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CIVIL LEGAL MALPRACTICE IN WISCONSIN: *HELMBRECHT* AND BEYOND

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INTRODUCTION

The purpose of this article is to examine the underlying legal framework behind what is increasingly called the "legal malpractice crisis." Claims arising out of alleged legal malpractice have multiplied enormously within the past thirty years. Sections I and II of this article will examine the history of the expanding concept of legal malpractice and the specific elements of a legal malpractice case. Section III will deal with the developing law of malpractice as background for the statistical data which verifies the growth of malpractice claims. These data are presented in Sections IV and V. The statistics provided by the American Bar Association and Wisconsin Bar Association make it clear that both the number of claims and amounts paid out to settle those claims have increased over the past three to four years. This is a continuation of a long-term trend.

Courtroom tactics have recently begun to be questioned within the context of malpractice actions. This trend will be examined in Section VI along with the opposite trend which is the rule in British courts as set forth in Section VII.

Finally, Section VIII will examine the Wisconsin Supreme Court's most recent statement on malpractice in *Helmbrecht v. St. Paul Insurance Co.*¹ and some of the foreseeable consequences for Wisconsin practitioners.

I. HISTORY AND BACKGROUND

The general concept of attorney malpractice has its origins in early English case law. English cases from the 18th century

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1. 122 Wis. 2d 94, 362 N.W.2d 118 (1985).

and early 19th century set a standard of care for the legal profession of "a fair, reasonable and competent degree of skill."²

One of the first reported United States cases concerning malpractice was *Stephens v. White*.³ Plaintiff's attorney in this case commenced an action on a debt. The attorney negligently handled the matter which resulted in judgment for the plaintiff being reversed. Plaintiff sued for malpractice and the attorney defended on the basis that he had not been paid and therefore no duty arose. The court found that if a man undertakes to perform a professional act, he is chargeable for neglect to the person who employed him, although he has received no reward. This result is significant as early British cases held that a barrister could not be sued by a client for malpractice because the barrister had no reciprocal right to sue his client for a fee.

One of the earliest United States Supreme Court cases was *Savings Bank v. Ward*.⁴ In this case a negligence action was instituted against an attorney by a third-party lender who had relied on the attorney's certification of title in making a loan secured by land purportedly owned by the prospective buyer. It was later determined that the borrower did not own the land and subsequently a malpractice action against the attorney was brought by the third-party lending institution. The standard of care required under this case was "a reasonable degree of care and skill in the performance of such duties; and if injury results to the client for a want of such a degree of reasonable care and skill, the attorney may be held to respond in damages to the extent of the injury sustained."⁵ The Court went on to state:

[I]t must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is that if he acts with a proper degree of skill, and with reason-

2. *Lanphier v. Phipos*, 173 Eng. Rep. 581, 583 (K.B. 1838). See also *Montriu v. Jefferys*, 172 Eng. Rep. 51 (K.B. 1825); *Pitt v. Yalden*, 98 Eng. Rep. 74 (K.B. 1767); *Russell v. Palmer*, 95 Eng. Rep. 837 (K.B. 1767).

3. 2 Va. 709 (2 Wash. 203, 1796).

4. 100 U.S. 195 (1879).

5. *Id.* at 198.

able care and to the best of his knowledge, he will not be responsible.⁶

In addition, liability in *Ward* was limited to the client and not to third parties. This was one of the first statements on the issue of privity. Significantly, while a negligence approach was adopted by the court in *Ward*, the standard of care only required representation to the best of the attorney's knowledge. This overall attitude and the underlying faith in the profession which it represented continued as the general judicial view of attorney malpractice actions until the early 1960s.⁷ The courts began to take a tougher approach toward the errors of attorneys and the consequences of their errors after that time.

Some state cases approached the malpractice issue as a question of breach of contract,⁸ while others used a tort analysis.⁹ Even in the contract approach, however, courts often found that the attorney contracted to exercise the degree of skill and care required by the tort standard. The primary differences between the two approaches were that in contract actions the statute of limitations was longer and the measure of damages was more limited.

In most of the early malpractice actions there was a requirement of privity between the attorney and client. In other words, third parties who were potentially affected by the alleged malpractice had no specific right to sue the malpracticing attorney. Privity was required in order for the attorney and client to maintain control over their own contract and to limit what would otherwise be an attorney's boundless duty to the public.

The requirement of privity began to erode in the late 1950s.¹⁰ The erosion of the privity requirement has followed two basic theories. The strict privity requirement has some-

6. *Id.* (citation omitted).

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

8. *Goodman & Mitchell v. Walker*, 30 Ala. 482, 495, 68 Am. Dec. 137 (1857); *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); *Kurtenbach v. TeKippe*, 260 N.W.2d 53 (Iowa 1977); *Grago v. Robertson*, 49 A.D.2d 645, 370 N.Y.S.2d 255 (1975).

9. *Jones v. White*, 90 Ind. 255 (1883).

10. *Lucas*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821; *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958).

times been circumvented on the basis of a third-party beneficiary analysis.¹¹ Under such an analysis the non-client must prove that the client directly intended to benefit the non-client by his or her relationship with counsel in order for the non-client to successfully assert malpractice by the attorney.¹² This approach has been specifically adopted in Illinois and Pennsylvania.¹³

Another theory which forms the basis for inroads on the privity requirement is the "balancing of factors" theory.¹⁴ Under this policy-based theory the court balances the following factors to determine whether the attorney is liable to parties not in privity:

- (1) the extent to which the transaction was intended to affect the plaintiff;
- (2) the foreseeability of harm to the plaintiff;
- (3) the degree of certainty that the plaintiff suffered injury;
- (4) the closeness of the connection between the defendant's conduct and the injury;
- (5) the moral blame attached to the defendant's conduct; and
- (6) the policy of preventing future harm.¹⁵

II. ELEMENTS OF A WISCONSIN MALPRACTICE CASE

The basic elements of a legal malpractice case in Wisconsin are founded upon fundamental concepts of negligence. Plaintiff must prove the existence of an attorney-client relationship and the failure of the defendant attorney to exercise the skill and knowledge possessed by other members of the profession. Plaintiff must show that the attorney's failure to exercise such skills or the breach of duty was the proximate

11. See Annot., 45 A.L.R.3d 1181, 1190 (1972). For a summary of developments in this area, see *Brody v. Ruby*, 267 N.W.2d 902, 906-08 (Iowa 1978).

12. *Flaherty v. Weinberg*, 303 Md. 116, ___, 492 A.2d 618, 625-26 (1985).

13. *Ogle v. Fuiten*, 102 Ill. 2d 356, ___, 466 N.E.2d 224, 227 (1984); *York v. Stiefel*, 99 Ill. 2d 312, ___, 458 N.E.2d 488, 492 (1983); *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983).

14. See *Lucas*, 56 Cal. 2d at ___, 364 P.2d at 687, 15 Cal. Rptr. at 823; *Biakanja*, 49 Cal. 2d at ___, 320 P.2d at 19; *Bucquet v. Livingston*, 57 Cal. App. 3d 914, 922, 129 Cal. Rptr. 514, 518 (1976); *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 111, 128 Cal. Rptr. 901, 905 (1976).

