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A Modern Approach to the Legal Malpractice Tort

Kenneth G. Lupo
Indiana University School of Law

A Modern Approach to the Legal Malpractice Tort

A plaintiff faces serious obstacles to recovery in a legal malpractice action because the tort law requirement[1] that he accept the burden of proof on the issues of cause-in-fact and negligence is, in many instances, applied in such a way as to insulate the attorney from liability. As a result of the persistent application of legal principles long abandoned in other areas of tort law, the legal malpractice plaintiff often loses even before he is heard on the merits of his action.[2] For example, although the discovery rule[3] has been applied by most jurisdictions in malpractice actions against other professionals to prevent the harsh application of the traditional rule that the statute of limitations runs from the time the wrong is committed, the plaintiff in a legal malpractice action is rarely permitted to take advantage of it.[4] Moreover, despite the fact that "[i]n every jurisdiction the courts

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[1]Legal malpractice actions have sounded both in contract and negligence. *See, e.g.*, Neel v. Magana, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); Grago v. Robertson, 49 App. Div. 2d 645, 370 N.Y.S.2d 255 (Sup. Ct. 1975); Peters v. Summons, ___ Wash. 2d ___, 552 P.2d 1053 (1976). The cause of action, however, for all practical purposes is in tort since: "[I]f the action is treated as one *ex contractu* courts . . . declare the attorney 'impliedly contracts' to exercise the degree of care, skill and knowledge which is required by the negligence standard." Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 756-57 (1959). To recover the plaintiff must prove 1) a duty owed by the attorney to the client, 2) a breach of that duty and 3) injury to the client which is proximately caused by the attorney's breach. For various statements of the elements required to make out a prima facie case of legal malpractice, *see, e.g.*, Eckert v. Schaal, 251 Cal. App. 2d 1, 58 Cal. Rptr. 817 (1967); Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975); Modica v. Crist, 129 Cal. App. 2d 144, 276 P.2d 614 (1954). Cause-in-fact is not explicitly stated as an element of the plaintiff's prima facie case; still, it is generally accepted that "[i]n order to recover in a negligence action against an attorney it is necessary to show tht his negligence was the cause of legal damage to the client." Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 769 (1959).

[2]*See* Wallach & Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA LAW. 257 (1970) where the authors recognize:

> The lawyer who commits a malpractice in the representation of his clients . . . is protected by a maze of ancient legal principles which make it virtually impossible for the injured client to be made whole or even for the lawyer to be reprimanded.

Id. at 257.

[3]The discovery rule is a judicial creation which tolls the statute of limitations until the plaintiff discovers or should have discovered the harm.

[4]The general rule is that a cause of action in legal malpractice accrues and the statute begins to run when the attorney commits the negligent act, regardless of whether the malpractice victim knew or could have known about the negligence. *See, e.g.*, Lally v. Kuster, 177 Cal. 783, 171 P. 961 (1918); Galloway v. Hood, 69 Ohio App. 278, 43 N.E.2d 631 (1941); Deneer v. Rouse, 48 Wis. 2d 528, 180 N.W.2d 521 (1970). The general rule is criticized in Note, *The Commencement of the Statute of Limitations in Legal Malpractice Actions - The Need for Reevaluation*, 15 U.C.L.A. L. REV. 230 (1967). That the policy reasons for the application of the discovery rule apply in legal as well as other types of professional malpractice actions has been recognized by some courts. *See, e.g.*, Neel v. Magana, 6 Cal. 3d 176, 188, 491 P.2d 421, 428, 98 Cal. Rptr. 837, 844 (1971):

have recognized that the concept of privity is an anomaly in tort litigation,"[5] third parties are seldom allowed to maintain an action against an attorney.[6] The judicial refusal to apply the discovery rule and the continued application of the privity doctrine in legal malpractice not only represent inconsistencies in the law of malpractice, but also have the effect of dismissing many valid suits against negligent attorneys at the trial court level.[7] These considerations indicate that an expansion of the theories of legal malpractice liability on the appellate level is both justified and necessary.

The modifications to the present approach to legal malpractice proposed herein are consistent with tort concepts such as the doctrines of causation and negligence and yet promote several desirable social policies. First, in easing the burden of recovery for legal malpractice plaintiffs the risk of loss will be shifted to the party best able to insure against it.[8] Many legal practitioners point to the disastrous rise in medical malpractice insurance premiums which has resulted from the judicial expansion of liability in that area; they argue that a similar result would obtain in the

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> Corollary to [the attorney's] expertise is the inability of the layman to detect its misapplication; the client may not recognize the negligence of the professional when he sees it. He cannot be expected to know the relative medical merits of alternative anesthetics nor the various legal exceptions to the hearsay rule. If he must ascertain malpractice at the moment of its incidence, the client must hire a second professional to observe the work of the first, an expensive and impractical duplication, clearly destructive of the confidential relationship between the practitioner and his client.

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

[5]Haughey, *Lawyers' Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888, 894 (1973) [hereinafter cited as *Lawyers' Malpractice*].

[6]The general rule states that an attorney is not liable to third persons for his negligent acts. *See, e.g.*, Savings Bank v. Ward, 100 U.S. 195 (1879); McDonald v. Stewart, 289 Minn. 35, 182 N.W.2d 437 (1970); Waugh v. Dibbens, 61 Okla. 221, 160 P. 589 (1916). Many view the continued application of the privity doctrine in the area of legal malpractice as another scheme used by the profession to artifically insulate its members from liability. *See, e.g.*, Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1312 (1963). The privity doctrine is especially anamalous in the legal malpractice actions involving defectively drawn wills or defective title searches, since in these cases the attorney's activity is clearly intended to affect the third party. Within this class of cases, some courts have extended the third party beneficiary theory of contracts to the field of legal malpractice. *See* Averill, *Attorney's Liability to Third Persons for Negligent Malpractice*, 2 LAND & WATER L. REV. 379, 400 (1967); Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1310 (1963). The privity rule has been eliminated in California *see, e.g.*, Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1961); Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971), but in the majority of jurisdictions, the general rule of privity is strictly applied.

[7]*See, e.g.*, Mickel v. Murphy, 147 Cal. App. 2d 718, 305 P.2d 993 (1957) (defendant-attorney's demurrer based on lack of privity affirmed); Gilbert Properties, Inc. v. Millstein, 33 N.Y.2d 857, 307 N.E.2d 257 (1973); Fladerer v. Needleman, 30 App. Div. 2d 371, 292 N.Y.S.2d 277 (1968) (dismissal based on statute of limitations affirmed).

[8]Legal malpractice insurance is widely available, and most practitioners are covered. *See generally* Denenberg, Ehre & Huling, *Lawyers' Professional Liability Insurance: The Peril, the Protection and the Price*, 1970 INS. L.J. 389; LeHouillier, *Legal Malpractice: The Risks and Insurance Protection*, 42 INS. COUNSEL J. 106 (1975).

field of legal malpractice if liability is expanded. This is not a valid objection, however, since the enormous rise in medical malpractice insurance costs can be directly traced to the high cost of medical care and the concomitant recoveries resulting from a doctor's malpractice;[9] actions in legal malpractice rarely result in such huge judgments. Second, the present approach to legal malpractice artifically insulates the negligent attorney from liability, which is obnoxious to the generally recognized policy of deterring negligent conduct; an increase in the legal malpractice recovery rate would result in a higher quality of advocacy because attorneys who are consistently careless in meeting deadlines and filing papers would consistently be held liable and subject to professional reprimand.

