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## Attorney Liability for Unintentional Malpractice in Missouri

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# Comments

## ATTORNEY LIABILITY FOR UNINTENTIONAL MALPRACTICE IN MISSOURI

### I. INTRODUCTION

Attorney malpractice should concern all practicing attorneys. It has a definite economic impact, it adversely affects the public image of the bar, and it represents a breach of the ethical responsibility to represent clients competently.<sup>1</sup> Although the present economic impact of malpractice is not great for attorneys,<sup>2</sup> the number of claims and recoveries is increasing, resulting in higher insurance rates and increasing risk. From the standpoint of both economics and professional pride, attorneys have an interest in maintaining public confidence in their competence and integrity.

Aside from these considerations, which arise largely from self-interest, the attorney has a responsibility to be knowledgeable in the malpractice area in order to properly advise clients. Though an attorney may shrink from the unpleasant task of suing a fellow member of his profession, the duty exists nonetheless. An attorney should be as capable of recognizing the potential attorney malpractice action and advising his client thereon as he is in other areas of the law.<sup>3</sup> This comment is intended to aid the practicing attorney in recognition and analysis of the attorney malpractice claim.

### II. ATTORNEY MALPRACTICE AS A NEGLIGENCE ACTION

#### A. *In General*

An action for attorney malpractice is essentially a negligence action.<sup>4</sup> There is, of course, a contract between the attorney and his client, and the attorney may be liable for its breach. In addition to contractual liability, however, the attorney can also be liable in tort for failure to exercise reasonable care in performing his services. Under either theory of recovery, the client will have to prove the attorney's failure to exercise reasonable care.<sup>5</sup> The attorney's fiduciary duty to his client is an important factor in malpractice cases.<sup>6</sup> An attorney, for example, may be liable for his failure to act affirmatively to protect his client's interests.<sup>7</sup>

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1. See ABA CANONS OF PROFESSIONAL ETHICS No. 6. The attorney has an ethical responsibility to represent his client competently.

2. See Rottman and Stern, *The Risk of Attorney Professional Liability*, 28 J. Mo. B. 127 (1972).

3. See pt. V of this comment *infra*.

4. Maryland Cas. Co. v. Price, 231 F. 397 (4th Cir. 1916); Weiner v. Moreno, 271 So. 2d 217 (Fla. Ct. App. 1973). See generally Annot., 45 A.L.R.2d 5 (1956).

5. Cases cited note 4 *supra*.

6. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 726 (4th ed. 1971).

7. E.g., *In re Dagg*s, 384 Mich. 729, 732, 187 N.W.2d 227, 228 (1971).

Even though the contract and tort theories involve the same elements of proof,<sup>8</sup> they may be controlled by different statutes of limitations.<sup>9</sup> The particular theory employed is especially significant in situations where the plaintiff is not a party to the contract. Because some courts dogmatically adhere to a "privity" requirement for recovery on a contract, the plaintiff must be careful to show that the recovery sought is based on a negligence theory. In any event, it is clear that an attorney's liability need not arise from a contractual relationship. Thus an attorney may be liable where the client was not a paying one, or when there was no actual agreement to represent.<sup>10</sup>

### B. Standard of Care

General speaking, the attorney is not an insurer of the cause which he espouses.<sup>11</sup> His obligation is to advise the client as to the validity of a cause of action or defense and the likelihood of success, but he does not guarantee results. Nor is the attorney liable for every mistake. Especially in the conduct of litigation, courts recognize that the best of attorneys make errors or take positions that later turn out to be erroneous.<sup>12</sup> Thus, a mere loss of a lawsuit is not in itself actionable negligence. There must as least be a failure to exercise reasonable care and skill.<sup>13</sup>

Early cases held that attorneys were liable only for gross negligence.<sup>14</sup> The modern rule, however, is similar to that applied to physicians: attorneys are liable to clients for damages resulting from the failure to exercise that degree of care, skill, professional knowledge, and diligence which is commonly possessed by members of the legal profession.<sup>15</sup>

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8. *E.g.*, *Neel v. Magana*, 6 Cal. 3d 176, 181, 491 P.2d 421, 423, 98 Cal. Rptr. 837, 839 (1971); *Lewis v. Collins*, 260 So. 2d 357, 360 (La. Ct. App. 1972); *Christy v. Saliterman*, 288 Minn. 144, 150, 179 N.W.2d 288, 293 (1970).

9. § 516.120, RSMo 1969. Missouri applies the same statutory period to both contract and negligence actions.

10. *Fort Myers Seafood Packers Inc. v. Steptoe*, 381 F.2d 261, 262 (D.C. Cir. 1967); *cert. denied*, 390 U.S. 946 (1968); *Central Cab v. Clarke*, 259 Md. 542, 549, 270 A.2d 662, 666 (Md. App. 1970). *Cf.* *Fish v. Kelly*, 144 Eng. Rep. 78 (C.P. 1864) (denying recovery where the attorney's advice was given in casual conversation); *W. PROSSER, HANDBOOK OF THE LAW OF TORTS* 706 (4th ed. 1971): "An attorney or physician who gives curbstone advice when it is requested by one who is not a client or patient is required only to give an honest answer." These latter sources indicate that there must be some minimum degree of relationship or justifiable reliance before the attorney will be held liable.

11. *Talbot v. Schroeder*, 13 Ariz. App. 230, 231, 475 P.2d 520, 521 (1970); *Young v. Bridwell*, 20 Utah 2d 332, 437 P.2d 686 (1968); *Denzer v. Rouse*, 48 Wis.2d 528, 180 N.W.2d 521 (1970).

12. *E.g.*, *Olson v. North*, 276 Ill. App. 457 (1934).

13. *Roehl v. Ralph*, 84 S.W.2d 405 (St. L. Mo. App. 1935). There is language in some cases to the effect that an attorney is not liable for errors made in good faith. *See, e.g.*, *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954). But this is contradictory to an objective "reasonable attorney" standard, and these cases can only apply when a reasonable attorney could have acted as the defendant attorney did. *See Highway Ins. Underwriters v. Lufkin-Beaumont*, 215 S.W.2d 904, 916 (Tex. Civ. App. 1948).