15. *Flaherty*, 303 Md. at ___, 492 A.2d at 622 (footnote omitted).

cause of actual damage to the client. As discussed above, this duty may be extended to a third party if the defendant attorney can be shown to owe a duty to that person under either a third-party beneficiary analysis, balancing of factors analysis, or other approaches.

The Wisconsin Supreme Court stated the rule regarding a lawyer's liability for malpractice in the early case of *Malone v. Gerth*.¹⁶

[A]n attorney must be held to undertake to use a reasonable degree of care and skill, and to possess to a reasonable extent the knowledge requisite to a proper performance of the duties of his profession, and, if injury results to the client as a proximate consequence of the lack of such knowledge or skill, or from the failure to exercise it, the client may recover damages to the extent of the injury sustained; but we are all human beings, and attorneys are not responsible for errors and mistakes that they make. If an attorney is fairly capacitated to discharge the duties ordinarily incumbent upon one of his profession, and acts with a proper degree of attention, and with reasonable care, and to the best of his skill, he will not be responsible. He must, of course, act toward his client with integrity and honesty.¹⁷

The above quote from *Malone* seems to exempt lawyers from the consequences of "errors and mistakes that they make." In *State v. Bonisz*,¹⁸ the court stated this is not what it meant; it found the client entitled to protection against the attorney's carelessness or incompetence.¹⁹

The basic elements of a malpractice case thus include negligence, proximate cause, and actual damages. The Wisconsin Supreme Court has succinctly delineated what must be shown in a malpractice action:

In an action against an attorney for negligence or violation of duty, the client has the burden of proving the existence of the relation of attorney and client, the acts constituting the alleged negligence, that the negligence was the proximate cause of the injury, and the fact and extent of the injury alleged. The last element mentioned often involves the burden of showing that, but for the negligence of the attorney, the

16. 100 Wis. 166, 75 N.W. 972 (1898).

17. *Id.* at 173-74, 75 N.W. at 974.

18. 231 Wis. 157, 285 N.W. 386 (1939).

19. *Id.* at 168-69, 285 N.W. at 391.

client would have been successful in the prosecution or defense of an action.²⁰

The question of the existence of error in a malpractice case is a mixed question of law and fact.²¹ This is because the trier of fact is confronted with the dual problem of what a particular attorney did or failed to do, and what a reasonable or prudent attorney would do in the same circumstance.²² The standard of care to be applied in a particular case in order to determine the level of skill required of the defendant attorney and the fact of deviation from that standard is usually established by expert testimony.²³

Expert testimony is required to establish a prima facie case of malpractice in most jurisdictions.²⁴ When the case turns on an issue not related to legal expertise, expert testimony may not be necessary.²⁵ Expert witnesses are *not* necessary where the record discloses obvious and undisputed carelessness or conduct not necessarily related to legal expertise.²⁶ Finally, expert testimony is not required where counsel failed to follow the explicit instructions of the client,²⁷ and such failure caused the resultant harm.

As in any negligence case, the fact that the defendant attorney has breached a duty to the client must be linked to the attorney actually causing the plaintiff's damages. Not every act of carelessness nor every mistake of judgment made by an attorney will necessarily be a causative factor of the client's harm. The attorney, for instance, is not required to un-

20. *Lewandowski v. Continental Casualty Co.*, 88 Wis. 2d 271, 277, 276 N.W.2d 284, 287 (1979) (quoting 7 AM. JUR. 2D *Attorneys at Law* § 188, at 156 (1963)).

21. *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 112, 362 N.W.2d 118, 128 (1985).

22. *Id.*

23. *See Olfe v. Gordon*, 93 Wis. 2d 173, 181, 286 N.W.2d 573, 577 (1980); *see also* Annot., 14 A.L.R.4th 170 (1982).

24. *See Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller*, 75 Ill. App. 3d 516, 394 N.E.2d 559 (1979); *House v. Maddox*, 46 Ill. App. 3d 68, 360 N.E.2d 580 (1977); *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1974); *Kohler v. Woolen, Brown & Hawkins*, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973); *Sanders v. Smith*, 83 N.M. 706, 496 P.2d 1102 (1972).

25. *See Maddox*, 46 Ill. App. 3d 68, 360 N.E.2d 580; *Muse v. St. Paul Fire & Marine Ins. Co.*, 328 So. 2d 698 (La. Ct. App. 1976); *Hill v. Okay Constr. Co.*, 312 Minn. 324, 252 N.W.2d 107 (1977); *Hansen v. Wightman*, 14 Wash. App. 78, 538 P.2d 1238 (1975).

26. *Olfe*, 93 Wis. 2d at 181-82, 286 N.W.2d at 577.

27. *Id.* at 184, 286 N.W.2d at 578.

ingly predict how a court will interpret a document twenty years after it is drafted. The wide range of activity between competence and malpractice was recognized in *Denzer v. Rouse*.²⁸

In order to show proximate cause, plaintiff must prove the underlying merits of the original claim, including the fact that any judgment so obtained would have been collectible.²⁹ Plaintiff must prove what the outcome would have been but for the negligence of the attorney. One way to determine the value of the lost claim of a plaintiff is to retry the underlying cause of action. Thus, plaintiff must prove "two cases in a single proceeding" in order to prevail in some Wisconsin malpractice actions.³⁰ In *Lewandowski v. Continental Casualty Co.*,³¹ the plaintiff proved his underlying personal injury claim before the malpractice trial jury and established before that jury the amount he would have received but for the negligence of his attorney. The court in *Lewandowski* specifically recognized that situations may arise where the value of the original action could not be determined by a trial within the trial.³² A malpractice case founded on an attorney's failure to appeal, for instance, turns on the merits of legal issues which would have been raised in such an appeal. Similarly, only an issue of law is presented when the client was the defendant in the underlying action and the attorney failed to raise a specific meritorious defense.³³ In the latter two examples, these issues of law would be determined by the court, rather than a trial within the trial before the finder of fact.

Other jurisdictions which have considered the issue of determination of damages have reached differing solutions. In several jurisdictions, under somewhat unusual circumstances,

28. 48 Wis. 2d 528, 534, 180 N.W.2d 521, 524-25 (1970).

29. See *Floro v. Lawton*, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960); *Priest v. Dodsworth*, 235 Ill. 613, 85 N.E. 940 (1908); *Baker v. Beal*, 225 N.W.2d 106 (Iowa 1975); *Hoppe v. Ranzini*, 158 N.J. Super. 158, 385 A.2d 913 (1978); *Vooth v. McEachen*, 181 N.Y. 28, 73 N.E. 488 (1905).

30. *Lewandowski*, 88 Wis. 2d at 277, 276 N.W.2d at 287.

31. 88 Wis. 2d 271, 276 N.W.2d 284 (1979).

32. *Id.* at 278-81, 276 N.W.2d at 287-89.