The purpose of this note is to propose solutions to the problems encountered by the legal malpractice plaintiff by reducing to a tolerable level the burden which the plaintiff must bear in order to recover; these solutions will promote the aforementioned policies and will bring about more equitable results.

THREE BASIC CATEGORIES OF LEGAL MALPRACTICE: THE CURRENT TREATMENT

Regardless of the type of legal malpractice of which the client is a victim, the difficulty of recovery is aggravated by a judicial approach to legal malpractice which both disregards policy and is unsupported by the history of negligence actions against professionals. A legal malpractice action may be characterized, depending on the surrounding factual situation, as falling into one of three categories,[10] each of which receives different treatment by the courts. The first category, which might be termed "litigation malpractice," involves an error made by the attorney in the litigation of his client's action.[11] The second category comprises situations in which the attorney has failed to discover the applicable law, resulting in the loss of his client's action. Finally, the third category of legal malpractice actions involves cases in which the attorney has exercised his informed professional judgment and yet was proven incorrect.

Litigation Malpractice: The Suit Within a Suit Rule

Litigation malpractice, easily distinguishable within the broad field of legal malpractice, consists of any error committed by the attorney as a

[9]It should also be noted that the award of punitive damages in legal malpractice actions is rare. *See, e.g.*, Welder v. Mercer, 247 Ark. 999, 448 S.W.2d 952 (1970) (award of punitive damages in legal malpractice action requires more than a showing of gross negligence).

[10]That legal malpractice actions may be categorized depending on the factual characteristics has been recognized by other writers on the subject. *See, e.g., Lawyers' Malpractice, supra* note 5.

[11]Litigation malpractice is a part of the more general area involving inadvertant errors made by the attorney; this category is discussed by Haughey, in *Lawyers' Malpractice, supra* note 5, at 892-94.

result of which the client either loses entirely his opportunity to litigate the merits of his case or does not receive the benefit of a full and fair trial on all the issues. The most common example of this type of malpractice is the inadvertent failure of the attorney to file his client's action within the statute of limitations.[12] Other examples are: failue to perfect an appeal, faulty service of summons, failure to comply with venue or jurisdiction requirements and failure to plead or argue a valid claim or defense.[13] When an action in legal malpractice falls within this category, the plaintiff will usually have little difficulty proving that his attorney was negligent because most actions of this type involve the failure on the part of the attorney to comply with technical rules well known by a legal practitioners. In a litigation malpractice action, however, the plaintiff, in order to prevail on the issue of cause-in-fact, must prove more than that his original action was lost or compromised. When the attorney causes his client to lose his cause of action or be denied a full trial on the merits, "the rule has developed that . . . the client . . . must show not only that the attorney was negligent but also that the result would have been different except for his negligence."[14] Since it requires the plaintiff-client to prove two cases in a single proceeding, this rule has been termed the "suit within a suit" requirement.[15] Thus, when the attorney's negligent act involves some aspect of the litigation in the underlying action, the malpractice plaintiff must prove his action against the opposing party in the underlying action as well as his action against the attorney.[16] Further, the malpractice plaintiff must also prove the ability of the original opposing party to respond in damages,[17] so that the insolvency of the original opposing party

[12]*See, e.g.*, Walker v. Porter, 44 Cal. App. 3d 174, 118 Cal. Rptr. 468 (1974); Baker v. Beal, 225 N.W.2d 106 (Iowa 1975).

[13]*See, e.g.*, Better Homes, Inc. v. Rodgers, 195 F. Supp. 93 (N.D. W. Va. 1961) (failure to perfect appeal); Harding v. Bell, 265 Or. 202, 508 P.2d 216 (1973) (failure to assert a valid defense). The plaintiff in a legal malpractice action might have been either the plaintiff or the defendant in the underlying action.

[14]Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 769 (1959). This rule is not followed in the rare case in which the result of the original action is beyond dispute. The recent case of Watkins v. Sheppard, 278 So. 2d 890 (La. Ct. App. 1973), is illustrative. In that case, one Netterville negligently drove his car into Watkin's car, which was parked in the latter's driveway. The defendant-attorney failed to file Watkin's action within the one-year prescription period. The court did not bother to discuss the causation issue: "The existence of an attorney-client relationship between Sheppard and Watkins is not an issue in the suit, nor is the probable success of Watkins' action for property damages for the negligence of Netterville." 278 So. 2d at 891.

[15]*See* Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. VA. L. REV. 225 (1958) [hereinafter cited as *Attorney Negligence*].

[16]For example, if the attorney fails to file the client's complaint in a personal injury action within the statutory period, the plaintiff-client must prove the negligence of the original defendant and of the defendant-attorney; the attorney can use the original defendant's defense of contributory negligence as an affirmative defense to the malpractice action. *See* Maryland Cas. Co. v. Price, 231 F. 397 (4th Cir. 1916); Piper v. Green, 216 Ill. App. 590 (1920).

[17]Of course, if the plaintiff-client in the malpractice action was the defendant in the original action, he will not have to prove the original plaintiff's ability to respond in damages unless a cross complaint was involved.

is an additional defense for the attorney; the defendant-attorney in fact has at his disposal all of the original opposing party's defenses.[18]

It is virtually undisputed that the burden of proving two actions in a single proceeding is extremely heavy. At least one commentator suggests that this burden is the plaintiff-client's most difficult task,[19] and even those who support the suit within a suit requirement concede its harshness:[20]

> The cases are not at all clear as to the extent of the burden which the client must assume, that is, whether he need only prove that he would have been successful in the original action by evidence sufficient to convince the jury in the malpractice action that the jury or court in the original proceeding would have found for him in the absence of the attorney's negligence, or whether he must establish, to the satisfaction of the court in the malpractice action and as a matter of law that he clearly or probably would have won the original action. In either case the burden is an extremely difficult one, as is demonstrated by the number of cases in which the client has failed on this point.[21]

The rationale behind the imposition of the suit within a suit requirement in litigation malpractice actions is easily stated: the loss of an invalid action or a worthless judgment causes no damage at all. This rationale, thought persuasive on its face, has two conceptual difficulties. First, the suit within a suit requirement extends the burden of proof normally required in a tort action. The requirement that the plaintiff prove cause-in-fact in a negligence action is universally accepted and reflects the doctrine of fault which underlies American tort law.[22] The major policy behind this requirement is that frivolous suits against innocent defendants should be summarily dismissed. Nevertheless, the suit within a suit requirement, when applied in an action of litigation malpractice, effectively extends this burden of proof by requiring the plaintiff to prove the merits of *two* actions in a single proceeding. Despite

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[18]*See, e.g.*, Lawson v. Sigfrid, 83 Colo. 116, 262 P. 1018 (1927); Jones v. Wright, 19 Ga. App. 242, 91 S.E. 265 (1917). The damage issue in legal malpractice is not significantly different from that in ordinary negligence actions unless the damages are unliquidated, in which case the argument has been made that the jury in the malpractice action should not be allowed to "speculate" on the amount of damages which might have been awarded by the original jury. *See Attorney Negligence, supra* note 15 at 234-35. An additional aspect of the damage issue in legal malpractice is that evidence as to the original opposing party's insurance coverage is admissible to prove his ability or disability to respond in damages. *See id.* at 237-38. For more information on the damage issue in legal malpractice, *see generally* Annot., 45 A.L.R.2d 62 (1956). It should be noted in this connection that the causation issue is often treated as one of damages, the suit within a suit rule being then considered as a method of ascertaining the plaintiff's damages. *See Attorney Negligence, supra* note 15 at 235.