14. *E.g.*, *Douglas Shoe Co. v. Rollwage*, 187 Ark. 1087, 63 S.W.2d 841 (1933); *Babbitt v. Bumpus*, 73 Mich. 331, 41 N.W. 417 (1889).

15. *Rhine v. Haley*, 238 Ark. 72, 83, 378 S.W.2d 655, 661 (1964); *Gabbert*

Missouri law fails to specify whether the standard of care is based on local, state-wide, or nation-wide conduct in the profession.<sup>16</sup> At issue is whether an attorney in a rural area, with a limited library, is held to the same standard as an attorney in a metropolitan area. A minority of jurisdictions apply a local standard,<sup>17</sup> but the better and more common rule is to hold all attorneys within a particular state to a state-wide standard.<sup>18</sup> There are few cases in this area, primarily because the difference between the standards is minimal. Theoretically at least, an attorney should be liable even under a "same locality" standard if he undertook a case or a task about which he lacked knowledge or access to knowledge.

One jurisdiction has held that an attorney's compliance with prevalent community standards was not an absolute defense. In *Gleason v. Title Guarantee Co.*,<sup>19</sup> the Fifth Circuit held an attorney liable where he relied on a phone conversation with an abstract company representative as the basis for his erroneous title opinion. In response to the attorney's assertion that his conduct was a common practice among attorneys in that area due to a real estate boom which had put the abstract company and recorder's office behind in filing and recording, the court said, "All customs are not good customs. . . . and lawyers have no prescriptive right to make knowingly false statements in the name of custom."<sup>20</sup> The rationale for the holding in *Gleason* is analogous to that underlying the rule in other tort actions, that an industry practice is evidence, but not conclusive proof, of reasonableness.<sup>21</sup>

A recurrent question in malpractice actions is the status of expert testimony.<sup>22</sup> Although it is generally agreed that expert testimony is admissible,<sup>23</sup> the issue whether expert testimony is always required has never been resolved in Missouri. It is difficult to say which is the better view. Logically, since the standard of care is stated in terms of the "reasonable attorney," the proof should require testimony as to the practices of attorneys. Such testimony would necessarily be given by experts. Requiring expert witnesses, however, would be excessive in cases where negligence is blatant,<sup>24</sup> and the

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v. Evans, 184 Mo. App. 283, 293, 166 S.W. 635, 638 (Spr. Ct. App. 1914); McCullough v. Sullivan, 102 N.J.L. 381, 384, 132 A. 102, 103 (Ct. Err. & App. 1914).

16. Cf. Mo. Approved Instr. § 11.06 (1973), indicating a state-wide standard in medical malpractice cases.

17. Ramp v. St. Paul Fire and Marine Ins. Co., 263 La. 774, 786, 269 So. 2d 239, 244 (1972); Cook v. Irion, 409 S.W.2d 475 (Tex. Civ. App. 1966).

18. E.g., Feil v. Wishek, 193 N.W.2d 218 (N.D. 1971); Cook, Flanagan & Berst v. Clausung, 73 Wash. 2d 393, 395, 438 P.2d 865, 866 (1968).

19. 300 F.2d 813 (5th Cir. 1962).

20. *Id.* at 814. The false statement referred to was the attorney's statement that the title certification was based on personal examination when in fact it was not. It is important to note that the same result could conceivably have been achieved here by applying a state-wide standard of performance.

21. W. Prosser, *supra* note 6, at 167.

22. See generally Annot., 17 A.L.R.3d 1442 (1968).

23. E.g., Rhine v. Haley, 238 Ark. 72, 378 S.W.2d 655 (1964).

24. See *Bonhiver v. Rotenberg*, 461 F.2d 925, 928 (7th Cir. 1972). Drawing an analogy from medical malpractice cases, the court recognized that some cases of attorney malpractice in which the negligence was "grossly apparent" did not

client either neglects to or is unable to present expert testimony. Such a requirement could be especially onerous if attorneys are reluctant to be an expert witness against the members of their own profession. If the lack of care is clear without expert testimony, then its absence should not defeat recovery.<sup>25</sup>

The best practice would be to follow the rule applied in medical malpractice cases. Expert testimony is essential to support an action for malpractice, except where the lack of skill or want of care is such as to be within the common knowledge and experience of laymen.<sup>26</sup> Though this is conclusory, it does provide a standard which is reasonably flexible and has been workable in medical malpractice cases. As in the latter cases, the exception should be of narrow bounds, limited to cases of obvious negligence. However, this exception will apply to attorney malpractice actions more often than to medical malpractice cases, because a greater portion of the attorney's work involves skills and judgments of a type common to the business world and should, therefore, be more readily comprehensible to laymen.

### C. Causation and Damages

The issues of causation and damages are necessary elements of recovery, but are often not clearly delineated in the cases.<sup>27</sup> The damages issue involves a determination of whether the plaintiff suffered injury.<sup>28</sup> If the claim lost through attorney malpractice would not have resulted in recovery in any event,<sup>29</sup> or if the defense lost would not have prevented recovery,<sup>30</sup> or if the right lost was of no value,<sup>31</sup> then there are no damages. Proof of

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require expert testimony, but held that such obvious negligence did not exist in this case. *Cf.* *Starr v. Mooslin*, 14 Cal. App. 3d 988, 92 Cal. Rptr. 583 (1971), recognizing the exception. *Contra*, *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966); *Olson v. North*, 276 Ill. App. 457 (1934). These cases involved alleged errors of judgment in negotiating a settlement of a claim and conduct of a murder trial respectively. Considering the latitude given attorneys in these areas, it is unclear what the Illinois court would do in a case of obvious negligence. Illinois recognizes the exception for "grossly apparent" negligence in medical malpractice cases. *See* *Bonhiver v. Rotenberg*, *supra*.