33. *Id.* at 279, 276 N.W.2d at 288. See also *Baker*, 225 N.W.2d 106; *Fuschetti v. Bierman*, 128 N.J. Super. 290, 319 A.2d 781 (1974).

expert testimony has been admitted as evidence of the underlying settlement or judgment value of the case.³⁴

III. RELATED ISSUES

The burden of proof in a negligence action normally lies with the plaintiff. The exception to this rule occurs in cases involving the breach of fiduciary duty owed by the defendant attorney. Some jurisdictions have found that where a fiduciary duty is owed by the attorney to the client, the burden of proof shifts to the attorney.³⁵ The Louisiana courts have held that where the client makes a prima facie showing of negligence, the burden shifts to the defendant attorney to show that the client could not have succeeded notwithstanding the impropriety.³⁶

The preponderance of the evidence is the required standard of proof. It is usually not possible to prove absolutely what would have occurred had the malpractice not taken place. Plaintiff therefore must only show what would probably have occurred absent the malpractice.³⁷

Both the malpracticing attorney and the partners of the law firm may be liable to a client.³⁸ This duty of loyalty runs from each attorney employed by the firm to every client of the firm.³⁹ The same general rule applies to attorneys who practice as members of a professional corporation.⁴⁰ A referring

34. See *Duncan v. Lord*, 409 F. Supp. 687 (E.D. Pa. 1976); *Warwick, Paul & Warwick v. Dotter*, 190 So. 2d 596 (Fla. Dist. Ct. App. 1966), *cert. denied*, 201 So. 2d 233 (Fla. 1967); *Central Cab Co. v. Clarke*, 259 Md. 542, 270 A.2d 662 (Ct. App. 1970); *Shields v. Campbell*, 277 Or. 71, 559 P.2d 1275 (1977); *Helmbrecht*, 122 Wis. 2d 94, 362 N.W.2d 118.

35. *Hicks v. Clayton*, 67 Cal. App. 3d 251, 136 Cal. Rptr. 512 (1977); *Jacobsen v. National Bank of Austin*, 65 Ill. App. 3d 455, 382 N.E.2d 277 (1978); *Abrams, Kisseloff & Kissen v. 160 Bleecker St. Assocs.*, 67 A.D.2d 629, 412 N.Y.S.2d 19 (1979).

36. See *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 So. 2d 1109 (La. 1982).

37. *Lewandowski v. Continental Casualty Co.*, 88 Wis. 2d 271, 281, 276 N.W.2d 284, 289 (1979). See also *Floro v. Lawton*, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960); *Vooth v. McEachen*, 181 N.Y. 28, 73 N.E. 488 (1905); *Gladden v. Logan*, 28 A.D.2d 1116, 284 N.Y.S.2d 920 (1967).

38. *Waldeck v. Brande*, 61 Wis. 579, 21 N.W. 533 (1884); see also *Annot.*, 76 A.L.R.3d 1020 (1977).

39. See *Harman v. La Crosse Tribune*, 117 Wis. 2d 448, 344 N.W.2d 536 (Ct. App.), *cert. denied*, 105 S. Ct. 58 (1984).

40. WIS. STAT. § 180.99(8) (1983-84).

attorney may also be liable in a referral to other counsel,⁴¹ if they agree to split the fee or recovery.

The doctrine of *res ipsa loquitur* has been suggested in some jurisdictions as a means of allowing a jury to consider a question of malpractice without expert testimony.⁴² In some jurisdictions there is precedent for bifurcating the process so that the issue of malpractice is determined separately from the issue of the value of the underlying case.⁴³ Bifurcation has the advantage of separating and clarifying the issues in a case where the underlying cause of action is complex and confusion with the ultimate question of attorney negligence could result from a trial where *both* issues are heard simultaneously.

Finally, the statute of limitations in malpractice cases was originally found to run from the time of the injury.⁴⁴ The recent adoption of the "discovery rule" in tort actions by the Wisconsin Supreme Court⁴⁵ undoubtedly will apply to malpractice actions. This will continue to expand the liability of Wisconsin practitioners.

IV. STATISTICAL TRENDS

Within the past thirty years, malpractice claims against attorneys have evolved from a matter of passing concern to an increasingly common and disturbing problem. The shrinking availability of malpractice insurance coverage and its rising cost have also become matters of concern to practicing attorneys. The underlying reasons behind these changing statistics are not factors which can be proven empirically. Within the past thirty years there has been an overall change in public attitudes and a greater tendency to hold professionals accountable for their actions. In general, individuals feel that if they have been harmed, they are entitled to reimbursement

41. See *Flora*, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98; *Hill v. Curtis*, 154 A.D. 662, 139 N.Y.S. 428 (1913).

42. *Donato v. Dutton, Kappes & Overman*, 154 Ind. App. 17, 288 N.E.2d 795 (1972). *Contra Mazer v. Security Ins. Group*, 368 F. Supp. 418, 422 (E.D. Pa. 1973).

from some quarter. This expectation has arisen at a time when courts have often modified traditional legal theories to expand potential liability of defendants. In addition, the standard of care for lawyers has increased as they become more and more specialized and as the law itself evolves into distinct areas of expertise. Lawyers have become less reluctant to take cases against their colleagues and to testify against other attorneys. Nevertheless, clients have become more aggressive in asserting their own rights. All of these factors have combined with the fact that many areas of legal practice have become increasingly complicated and thus have increased not only the likelihood of errors, but also the likelihood that the client injured by the error will sue the attorney.

Unfortunately, reliable data on the types of claims filed and the average amount of recovery is often difficult to obtain. Insurance industry statistics show a quadrupling of claims between 1973 and 1976 from 1.8 to 7.2 claims per 100 policies.⁴⁶ The same source indicates a doubling in the amount paid per claim from 1971 to 1975. The statistics provided by the ABA Standing Committee on Lawyer's Professional Liability, however, do not show the increase to be this large. The ABA Standing Committee operates the National Legal Malpractice Data Center as a joint effort with several legal malpractice insurance carriers. Its data bank is nationwide. Through September 30, 1983, information was collected on 18,420 claims. The following information is based upon statistical analysis of these claims.⁴⁷

ABA DATA CENTER STATISTICS

In its September, 1983 report, the Data Center found that 35.8% of the claims were made against sole practitioners and 44.3% against firms of between two and five attorneys.⁴⁸ Unfortunately, the Data Center does not have demographic in-

46. Francis J. McCarthy, *Insurance Aspects of Legal Malpractice*, in *American Bar Association, Section of Insurance, Negligence and Compensation Law, Professional Liability of Trial Lawyers, The Malpractice Question 5064* (Chicago, Amer. Bar Assoc., 1979).

47. ABA Comm. on Lawyer's Professional Liability *National Legal Malpractice Data Center 3* (1983) [hereinafter cited as *Data Center Report*].

48. *Id.*

formation,⁴⁹ so it is not possible to determine statistically if such figures are significant in terms of the absolute number of practitioners in each group. Since it is not known what percentage of lawyers nationwide practice in firms of four or fewer attorneys, the significance of these particular percentages is unclear.⁵⁰ The following information was obtained from the National Data Center's 1983 report. In some cases updated cumulative figures through 1985 are also provided.⁵¹

Sole practitioners have

- 35% of all claims—(1985, 34.9%)
- 43.1% of all family law claims
- 43.6% of all criminal law claims⁵²

Firms of between six and thirty attorneys have

- 18.6% of all claims
- 33.2% of SEC claims
- 34.2% of all personal injury defendant claims⁵³

The Data Center codes all of the data it receives and analyzes it according to areas of law in which the attorney was retained by the client. The data is further coded according to the activity in which the attorney was engaged at the time the error was made and the nature of the error which was the underlying cause of the claim.⁵⁴ The following are the predominant areas in which claims arose according to the ABA statistics:

49. *Id.* at 1.