[19]Leavitt, *The Attorney as Defendant*, 13 HASTINGS L.J. 1, 30 (1961).

[20]*See, e.g.*, Shayne & Dachs, *Legal Malpractice—The Rising Cost of the Error of Our Ways*, 25 DEF. L.J. 425, 435 (1976).

[21]Annot., 45 A.L.R.2d 5, 10-11 (1956).

[22]Thus, the requirement that the plaintiff in a negligence action must show that the defendant at least "had something to do with" the damage alleged. *See generally* Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956).

the fact that the litigation malpractice plaintiff is able to demonstrate that his attorney was negligent, he may be unable to satisfy the suit within a suit requirement. The net effect, then, is to deny relief to a litigation malpractice plaintiff regardless of his ability to show a causal connection between the defendant's negligence and the loss of his cause of action. The suit within a suit requirement thus does little to support the policy behind causation but often has the effect of exonerating negligent attorneys.

The second conceptual problem underlying the imposition of the suit within a suit requirement in a litigation malpractice action is that the rule fails to distinguish between the burdens placed on the plaintiff to prove causation and to prove damages.[23] An example of the indiscriminate operation of the suit within a suit rule in the context of damages is instructive. If the plaintiff in the legal malpractice action was also the plaintiff in the underlying tort action, say a personal injury action with valid claims for unliquidated and punitive damages, and his attorney failed to file within the statute of limitations, the plaintiff-client will be required to prove not only that he would have won on the merits but also the damages that would have been recovered in the underlying action and the ability of the original defendant to respond in damages. On the other hand, if the plaintiff in the malpractice action was the defendant in the underlying action and his attorney failed to file a timely answer, the result being default judgment, the plaintiff-client, although he will still have to prove causation (in this case a valid defense), will not be required to prove damages. The extent of his harm is liquidated in the amount of the judgment. Concededly, the distinction between cause in fact and damages is blurred in the context of litigation malpractice regardless of the suit within a suit requirement because the proof of causation involves the proof of damages. Thus, if the attorney loses a worthless cause of action, fails to assert an invalid defense or does not file an action against an insolvent defendant within the statute of limitations, it cannot be said that "but for" the negligence of the attorney the plaintiff would not have suffered a loss. Nevertheless, the suit within a suit requirement in effect merges the two issues with the result that the plaintiff will often be required to prove damages in order to prove causation. Since the litigation malpractice plaintiff must also prove causation in order to prove damages, the suit within a suit requirement produces a bootstrapping effect which denies recovery to clients who have lost valid underlying actions as well as to those who had no valid action at the outset.

The suit within a suit requirement is based on early American cases in which the real issue was damages. Most of these cases are either unrelated to legal malpractice[24] or are exclusively limited to those legal malpractice

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[23]*See* note 16 *supra.*

[24]*See, e.g.*, Governor v. Baker, 14 Ala. 652 (1848); Bank of Mobile v. Huggins, 3 Ala. 206 (1841); Getchell & Martin L.M. Co. v. Employers Liab. Assurance Corp., 117 Iowa 180, 90

cases in which the alleged negligence involved a breach of the attorney's duty to collect on a promissory note or similar instrument.[25] The early American cases are traceable to English cases in which the issue was also damages;[26] those cases which are on point often do not cite authority supporting their ruling that the plaintiff must bear the burden of proof for all of the elements of both cases,[27] but apparently the rationale is that "suits against attorneys for negligence are governed by the same principles as apply in other negligent [sic] actions."[28] The courts seem to accept this rationale without discussion,[29] as there are no cases which recognize a distinction between the proof of cause in fact in legal malpractice actions and ordinary negligence actions. The suit within a suit requirement thus finds no sound basis in the case law unless one blindly concurs with the proposition that the doctrine of causation should be mechanically applied in legal malpractice. Given that the suit within a suit rule is extremely harsh, adds little or nothing to the policy underlying the requirement that the plaintiff assume the burden of proof on causation, and is unfounded in case law, an alternative method of treating the causation issue is both desirable and necessary.

Failure to Discover Applicable Law: The Subjectification of the Standard of Care

If the attorney acts for or renders advice to his client based on insufficient research, for example by drafting an instrument which violates a statutory requirement[30] or by rendering advice which is contrary to the

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N.W. 616 (1902); Staples v. Staples, 85 Va. 76, 7 S.E. 199 (Sup. Ct. App. 1888); Seefeld v. Chicago Minnesota & St. Paul Ry. Co., 70 Wis. 216, 35 N.W. 278 (1887).

[25]Goodman & Mitchell v. Walker, 30 Ala. 482 (1857); Walker v. Goodman, 21 Ala. 647 (1852); Pennington v. Yell, 11 Ark. 212 (1850).

[26]*See, e.g.*, Russell v. Palmer, 95 Eng. Rep. 837, 2 Wils. 325 (K.B. 1767), in which the defendant-attorney's negligence in failing to collect a judgment entered against one Stewart in favor of his client allegedly resulted in damages of £ 3500. In the first malpractice trial, the presiding judge directed the jury that they might enter a verdict for the whole debt due, and the plaintiff received a verdict of £ 3000. In the second trial, the jury was allowed to "find what damages they pleased, and accordingly found only £ 500, as it appeared to them in evidence, that Stewart was not totally insolvent." *Id.* at 839, 2 Wils. at 328.

[27]*See, e.g*, Nave v. Baird, 12 Ind. 318 (1859), in which the court ruled that the attorney's refusal to apply for a change of venue would not subject him to liability unless the plaintiff could prove that the application for the change of venue would have been accepted and that he was damaged by the refusal. No authority was cited in support of the ruling.

[28]Maryland Cas. Co. v. Price, 231 F. 397, 402 (4th Cir. 1916). The court did recognize, however, that there was some conflict on this point in the reported decisions.