25. *Central Cab Co. v. Clarke*, 259 Md. 542, 270 A.2d 662 (Md. App. 1970).

26. *W. Prosser*, *supra* note 6, at 164.

27. *E.g.*, *Weiner v. Moreno*, 271 So. 2d 217 (Fla. Dist. Ct. App. 1973). The court held, in an action against an attorney for allegedly causing the loss of plaintiff's wrongful death claim, that the attorney could prove lack of causation by showing that the decedent's death was caused by other factors than medical malpractice (upon which plaintiff's claim was based). This was properly an issue of damages; *i.e.*, the attorney was the cause of the lost claim, but the claim was invalid and therefore valueless.

28. *E.g.*, *In re Novolich*, 7 Wash. App. 495, 500 P.2d 1297 (1972). "It is axiomatic that there must be injury before negligence is actionable." *Id.* at 500, 500 P.2d at 1302.

29. *Johnson v. Haskins*, 119 S.W.2d 235 (Mo. 1938); *National Hollow Brake Beam Co. v. Bakewell*, 224 Mo. 203, 123 S.W. 561 (1909).

30. *E.g.*, *Roehl v. Ralph*, 84 S.W.2d 405 (St. L. Mo. App. 1935).

31. *Goldzier v. Poole*, 82 Ill. App. 469 (1899); (failure to recover against an insolvent defendant is not actionable against an attorney in a malpractice claim).

damage is a significant hurdle for the client in malpractice cases. It actually involves a suit within a suit. In addition to proving negligence and causation, the client must also prove that his defense or claim in the original action was valid.

The causation issue involves determining whether the attorney's acts produced the damage. There must be, at the least, "but for" causation.<sup>32</sup> The plaintiff must show that "but for" the attorney's allegedly negligent act, the damage would not have occurred.<sup>33</sup> Where, however, there are two concurrent "causes," each of which combine to cause the injury, or where one negligent act is followed by another and both combine to cause the injury, the policy considerations of proximate causation come into play. In these cases, courts utilize the "substantial factor"<sup>34</sup> and "independent intervening cause"<sup>35</sup> tests respectively.

### III. LIABILITY TO THIRD PARTIES

A question that has troubled courts for years is the scope of a defendant's liability to persons with whom he has not dealt.<sup>36</sup> This area of the law has suffered from an injection of contract concepts into tort analysis. In the usual tort case, the question whether, as a matter of law, a particular plaintiff will be allowed to present his case to a jury depends basically on considerations of public policy and fairness.<sup>37</sup> This demands consideration of the connection between the alleged tortious conduct and the harm suffered, culpability, foreseeability, and the deterrent effect of a finding of liability on future conduct.

The contract approach is different. In contract cases, only parties to the contract or third party beneficiaries embraced by the agreement are entitled to benefit from the contractual rights.<sup>38</sup> As a consequence, when acts which breach a contract also damage someone who is not a party to it, the tort and contract approaches overlap, and courts wrestle with the application of the privity of contract doctrine to the tortious aspect of the acts.<sup>39</sup> Thus, since

32. W. PROSSER, *supra* note 6, at 238.

33. *Trustees of Schools v. Schroeder*, 2 Ill. App. 3d 1009, 278 N.E.2d 431 (1971); *Christy v. Saliterman*, 288 Minn. 144, 179 N.W.2d 288 (1970).

34. *Modica v. Crist*, 129 Cal. App. 2d 144, 146, 276 P.2d 614, 617 (1954). The court quoting Prosser, "*Proximate Cause in California*" 38 CALIF. L. REV. 369, 378 held that "[d]efendant's conduct is a cause of the event if it was a material element and substantial factor in bringing it about. Whether it is such a substantial factor is for the jury to determine, unless the issue is so clear that reasonable men cannot differ." *Id.* at 146, 276 P.2d 614, 617. See W. PROSSER, *supra* note 6, at 240.

35. *Ward v. Arnold*, 52 Wash.2d 581, 328 P.2d 164 (1958). The court rejected the "sole causation" requirement and held that an intervening event would not break the chain of causation if "in the course of events that it might reasonably have been anticipated by the wrongdoer . . ." *Id.* at 584, 328 P.2d at 166. See W. PROSSER, *supra* note 6, at 270.

36. See generally Annot., 45 A.L.R.3d 1181 (1972).

37. See W. Prosser, *supra* note 6, at 244.

38. *Rosell v. Barcus*, 89 F. Supp. 234 (W.D. Mo. 1950); *Crow v. Kaup*, 50 S.W.2d 999 (Mo. 1932).

39. See, e.g., *Anderson v. Boone County Abstract Co.*, 418 S.W.2d 123 (Mo. 1967). Although the court seemed willing to entertain the possibility of a tort

*Winterbottom v. Wright*,<sup>40</sup> courts have been attempting to separate the two concepts.<sup>41</sup>

As in other areas of tort law, "privity" analysis has been a barrier to third party recovery in attorney malpractice cases. Some jurisdictions, including Missouri,<sup>42</sup> have held that an attorney is liable to third parties only for intentional acts. Fortunately, there is a trend in other areas of tort law and in legal malpractice to extend liability to third persons.

The leading case involving an attorney's liability to third persons is *Lucas v. Hamm*.<sup>43</sup> This case stated that an attorney can be held liable to beneficiaries of a will for its negligent preparation. A provision in the will violated the rule against perpetuities, thereby causing a loss to one of the intended beneficiaries. The court emphasized that damages are clearly foreseeable in the case of an invalidated will, and that if the intended beneficiaries cannot recover for the attorney's negligence, then no one else could bring the cause of action.<sup>44</sup> Though the court showed typical leniency in holding that the rule against perpetuities was difficult to understand and a "net spread for the unwary,"<sup>45</sup> and that therefore the attorney was not negligent, the case has been followed in subsequent California cases holding attorneys liable without the requirement of privity of contract.<sup>46</sup>

*Lucas* was preindicated by an earlier California case, *Biakanja v. Irving*.<sup>47</sup> *Biakanja* held that liability would be determined in each case by balancing various factors based on policy considerations affecting the causation issue.<sup>48</sup> These factors include: (1) The extent to which the transaction

action and discussed the tort aspects at length, it first discussed and dismissed the possibility of a contract recovery due to a lack of privity. *Id.* at 128.

