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Standard of Care in Legal Malpractice

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NOTES

STANDARD OF CARE IN LEGAL MALPRACTICE

In recent years, legal malpractice has become a subject of increasing concern to the legal profession. The ambit of potential liability which awaits the negligent attorney has under gone a significant expansion. That an attorney would be liable to his client for the direct consequences of his own negligent legal practice has long been established.[1] In fact, legal malpractice was one of the earliest forms of professional negligence recognized by the courts.[2] Until recently, however, the concept of privity of contract limited the attorney's liability to the pecuniary losses suffered by his client.[3] In 1962, as part of the continuing assault on the requirement of privity, the Supreme Court of California noted that an attorney would be liable to third persons who suffered economic losses as a proximate result of his negligent legal practice.[4] While the precise limits of the liabilities of an attorney to third parties are not yet clear, it is apparent that liability for legal malpractice has assumed a new dimension.

In addition to this expansion of potential liability, the rapidly changing character of legal practice has produced significant problems even in the traditional areas of liability. The increasing complexity of the law, the development of specialization, the diversity of services which clients expect, and perhaps the sheer volume of laws, all serve to increase the likelihood that errors will occur, and concomitantly to increase demands by clients for a more protective measure of professional conduct.[5] Furthermore, the increasing availability of malpractice insurance diminishes the reluctance of clients and their attorneys to institute malpractice suits. However, the threat of being sued for malpractcie may act as an unwholesome restraint on the creative energies of the practicing

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1. *See, e.g.*, Pitt v. Yalden, 4 Burr. 2060, 98 Eng. Rep. 74 (K.B. 1767); Russell v. Palmer, 2 Wils. K.B. 325, 98 Eng. Rep. 837 (K.B. 1767); Adams v. Ward, —Winch 91, 124 Eng. Rep. 76 (C.P. 1625).

2. *Id.;* Lamphier v. Phipos, 8 Car. & P. 475, 173 Eng. Rep. 581 (N.P. 1838).

3. *See* National Sav. Bank v. Ward, 100 U.S. 195 (1879); Buckley v. Gray, 110 Cal. 339, 42 P. 900 (1895); Kendall v. Rogers, 181 Md. 606, 31 A.2d 312 (1943).

4. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962). *See also* Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (overruling Buckley v. Gray, 110 Cal. 339, 42 P. 900 (1895)).

5. Cantrall, *A Country Lawyer Looks at 'Specialization'*, 48 A.B.A.J. 1117 (1962); Joiner, *Specialization in Law? The Medical Profession Shows the Way*, 39 A.B.A.J. 539 (1953); Meehan, *Careless Lawyers and Careworn Third Parties*, 28 BRKLYN. L. REV. 99 (1961).

attorney, not merely because of the damages he may be forced to pay, but also because of the injury to his professional reputation that such suits are likely to bring even if he is found not liable. Consequently, the area of legal malpractice deserves constant re-evaluation.

The single most significant factor in malpractice generally, and in legal malpractice particularly, is the concept of due care. The attorney must apply to himself, as the minimum guage of his actions, the standard of care used to define liability for malpractice; it is through this concept that the social policies defining the incidence of legal liability are expressed when he fails to meet the minimum standard of care. The purpose of this Note is to analyze the various factors in the currently articulated standard of care applicable in legal malpractice actions, and to assess the adequacy of those factors in view of the current status of the legal profession.

