict in the malpractice action than he could have in the first action, for reasons wholly unrelated to the attorney's negligence. The second jury might be more liberal, the dollar might be worth less at the time of the second trial, the circumstances of the parties might have changed, or the attorney might be a target defendant. While these factors may work to the detriment of the attorney, they pervade our trial system, and parties in every case are subject to the same vagaries of justice. It is also possible that these factors could work to the attorney's advantage.

Damages

Recent Illinois cases indicate that proof of the plaintiff's damages may be established by the defendant-attorney's own actions or by a prior course of dealing between the plaintiff and the party against whom the plaintiff had the underlying claim. While plaintiff is always entitled to prove the injury in the same manner that he would have in trying the underlying cause of action,⁸⁶ abbreviated methods of proving damages have been accepted. One example of a short-cut method of proof was employed in *House v. Maddox*,⁸⁷ where an insurer offered the plaintiff \$8,000 for her claim and raised the offer to \$16,500 after she retained the defendant-attorney. Because the attorney allowed the statute of limitations period to lapse before filing suit, the court allowed the facts themselves to support the claim for damages.⁸⁸

Similarly, in *Kohler v. Woolen, Brown & Hawkins*,⁸⁹ plaintiff's attorney failed to file a timely demand for arbitration

ble in evidence and (2) failure to mitigate damages is a defense. The conflict was resolved by holding offers of compromise inadmissible where an issue of liability exists, but admissible on the issue of damages once liability is determined. 49 Ill. App. 3d at 681, 364 N.E.2d at 688. The *Smiley* rationale may require a bifurcated trial of liability and damages where mitigation of damages is used by the defense.

86. See note 81 and accompanying text *supra*.

87. 46 Ill. App. 3d 68, 360 N.E.2d 580 (1977).

88. *Id.* at 73, 360 N.E.2d at 584. Interestingly, the trial court in a bench trial awarded the plaintiff only \$3,000. Apparently there was no claim on appeal by plaintiff that the verdict was inadequate.

89. 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973).

in an uninsured motorist case. Nevertheless, the case was arbitrated, and the clients were awarded \$17,500 and \$16,000. The insurer subsequently brought suit to set aside the arbitration awards on the ground that the demands for arbitration were not timely filed. The court held that the attorneys were estopped to deny the facts they had pleaded in the arbitration proceeding. Accordingly, the arbitrator's awards were admissible on the issue of damages.⁹⁰

As in other situations, a plaintiff has a duty to mitigate his damages. In *Smiley v. Manchester Insurance & Indemnity Co.*,⁹¹ this rule recently conflicted with the principle that offers of compromise are inadmissible as evidence. An insurance company's former attorney failed to communicate to the original plaintiff an offer to settle, thereby exposing the insurer to greater liability because of its bad faith. In directing a verdict for the insurer against its former attorney, the court held that an offer of compromise is inadmissible when a question of liability exists, but admissible on the issue of damages once liability has been determined.⁹² *Smiley* seems to require bifurcated trials as to liability and damages when a mitigation of damages defense is pleaded.

Since *Goldizen v. Poole*,⁹³ it has been accepted that the client can recover only for injuries actually sustained. Accordingly, it has been assumed that an Illinois plaintiff would not be permitted to recover more in a malpractice action than the amount that could have been awarded in trying the original action. Consequently, it has been argued that if the plaintiff were bound to pay attorney's fees in the underlying action, the amount of those fees should be deducted from the malpractice recovery sum.⁹⁴

California courts have been most reluctant to permit a negligent attorney to reduce the award to plaintiff by the amount of the contingency fees recoverable had the original suit been successfully litigated. In rejecting an attorney's argument that a person should not recover greater damages than he could have had both parties to the contract fully performed, one court refused to deduct attorneys' fees, stating: "One whose wrongful conduct has rendered difficult the ascertainment of damages cannot complain because the court must make an estimate of

90. *Id.* at 458, 304 N.E.2d at 679.

91. 49 Ill. App. 3d 675, 364 N.E.2d 683 (1977), *aff'd*, 71 Ill. 2d 306, 375 N.E.2d 118 (1978).

92. 49 Ill. App. 3d at 681, 364 N.E.2d at 688.

93. 82 Ill. App. 469 (1898).

94. J. MIRZA, ILLINOIS TORT LAW AND PRACTICE § 13.2 (1974); *see* Childs v. Comstock, 69 A.D. 160, 74 N.Y.S. 643 (1902).

damages rather than an actual computation."⁹⁵ The court also noted that because the attorney had failed to file a counterclaim for his actual services, the question of payment for services was not properly before the court.