40. 10 M. & W. 109, 152 Eng. Rep. 402 (1842). This case denied recovery to an employee-driver injured in a mail coach accident. The defendant contracted with the Postmaster to keep the coaches in repair. However, neither the plaintiff nor his employee were parties to the maintenance contract.

41. One of the first cases to make this distinction clear was *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922), which recognized that an act arising out of contractual performance could also result in tort liability to plaintiffs other than the contractual parties. A later case by the same court, *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931), seemed to limit the class of permitted plaintiffs to persons who were known to the actor who breached the contract, but continued to recognize the tort nature of the liability.

42. *Lackey v. Vickery*, 57 F. Supp. 791 (W.D. Mo. 1944); *McDonald v. Stewart*, 289 Minn. 35, 182 N.W.2d 437 (1970).

43. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

44. *Id.* at 589, 364 P.2d at 688, 15 Cal. Rptr. at 824.

45. *Id.* at 592, 364 P.2d at 690, 15 Cal. Rptr. at 826.

46. *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); *Donald v. Garry*, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971). *But see* *Haldane v. Freedman*, 204 Cal. App. 2d 475, 22 Cal. Rptr. 445 (1962). *See also* *Licata v. Spector*, 26 Conn. Supp. 378, 225 A.2d 28 (Ct. C. P. 1966); *Ramp v. St. Paul Fire and Marine Ins. Co.*, 263 La. 774, 269 So. 2d 239 (1972); *Woodfork v. Sanders*, 248 So. 2d 419 (La. App. 1971), *writ denied*, 259 La. 759, 252 So. 2d 455 (1971). These cases have followed the California rationale in allowing recovery to intended beneficiaries of wills that have been invalidated due to the attorney's negligence.

47. 49 Cal. 2d 639, 647, 320 P.2d 16 (1958).

48. *Id.* at 650, 320 P.2d at 19.

was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the conduct and the injury suffered; and (5) the policy of preventing future harm.<sup>49</sup>

*Donald v. Garry*<sup>50</sup> is the most extreme California case imposing liability on an attorney to a third party. In *Donald*, the plaintiff was a creditor who had turned a debt over to a credit collection agency. The collection agency employed the defendant attorney to file suit, but the case was dismissed for want of diligent prosecution. The court reversed the lower court's dismissal holding that if the allegations were true, the attorney was liable to the plaintiff even though there was no privity of contract between them.<sup>51</sup> Citing *Restatement Second of Torts*<sup>52</sup> and previous California cases, the court reasoned that the transaction had been intended primarily for the plaintiff's benefit, that the damage to the plaintiff was clearly foreseeable, and that the plaintiff was unquestionably injured by the attorney's negligence. The court also pointed out that public policy favored encouragement of diligent prosecution of lawsuits.

The only case purporting to state the Missouri rule as to an attorney's liability to third parties is *Lackey v. Vickery*.<sup>53</sup> In *Lackey*, plaintiff sued a client and his attorney for their intentional failure to take action to remove the lien on his property after he had paid the judgment from which the lien resulted. The court, purporting to apply Missouri law, but citing only *Corpus Juris Secundum*, held that an attorney is liable to a third party only for malicious or fraudulent acts. The case, however, has limited precedential value because of its peculiar facts<sup>54</sup> and lack of analysis.

Under the restrictive rule of *Lackey*, most plaintiffs would have to recover on third-party beneficiary contract theory. It is clearly the law in Missouri that a contract for valid consideration between two parties for the benefit of a third may be enforced by the third party, even though that person was not named in the contract, was not in privity to the contract, or was ever aware of the making of the contract.<sup>55</sup> Some attorney malpractice cases might fit into this type of analysis. This theory has limited value, however, because it probably requires that the benefit running to the third party be direct.<sup>56</sup>

Because of the paucity of Missouri cases involving attorney's liability to third parties, the essential considerations must be gleaned from Missouri

49. *Id.*

50. 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971).

51. *Id.* at 771, 97 Cal. Rptr. at 192.

52. RESTATEMENT (SECOND) OF TORTS, § 324 A (1965). This section deals with liability to third persons for negligent performance of an undertaking.

53. 57 F. Supp. 791 (W.D. Mo. 1944).

54. The actual tort alleged was an intentional tort and the cause of action was properly against the attorney's client.

55. *Rosell v. Barcus*, 89 F. Supp. 234 (W.D. Mo. 1950); *Crow v. Kaup*, 50 S.W.2d 995 (Mo. 1932).

56. For example, advice given to a client which may benefit business associates, protect creditors, etc. is indirect. See RESTATEMENT (SECOND) OF TORTS § 324 A (1965) (liability to third persons for negligent acts); RESTATEMENT OF TORTS § 552 (1938) (negligent supplying of information).



cases concerning the liability of other professionals. In *Anderson v. Boone County Abstract Co.*,<sup>57</sup> the abstract company negligently omitted a restrictive covenant from an abstract it prepared. The abstract was prepared for a predecessor in title to the plaintiff with whom the plaintiff had not dealt. Plaintiffs alleged that they had relied on the abstract in purchasing the land for commercial use which was prohibited by the restrictive covenant. The court held that lack of privity barred an action on the contract, and that the plaintiffs were too remote to recover on a theory of negligent misrepresentations.<sup>58</sup>

In *Slate v. Boone County Abstract Co.*,<sup>59</sup> on the other hand, the seller of property had hired the abstract company to prepare an abstract to be delivered to the purchasers. Purchasers alleged that they were damaged by the company's failure to include a utility easement in the abstract. Recovery was allowed on a third party beneficiary theory.