50. *Id.* at 1-2.

51. In some of the following tables where the data does not appear to total 100%, some statistical information has been deleted because of insufficient data or rounding off of numbers.

52. Data Center Report, *supra* note 47, at 10. The 1985 figures are from a telephone interview with Sharee Swetin, American Bar Association, National Legal Malpractice Data Center (Feb. 1986).

53. Data Center Report, *supra* note 47, at 21-22.

54. *See infra* notes 58-61.

	1983	1985
Bankruptcy	12.3%	10.5%
Estates and Trusts	7.1%	7.0%
Family Law	7.8%	7.9%
Personal Injury- Plaintiff	24.0%	25.1%
Real Estate	24.9%	23.3%
All other	23.9%	26.2% ⁵⁵

Because of the lack of demographic data, it is not known what percentage of *all attorneys' activities* are devoted to particular areas of practice.⁵⁶ Therefore, in analyzing these statistics it is impossible to conclude absolutely that a disproportionate number of claims arise in the personal injury or real estate areas of practice, although that appears to be the case.

An analysis of the type of alleged error in all cases combined produced the following data:

	1983	1985
Administrative Errors	20%	25.76%
Client Relations	15%	16.27%
Intentional Wrongs	11%	11.59%
Substantive Errors	45%	43.59% ⁵⁷

There are large variances in the above statistics in different areas of legal practice. The most notable differences of error by area of law are:

1. Substantive Errors are the source of 56.7% of all claims involving Real Estate and 32.8% of all claims involving Personal Injury/Plaintiff actions.⁵⁸

55. The 1983 figures are from Data Center Report, *supra* note 47, at 10. 1985 figures are from a telephone interview with Sheree Swetin, *supra* note 52.

56. Data Center Report, *supra* note 47, at 10.

57. *Id.* at 11 (1983 figures). The 1985 figures are from a telephone interview with Sheree Swetin, *supra* note 52.

58. Data Center Report, *supra* note 47, at 14. The Center defines Substantive Errors as to include a failure to know or ascertain a deadline correctly, an error in mathematical calculation, an error in public record search, a planning error in choice of procedures, inadequate discovery of facts, inadequate investigation, a failure to understand or anticipate consequences, a failure to know or properly apply the law or a conflict of interest. *Id.* at 12.

2. Administrative Errors are the source of 15.5% of all claims involving Real Estate and 48.9% of all claims involving the Personal Injury/Plaintiff area.⁵⁹
3. Client Relations are the source of 10.3% of all claims involving Personal Injury/Plaintiff claims and 24.4% of all claims involving Family Law.⁶⁰
4. Intentional Wrongs are the source of 13.5% of all claims involving Family Law, 14.6% of all claims in Collection/Bankruptcy, 8.6% of all claims in Real Estate, 8.9% in Estates, Trusts, Probate and 6.0% of all claims in Personal Injury/Plaintiff.⁶¹

Finally, the overall 1983 statistics show that 52.2% of all claims arise from litigation activities.⁶² The figure for 1985 is 44.8%.⁶³ The breakdown of the activities which comprise these totals is as follows:

	1983	1985
Commencement of Action	25.2%	24.8%
Pretrial	7.2%	8.0%
Trial	7.1%	6.8%
Post-trial	1.9%	2.7%
Settlement	8.0%	7.9%
Appeal	2.0%	2.6% ⁶⁴

DISPOSITION OF CLAIMS

The Data Center also compiled statistics on the disposition of claims. In both 1983 and 1985, no payment was made to the claimant in 67.5% of the cases.⁶⁵ In the remaining cases

59. Data Center Report, *supra* note 47, at 14. The Center defines Administrative Errors to include a failure to calendar properly, a failure to react to the calendar, a failure to file documents where no search is involved, procrastination in performance, lack of follow-up, lost file, document or evidence or clerical error. *Id.* at 12.

60. Data Center Report, *supra* note 47, at 14. The Center defines Client Relations errors to include a failure to follow client's instructions, failure to obtain client's consent or to inform client, or improper withdrawal from representation. *Id.* at 12.

61. Data Center Report, *supra* note 47, at 14. The Center defines Intentional Wrongs to include libel or slander, malicious prosecution, abuse of process, violation of civil rights or fraud. *Id.* at 12.

62. *Id.* at 21.

63. Telephone interview with Sheree Swetin, *supra* note 52.

64. The 1983 figures are from Data Center Report, *supra* note 47, at 22. The 1985 figures are from a telephone interview with Sheree Swetin, *supra* note 52.

65. Data Center Report, *supra* note 47, at 28. No-payment, abandoned claims accounted for 51.3% of the cases while 16.2% of the suits were dismissed. *Id.* at 24.

in which payments were made, they were made in the following manner:

	<u>1983</u>	<u>1985</u>
Settlement/No suit	19.8%	19.4%
Settlement after suit commenced	11.5%	12.0%
Judgment for Plaintiff	1.1%	1.1% ⁶⁶

The above claims disposition results can also be correlated with various areas of practice. In the following table the 1985 statistics are in parenthesis:

	Real Estate	Personal Injury Plaintiff	Estates, Trusts Probate	Family	Criminal	All claims
No Payment	54.7 (52.4)	43.2 (42.9)	50.4 (52.2)	56.9 (54.1)	48.5 (50.4)	51.2* (50.0)**
Payment/ No Suit	19.1 (18.7)	27.5 (28.1)	23.4 (22.5)	10.8 (11.0)	9.1 (8.0)	19.8 (19.5)
Payment/ Suit	9.8 (11.2)	16.4 (16.6)	10.9 (10.6)	11.1 (10.4)	3.8 (3.1)	11.6 (12.0)
Suit Dismissed	15.3 (16.2)	11.3 (10.7)	14.1 (13.7)	20.8 (24.1)	36.4 (37.1)	16.2 (17.4)
Payment/ Judgment	1.1 (1.4)	1.6 (1.7)	1.2 (1.0)	.3 (.4)	2.3 (1.3)	1.1 (1.1)

* 1983

** (1985)⁶⁷

AMOUNT OF PAYMENT

Of the 32.3% of cases nationwide for 1983⁶⁸ (32.7% for 1985)⁶⁹ in which payments actually were made to claimants, the following statistics have been compiled:

66. The 1983 figures are from Data Center Report, *supra* note 47, at 24. The 1985 figures are from a telephone interview with Sheree Swetin, *supra* note 52.

67. The 1983 figures are from Data Center Report, *supra* note 47, at 26. The 1985 figures are from a telephone interview with Sheree Swetin, *supra* note 52.