[29]*See, e.g.*, Brown v. Gitlin, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1974). In affirming entry of judgment against plaintiff by the Cook County Circuit Court, the appellate court indicated that, although the attorneys failed to file a stock transfer report as required by the Illinois Securities Act, testimony of the defendant's three expert witnesses over the testimony of plaintiff's single expert was sufficient to sustain a directed verdict for the defendant. The court seemed predisposed on the issue, stating that, "[i]n a case such as this, error by the attorney does not constitute malpractice." *Id.* at 1021, 313 N.E.2d at 183.

[30]*See, e.g.*, Brown v. Gitlin, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1974).

legal opinion expressed in the published case law, the issue is whether his failure to discover and correctly apply the law constitutes negligence. It is in this category of cases that courts often subjectify the standard of care,[31] and it is not uncommon that the jury is instructed that if the defendant acted in good faith or with a "fair degree" of knowledge and skill, he should not be considered negligent.[32]

The historical development of the standard of care reveals the protective attitude with which the courts have traditionally approached members of the legal profession accused of negligence. Early cases in this country and in England held an attorney liable only for "gross negligence,"[33] although it is possible that this phrase meant only a failure to exercise ordinary care because it developed when terminology in the negligence field was still in its formative stages.[34] The United States Supreme Court, in *Savings Bank v. Ward*,[35] set forth the general standard of care which forms the basis of the present rule regarding attorney malpractice:

> Proof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the action; but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsbile 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 reasonable care and to the best of his knowledge, he will not be held responsible.[36]

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[31]The general rule "requires an attorney to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated." 7 AM. JUR. 2d *Attorneys at Law* § 168 (1963).

[32]The court habitually subjectifies the standard of care by instructing the jury to find for the defendant on the issue of negligence if he acted in good faith or with a "fair degree" of knowledge and skill. *See, e.g.*, Savings Bank v. Ward, 100 U.S. 195 (1879); Palmer v. Nissen, 256 F. Supp. 497 (D. Me. 1966); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889). For an extreme example of a subjective standard of care, see Lynn v. Lynn, 4 Wash. App. 171, 480 P.2d 789 (1971), where the court described the standard as follows:

> Attorneys frequently differ on trial tactics, and obviously the substitute attorney did not agree with the trial attorney on the manner in which the trial was conducted. A difference of opinion on trial tactics, however, does not constitute either negligence or incompetence. The test of the skill and competence of counsel is: After considering the entire record, was the complaining party afforded a fair trial?

Id. at 175, 480 P.2d 792. Courts have also held that the standard of care may vary depending upon such factors as the amount of time in which the attorney had to make his decision regarding the alleged negligent conduct; this injects further subjective elements into the standard of care. *See* Gillen, *Legal Malpractice*, 12 WASHBURN L.J. 281 (1973).

[33]*See, e.g.*, Pennington v. Yell, 11 Ark. 212 (1850); Fitch v. Scott, 4 Miss. (3 Howard) 314 (1839); Baikie v. Chandness, 170 Eng. Rep. 1291, 3 Camp. 17 (N. P. 1811).

Some courts used the phrases *lata culpa* and *crassa neglegentia*, but apparently meant only ordinary negligence. *See* Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 760 (1959).

[34]One of the best explanations of the terminology is found in Holmes v. Peck, 1 R.I. 242 (1849): "We recognize the principle, which subjects an attorney for the want of ordinary skill and care in the management of the business entrusted to him, as anyone else, who professes any other art or mystery. The want of ordinary care and skill in such a person is gross negligence." *Id.* at 245.

[35]100 U.S. 195 (1879).

[36]*Id.* at 198.

Although this standard virtually eliminated the overprotective "gross negligence" standard in American legal malpractice jurisprudence, nevertheless "[t]he holding of *Savings Bank* represented a judicial attitude which resulted in the legal profession adhering to laissez-faire oriented standards of professional responsibility strikingly inconsistent with the standards of liability developing in other areas of the law."[37] This judicial attitude is reflected by the subjective aspect of the *Savings Bank* standard which provides that the attorney is not held responsible as long as he conducts the client's cause "to the best of his knowledge."

As has often been noted, the standard of care has not become more clear with the passage of time.[38] An examination of the standards of care used since *Savings Bank* reveals that the courts exercise a broad range of discretion in describing the attorney's duty to his client.[39] Subjectifying any portion of the standard of care is inappropriate in legal malpractice because when the attorney accepts employment, he theoretically undertakes to perform his client's business with the care, skill and knowledge which fellow members of the bar exercise. Further, since the average client is totally ignorant of the intricacies of law, he should be able to rely on professional advice, and the standard of care used in legal malpractice should advance that reliance. Finally, the client's only means of protection against improperly rendered legal services is an action in malpractice, and subjectification of the standard of care effectively strips him of this protection. When the attorney has lost his client's action by virtue of his failure to discover the applicable law, the subjectification of the standard of care amounts to nothing less than a judicial determination that for attorneys ignorance of the law *is* an excuse.[40]

Error Based on Informed Professional Judgment: Good Faith as an Excuse

It happens occasionally that the attorney, after having researched the law applicable to his client's problem, discovers that the problem lies in one of the many "grey areas" of the law. Perhaps the case law is in

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[37]Note, *Legal Malpractice—Erosion of the Traditional Suit Within a Suit Requirement*, 7 TOL. L. REV. 328, 331 (1975).

[38]*See, e.g.*, Heffernan, *Professional Malpractice Insurance: Let the Attorney Beware*, 48 CONN. B.J. 347, 348 (1975).

[39]Thus, in Spangler v. Sellers, 5 F. 882 (C.C.D. Ohio 1881), the court included in its instructions to the jury concerning the standard of care the statement that the attorney's duty to his client "did not require of him the possession of perfect legal knowledge, and the highest degree of skill in relation to business of that character, nor that he would conduct it with the greatest degree of diligence, care, and prudence." *Id.* at 887. In the more recent case of Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954), the court included in its statement to the jury the instruction that the attorney, in undertaking his employment, represents that "he will exert his best judgment in the prosecution of the litigation entrusted to him; and . . . he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause." *Id.* at 519, 80 S.E.2d at 145-46.

[40]This inconsistency has never been explanied by the courts. *See* Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 755 (1959).

conflict, or the applicable statute is ambiguous and has not been construed by the courts. In such cases the attorney's opinion may represent little more than an educated guess, and if he guesses incorrectly, the resulting malpractice action fits within the third category. In this area of good faith error the plaintiff-client's case is the weakest because the deterrence policy, which supports the extension of legal malpractice liability, does not apply. As might be expected, within this category "the courts will almost always exonerate the attorney from malpractice liability . . . ."[41] Two methods are used.