As in other areas of tort law, punitive damages may be awarded if the attorney is guilty of willful misconduct.⁹⁶ While no Illinois court has awarded punitive malpractice damages, there is no theoretical bar to their imposition.⁹⁷

ACCRUAL OF THE CAUSE OF ACTION

The problem of when an action for legal malpractice accrues almost always arises in the context of a defense that a statute of limitations has run, barring plaintiff's claim. It had been held over a half century ago that an action for legal malpractice arises at the time of the negligent act.⁹⁸ Since that time, however, Illinois has applied the "discovery" rule to other types of professional malpractice, finding that the action arises when the plaintiff learns of his injury or reasonably should have learned of it.⁹⁹

An Illinois appellate court applied the discovery rule to legal malpractice actions in *Kohler v. Wollen, Brown & Hawkins*.¹⁰⁰ In *Kohler*, the alleged malpractice occurred in 1964, the damages

95. *Benard v. Walkup*, 272 Cal. App. 2d 595, 601, 77 Cal. Rptr. 544, 551 (1969) (court also noted that the attorney had failed to file a counterclaim for his services).

96. *See Public Taxi Serv., Inc. v. Barrett*, 44 Ill. App. 3d 452, 458, 357 N.E.2d 1232, 1238 (1976) (amendment of complaint to include prayer for punitive damages allowed where defendant is aware from nature of complaint that plaintiffs intend to prove willful misconduct).

97. In *Hill v. Montgomery*, 184 Ill. 220, 56 N.E. 320 (1900), a woman, who was told by her attorney that she was divorced when she was not, was awarded \$5,000 damages. Today, this situation would probably be deemed fraud or a case of outrageous conduct within the rule allowing damages for the intentional infliction of emotional distress.

98. *Maloney v. Graham*, 171 Ill. App. 409 (1912). *See also Dolce v. Gamberdino*, 60 Ill. App. 3d 124, 376 N.E.2d 273 (1978) (statute of limitations arises at the time of the negligent act).

99. *E.g.*, *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969) (surveying malpractice); *accord*, *Lipsey v. Michael Reese Hosp.*, 46 Ill. 2d 32, 262 N.E.2d 450 (1970) (medical malpractice). Illinois courts have consistently held, in medical malpractice cases, that the statute of limitations starts to run from the date when plaintiff discovered or should have discovered the last element necessary to his cause of action. *Lind v. Zekman*, 77 Ill. App. 3d 432, 395 N.E.2d 964 (1979); *Kristina v. St. James Hosp.*, 63 Ill. App. 3d 810, 380 N.E.2d 816 (1978); *Roper v. Markle*, 59 Ill. App. 3d 706, 375 N.E.2d 934 (1978). Three years ago, however, the Illinois legislature shortened the limitations for doctors and hospitals without regard to these "discovery" principles. *See ILL. REV. STAT. ch. 83, § 22.1* (1977). The statute reads in pertinent part: "No action for damages . . . shall be brought more than 4 years after the date on which occurred the act or omission or occurrence. . . ."

100. 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973).

were ascertained in 1970, and the actions were filed in 1970 and 1971. Finding that the actions were timely commenced, the court held that an action does not accrue "until the client discovers or should have discovered the facts establishing the elements of the cause of action."¹⁰¹ The *Kohler* court found persuasive the reasoning of *Neel v. Magana*,¹⁰² where the California Supreme Court took cognizance of laymen's difficulties in ascertaining the existence or effect of various elements of legal malpractice:

A client may not recognize the negligence of a professional when he sees it, and if he must ascertain malpractice at the moment of its occurrence, the client must hire a second professional to check the work of the first, which would be an impractical duplication and would destroy the confidential relationship between the practitioner and his client.¹⁰³

In a companion case to *Neel*, the court decided that even when a plaintiff-client immediately recognizes his attorney's negligence, but does not sustain damages until years later, the cause of action does not accrue until the damages are realized.¹⁰⁴ Therefore, the action for legal malpractice was held not to accrue until the last event necessary to create the cause of action occurred.

ABATEMENT OR SURVIVAL OF THE ACTION

In *McGill v. Lazzaro*,¹⁰⁵ an Illinois appellate court ruled that an action for legal malpractice survives the death of the defendant. In reaching its decision, the court applied two tests. First, it determined that the accrued action was "personal property" within the meaning of the Illinois Survival Statute.¹⁰⁶ Second, the court noted that since causes of actions for fraud, negligence, and bad faith can be assigned, this claim was also assignable and therefore survived the death of either party. The court explicitly rejected a prior decision and found that a legal malpractice action survives the attorney's death.¹⁰⁷

101. *Id.* at 460, 304 N.E.2d at 681.