THE MEDICAL—LEGAL MALPRACTICE ANALOGY

The expansion of legal malpractice has been predicated on a supposed similarity between the legal and medical professions; basing their reasoning on this supposed similarity, courts frequently and uncritically conclude that the rules governing legal and medical malpractice are idential. Emblematic of this view is the leading Indiana case on legal malpractice, *Citizens' Loan, Fund & Savings Ass'n v. Friedley*:

> [a]ttorneys are very properly held to the same rules of liability for want of professional skill and diligence in practice, and for erronious or negligent advice to those who employ them, as are physicians and surgeons and other persons who hold themselves out to the world as possessing skill and qualifications in their respective trades or professions.[6]

Since courts have adopted this method of analogy for determinnig legal malpractice rules, the medical malpractice concept of due care can serve as a comparative touchstone for development of this Note. However, since the courts have asserted the analogy without analyzing the professions to determine the limits of utility of the analogy, special notice must be taken of differences in treatment of malpractice in the two professions.[7]

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6. 123 Ind. 143, 145, 23 N.E. 1075, 1076 (1889). *Accord,* Theobald v. Byers, 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864, 866 (1961); Slade v. Harris, 105 Conn. 436, 442, 135 A. 570, 572 (1927); Olson v. North, 276 Ill. App. 457, 475 (1934); Cook v. Irlon, 409 S.W.2d 475, 477 (Tex. Civ. App. 1966).

7. In all cases reviewed, the court merely asserted the existence of the analogy and proceeded to adopt the "analogous" rule from medical malpractice; no court provided analysis of the professions or a discussion of the proper limits of the rationale of the analogy. *See, e.g.,* Wimsatt v. Haydon Oil Co., 414 S.W.2d 908 (Ky. App. 1967); cases cited note 6 *supra.*

THE PROFESSIONAL STANDARD OF CARE

The elements necessary to establish a prima facie case of medical or legal malpractice are the same as those necessary to state a cause of action for ordinary, non-professional negligence:[8] a duty of care owed by the defendant to the plaintiff, a breach of that duty, and injury to the plaintiff as a proximate result of the breach.[9] In non-professional negligence actions, the standard of care by which the defendant's duty is defined is stated in terms of the conduct expected of a hypothetical reasonably prudent man under circumstances similar to those which confronted the defendant.[10] When the negligence alleged lies in the breach of a duty of professional care, however, the defendant's duty is defined by the profession to which he belongs in terms of the minimum quality of professional conduct "customarily" provided by the members of that profession. Thus, in an action for professional malpractice, the test of fault or breach of duty is not determined by reference to the traditional reasonable man standard, but by the degree of departure from customary professional conduct.[11] The custom-departure standard of care recognizes that, where specialized skills and knowledge are involved, jurors are not competent to implement a standard of care by reference to their own experience and knowledge as reasonable men. Moreover, the self-evaluative nature of a test based on customary professional conduct protects the profession from the potentially destructive propensities of any different criteria for liability which did not reflect the peculiar needs of the profession to have the proper allocation of risks between the attorney and his client.[12] The reasonably prudent man test might sacrifice the pro-

8. Professional negligence is generally termed "malpractice," and the words are used interchangeably in this Note. The connotations of "malpractice" in the public mind make it peculiarly unfortunate as a descriptive adjective.

9. Ishmael v. Millington, 243 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Eckert v. Schaal, 58 Cal. Rptr. 817 (Cal. App. 1967).

10. Blyth v. Birmingham Waterworks Co., 11 Ex. 781, 782, 156 Eng. Rep. 1047, 1049 (1856): "Negligence is the ommission to do something which a reasonable man, guided upon those considerations which oridnarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

11. *See, e.g.*, Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964); Leverman v. Cartall, 393 S.W.2d 931 (Tex. Civ. App. 1965); W. MORRIS, MORRIS ON TORTS § 4 at 59 (1953); W. PROSSER, LAW OF TORTS § 32 at 164-68 (3d ed. 1964).