If the court feels that the attorney exercised his best judgment on a questionable area of law, the instructions given the jury go beyond subjectification of the standard of care; the jury is literally ordered to find for the defendant if he has shown that he exercised his professional judgment in good faith.[42] The rationale for excusing the attorney under such circumstances has been expressed by the courts many times: the professional must be given a certain degree of "diagnostic leeway" without fear of liability or he will refuse to exercise his professional judgment in the future.[43] Although it is not clear that good faith should be a defense in any negligence action,

> [t]he attorney does enjoy a favored position in the law of malpractice, particularly in this important area of the exercise of professional judgment in situations in which there is no absolute answer to a problem. . . . [W]hen it comes down to the nitty-gritty of a particular case, the lawyer appears to escape liability unless it can be shown that his action, whatever it was, was clearly and demonstrably wrong . . . .[44]

This state of the law seems particularly objectionable because the layman has no alternative source of advice and "he expects and should expect competent professional advice and guidance even on the toughest issues, where he needs it most."[45]

A second method used to limit the plaintiff's recovery is to make the negligence issue a question of law.[46] The leading case supporting this

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[41]*Lawyers' Malpractice, supra* note 5, at 897.

[42]*See, e.g.*, Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1238 (M.D. La. 1973). *See also* Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 760 (1959).

In Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Reptr. 821, *cert. denied*, 368 U.S. 987 (1961), the court was of the opinion that "[t]he attorney is not liable for every mistake he may make in his practice . . . he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers." *Id.* at 591, 364 P.2d at 689, 15 Cal. Reptr. at 825.

[43]*See, e.g.*, Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966) ("If a judgment against an attorney, on a record such as is before us, can be justified, the legal profession would be more hazardous than the law contemplates."); Breedlove v. Turner, 9 Mart. 353 (La. Sup. Ct. 1821) ("No one, therefore, would dare to pursue the profession, if he was held responsible for the consequences of a causal failure of his memory, or a mistaken course of reasoning.").

[44]*Lawyers' Malpractice, supra* note 5, at 903.

[45]*Id.* at 899.

[46]*See, e.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1961); Gambert v. Hart, 44 Cal. 542 (1872); Armstrong v. Adams, 102 Cal. App.

approach is *Gambert v. Hart*,[47] a California case decided in 1872. The court, without citing supporting authority or justifying its conclusion, ruled: "In actions of this character against attorneys, the rule is well settled that when the facts are ascertained the question of negligence or want of skill is a question of law for the Court."[48] Another leading case which adopted the same holding is *Gimbel v. Waldeman*,[49] which stated:

> [N]o question of fact is involved but . . . the matter is one of pure law and . . . *it would be improper* to submit to a jury of lay persons the question whether the advice was correct, or, if incorrect, whether in view of the state of the law on the subject the defendant was guilty of negligence.[50]

The court implied that the rationale for taking the negligence issue from the jury within this category of cases is that the issue is inherently legal—too complicated for the lay juror to comprehend and decide. Unlike the *Gambert* court, the New York Supreme Court in *Gimbel* cited authority to support its decision to remove the issue from the jury.[51] Neither of the supporting cases, however, involved legal malpractice; both cases merely stand for the proposition that questions of foreign law which depend on the construction of statutes or judicial opinions of the foreign jurisdiction are questions of law for the court. The *Gimbel* court's reliance on these cases strengthens the inference that the rationale for removing the question of the attorney's negligence from the jury was based solely on the complexity of the legal issues.[52] Although the question of law approach has been seriously undermined by the recent case law,[53] apparently the negligence issue might still be decided by the court if the attorney acted on a so-called "esoteric problem" of law.[54]

677, 283 P. 871 (1929); Casner v. Gray, 54 Colo. 551, 131 P. 404 (1913); Gimbel v. Waldeman, 193 Misc. 758, 84 N.Y.S.2d 888 (Sup. Ct. 1948); Hill v. Mynatt, 59 S.W. 163 (Tenn. Ct. Ch. App. 1900). These cases represent a minority view that the negligence issue is a question of law for the court in a legal malpractice action. This is to be distinguished from the situation where the evidence is so overwhelmingly in favor of the defendant-attorney that a directed verdict in his favor is warranted. It is often difficult to determine which approach is being used by the court. *See* Note, *Standard of Care in Legal malpractice*, 43 IND. L.J. 771, 776 n.27 (1967).

[47]44 Cal. 542 (1872).

[48]*Id.* at 552.

[49]193 Misc. 758, 84 N.Y.S.2d 888 (Sup. Ct. 1948).

[50]*Id.* at 760, 84 N.Y.S.2d at 891 (emphasis added).

[51]Hanna v. Lichtenhein, 225 N.Y. 579, 122 N.E. 625 (1919); Bank of China, Japan & The Straits, Ltd. v. Morse, 168 N.Y. 458, 61 N.E. 774 (1901).

[52]Hill v. Mynatt, 59 S.W. 163 (Tenn. Ct. Ch. App. 1900), was also an action against an attorney in which the alleged negligence involved a debatable point of law. The court did not directly speak on the question of whether the issue was one for the jury or the court, but did in fact decide it as a matter of law, also applying the stated rationale by implication.

[53]*Gambert* was recognized but not followed in California until 1966, when it was overruled in Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966). The recent cases have all reiterated the overthrow of the question of law approach to the negligence issue in legal malpractice. *See, e.g.*, Frank H. Taylor & Son, Inc. v. Sheppard, 136 N.J. Super. 85, 344 A.2d 344 (1975); Grago v. Robertson, 49 App. Div. 2d 645, 370 N.Y.S.2d 255 (1975).

[54]*See* Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1961); Wright v. Williams, 47 Cal. App. 3d 802, 121 Cal. Rptr. 722 (Ct. Spec. App. 1975).

The practice of deciding negligence as a matter of law, peculiar to the field of legal malpractice, has been justified on the ground that since the judge is uniquely qualified in legal matters, the submission of the negligence issue to the jury would be superfluous.[55] However, since the jury resolves complicated issues of fact in other types of civil actions, there seems to be no compelling reason to treat the issue differently in legal malpractice.[56] Furthermore, since the courts which have used the question of law approach unanimously find in favor of the defendant-attorney, the removal of the negligence issue from the jury appears to be a subterfuge for limiting recovery in legal malpractice. The fact that in a majority of legal malpractice actions which reach litigation the defendant-attorney waives the right to jury trial also raises the inference that the court is considered a more sympathetic trier of fact from the attorney's standpoint.[57] In reality, the courts have failed to recognize that a mixed question of law and fact is involved.

Despite the fact that professionals must be accorded a degree of freedom in the exercise of their professional judgment, it does not follow that the attorney who errs on a debatable point of law should be unequivocally relieved of liability. Good faith has never been considered a defense in a negligence action, and the issue is decided by the jury in every other branch of tort law. Within the field of medical malpractice, the physician is often held liable despite the fact that he exercised his informed professional judgment in good faith.[58] At the first level is the determination that, as a matter of law, certain conduct does or does not constitute negligence. Then follows the determination whether the conduct in the case at hand does in *fact* meet the standard of care required. It is at this second level of analysis that courts have arrogated a jury function to themselves.

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[55]Note, *Standard of Care in Legal Malpractice,* 43 IND. L.J. 771, 777 (1967).