*Westerhold v. Carroll*<sup>60</sup> involved an architect's liability to an indemnitor of a surety. The defendant architect had been hired by the land owner to supervise the construction of a building on the land and to advise the owner when progress payments were due on work completed. Although a performance bond was required, the surety was not a party to the construction contract, and the plaintiff's contract as indemnitor was with the surety only. The architect negligently approved progress payments in excess of work performed. When the contractor defaulted, the indemnitor's cost of completion exceeded the amount remaining due on the contract from the owner, resulting in a loss. The indemnitor sought to recover this loss from the architect. The court recognized the tort nature of the case and that "a party by entering into a contract may place himself in such a relation toward third persons as to impose upon him an obligation to act in such a way that the third persons will not be damaged."<sup>61</sup> Emphasizing that the defendant should have foreseen the surety's reliance on his decisions as to progress payments, the court remanded the case, adopting the view of *Biakanja v. Irving*<sup>62</sup> that "whether or not in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves a balancing of factors. . . ."<sup>63</sup>

57. 418 S.W.2d 123 (Mo. 1967).

58. *Id.* at 128. The court discussed RESTATEMENT OF TORTS, *supra* note 56, at § 552, but, without rejecting the principle, declined to apply § 552 to this case because it felt that extension of liability to the class of "potential purchasers" was too great a burden on abstractors. Language in the concluding paragraph of the *Anderson* opinion indicates, however, that the court might be willing to allow a third party to recover if he was (1) identifiable and (2) the defendant should have known of the plaintiff's reliance.

59. 432 S.W.2d 305 (Mo. 1968).

60. 419 S.W.2d 73 (Mo. 1967).

61. *Id.* at 80.

62. 49 Cal 2d 647, 320 P.2d 16 (1958).

63. *Id.* at 650, 320 P.2d at 19. The court stated the factors to be (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to him; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; (6) and the policy of preventing future harm. *Id.* at 650, 320 P.2d at 19.

The most recent case involving this question is *Aluma Kraft Manufacturing Co. v. Elmer Fox & Co.*<sup>64</sup> In that case, the court followed the rationale of *Westerhold* and held the defendant accounting firm liable for negligence in preparation of a financial statement which the defendant *knew* was to be relied on by the plaintiff as a means of determining the price of stock to be purchased by plaintiff from the defendant's employer.

These cases indicate the probable result in an attorney malpractice case involving liability to persons not in privity. They show that Missouri courts do recognize that tort and contract liability may co-exist in the same fact situation, with a different scope of liability being recognized for tortious acts. Significantly, although the Missouri courts have yet to grant relief to a plaintiff not known to the defendant, the balancing test<sup>65</sup> which the court purports to apply in both *Westerhold* and *Aluma Kraft* seems to leave open this possibility.<sup>66</sup>

#### IV. DEFENSES

##### A. Assumption of the Risk and Contributory Negligence

The common tort defenses of contributory negligence and assumption of the risk are typically inapplicable to most legal malpractice fact situations. Assumption of the risk requires voluntary acceptance of a known risk.<sup>67</sup> It is therefore inapplicable to the normal attorney-client relationship, where the conduct of litigation or preparation of legal document is entrusted completely to the attorney.<sup>68</sup> Such a defense would be relevant to a malpractice case if an attorney engaged in a particular negligent course of action at the specific request of a client who had been fully advised of the risks and all viable alternatives.

The defense of contributory negligence is also rarely available, the entire conduct of litigation or completion of a legal task normally being entrusted to the attorney. Nonetheless, in some cases, certain overt acts or failures of cooperation on the client's part which effectively prevent an attorney from adequately prosecuting or defending an action have been held to absolve an attorney from alleged negligence.<sup>69</sup> Of course, in addition to providing a contributory negligence defense, obstructive actions by a client can defeat his cause of action by breaking the requisite chain of causation, which is a *sine qua non* of recovery.

64. 493 S.W.2d 378 (Mo. App., D. St. L. 1973).

65. See note 63 *supra*.

66. A logical extension would be to allow plaintiffs of a reasonably defined and foreseeable class to recover for negligent providing of advice or services. See *Tartera v. Palumbo*, 453 S.W.2d 780 (Tenn. 1970) (surveyor liable to purchasers of subdivision lots for survey errors made before the purchasers were identified).

67. W. PROSSER, *supra* note 6, at 440.

68. But see *Carr v. Glover*, 70 Mo. App. 242 (1897), where the client himself was a skilled attorney and chose the form of pleadings, and thus he could not recover for the adverse consequences of their use.

69. See *Martin v. Hall*, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971) (failure of client to appear at a hearing at which a lesser punishment had been arranged); *Theobald v. Byers*, 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864, 866 (1961) (recognizing contributory negligence as a defense to an attorney mal-

B. *Statute of Limitations*

A more viable defense available to an attorney is the statute of limitations.<sup>70</sup> The period of limitation for both contract and negligence actions in Missouri is five years.<sup>71</sup> Different states offer varying definitions of when the statute begins to run: (1) the time of the negligent act;<sup>72</sup> (2) the time of discovery of the negligent act,<sup>73</sup> or (3) the time that damages are sustained.<sup>74</sup> Missouri has opted for a minority rule. The Missouri statute provides that the period of limitations for malpractice begins when "damage resulting therefrom is sustained and capable of ascertainment . . ." <sup>75</sup> This rule, in the usual situation, seems to be the most just. It adequately protects plaintiffs from loss of their claims without being so liberal as to unreasonably overburden attorneys with the defense of stale claims. Since a client must show damages to recover, it would be unjust to start the statute running at the time of the negligent act, or even at the time of discovery of such act, since the act will often occur long before any damages are suffered or made certain. Insofar as an attorney's advice or work has lasting effect on a client's affairs, a contrary rule would greatly reduce the client's ability to recover for malpractice.