102. 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

103. *Id.* at 188, 491 P.2d at 428, 98 Cal. Rptr. at 844.

104. *Budd v. Nixen*, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971).

105. 62 Ill. App. 3d 151, 379 N.E.2d 16 (1978).

106. *Id.* at 154, 379 N.E.2d at 18. See ILL. REV. STAT. ch. 3, § 339 (1975) (now contained in ILL. REV. STAT. ch. 110½, § 27-6 (1977)).

107. 62 Ill. App. 3d at 154, 379 N.E.2d at 18. The court rejected the holding of *Butterman v. Chamales*, 73 Ill. App. 2d 399, 220 N.E.2d 81 (1966) (malpractice action against attorney did not survive his death since the cause of action lies in tort, not in contract). The *McGill* holding was supported by *Jones v. Siesennop*, 55 Ill. App. 3d 1037, 371 N.E.2d 892 (1977) (action for professional negligence against an attorney survived the death of the plaintiff).

What should the result be when plaintiff has not yet discovered the existence of his action against an attorney at the time of the latter's death? Although Illinois law is silent, it has been assumed that if the action has not yet accrued at the attorney's death, the possibility of future action is not "personal property," and therefore it cannot survive. This unfortuitous result in a society where attorneys are insured seems unjust and unwarranted.

CONCLUSION

Legal malpractice actions have affected nearly every Illinois attorney in some manner and have arisen in many substantive areas of the law.¹⁰⁸ Whether the prevalence of the cause of action is beneficial is no longer disputed.¹⁰⁹ Many problems concerning evidentiary standards in the proof of legal malpractice, procedural devices, and scope of issues to be litigated are still unresolved in Illinois. Many of these issues have already been decided in other states, however.

While Illinois imposes a higher standard of care on trial lawyers than do other states, Illinois is less exacting in formulating the lawyer's duty to research and less harsh in the computation of damages. To the extent of current case law, Illinois limits malpractice liability in cases involving non-client third parties. In other respects, however, legal malpractice in Illinois parallels medical malpractice in this state and legal malpractice nationwide.

The expectations of clients have always been high, and they

108. Some examples of the affected areas are: (1) appeals, *see, e.g.*, Trustees of Schools of Township 42 N. v. Schroeder, 2 Ill. App. 3d 1009, 278 N.E.2d 431 (1971); (2) personal injury claims, *see, e.g.*, House v. Maddox, 46 Ill. App. 3d 68, 360 N.E.2d 580 (1977); Kohler v. Woolen, Brown & Hawkins, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973); (3) releases, *see, e.g.*, Pennington v. Jones, 46 Ill. App. 3d 65, 360 N.E.2d 566 (1977); (4) securities, *see, e.g.*, Brown v. Gitlin, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1974); (5) real estate transactions, *see, e.g.*, Miller v. Schultz, 53 Ill. App. 3d 721, 368 N.E.2d 1141 (1977); (6) abstracting, *see, e.g.*, Chase v. Heaney, 70 Ill. 268 (1873); (7) creditor-debtor matters, *see, e.g.*, Priest v. Dodsworth, 235 Ill. 613, 85 N.E. 940 (1908).

Although none have yet been successful, several cases have been litigated in the criminal defense field. *E.g.*, Ehn v. Price, 372 F. Supp. 151 (N.D. Ill. 1974). In several other cases, negligence has been alleged in the context of criminal proceedings. *See, e.g.*, People v. Knippenberg, 66 Ill. 2d 276, 362 N.E.2d 681 (1977); People v. Allen, 132 Ill. App. 2d 1015, 270 N.E.2d 54 (1971).

There are other areas in which malpractice actions have been litigated in Illinois. The aforementioned areas and authorities are intended to convey only the variety of subject matter found in legal malpractice suits.

109. *See* J. MIRZA, ILLINOIS TORT LAW AND PRACTICE § 13.2 (1974) (the author, a leading Illinois trial lawyer, has suggested that "a few good legal malpractice actions would help a great deal in increasing the ethics of the Bar").

continue to increase. Formal certification of specialists may satisfy these expectations and may serve to clarify the various duties imposed on attorneys.¹¹⁰ To the lament of the negligent attorney and to the benefit of the bar, the continuous pursuit of the negligent attorney will produce the judicial response that is necessary to protect the consumer of legal services and to define the duties and responsibilities of every member of the practicing bar. Later and perhaps lengthier legal malpractice chapters will be read by consumer and lawyer alike with great interest.

110. The fact that specialization would have these effects does not necessarily mean that specialization for the Bar is desirable. It is beyond the scope of this article to address the merits of or problems with legal specialization generally.