[56]More important, it is quite possible that judges, when not required to state the standard by which they measure attorney negligence, may begin to decide the issue according to their personal predispositions:

> Allocating responsibility between judge and jury in attorney malpractice suits raises questions even more delicate and complex than those presented in ordinary negligence cases, which normally involve mixed questions of law and fact. The nature of the relationship between bench and bar inevitably influences judicial attitudes. It is not entirely unrealistic to suppose that some judges who feel strongly about improving the legal profession may treat an erring attorney with excessive harshness. Moreover, since judges are constantly exposed to a wide range of legal issues, they may believe that they are uniquely qualified to evaluate the difficulty of the probelms that faced the defendant attorney.

Note, *Attorney Malpractice,* 63 COLUM. L. REV. 1292, 1306 (1963).

[57]Note, *Use of Expert Testimony in Attorney Malpractice Cases,* 15 HASTINGS L.J. 584, 586 (1964).

[58]*Lawyers' Malpractice, supra* note 5, at 888-89, suggests that the dichotomy between recovery in legal as opposed to medical malpractice is explained by the straightforward rationale that, since an attorney's mistake results in loss of money and property while a doctor's mistake results in loss of life and health, which occupy a higher position in the American value system, recovery in legal malpractice is less frequent. *See* note 78 *infra.*

A Solution to the Plaintiff-Client's Dilemma

Modified Res Ipsa Loquitur

Although the requirement that the plaintiff prove cause-in-fact certainly should not be abandoned in legal malpractice, its application might easily be modified to ease the unjustifiably harsh burden placed on the malpractice plaintiff when the alleged negligence involves a litigation error. Once the plaintiff shows (1) that an attorney-client relationship existed and (2) that the attorney negligently lost the original action through a litigation error, the burden of proof should shift to the defendant to show that the client's action was not meritorious. This shift in the burden of proof is suggested by the doctrine of res ipsa loquitur, but is a modified version of that doctrine as applied to an action in litigation malpractice.[59] The theory is appealing for several reasons. First, it satisfies the major policy underlying the cause-in-fact requirement—the dismissal of frivolous suits against innocent defendants. The plaintiff's suit is not frivolous when he is required to prove an attorney-client relationship, and the defendant is hardly innocent if the plaintiff can show loss or compromise of his action due to the attorney's conduct. These requirements, which would be placed on the plaintiff as conditions for invoking the modified res ipsa loquitur theory, would thus allow valid actions to reach litigation without significantly increasing the danger of an expansion in frivolous malpractice actions. Second, the burden of proof on the litigation malpractice plaintiff is reduced to a tolerable level; once the plaintiff has proved a casual connection between the defendant's conduct and the loss or compromise of his cause of action or appeal it is not unreasonable to require the defendant to bear that part of the burden of proof—that the original action was invalid—which represents an extension beyond that burden normally required of the plaintiff in a tort action. Third, shifting the burden of proof on causation to the defendant in nonmalpractice tort law is not novel,[60] and there is no compelling reason why the burden should not shift in this limited class of cases, where the litigation malpractice plaintiff can usually show that the defendant's negligence had some substantial connection with the loss of his cause of action, although he can seldom prove "but for" causation. Finally, acceptance of the client's case raises the presumption that the attorney, at least at one time, thought that the plaintiff's original action possessed merit.[61]

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[59]*See Lawyers' Malpractice, supra* note 5.

[60]*See, e.g.*, Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). Although the policy considerations in simple tort cases differ from those in legal malpractice cases, *Haft* and *Summers* are analogous to the extent that they stand for the proposition that the burden of proof on causation can shift when it is impossible or extremely difficult for the plaintiff who has been injured by a negligent defendant to bear the full burden of proof.

[61]In such a case, "it might not be too unreasonable to require the attorney to prove the lack of merit in the claim he encouraged his client to pursue." *Lawyers' Malpractice, supra* note 5, at 893.

Since the modified res ipsa loquitur theory merely shifts the burden of producing evidence to the defendant-attorney and does not affect the burden of persuasion, which always remains on the plaintiff, one criticism of the theory is that it will have little dispositive effect "except in the occasional situation in which the parties both avoid offering proof on the issue, hoping to prevail on the strict legal issue of who had the burden to proceed."[62] Even if this is so, the proposed shift would prevent many complaints against attorneys from being dismissed on the ground that they fail to state a cause of action since the litigation malpractice plaintiff would no longer be required to plead and prove the validity of the original cause of action. The burden of pleading this issue is also a psychological setback, making the party who must so plead enter the action as a loser; the plaintiff-client seldom has the evidence necessary to sustain the burden, whereas the attorney, who presumably has researched the original case, is more likely to have the depositions, documents and other evidence relating to the validity or invalidity of the original action. The knowledge that the burden of proof will shift if the plaintiff is able to prove a casual connection would also have the effect of increasing the number of settlements in this area. This is an especially desirable result in the category of litigation malpractice, where, as pointed out above, the defendant-attorney is usually negligent.

There is ample evidence that before legal malpractice was labeled tort and decided under that body of law that proposed shift in the burden of proof was the rule rather than the exception. In the case of *Fitch v. Scott,*[63] the attorney failed to bring suit on a promissory note placed in his hands for collection by a creditor, and thus surrendered the claim since the debtor subsequently became insolvent. The court held for the plaintiff creditor in the malpractice action, placing the burden of proof of showing that the action lacked merit on the defendant-attorney.[64] This result was also upheld in *Coopwood v. Wallace,*[65] where the court expressed the opinion that the attorney "became prima facie liable in an action on the case . . . which liability he could only discharge by showing, that a judgment . . . would have been unavailing and useless."[66] One nineteenth century treatise[67] laid down the rule that

> when negligence has been proved in consequence of which judgment has gone against the client, it is not incumbent on the client to show that but for the negligence he could have succeeded in the action. It is for the solicitor to defend himself if he can by showing that the client has not been hurt by his negligence.[68]

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[62] *Id.*
[63] 4 Miss. (3 Howard) 314 (1939).
[64] *Id.* at 320.
[65] 25 Miss. 129 (1852).
[66] *Id.* at 131.
[67] F. WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE (1874).
[68] *Id.*, § 752.

Recent cases have expressed a desire to abrogate the suit within a suit requirement and have in fact used several methods which create a presumption in favor of the plaintiff-client similar to that effected by the modified res ipsa loquitur approach of shifting the burden of proof. In *Walker v. Porter,*[69] the trial court granted the defendant-attorney a nonsuit because the plaintiff-client failed to prove which of three defendants in the underlying personal injury action was responsible. Although the court of appeals accepted the suit within a suit requirement, it nevertheless reversed:

> [T]he underlying facts surrounding the accident followed by [the plaintiff's] conference with [the attorney] proved, in our opinion, a prima facie case that one or more of the three potential defendants involved was legally responsible . . . . Appellant [plaintiff] was not required to meet this additional burden.[70]

In *Baker v. Beal,*[71] defendant-attorneys sacrificed their client's dram shop action to a two-year statute of limitations. The trial court in the malpractice action held for the defendants because the plaintiff failed to prove whether the defendant tavern in the original action was a licensee, which was a statutory prerequisite to the imposition of liability in the underlying action. The appellate court noted that the plaintiff had not challenged the suit within a suit requirement, but that no decision within the jurisdiction had directly held that rule to be the law.[72] The court then held that the plaintiff was "entitled to the same presumption defendants rely on in another context: everyone is presumed to discharge his duty, whether legal or moral, until the contrary is made to appear."[73] The *Baker* court thus appears to support the creation of a presumption in a litigation malpractice action that the underlying action was valid on a bare showing of the existence of the attorney-client relationship.