12. W. MORRIS, *supra* note 11, at 60. *See also* Curran, *Professional Negligence—Some General Comments*, in PROFESSIONAL NEGLIGENCE 3-4 (Roady & Anderson ed. 1960). The custom-departure approach is well stated in Carbone v. Warburton, 22 N.J. Super. 5, 6, 91 A.2d 518, 520 (1952): "When a physician is charged with negligence in the diagnosis and treatment of a patient's condition, it must appear that he departed from the degree of skill required of him. And, in order to demonstrate this ultimate fact two elements of proof are essential. First those standards must be established which are generally recognized and accepted by the branch of the profession to which he belongs as the customary and proper methods of diagnosis or treatment of the physical or mental conditions concerned in the inquiry. Secondly, a departure from such standards under circumstances justifying the conclusion of want of the requisite degree of care."

fessional reputations of competent attorneys or physicians on the altar of an advocacy which, instead of serving to identify professional irresponsibility, merely favored disgruntled lay victims.

The standard of care generally articulated in medical malpractice was well stated in a recent case, *Peterson v. Carter*:[13]

> [the law is] that a physician or surgeon called to prescribe and professionally treat a patient is bound to bring to his aid and relief such care and 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.

Thus a physician is negligent when his patient suffers because of some departure by the physician from the customary practices of physicians in the community.

A concise general statement of the standard of care applicable in legal malpractice actions is that in *Hodges v. Carter*:[14]

> [o]rdinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill and ability necessary to the practice of his profession and which others simliarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) 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.

While the formulation of the general standard of care applicable in medical malpractice has become relatively fixed,[15] in legal malpractice it remains chameleonic. It has been said that an attorney is negligent if he does not possess and use "such skill, prudence, and diligence as lawyers of *ordinary skill and capacity* commonly possess and exercise."[16] Again, a

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See also Correll v. Goodfellow, 255 Iowa 1237, 125 N.W.2d 745 (1964); Rule v. Cheeseman, 181 Kan. 957, 317 P.2d 472 (1957); Artist v. Butterweek, 426 P.2d 559 (Colo. 1967).

13. 182 F. Supp. 393, 394 (W.D. Wis. 1960). *Accord,* Ayers v. Parry, 192 F.2d 181, 184 (3d Cir. 1951), *cert. denied,* 343 U.S. 980 (1952). *See generally* McCoid, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549 (1959).

14. 239 N.C. 517, 520, 80 S.E.2d 144, 145-46 (1954). *Accord,* Spangler v. Sellers, 5 F. 882, 887 (C.C.S.D. Ohio 1881); Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 145, 23 N.E. 1075, 1076 (1889).

15. McCoid, *supra* note 13, at 558-59; W. MORRIS, *supra* note 11, at 59-60.

16. Theobald v. Byers, 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864, 865 (1961) (emphasis added).

client "has a right to . . . *a fair average degree* of professional skill and knowledge."[17] One court held an attorney negligent when he failed to use the skill and diligence ordinarily possessed by *"well informed members* of the profession,"[18] but another said that "the skill and diligence required of an attorney is such as *a man of ordinary prudence* gives to his own business."[19] Apparently the courts are not certain of the qualities of the jural referent in legal malpractice actions.

Viewing *Peterson* and *Hodges* as representative statements, the medical-legal analogy is clearly operative at this basic level. Both standards are purportedly objective, since each depends on what other members of the profession would have done under circumstances similar to those which confronted the defendant. This accords with the objectivity of the reasonably prudent man test in non-professional negilgence. In each case, objectivity is achieved through the self-evaluative technique of determining customary professional conduct in similar circumstances, and holding the defendant liable only for a deviation from that custom. Both medical and legal standards of care also include a subjective element in the requirement that the defendant exercise his own best judgment and act to the best of his personal abilities.[20] It is this subjective element of looking at the personal abilities and knowledge of the defendant that is not paralleled in non-professional negligence.[21] It is equally apparent from *Peterson* and *Hodges,* however, that there are dissimilarities between the general standards applicable to the two professions. On its face, the medical standard is more particularized, since the locality of practice and "system or school" elements are not present in the legal standard.