68. Data Center Report, *supra* note 47, at 28.

69. Telephone interview with Sheree Swetin, *supra* note 52.

<u>Payment Amount</u>	<u>Percentages of Cases</u>	
	<u>1983</u>	<u>1985</u>
From \$1 to \$1,000	3.1%	2.8%
From \$1,001 to \$5,000	8.8%	8.9%
From \$5,001 to \$10,000	5.6%	6.6%
From \$10,001 to \$25,000	5.8%	6.5%
From \$25,001 to \$50,000	3.3%	3.0%
From \$50,001 to \$100,000	2.2%	1.9%
Over \$100,000	4.3%	3.0% ⁷⁰

The above statistics do not include defense costs. Of all the claims, 65.2% incurred defense costs of under \$1,000.⁷¹

V. WISCONSIN STATISTICS

Wisconsin statistics show trends very similar to those found in the ABA data. Small firms of between one to four lawyers account for nearly two-thirds of all claims made against the Bar endorsed insurance program.⁷²

70. The 1983 figures are from Data Center Report, *supra* note 47, at 28. The 1985 figures are from a telephone interview with Sheree Swetin, *supra* note 52.

71. Data Center Report, *supra* note 47, at 29.

72. Report from Lawyers Professional Liability Program for State Bar of Wisconsin, Section V (June 30, 1985) [hereinafter cited as Lawyers Professional Liability Report].

CHART 1
STATE BAR OF WISCONSIN
LAWYERS' PROFESSIONAL
LIABILITY PROGRAM
% LOSSES BY FIRM SIZE (BY NUMBER OF CLAIMS)
VALUED AS OF JUNE 30, 1985

<u>Firm Size</u>	<u>1982/83 PY</u>	<u>1983/84 PY</u>	<u>1984/85 PY</u>
1	24.0%	29.6%	28.8%
2-3	35.1%	28.5%	27.0%
4	9.3%	9.0%	11.8%
5-6	16.9%	13.0%	11.2%
7-10	5.3%	10.1%	9.5%
11-19	9.4%*	6.5%	5.5%
20 Plus	*	3.3%	6.2%
	100.0%	100.0%	100.0% ⁷³

* Records kept for policy year 1982/83 combined firm sizes 11 and above.

CHART 2
STATE BAR OF WISCONSIN
LAWYERS' PROFESSIONAL
LIABILITY PROGRAM
% LOSSES BY FIRM SIZE (BY DOLLARS PAID OUT)
VALUED AS OF JUNE 30, 1985

<u>Firm Size</u>	<u>1982/83 PY</u>	<u>1983/84 PY</u>	<u>1984/85 PY</u>
1	28.0%	27.3%	24.2%
2-3	28.8%	35.6%	25.9%
4	16.7%	11.1%	18.1%
5-6	18.1%	7.0%	8.4%
7-10	.9%	6.1%	12.6%
11-19	7.5%*	12.4%	3.2%
20 plus	*	.5%	7.6%
	100.0%	100.0%	100.0% ⁷⁴

* Records kept for policy year 1982/83 combined firm sizes 11 and above.

The reason more claims are made against smaller firms is not empirically provable. It is apparent, however, that certain types of back-up and in-house consultation and administrative

73. *Id.*

74. *Id.*

support staff are less available to members of small firms than lawyers from larger firms.

The total number of claims and incidents reported in the Wisconsin-bar endorsed plan have also increased sharply within the past three years. The increase has been from a total of 225 combined incidents and claims in the 1982-83 policy year to a total of 400 for the 1984-1985 policy year, a 50% increase in two years.⁷⁵

CHART 3
STATE BAR OF WISCONSIN
LAWYERS' PROFESSIONAL
LIABILITY PROGRAM
CLAIM SUMMARY BY POLICY YEAR

	1982/83 PY	1983/84 PY	1984/85 PY
Total Claims and Incidents			
Reported (#)	225	276	400
Incidents (#)	64	79	219
Lawsuits (#)	57	104	106
Demands (#)	82	85	67
Claims Denied (#)	9	2	1
Claims with Other			
Defense Provided (#)	13	6	7
Total Payments (\$)	\$1,171,392	\$1,736,193	\$217,757
Indemnity Payments (\$)	772,368	1,259,263	95,937
Expense Payments (\$)	399,024	476,930	121,820 ⁷⁶

The above dollar figures seem to indicate that amounts paid out are declining in the 1984-85 fiscal year. This is not the case. Settlements and litigation have not been completed in the most recent claims, so the figures for 1984-85 do not accurately represent the real increase in this area. The total payouts which have resulted from claims have increased during the period from 1982 to 1984, and it is anticipated that they will continue to increase. It is not possible to state absolutely what the actual payouts for a given year represent. The

75. *Id.* at Section VI.

76. *Id.* "Incidents" include any notification from insureds to the insurer of incidents which have not yet ripened into an actual claim; "demands" include demands not yet matured into litigation; and "other defenses provided" include situations where coverage is available through some other source, for example where a practitioner practices part time in the public and private sector. *Id.*

Wisconsin plan is a "claims made" rather than an "occurrence" policy. All prior acts of malpractice within a given period are covered, and therefore, as the policy gets older, more and more claims actually mature. It also takes between three and four years to completely investigate and resolve some claims so that the amounts paid out in any given year may not totally reflect the type and amount of claims made in that particular year. It is clear, however, from the above statistics that the number of claims have almost doubled between 1982 and 1985, and it is anticipated that the sums paid out will increase accordingly.⁷⁷

There are some specific areas of law practice which generate the most malpractice claims based on 1984-85 statistics. These are real estate; personal injury/plaintiff; commercial law, bankruptcy and creditors' rights; and family law.⁷⁸ Because these areas of practice generate the most claims, certain insurance carriers have begun to add a surcharge on policies where the attorney practices primarily in these areas.

77. Telephone interview with Joseph Branch, Chairperson for the Insurance for Members Committee, State Bar of Wisconsin (Nov. 1985).

78. Lawyers Professional Liability Report, *supra* note 72, at Section VII.

CHART 4
 STATE BAR OF WISCONSIN
 LAWYERS' PROFESSIONAL
 LIABILITY PROGRAM
 1984/1985 POLICY YEAR
 ALL CLAIMS

<u>AREA OF PRACTICE TOTAL</u>	<u>TOTAL</u>
Personal Injury/Property Damage - Plaintiff	64
Real Estate	34
Commercial Law, Bankruptcy, Creditors' Rights	33
Corporate and Business	
Organization	24
Family Law	23
Estate, Trust and Probate	19
Personal Injury/Property Damage - Defendant	14
Criminal	12
Taxation	10
Civil Rights and Discrimination	8
All Others	24 ⁷⁹

Finally, the types activities which generate claims can also be divided into categories. The largest area of offense is that of "failure to know or ascertain deadlines," the second, "planning error in choice of procedure."⁸⁰

79. *Id.*

80. *Id.*

CHART 5
 STATE BAR OF WISCONSIN
 LAWYERS' PROFESSIONAL
 LIABILITY PROGRAM
 1984/1985 POLICY YEAR
 ALL CLAIMS

<u>TYPE OF ERROR</u>	<u>TOTAL</u>
Failure to Know Deadline or to Ascertain Deadline Correctly	30
Procrastination in Performance of Services	24
Planning Error in Choice of Procedures	24
Inadequate Discovery of Facts or Inadequate Investigation	22
Failure to Know or Properly Apply the Law	19
Failure to Follow Client's Instructions	17
Failure to File Documents Where No Deadline is Involved	14
Failure to Inform Client Adequately or to Obtain the Client's Consent	14
Failure to Understand or Anticipate Tax Consequences	11
Conflict of Interest	11
Failure to Calendar Properly	10
Failure to React to Calendar	11
All Others (5 or less claims each)	56 ⁸¹

These statistics again are a breakdown of claims made during a given year and do not necessarily total to the number of claims made during that same year. Specific categories such as "other defense provided" may be left out of these statistics. Regardless of this, the statistics do show a general trend of the types of errors which give rise to malpractice claims. By comparison, a similar statistical analysis for 1982-83 and 1983-84 shows different absolute numbers of claims but relatively the same percentages in the area of practice statistics with some differences in the type of errors committed. The trends in all of these years remain the same.