In *Smith v. Lewis*[74] an attorney handling a divorce action failed to recognize that his client had a community interest in some of her husband's property and consequently failed to assert a valid claim in the uncontested divorce action; the jury in the malpractice action awarded $100,000 damages. The Supreme Court of California, sitting en banc, affirmed and stated in a footnote:

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[69]44 Cal. App. 3d 174, 118 Cal. Rptr. 468 (1974).

[70]*Id.* at 178, 118 Cal. Rptr. at 470.

[71]225 N.W.2d 106 (Iowa 1975).

[72]*Id.* at 106.

[73]*Id.* at 110. It is interesting to note that this part of the court's language evolved from the Illinois case of Priest v. Dodsworth, 235 Ill. 613, 85 N.E. 940 (1908), cited in Olson v. North, 276 Ill. App. 457 (1934), to rule that the doctrine of res ipsa loquitur should not be applied in legal malpractice actions.

[74]13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

> Whether defendant's negligence was a cause in fact of plaintiff's damage—an element of proximate cause—is a factual question for the jury to resolve. . . . Here the jury was correctly instructed that plaintiff had the burden of proving, inter alia, that defendant's negligence was a proximate cause of the damage suffered . . . . [W]e see no reason on the present record to disturb the jury's implied finding of proximate cause.[75]

The California Supreme Court therefore seems to feel that in a litigation malpractice action the plaintiff need not bear the burden of proving that the claim was in fact valid, a crucial part of the suit within a suit requirement. That the attorney caused the malpractice plaintiff's harm is presumed from a jury determination of negligence. Legal writers who have analyzed *Smith* have expressed fear of an enormous increase in legal malpractice liability: "If indeed *Smith* has abrogated the rigorous 'suit within a suit' requirement, the bifurcated defense that attorneys have long employed to avoid successful legal malpractice litigation will have been eliminated in California."[76] One writer, in fact, suggests that "[t]his inroad on the 'suit within a suit' requirement could very well transform what we now know as a negligence action into one approaching absolute liability."[77] Although these fears are for the most part unfounded since the plaintiff in each of the foregoing cases had proved negligence, displeasure with the suit requirement and haphazard judicial attempts to circumvent it could well result in patchwork solutions to the legal malpractice causation problem.

The modified res ipsa loquitur theory raises a rebuttable presumption that the underlying action was valid. Once the plaintiff has shown a causal connection between the defendant's negligence and the loss of his action, the defendant-attorney has the burden of showing that plaintiff's claim was not meritorious. Unlike the suit within a suit requirement, modified res ipsa loquitur has a sound basis in history and accords with the policies of deterrence and shifting of loss; its application would result in more reasonable settlements for the wronged client and, since the plaintiff must still prove negligence, it would also increase the quality of legal services without creating a serious increase in frivolous suits.

The Imposition of a Duty to Perform Reasonable Research

In order to bring legal malpractice in line with other forms of malpractice, the court should submit the negligence issue to the jury under an objective standard of care.[78] In a legal malpractice action involving the

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[75]*Id.* at 361 n.9, 530 P.2d at 597 n.9, 118 Cal. Rptr. at 629 n.9.

[76]Note, *Legal Malpractice—Erosion of the Traditional Suit Within a Suit Requirement*, 7 TOL. L. REV. 328, 339 (1975).

[77]Shayne & Dachs, *Legal Malpractice—The Rising Cost of the Error of Our Ways*, 25 DEF. L.J. 425, 437 (1976).

[78]*Compare* Peterson v. Carter, 182 F. Supp. 393 (W.D. Wis. 1960), where the traditional medical malpractice standard of care is described:

attorney's failure to discover or correctly apply the applicable law, negligence should be determined by such factors as the extent of a statute's recognized applicability by other attorneys, the number and weight of the cases which the defendant overlooked and their dates of decision relative to the time of his alleged negligent conduct. The jury is competent to weigh the evidence relating to such factors and to determine whether the attorney exercised the skill and ability ordinarily exercised by legal practitioners, especially since expert testimony is admissible on this issue.[79] A suggested jury instruction which sets forth an objective standard of care could be worded as follows:

> Under our system of jurisprudence, an attorney is considered negligent if he breaches any duty owed to his client. The attorney's primary duty to his client requires him to exercise the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession. If you conclude that the evidence in this case indicates that this defendant's conduct fell below this standard, you are to find for the plaintiff on the issue of negligence.

This instruction contains no subjective factors thus minimizing the judicial interference but not the jury's determination of negligence, and restoring the mixed question of law and fact approach which is used in all other branches of tort law to resolve the issue of negligence.

In addition to the consistent use of an objective standard of care, an additional jury instruction which sets forth explicitly the attorney's duty to perform a reasonable degree of research should also be included so as to clarify the duty and produce judicial consistency. There is support for this approach in recent case law. In *Smith v. Lewis*,[80] the court stated:

> [A] physician or surgeon called to prescribe and professionally treat a patient is bound to bring to his aid and relief such care the skill as is ordinarily possessed and used by physicians and surgeons of the same system or school of practice, in the vicinity or locality in which the physician resides, having reference to the advanced state of medical or surgical science at the time.

Id. at 394. This standard, unlike that often given in legal malpractice actions, is totally objective and therefore does not interfere with the jury function of determining the negligence issue.

[79] *See generally* Annot., 17 A.L.R. 3d 1442 (1968). Unfortunately, there is some support in the literature, *see, e.g.*, Note, *Use of Expert Testimony in Attorney Malpractice Cases*, 15 HASTINGS L.J. 584 (1964); Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771 (1967), and in the case law, *see, e.g.*, Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966); Olson v. North, 276 Ill. App. 457 (1934), for the principle which *requires* the plaintiff in a legal malpractice action to produce expert testimony in order to avoid a direct verdict in favor of the defendant or the entry of a nonsuit. As one commentator has pointed out,

> [i]t would be overly optimistic to think that the difficulty in obtaining expert testimony will be less prevalent among attorneys than it is among physicians. When the "conspiracy of silence" is coupled with the client's problem in finding a lawyer who is willing to sue his brethren, it can only be concluded that litigation in this area will be an inadequate and speculative remedy.

Wallach & Kelley, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA LAW. 257, 265-66 (1970).

[80] 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

> [E]ven with respect to an unsettled area of the law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.[81]

It is not yet known whether the duty imposed by the California Supreme Court will be generally adopted, but this aspect of *Smith* has been followed in other California decisions.[82] It has been said that *Smith* has greatly restricted the "unsettled area of the law" category and that, as a result, the attorney will no longer be excused from liability "unless he can affirmatively show that he thoroughly researched all facets of the question related to that area."[83]

A jury instruction suggested for the imposition of the duty to perform reasonable research is as follows:

> The attorney's duty to his client also requires him to perform a reasonable degree of research in attempting to ascertain the legal principles applicable to his client's action. If you conclude that the evidence indicates that the defendant did not make a reasonable effort to ascertain the law applicable to his client's action, you are to find for the plaintiff on the issue of negligence.