Juxtaposing general statements from legal and medical malpractice cases of the applicable standards of care is of little analytic value, however, since the statements provide no indication of the factual situations which may result in liability. Each standard is merely the statement of a methodology to be utilized in determining whether or not particular conduct sufficiently deviated from acceptable professional conduct to warrant the imposition of legal liability. The viability of each standard, its adequacy to balance interests of the profession and the client, depends

17. Cochrane v. Little, 71 Md. 323, 326, 18 A. 698, 701 (1889) (emphasis added).

18. Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 146, 23 N.E. 1075, 1076 (1889) (emphasis added); Roehl v. Ralph, 84 S.W.2d 405, 409 (Mo. App. 1935).

19. Williams v. Knox, 10 N.J. Super. 384, 385, 76 A.2d 712, 715 (1950) (emphasis added).

20. *See, e.g., In re* Watts, 190 U.S. 1 (1903); National Sav. Bank v. Ward, 100 U.S. 195 (1879); Palmer v. Nissen, 256 F. Supp. 497 (S.D. Me. 1966); Hill v. Mynatt, 59 S.W. 163 (Tenn. Ct. Ch. App. 1900).

21. *See, e.g.,* The *Germanic,* 196 U.S. 589 (1904); Vaughan v. Menlove, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (1837).

on application of the standard to specific fact situations. Effective particularization of the standard thus becomes of paramount significance.

Initially, it is essential to determine to whom the materials used to particularize the standard of care are to be directed, since the character and qualifications of the recipent bear significantly upon the nature of the materials themselves. In medical malpractice, the principle is firmly established that the determination of the ultimate fact of negligence is a function of the jury, under proper instructions from the court.[22] Thus it is laymen who measure the defendant's conduct against the standard of care, and the materials used to particularize the standard must be directed toward them.

In legal malpractice, however, there is a conflict among jurisdictions as to whether the determination of negligence is a function of the jurors or of the judge. The leading case in California, *Gambert v. Hart*,[23] held that whether or not an attorney's conduct was "negligent" was a question of law to be decided by the judge. Although the jury continued to perform the function of determining the "facts," "[w]hen the facts are ascertained, the question of negligence or want of skill is a question of law for the court."[24] Although one writer has termed *Gambert v. Hart* a "rare anomoly,"[25] no California case to the contrary has been found and, indeed, recent California cases have reaffirmed the quetsion of law approach.[26] Although distinctively a minority position, the question of law approach occasionally has been adopted by other jurisdictions.[27]

In a majority of states, whether an attorney's conduct was negligent is a question of fact for the jury, just as in medical malpractice. The

22. *See, e.g.*, Estrada v. Orwitz, 75 Cal. App. 2d 54, 170 P.2d 43 (1946) (dentist); Norton v. Hamilton, 92 Ga. App. 727, 89 S.E.2d 809 (1955) (physician); Barnes v. Mitchell, 34 Mich, 7, 67 N.W.2d 208 (1954) (chiropractor). Of course, where reasonable men could not disagree on the facts, the issues may be decided as matters of law. Robinson v. Ferguson, 107 Ind. App. 107, 22 N.W.2d 901 (1939).

23. 44 Cal. 542 (1872). *But cf.*, Note, *Use of Expert Testimony in Malpractice Cases*, 15 HAST. L. Rev. 584 (1964).

24. Gambert v. Hart, 44 Cal. 542, 552 (1872).

25. *See generally* Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959).

26. *See* Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); Armstrong v. Adams, 102 Cal. App. 677, 283 P. 871 (1929). *But see* Floro v. Lawton, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960) (using both the question of law and question of fact approaches, leaving California law confused).