The major conclusion which can be drawn from this data is that legal malpractice claims are an ever-increasing problem. Prompt response to clients' queries and careful planning

81. *Id.*

and communication with clients are the most often suggested solutions to this problem.

VI. MALPRACTICE IN THE COURTROOM

The ABA study defines "litigation errors" broadly to include failure to calendar due dates, procrastination and lack of follow-up, planning errors in procedure, failure to know or properly apply the law and so forth. Concern in this section of the article will be focused on two areas: (1) trial tactics, i.e., the trial itself, and (2) settlement of the case before judgment.

In general, the specific handling of evidence and witnesses at trial and other questions of tactical judgment of trial attorneys have not been "second-guessed" by the Wisconsin courts.⁸² Attorneys have not been found liable in other states for harm caused by errors in judgment where the error is not attributable to negligence.⁸³

Trial counsel's tactics within the trial itself, including choice of witnesses, areas of cross-examination, and decisions to use or not to use specific items of evidence,⁸⁴ have usually been determined to be within the sole discretion of trial counsel. Increasingly, however, the losers in litigation have begun to question the specific tactics of their legal counsel and to call these decisions into question within the forum of a malpractice action.

This is specifically true where the client disagrees with the chosen tactic or method of presenting the case. In general, the lawyer's good faith decisions in this area have been upheld,⁸⁵

82. *Denzer v. Rouse*, 48 Wis. 2d 528, 534, 180 N.W.2d 521, 524-25 (1970).

83. *Stricklan v. Koella*, 546 S.W.2d 810 (Tenn. Ct. App. 1977). For other cases which follow the same line of reasoning, see *Mazer v. Security Ins. Group*, 368 F. Supp. 418 (E.D. Pa. 1973), *aff'd*, 507 F.2d 1338 (3d Cir. 1975); *Dolan Title & Guar. v. Hartford Accident & Indem. Co.*, 395 So. 2d 296 (Fla. Dist. Ct. App. 1981); *Pacelli v. Klopferberg*, 65 Ill. App. 3d 150, 382 N.E.2d 570 (1978); *Prawer v. Essling*, 282 N.W.2d 493 (Minn. 1979).

84. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730 (7th Cir. 1976); *Willage v. Law Offices of Wallace & Breslow*, 415 So. 2d 767 (Fla. Dist. Ct. App. 1982); *Oda v. Highway Ins. Co.*, 44 Ill. App. 2d 235, 194 N.E.2d 489 (1963); *Prawer*, 282 N.W.2d 493; *Sanders v. Smith*, 83 N.M. 706, 496 P.2d 1102 (1972); *Utterback-Gleason Co. v. Standard Accident Ins. Co.*, 193 A.D. 646, 184 N.Y.S. 862 (1920), *aff'd*, 233 N.Y. 549, 135 N.E. 913 (1922).

85. *Cardaerella v. United States*, 258 F. Supp. 813, 816 (W.D. Mo. 1966), *aff'd*, 375 F.2d 222, *cert. denied*, 389 U.S. 882 (1967); *Stricklan*, 546 S.W.2d at 814.

but where strategic decisions will affect the material outcome of the case, it has been held that the client must be consulted on strategy.⁸⁶ In addition, trial counsel have been found to have a duty to object to incompetent or improper evidence.⁸⁷ This should not be considered a black letter rule. There are many trial situations in which counsel skillfully allows the admission of improper evidence or purposefully does not object to certain evidence. This may be good practice depending upon the facts.

In many of the cases dealing with specific trial decisions concerning the handling of witnesses, trial counsel's decisions have been upheld. These include failure to prepare a witness for cross-examination,⁸⁸ failure to impeach a witness,⁸⁹ or improperly excusing a witness.⁹⁰ Neither does an attorney have a duty to take a legal position simply because his client desires it⁹¹ nor to use a defense which has no prospect for success even though his client desires it. While in general courtroom tactics are largely immune from attack as constituting malpractice, the existence of the foregoing cases makes it clear that inroads have been made even in this area. The Wisconsin appellate court has implied that an attorney may be sued for malpractice for errors made in the conduct of litigation.⁹² The court has also stated that the trial judge has a duty to protect the rights of litigants in his or her court and has a duty to intervene before the professional misconduct of an attorney affects the substantive rights of the parties.⁹³ Thus, strategic decisions within the courtroom may be called into question in a malpractice action.

86. *Lowe v. Continental Ins. Co.*, 437 So. 2d 925 (La. Ct. App.), *cert. denied*, 442 So. 2d 460 (1983), *cert. denied*, 466 U.S. 942 (1984).

87. *State v. Staley*, 292 N.C. 160, 232 S.E.2d 680 (1977); *McMahan v. City of Abilene*, 8 S.W.2d 554 (Tex. Civ. App. 1928).

88. *See Cook v. Irion*, 409 S.W.2d 475 (Tex. Civ. App. 1966).

89. *Sanders*, 83 N.M. 706, 496 P.2d 1102.

90. *Johnson v. American Life Ins. Co.*, 237 Ala. 70, 185 So. 409 (1938).

91. *Gallegos v. Turner*, 256 F. Supp. 670 (D. Utah 1966), *aff'd*, 386 F.2d 440 (10th Cir. 1967), *cert. denied*, 390 U.S. 1045 (1968); *Sprague v. Moore*, 136 Mich. 426, 99 N.W. 377 (1904).

92. *Village of Big Bend v. Anderson*, 103 Wis. 2d 403, 406, 308 N.W.2d 887, 889 (Ct. App. 1981).

93. *Id.* at 407-08, 308 N.W.2d at 890.