Under this instruction, the jury will weigh the factors relevant to the resolution of this issue free of judicial interference. The imposition of this duty will unquestionably have a deterrent effect on those attorneys who accept actions which they do not have time to research adequately; the result could only be higher quality legal services, certainly a desirable end.

The Imposition of a Duty to Inform the Client

In cases where the attorney performs reasonable research and yet makes a good faith error of professional judgment, the determination of negligence is within the competence of the jury. Here too the mixed question of law and fact approach to negligence should be restored by the consistent submission of the negligence issue to jury under an objective standard of care. Most important, expert testimony is admissible, and the issue whether action taken or advice rendered by the attorney violates professional standards of care is factual.

An attorney must be allowed to exercise his informed judgment within a questionable area of law without fear of liability. Nevertheless, because

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[81] *Id.* at 359, 530 P.2d at 595, 118 Cal. Rptr. at 627.

[82] *See, e.g.*, Wright v. Williams, 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 722, 729 (Ct. Spec. App. 1975): "The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment."

[83] Note, *Legal Malpractice—Erosion of the Traditional Suit Within a Suit Requirement*, 7 TOL. L. REV. 328, 336-37 (1975).

in some cases his judgment might not meet the standard of the profession, a possible compromise would be to impose upon an attorney a duty to inform the client that the legal point is a fine one and to advise him of the ramifications of various courses of conduct; the client might then decide to accept the consequences of his attorney's decision or to obtain a second opinion. The attorney could easily satisfy this requirement by submitting to his client an explanation of the legal problem, the consequences of the various alternative ways of approaching the problem, and his informed judgment of the proper course of conduct. The client could then either accept this judgment or order his attorney to pursue one of the alternative courses of conduct; the client's decision would be embodied in a letter or other written document which he would sign.[84] The requirement to inform the patient has long been imposed on the medical practitioner,[85] and there seems to be no logical reason for treating the attorney differently. Imposing a duty to inform the client in situations where the attorney must act on an unsettled question of law would have the effect of resolving this category of actions by means of contributory negligence or of the assumption of the risk doctrine.[86]

A jury instruction which would adequately explain the attorney's duty to inform his client could be worded as follows:

> An attorney is not required to insure the results of his labor, and he is not considered liable for every mistake which he makes in the course of his work. Nevertheless, neither the difficulty of the legal point nor a good faith effort on the part of the attorney is sufficient to exculpate him from negligent conduct. In cases where the attorney must act on an area of the law which is unsettled, he has a duty to give reasonable notice to his client of the possible consequences of the attorney's action in light of the legal circumstances so that the client may direct the attorney's action on the subject or seek a second opinion. Thus, if the defendant claims nonculpability based on the difficulty of the legal point or its unsettled character, and yet you conclude that the evidence indicates that he did not give his client reasonable notice of that fact, you should nevertheless find for the plaintiff on the issue of negligence.

This instruction informs the jury that the attorney is not to be held liable under all circumstances, but does not emphasize that point; when combined with an objective standard of care, this instruction would provide the plaintiff some degree of protection in situations where the attorney normally prevails on a mere showing of good faith. The notice

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[84]*See* Shayne & Dachs, *Legal Malpractice—The Rising Cost of the Error of Our Ways*, 25 DEF. L.J. 425, 428 (1976), where it is suggested that such increased communication with the client is a painless and effective method of avoiding legal malpractice actions.

[85]*See generally* Plante, *An Analysis of "Informed Consent"*, 36 FORDHAM L. REV. 639 (1968).

[86]For general information and cases respecting the defense of contributory negligence in a legal malpractice action, see Annot., 45 A.L.R.2d 5, 17-18 (1956).

requirement is an equitable compromise in this area of legal malpractice, since the attorney is given an opportunity to obtain his client's approval on a course of conduct and thereby escape liability. Since the instruction would be given only in the situation where the attorney asserts that he was not negligent because of the unsettled state of the law, and since the instruction would be combined with the jury instruction containing an objective standard of care, the jury would be able to determine the negligence issue free of judicial arrogation of the question of fact.

CONCLUSION

Courts seem to have developed unstated yet effective methods of increasing the recovery burden for the legal malpractice plaintiff; whether these methods are justifiable depends on whether one emphasizes policy rather than doctrine in the resolution of negligence actions against attorneys. The suit within a suit requirement and the subjectification of the standard of care for instance, rules which favor the defendant-attorney, are supported by the doctrines of causation and fault respectively, the former because the plaintiff in a negligence action is required to prove cause-in-fact, and the latter because the doctrine of fault suggests that a purely objective standard of care is sometimes harsh on defendants who are incapable of adhering to it. Nevertheless, legal malpractice is an aberration in many respects from the nonmalpractice negligence action, and there are convincing arguments that the present approach to malpractice, which favors attorneys, should be modified to further policies such as deterrence and shifting of the loss. Artificially limiting recovery in legal malpractice not only discourages valid suits against attorneys, thereby giving them unjustifiable differential treatment, it also encourages a quality of advocacy not consistent with the profession's standards. The policy of deterring negligent professional conduct supports the premise that legal malpractice liability should be extended. Moreover, since more attorneys are insured at present than ever before,[87] the policy of shifting the loss for negligent conduct to the party best able to insure against it also cuts in favor of an increase in legal malpractice liability.

Although various alternative methods have been suggested for the proper handling of legal malpractice claims,[88] it seems clear that the most feasible solution would involve the modification of the present strict doctrinal approach within the existing framework of the law of legal

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[87]*See* note 8 *supra.*

[88]*See, e.g.*, Wallach & Kelley, *Attorney Malpractice in California: A Shaky Citadel,* 10 SANTA CLARA LAW. 257, 269-72 (1970), suggesting an elaborate and expensive system based on the implementation of an impartial review panel for legal malpractice claims. This system is obviously premised on the impartiality of a panel of attorneys, and would seem to raise the same objections as were raised in considering whether the issue of negligence is a question of law for the court. There is as yet no empirical data on the effectiveness of similar systems now is use for the review of medical malpractice claims.

malpractice. These modifications would include the adoption of the modified res ipsa loquitur theory and the consistent submission of the negligence issue to the jury under an objective standard of care. In addition, the jury should be explicitly advised as to the duties owed by the attorney to his client, including the duty to properly research his client's action and the duty to inform the client in the case where the attorney must act on an unsettled area of law. The proposed modifications in the approach to legal malpractice will result in more equitable results which are consistent with the stated policy goals. If the profession is to improve its overall image and provide increasingly competent legal service to the general public, the negligent attorney must be held accountable for his failure to meet the standards of the legal community.

KENNETH G. LUPO