27. *See, e.g.*, Casner v. Gray, 54 Colo. 551, 131 P. 404 (1913); Hillegass' Adm'r v. Bender, 78 Ind. 225 (1881); Gimbel v. Waldman, 193 Misc. 758, 84 N.Y.S.2d 888 (Sup. Ct. 1948). Of course, it is often impossible to distinguish when a court is adopting a question of law approach and when it is ruling that, as a matter of law, the evidence on one side or the other is indisputable, so that there is no fact question. The ambiguity of the law-fact distinction contributes much to the confuison in legal malpractice betweeen the proper functions of judge and jury.

majority view is well stated in *Cochrane v. Little*:[28]

> [i]n actions of this character against attorneys, it is the duty of the court to instruct the jury for what species and degree of negligence or want of skill the defendant is properly answerable and what duty is imposed upon him by law, and leave them to determine, upon all the facts and circumstances of the case, whether the defendant has performed his duty, and if not, whether the negligence or want of skill was of a character or degree such as to render him liable. according to the definitions furnished by the instructions of the court.

It is not difficult to discover the rationale behind the question of law approach. The judge, it is argued, being an attorney and skilled in the law, is better qualified than lay-jurors to determine whether the defendant was negligent. Moreover, the expertise of the judge in legal matters provides a logical basis for a unique treatment of legal malpractice, since the judge does not have special knowledge and skill in other professions.[29] An ancillary argument might be that the court, without the aid of a jury, traditionally controls the conduct of attorneys as officers of the court and, arguably, legal malpractice is sufficiently related to these other controls to warrant similar treatment.[30]

There are, however, a number of negative factors inherent in the question of law approach. First, if the judge performs the function of determining the fact of negligence, he may, out of fraternal concern for the bar, apply the standard of care too leniently, or he may, out of zeal to improve the bar, apply the standard too harshly. In the former case, the close professional association of bench and bar may lead the public to view the result as judicial favoritism.[31] Finally, the fact that the judge

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28. 71 Md. 323, 326, 18 A. 698, 701 (1889). *Accord*, Walker v. Goodman & Mitchell, 21 Ala. 647 (1852); Slade v. Harris, 105 Conn. 436, 135 A. 570 (1927); Glenn v. Haynes, 191 Va. 574, 66 S.E.2d 509 (1951).

29. *See* Floro v. Lawton, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960); Gambert v. Hart, 44 Cal. 542 (1872). The proposition is supported by some commentators: Weiner, *The Civil Jury Trial and Law-Fact Distinctions*, 54 CALIF. L. REV. 1867, 1894 (1966); Comment, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1306 (1963).

30. Judicial control of attorneys as officers of the court includes many facets of legal practice. *See, e.g.*, Hicks v. Hicks, 58 Cal. Rptr. 63 (Cal. App. 1967) (setting attorney's fee); Ratterman v. Stapleton, 371 S.W.2d 939 (Ky. App. 1963) (establihsing rules and regulations for attorneys); *In re* Williams, 239 Minn. 530, 83 N.W.2d 115 (1957) (negligent legal practice as grounds for disbarment of attorney); New Jersey Bar Ass'n v. Northern N.J. Mortgage Ass'n, 55 N.J. Super. 230, 150 A.2d 496 (1964) (admission to practice).

31. Even under the majority approach, the relation of bench to bar provides ample opportunity for unwarranted intrusions by the judge into matters tradtiionally left to the jury. *See* Weiner, *supra* note 30, at 1194-95. It is interesting to note that the recent expansoin of liability was initiated by the one state which has consistently given the judge a larger role in legal malpractice cases: Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert denied*, 368 U.S. 987 (1962).

may be qualified to determine the question of negligence does not necessarily make it appropriate for him to do so. The private knowledge of a judge is generally not regarded as an adequate substitute for proof through evidence provided by the parties.[32] Since the standard of care is based on custom, even the judge, perhaps unaware of the prevailing custom among practitioners, may require the assistance of expert testimony. If jurors are competent to judge the conduct of dentists, physicians, surgeons, and architects, they should be equally competent to judge the conduct of an attorney. Furthermore, allowing the jury to determine the fact of negligence in legal malpractice actions has the advantage of minimizing judicial interferences with a traditional jury function. Since jury determination is consistent with the general body of malpractice law, the possible favoritism of the judge for the defendant-attorney is minimized.