There are several important exceptions to the general rule in Missouri that act to extend the limitation period. If the grounds for relief are fraud, the cause of action is deemed to accrue when the fraud is discovered by the aggrieved party, so long as it is within ten years of the facts constituting the fraud.<sup>76</sup> When the basic five year period is added to this ten year extension,<sup>77</sup> there is a possible fifteen year statute of limitations on undiscovered frauds. Also, where the defendant prevents the commencement of an action by absconding, or concealing himself, or "other improper acts"<sup>78</sup> (interpreted to mean fraudulent act),<sup>79</sup> the statute will be tolled until such

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practice claim); *Benton v. Craig*, 2 Mo. 198 (1830) (failure to provide necessary information); *Delfyette v. Fisher*, 40 A.D.2d 674, 336 N.Y.S.2d 147 (1972) (failure to submit to a physical exam); and *Zeitlin v. Morrison*, 167 App. Div. 220, 152 N.Y.S. 1000 (1915) (failure to return or sign necessary documents). *But see Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908 (Ky. App. 1967) (defendant could not assert as a defense the negligence of a subsequent attorney in failing to salvage the claim lost by defendant); and *Feil v. Wishek*, 193 N.W.2d 218 (N.D. 1971) (client not contributorily negligent in failing to take steps to perfect his security interest when he had no knowledge of the necessity of doing so).

70. *See generally*, Annot., 18 A.L.R.3d 978 (1968).

71. § 516.120, RSMo 1969.

72. N.Y. CIV. PRAC. § 214 (McKinney 1972).

73. *Neel v. Magana*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971) (recognizing the need for a special rule for attorney malpractice cases); and *Griffith v. Zavlaris*, 215 Cal. App. 2d 826, 30 Cal. Rptr. 517 (1963) (recognizing the discovery rule in title examination cases according to statute).

74. *E.g.*, *Fort Myers Seafood Packers Inc. v. Steptoe*, 381 F.2d 261 (D.C. Cir. 1967, *cert. denied*, 390 U.S. 946 (1968)).

75. § 516.100, RSMo 1969.

76. § 516.120(5), RSMo 1969.

77. § 516.120, RSMo 1969.

78. § 516.280 RSMo 1969.

79. *E.g.*, *Davis v. Carp*, 258 Mo. 686, 167 S.W. 1042 (1914); *Schrabauer v. Schneider Engraving Product*, 24 Mo. App. 304, 25 S.W.2d 529 (St. L. Ct. App. 1930).

improper acts have ceased.<sup>80</sup> Although the Missouri statute has been interpreted to require an act of concealment greater than mere silence,<sup>81</sup> the confidential relationship of an attorney and client gives rise to a duty to disclose. Accordingly, mere silence on the part of an attorney could constitute fraudulent concealment.<sup>82</sup>

Applying the above rationale, Missouri courts have held that, where an attorney withholds money or fails to pay over money collected for a client, the statute of limitations does not begin to run until the client learns of the existence of the money.<sup>83</sup> In some instances, however, the statute may not begin to run until a demand is made, a time potentially later than when the client learns of the existence of the money. To recover in an action for money collected, it must be alleged that a demand for the money has been made, but refused by the attorney.<sup>84</sup> This issue should depend on the relationship between the attorney and client at the time the client learns of the existence of the money.<sup>85</sup> If the attorney-client relationship is such that the client could expect that the attorney is holding the money as a fiduciary, or if such has been their previous custom, then the statutory period does not commence until demand is made. If the client learns that the attorney is holding money that is rightfully his and there is no reason for him to believe that the attorney is acting in good faith, then he is put on notice of the wrongful act and the statutory period commences as of that date.

In the areas of legal drafting and legal advisement, the Missouri rule works a considerable extension of the period of liability. For instance, the District of Columbia, applying the same rule as Missouri, held that the statute of limitations did not start running against a client who had been negligently advised on a contract until the damage occurred.<sup>86</sup> Kansas, applying a similar rule, held that a cause of action by a beneficiary of a will did not accrue until the courts had declared the will invalid.<sup>87</sup> Despite a general rule of commencing their statute at the time of the negligent act, California courts have held that, since damages are a necessary element of proof in malpractice cases and because of the fiduciary nature of the attorney-client relationship, the statutory period does not begin until the damage is done and the client is aware of facts constituting a cause of action.<sup>88</sup> One California court noted that a contrary rule would have meant

80. § 516.280, RSMo 1969.

81. *Piggott v. Denton*, 46 S.W.2d 618 (K.C. Mo. App. 1932).

82. *E.g.*, *Hood v. McConemy*, 53 F.R.D. 435, 447 (D.C. Del. 1971). *See W. Prosser, supra* note 6, at 697 (4th ed. 1971).

83. *Donahue v. Bragg*, 49 Mo. App. 273 (St. L. Ct. App. 1892); *Aultman, Miller & Co. v. Loring*, 76 Mo. App. 66 (K.C. Ct. App. 1898).

84. *Houx v. Russell*, 10 Mo. 246 (1846).

85. That is, if the attorney is continuing in a fiduciary relationship, mere retention of the money is not sufficient to start the period running even if the client knows the attorney has the money. *See Birkhead v. De Forest*, 120 F. 645 (2d Cir. 1903); *Browder v. DaCosta*, 91 Fla. 1, 109 So. 448 (1925).

86. *Fort Myers Seafood Packers Inc. v. Steptoe*, 381 F.2d 261 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1968).

87. *Price v. Holmes*, 198 Kan. 100, 422 P.2d 976 (1967).

88. *Neel v. Magana*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

that no one could have shown damages unless the testator died before the end of the statutory period.<sup>89</sup>

The longevity which the Missouri statute of limitations imposes on malpractice actions in the nonlitigation areas appears somewhat harsh.<sup>90</sup> Nonetheless, attorneys have little cause to complain. What the courts take with one hand, they return with the other. The client's favorable statute of limitations in advisement malpractice cases is offset by the great difficulty inherent in proving causation in such cases. In such cases the statute of limitations may not have run after twenty years; nevertheless, no recovery is available unless the attorney has negligently "caused" damages.