If the underlying reason for a tactical choice is insufficient, negligence may be found.⁹⁴ In addition, potential liability has been found for failure to procure and introduce evidence on an available legal theory,⁹⁵ failure to adequately resist a motion for summary judgment,⁹⁶ failure to present an available defense,⁹⁷ and failure to adequately prepare a defendant for a deposition.⁹⁸

VII. THE CONTRASTING ENGLISH VIEW

To avoid the problems of dissecting the underlying cause of action and determining which tactical and strategic decisions may have constituted negligence, the English courts have adopted a broader immunity rule for tactical trial decisions of barristers.⁹⁹ Prior to *Rondel v. Worsley*,¹⁰⁰ the English courts permitted suits against solicitors for negligence but not against barristers. The difference in treatment was based on the fact that barristers could not sue their clients for a fee, so they could not in turn be sued by their clients for negligence.¹⁰¹ In *Rondel*, Judge Lawton, the decision's author, did not distinguish between barristers and solicitors and did not consider the question of ability to sue for a fee as decisive.¹⁰² Rather, he analyzed the role of the advocate in general and the dual duty of the advocate to the court and client.¹⁰³ Judge Lawton dealt with the difficulty of second-guessing a lawyer's tactical decisions in a malpractice trial which may occur years after the original trial on the underlying cause of action. Because of the essential part which a legal advocate plays within the institutional framework which administers justice, Judge Lawton found immunity for barristers for alleged malpractice based on decisions which are made within the context of a trial.¹⁰⁴ Thus, within the English system, specific tactical deci-

94. *Lewis v. Collins*, 260 So. 2d 357 (La. Ct. App. 1972).

95. *Partin v. Olney*, 121 Ariz. 448, 591 P.2d 74 (Ct. App. 1978).

96. *Id.*

97. *Public Taxi Serv. Inc. v. Barrett*, 44 Ill. App. 3d 452, 357 N.E.2d 1232 (1976).

98. *Bevevino v. Saydjari*, 76 F.R.D. 88 (S.D.N.Y. 1977).

99. *Rondel v. Worsley*, [1967] 1 Q.B. 443.

100. *Id.* at 455.

101. *Id.*

102. *Id.* at 470.

103. *Id.* at 469.

104. *Id.* at 470.

sions made within the context of a trial cannot form the basis for a malpractice action.

In reaching this decision, Judge Lawton specifically emphasized that an advocate owes a duty to the court as well as to the clients.¹⁰⁵ The advocate cannot be a party to any deception of the court, and he or she must bring any irregularities in the courtroom proceedings to the court's attention.¹⁰⁶ The performance of these duties to the system may in fact prejudice an individual client. Because this dual duty to an individual client and the overall system could make an individual advocate an easy target for a disgruntled client, Judge Lawton stated that the immunity rule must continue to protect the advocate, and as a result, the system of administration of justice itself.¹⁰⁷

Judge Lawton concluded that allowing inroads against the immunity of advocates in a trial room setting would result in lawyers thinking only about self-protection from claims of negligence and making tactical decisions not based on solid legal reasons but upon such self-protection.¹⁰⁸ To avoid this result, Judge Lawton concluded that the English immunity rule must stand.¹⁰⁹ *Rondel* has been extended by *Saif Ali v. Sidney Mitchell and Co.*¹¹⁰ to allow immunity for trial advocates to include pretrial work which is tied to strategic decisions in the prosecution of the case.

The contrast between *Rondel*, which takes a broad view of the function of the judicial system as a whole and the advocate's role within that system, and the American view is startling. Overall, American case law in the area of legal malpractice looks specifically at the individual and whether that individual has suffered a compensable harm. No policy considerations are made about the effects of compensating an individual and what effect that may have on the system of administration of justice. Basically, the English courts have decided that the overall functioning of the system is paramount and that the advocate's dual duty to court and client must be

105. *Id.* at 469.

106. *Id.*

107. *Id.* at 470-71.

108. *Id.* at 470.

109. *Id.*

110. 1980 A.C. 198.

preserved. American courts have followed the general rule that if an individual was harmed due to the negligence of an attorney, there should be compensation regardless of the effects that an individual ruling may have on the overall judicial system. Thus, while the English courts continue to function with a rule of advocate immunity for courtroom decisions, American courts have increasingly begun to question the lawyer's courtroom decisions and to expand areas of liability.

VIII. *HELMBRECHT V. ST. PAUL INSURANCE CO.*

*Helmbrecht v. St. Paul Insurance Co.*¹¹¹ is the most recent statement by the Wisconsin Supreme Court on the issues of malpractice, including trial related issues. The case arose out of the representation of Jeanette Helmbrecht in a 1977 divorce action. Mrs. Helmbrecht's attorney did not conduct adequate discovery in the case to determine the nature and extent of the marital estate.¹¹² He did not prepare adequately for trial, and on the day of trial recommended an inadequate settlement to his client for less than one-half of the marital estate and for a maintenance award which was inadequate.¹¹³

The case is important for its consideration of four major areas: (1) whether the standard used in determining damages in a legal malpractice action is subjective (what a particular judge would have awarded) or objective (what a reasonable judge would have awarded); (2) whether issues of causation and damages should be decided by the court or a jury (i.e., are they questions of law or fact); (3) the duty of discovery which is required in divorce and other civil actions prior to settlement; and (4) the lack of any duty on the part of trial counsel to settle rather than try cases.

The Wisconsin Supreme Court in *Helmbrecht* upheld the procedure of establishing the value of the plaintiff's malpractice claim by retrying the underlying cause of action before the jury in the malpractice action as a "case within the case."¹¹⁴ The difficulty of determining an objective method of calculating the damages in a case which is originally tried to the court,

111. 122 Wis. 2d 94, 362 N.W.2d 118 (1985).

112. *Id.* at 115, 362 N.W.2d at 129.

113. *Id.* at 115-16, 362 N.W.2d at 130.

114. *Id.* at 118, 362 N.W.2d at 131.

and not a jury, is demonstrated by the result reached in *Helmbrecht*. In *Helmbrecht* the underlying cause of action was a divorce case in which the parties through their counsel reached a settlement in chambers on the day of trial, with the assistance of the trial judge during a settlement conference. This stipulated settlement was then presented to the court, approved by both parties in open court, and adopted by the trial judge as part of the findings of fact, conclusions of law and judgment. In a subsequent malpractice action, the divorce trial judge was allowed to testify as to whether or not he would have reached a different decision had the same information been presented to him at the trial.¹¹⁵ The supreme court in *Helmbrecht* stated that this method allowed a subjective rather than objective determination of the value of the case.¹¹⁶ Rather than a determination of what a specific judge would have done, the finder of fact must determine what a reasonable judge would have done under the circumstances.¹¹⁷ This is a decision which must be made by the finder of fact and, of course in a jury situation, it is the jury which makes that decision. Thus, in this specific type of situation, a jury is second-guessing what a reasonable judge would have or should have decided in the original case which was tried to the court.

The use of this objective standard places an unusual burden on all practicing divorce lawyers and every lawyer in Wisconsin trying a case to the court and not a jury. When faced with an offer of settlement, can the lawyer consider what this particular judge is likely to do based on prior experience? Or, can the lawyer only consider what an objective and perfect model judge would be likely to do? The *Helmbrecht* case provides no guidance. The adoption of this objective standard is consistent, however, with the general procedural rule that in a malpractice action, as in any civil action, questions of fact are for the jury and questions of law are for the court.¹¹⁸

The second major issue decided by the court in *Helmbrecht* is that the jury decides factual issues of causation and

115. *Id.* at 101, 362 N.W.2d at 123.

116. *Id.* at 107-08, 362 N.W.2d at 124-26.

117. *Id.* at 105, 362 N.W.2d at 125.