#### V. LIABILITY IN SPECIFIC SITUATIONS

The preceding general discussion of attorney malpractice can be better understood by analyzing an attorney's liability in specific situations. For instance, an attorney might be sued for failure to bring his client's suit or for failure to appear and defend a suit brought against the client.<sup>91</sup> The problem for the client in this situation is proving causation and damages. This involves proving two cases. Not only must the client prove the attorney's negligence caused the loss of a claim or defense, but he must also show that he suffered injury as a result of the loss.<sup>92</sup> In other words, the client must litigate all the issues involved in the original case in addition to the question of the attorney's negligence in handling it.

A common source of liability is negligent failure to comply with procedural rules. Examples of common errors include failure to comply with notice requirements,<sup>93</sup> misnaming of parties,<sup>94</sup> errors in pleadings,<sup>95</sup> and bringing an action on an improper theory.<sup>96</sup> Any one of these mistakes may result in liability, if the mistake resulted in damages.<sup>97</sup> Luckily, under modern rules with liberal pleading and joinder provisions, the careless attorney can often rectify his procedural errors before they cause damage.

Despite the fact that procedural rules have been complied with, clients will, on occasion, claim malpractice on the basis of the general conduct of the litigation.<sup>98</sup> These allegations rarely result in recovery, however, because

89. *Neel v. Magana*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

90. *Thorne v. Johnson*, 483 S.W.2d 658 (Mo. App., D.K.C. 1972) (applying present statute to abstractors liability).

91. *Central Cab Co. v. Clarke*, 259 Md. 542, 270 A.2d 662 (Md. App. 1970); *cf. Roehl v. Ralph*, 84 S.W.2d 405 (St. L. Mo. App. 1935).

92. *Jones v. Wright*, 19 Ga. App. 242, 91 S.E. 265 (1917).

93. *McLellan v. Fuller*, 226 Mass. 374, 115 N.E. 481 (1917).

94. *O'Neill v. Gray*, 30 F.2d 776 (2nd Cir.), *cert. denied*, 279 U.S. 865 (1929).

95. *Patterson & Wallace v. Frazer*, 79 S.W. 1077 (Tex. Civ. App. 1904).

96. *Cf. Eberhardt v. Harkless*, 115 F. 816 (W.D. Mo. 1902) (recovery denied for lack of proof of causation).

97. *Gabbert v. Evans*, 184 Mo. App. 283, 293, 166 S.W. 635, 638 (Spr. Ct. App. 1914).

98. *Boynnton v. Brown*, 103 Ark. 513, 145 S.W. 242 (1912). In this case failure to seek a continuance was the basis for a cause of action against an attorney, but recovery was denied for failure to prove breach of standard of care. *Brock v. Fouchy*, 76 Cal. App. 2d 363, 172 P.2d 945 (1946) (failure to introduce evi-

it is difficult to show that the attorney has acted unreasonably. It is recognized that an attorney must make many decisions during a trial that in retrospect appear to have been errors, despite the fact that they were quite reasonable at the time they were made according to facts then available or strategy therein being applied.<sup>99</sup> As a general rule, the courts are very lenient to attorneys in these cases.

Other common areas of dispute arise from allegations of improper settlements, or failure to take steps necessary to preserve a client's right to appellate review.<sup>100</sup> Familiar problems arise in both cases. As to the former, the client must prove that he could have recovered (or have paid less) had the claim been fully litigated.<sup>101</sup> In the latter, the client must show that he could have prevailed on appeal.<sup>102</sup> In either case, there must be a showing that the attorney acted unreasonably.

Numerous nonlitigational activities are ripe sources for malpractice actions,<sup>103</sup> none of which is more fecund than title opinions.<sup>104</sup> Although to date there is only one reported Missouri case involving attorney malpractice for a negligently researched opinion,<sup>105</sup> insurance statistics indicate that this is one of the most common sources of malpractice claims.<sup>106</sup> The dearth of reported cases in Missouri probably reflects the fact that once the existence of adverse claimants is brought to the attention of the embarrassed title examiner, he is often able to prevent loss either by bringing a quiet title suit or by quietly persuading remote claimants to give quit claim deeds.

Conflicts of interest can also be the basis of a legal malpractice action.<sup>107</sup> Due to the fiduciary relationship of an attorney to his client, the attorney has an affirmative obligation to disclose any facts important to the interests

dence); *Farmers Ins. v. District Court*, 507 P.2d 865 (Colo. 1973) (failure to answer a show cause order held to be inexcusable neglect).

99. *Gabbert v. Evans*, 184 Mo. App. 283, 293, 166 S.W. 635, 638 (Spr. Ct. App. 1914).

100. *Kruegel v. Porter*, 136 S.W. 801 (Tex. Civ. App. 1911). See also *Boss-Harrison Hotel Co. v. Barnard*, 148 Ind. App. 406, 408, 266 N.E.2d 810, 811 (1971) (stating that "[G]ood appellate advocacy demands the regular reading of the Advance Sheets. . .").

101. *Vooth v. McEachen*, 181 N.Y. 28, 73 N.E. 488 (1905).

102. *Trustees of Schools v. Schroeder*, 2 Ill. App. 3d 1009, 278 N.E.2d 431 (1971); *Gabbert v. Evans*, 184 Mo. App. 283, 294, 166 S.W. 635, 638 (Spr. Ct. App. 1914).

103. *Fort Myers Seafood Packers Inc. v. Steptoe*, 381 F.2d 261 (D.C. Cir. 1967), cert. denied, 390 U.S. 946 (1968) (negligence in drafting a contract); *Palmer v. Nissen*, 256 F. Supp. 497 (S.D. Me. 1966) (negligent drafting of a land sales contract); *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969) (negligence in will drafting); *Brackett v. H. R. Block & Co.*, 119 Ga. App. 144, 166 S.E.2d 369 (1969) (negligent preparation of a tax return). See generally, Annot., 65 A.L.R.2d 1363 (1959) (Wills); and Annot., 47 A.L.R.3d 1286 (1972) (Tax preparers).

104. *Renkert v. Title Guar. Trust Co.*, 102 Mo. App. 267, 76 S.W. 641 (St. L. Ct. App. 1903).

105. *Id.*

106. *Rottman and Stern, The Risk of Attorney Professional Liability*, 28 J. Mo. B. 127, 136 (1972) (42 percent based on a 1952 survey).

107. *E.g.*, *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

of the client, including any potential conflicts of interest between the client and the attorney.<sup>108</sup> The Code of Professional Responsibility tolerates some representation by one attorney of parties with conflicting interests, but only if the attorney fully discloses the nature and extent of the conflict to both parties.<sup>109</sup> Failure to disclose, even if arising from oversight or failure to recognize a conflict, may result in an action for negligence. This cause of action requires the same proof as any other malpractice suit, causation and damages still being prerequisites to recovery.

There are four principal categories of fact situations in which these conflicts of interest arise: (1) Representation of both husband and wife in matrimonial proceedings,<sup>110</sup> (2) representation of both insurer and insured,<sup>111</sup> (2) representation of both debtor and creditor,<sup>112</sup> and (4) representation of both buyer and seller.<sup>113</sup> Since the conflicts which arise in such situations are numerous and diverse, they will not be fully discussed here. However, attorneys should be conscious of this potential liability, and protect themselves by being alert for possible conflicts of interest and by making full disclosure when doubtful situations arise.

#### VI. REMEDIES

The most common recourse for a client who is injured by an attorney's negligence is to bring a tort action for money damages. It has been said that equitable relief is unavailable in cases of malpractice.<sup>114</sup> This is probably true, since equitable remedies would rarely be appropriate in a case of negligence. Nonetheless, equitable remedies would rarely be appropriate in a case of negligence. Nonetheless, equitable remedies would undoubtedly be appropriate to secure recovery of documents or other unique property wrongfully withheld by an attorney.<sup>115</sup> Similarly, in some instances, it might be proper to sue for rescission of a deed where the attorney acted adversely to the client's interests.<sup>116</sup> Thus, it seems inappropriate to flatly reject the possibility of equitable relief in all malpractice suits.

A Missouri statute provides one special remedy.<sup>117</sup> It allows for entry of judgment against an attorney where the attorney's failure to appear and defend resulted in dismissal of the client's suit or entry of judgment against him. This remedy is rarely utilized, however, probably because of a reluctance to enter judgment against an attorney without an opportunity for a full hearing on the merits of the case.<sup>118</sup>

108. See generally, Annot., 28 A.L.R.3d 389 (1969).

109. ABA CANONS OF PROFESSIONAL ETHICS No. 5 and E.C. 5-16.

110. *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

111. *Lysick v. Walcom*, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

112. *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897).

113. *In re Zafiratos*, 259 Or. 276, 486 P.2d 550 (1971).

114. *Marsh v. Whitmore*, 21 Wall. 178 (1874), *affg* 1 Haskell 391, F. Cas. No. 9122 (C. C. Me. 1872).

115. *McGowin v. Remington*, 12 Pa. 56, 51 Am. Dec. 584 (Sup. Ct. 1849).

116. *Bybee v. S'Renco*, 316 Mo. 517, 291 S.W. 459 (1927).

117. § 484.160, RSMo 1969.

118. This statute, if followed in its literal form, would undoubtedly raise constitutional questions and would be an abrogation of the client's burden of proof.

A nonjudicial remedy is available in certain situations in the form of the Client Security Fund of the Missouri Bar.<sup>119</sup> Missouri's fund is similar to those established in a number of states. The fund is extremely limited in scope. It specifically excludes claims for "malpractice, non-feasance, or negligence."<sup>120</sup> Its principal application is to cases of either defalcation or embezzlement of money, wrongful taking of property, or failure to turn over money properly belonging to a client. Recovery is further restricted by the requirement that the client must have exhausted all his judicial remedies before dipping into the fund. Additionally, no recovery is allowed unless the client was defrauded by an attorney who thereafter died, was disbarred or was declared incompetent. Furthermore, if the attorney is dead or incompetent, his actions must have been such as would have warranted disbarment. This formidable list of restrictions appears to make this protection valueless. Surprisingly, however, the Committee Report on the Client Security Fund for 1970-71 reported five claims totalling \$34,399, though only 47.8 percent of each claim was paid because of a lack of funds.<sup>121</sup> This amounted to a total payment of \$16,910. Though this plan is a slight improvement, the ratio of claims paid to claims made and the small number of claims presented are evidence of the plan's inadequacies.

#### VII. CONCLUSION

Fortunately, attorneys are not yet under as much pressure from malpractice claims as some other professionals. This might be partially traceable to the fact that the present Missouri law concerning legal malpractice affords considerable protection to the attorney as defendant. This is desirable from a legal viewpoint and is consistent with our general concepts of civil liability. The bar, however, represents itself as fiduciary, and its interests are best served by cultivating an image of fairness and responsibility toward its clients. This interest is ill-served when an attorney who does make an error turns his back on the client, forcing the client to hire yet another attorney and undergo further litigation to recover his originally valid claim.

Several steps could be taken. It is not suggested that individual attorneys or the bar should reimburse clients on groundless claims, but some nonjudicial remedy would be desirable in many cases. The Client Security Fund is a feeble step in the right direction. If its coverage could be expanded to include malpractice claims, to be reviewed by a panel of attorneys, and with the cost of the system being distributed to all the bar, both the client and the public image of the bar would benefit.

Even without such a program, widespread malpractice insurance would serve the interests of both attorney and client.<sup>122</sup> Presumably, in clear cases

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119. *Client Security Fund Established by Missouri Bar*, 22 J. Mo. B. 487 (1966).

120. *Id.* at 489.

121. *Committee Report, Client Security Fund*, 27 J. Mo. B. 647, 649 (1971).

122. Rottman and Stern, *The Risk of Attorney Professional Liability*, 28 J. Mo. B. 127, 137 (1972). This article indicates that only 65% of the members of the Bar have malpractice insurance and that coverage is often inadequate.