118. *Roehl v. Ralph*, 84 S.W.2d 405 (Mo. Ct. App. 1935); *Utterback-Gleason v. Standard Accident Ins. Co.*, 193 A.D. 646, 184 N.Y.S. 862 (1920), *aff'd*, 233 N.Y. 549, 135 N.E. 913 (1922).

damage.¹¹⁹ The basic rule in a malpractice case is that the judge decides questions of law, and the jury decides questions of fact, regardless of whether specific issues would have been decided by the court or jury in the original proceeding.¹²⁰ The breakdown of what constitutes questions of law and fact is sometimes unclear and thus in practice the division of responsibility between judge and jury is not always cleanly divided.

Helmbrecht is also significant because of the impact of the decision on a lawyer's willingness to settle cases. Negligence was found on the part of the attorney for failure to pursue adequate discovery in the *Helmbrecht* case. The only discovery done was a brief deposition of the opposing party.¹²¹ The underlying validity of information provided by the opposing party was not challenged. Specifically, counsel failed to verify the opposing party's income via bank statements, cancelled checks, and financial statements filed with lending institutions.¹²² Other similar methods of verification were not pursued by counsel in this case. The court in *Helmbrecht* pointed out that the existence of Mr. Helmbrecht's safety deposit box was disclosed by his tax return,¹²³ and the court found negligence in counsel's failure to determine the contents of such safety deposit box. In addition, negligence was found in his failure to obtain an independent appraisal of the value of the parties' home, of the defendant doctor's dental practice, and of three trusts.¹²⁴

Finally, in terms of reaching a settlement, the supreme court stated in *Helmbrecht* that counsel has no duty to negotiate a settlement.¹²⁵ This statement conflicts with prior judicial statements, a Wisconsin statute on settlements and various commentaries on the judicial system, all of which favor settlements over trials.¹²⁶ The court stated in *Helmbrecht* that if counsel did negotiate a settlement, he has the duty to "negoti-

119. *Helmbrecht*, 122 Wis. 2d at 124, 362 N.W.2d at 134.

120. *Chocktoot v. Smith*, 280 Or. 567, ___, 571 P.2d 1255, 1259 (1977).

121. *Helmbrecht*, 122 Wis. 2d at 115, 362 N.W.2d at 129-30.

122. *Id.*

123. *Id.* at 115, 362 N.W.2d at 130.

124. *Id.* at 119, 362 N.W.2d at 131.

125. *Id.* at 117, 362 N.W.2d at 131.

126. *Johnson v. Pearson Agri-Systems, Inc.*, 119 Wis. 2d 766, 250 N.W.2d 127 (1984); Wis. STAT. § 807.01 (1983-84).

ate with reasonable diligence."¹²⁷ Such diligence is not possible when inadequate discovery prevents the facts from being known. The conclusion which must be drawn from the supreme court's statements in *Helmbrecht* is that thorough discovery is essential in every divorce case. While this is an obvious conclusion, the cost of such in-depth discovery, including verifying income, assets and their fair market value, and contents of all safety deposit boxes will ultimately be passed on to the client. The conundrum which this creates is how to do sufficient discovery to do a thorough job and avoid a malpractice claim while simultaneously keeping costs reasonable for clients.

The supreme court's statements in *Helmbrecht* raise several practical issues. Faced with the possible result from a particular judge which does not comport with what would be the result by a "reasonable" judge, does an attorney become exposed to malpractice by advising a client to accept the lesser amount?¹²⁸ It must be borne in mind that frequently it is the client's word against the lawyer as to who said what in which setting. Last minute settlements in the courthouse are seldom well-documented. What about the expense and uncertainty of an appeal? What if the client wants a "bird in the hand" rather than "two birds in the bush?" Does the lawyer tell the client that the trial judge is not well-known for following appellate decisions and therefore, not a reasonable judge? Certainly a "reasonable lawyer" will be reluctant to put on the record a recommendation that the client accept a lesser settlement because the judge is not a "reasonable judge." What happens when the trial judge, acting as a settlement negotiator, presses the client for the reason the client is refusing the settlement recommended by the judge?

Formal discovery has been frequently criticized as overly time-consuming, as adding large costs to already expensive litigation and as adding to court congestion by virtue of motions

127. *Helmbrecht*, 122 Wis. 2d at 117, 362 N.W.2d at 131.

128. *Southerland v. County of Oakland*, 77 F.R.D. 727 (E.D. Mich. 1978), *aff'd*, 628 F.2d 978 (6th Cir. 1980). Negligent handling of settlement negotiations in other jurisdictions has resulted in liability for the difference between the amount received and the amount which would have been obtained through proper settlement negotiations. *Lieberman v. Employers Ins. of Wausau*, 171 N.J. Super. 39, 407 A.2d 1256 (1979), *modified*, 84 N.J. 325, 419 A.2d 416 (1980).

brought pertaining to the discovery process. If the lawyer is, however, susceptible to charges of malpractice for failure to conduct adequate formal discovery, malpractice premiums will continue to rise, adding to the cost of legal services. Either way—expensive discovery or expensive insurance—it is the client who ultimately bears the cost. Refusal to recommend a settlement which might arguably be somewhat less than an award at trial by “a reasonable judge” and instead recommending that the client incur the cost of trial and appeal is a cost, both emotionally and financially, which will be borne by the client. All of these factors could easily cause a reasonable attorney to be more concerned about protection from malpractice than about the client’s welfare—a result which no one wants.

IX. CONCLUSION

It is clear from both the ABA statistics and State Bar statistics that the number of malpractice claims and the amounts paid out to resolve such claims have continued to increase yearly. It is not possible to predict if these trends will continue based on currently available statistics, but there is no reason to assume that the present rate of increase will change. The threat of malpractice claims tends to make the practice of law more conservative. The risk of adopting a fresh approach to legal problems or novel defenses to an action must ultimately be balanced by practicing attorneys against the risk of a malpractice action should such an untried tactical approach or novel defense prove unsuccessful. The balance of the advocate’s “dual duty” to the court and client thus shifts inevitably toward the client. The growth of the existing body of law and the ability of our legal system to adjust to change suffers as a consequence.

A lawyer cannot function properly as a fearless, impartial advocate and advisor to the client if it is always necessary to keep one eye on the client as a potential adversary. It appears to the authors of this article that allowing lay juries to second-guess economic and strategic trial preparation and trial decisions of a lawyer and award large damages if the jury concludes that the lawyer made the wrong decision, will cause any reasonably prudent lawyer to resolve almost all doubts in

favor of more discovery, more trials, more appeals and less settlements.

There are, of course, many claims for malpractice which are certainly valid. Failure to file an action, missing a deadline, fraud, failure to know the law, conflict of interests and the like are all clear examples of malpractice. However, the concept of a system-wide approach and a balancing of these values within any fair and functional judicial system must include protection of both the client and the lawyer. High standards of legal practice must be upheld. Obviously, the British courts' view as stated in *Rondel* cannot be grafted wholesale on the United States' system of judicial administration. The direction in which the balance tips in the future will have a profound effect upon the continued use of the judicial system as a forum for the resolution of civil disputes.¹²⁹

129. See *supra* notes 99-110 and accompanying text.