The majority approach is not, however, free from disadvantages. The knowledge and expertise of the judge does make him an inviting substitute for a panel of lay-jurors. The danger in the majority approach is that the jury may be permitted to make an uninformed determination based upon their own, non-legal, experiences. It is essential to the proper functioning of the majority approach that the jury be made aware, through testimony of those who are experienced in legal practices, what the customs and practices of the profession would require in the circumstances which confronted the defendant. Only when the standard of care is stated in terms understandable to the average juror and referring to the particular conduct of the defendant can the standard be utilized by the jurors to make an intelligent assessment of the defendant's conduct.

Since liability for professional malpractice is based on the theory that the average member of the profession would not have acted as the defendant, the conduct of the average professional person—the professional "custom"—is of crucial importance to the jurors. In medical malpractice, the principle is well settled that, except for cases clearly within the layman's experience,[33] testimony by other physicians is essential to establish a prima facie case.[34] If the plaintiff fails to bring forward such evidence, the court will direct a judgment for the defendant-physician because the jury cannot rationally apply the general statement of the standard of care unless it is made aware of what the average

32. *See, e.g.,* Gibson v. Von Glahn Hotel Co., 185 N.Y.S. 154 (Sup. Ct. 1920); Darnell v. Baker, 179 Va. 86, 18 S.E.2d 271, syl. 3-5 (1942).

33. Stallcup v. Coscarat, 79 Ariz. 42, 282 P.2d 791 (1955); Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604 (1944); Graham v. St. Luke's Hosp., 46 Ill.App. 2d 147, 196 N.E.2d 355 (1964).

34. Ayers v. Parry, 192 F.2d 181 (3d Cir. 1951), *cert. denied,* 343 U.S. 980 (1952); Boyce v. Brown, 51 Ariz. 416, 77 P.2d 3 (1949); Robinson v. Ferguson, 107 Ind. App. 107, 22 N.E.2d 901 (1939).

physician would have done under a concrete set of circumstances and the jury cannot be permitted to speculate about what is customary medical treatment.[35] Testimony as to professional custom is also required in malpractice actions against dentists, architects, and other professionals.[36]

In an action for legal malpractice, however, the plaintiff is not required to present testimony by other attorneys on the customary practices of the profession in order to establish a prima facie case.[37] Albeit the opinions of other attorneys have been held admissible,[38] they are rarely utilized. The vast majority of reported cases do not mention testimony by other attorneys and, where such testimony does appear, it has usually been offered by the defendant in formulating his defense.[39] Only two cases have been discovered which unequivocally place the initial burden of going forward with expert testimony on the plaintiff.[40] The net effect of not requiring the plaintiff in a legal malpractice action to present expert testimony to establish a prima facie case is to shift the burden of presenting such evidence to the defendant. This recognizes that, realistically, a malpractice action involves a trial of both the attorney's liability for a particular act and his professional reputation. Since the desire to protect and vindicate his reputation lies heavily upon the defendant, he may feel compelled to present expert testimony in his defense even though the plaintiff has not established a prima facie case. The availability and use of a directed verdict or non-suit might relieve the defendant of legal liabilities but would not necessarily vindicate his reputation in the eyes of the profession or of the public.

There appears to be no articulated rationale for the unique treatment of expert testimony in legal malpractice nor for the concomitant shifting of the burden of going foraward with expert testimony. In states using the question of law approach, it may be logically consistent not to require

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35. *See, e.g.*, Reese v. Smith, 9 Cal. 2d 324, 70 P.2d 933 (1937).

36. Stallcup v. Coscarat, 79 Ariz. 42, 282 P.2d 791 (1955) (dentist); Paxton v. County of Alameda, 119 Cal. App. 2d 393, 259 P.2d 934 (1953) (architect); Tremblay v. Kimball, 107 Me. 53, 77 A. 405 (1910) (pharmacist).

37. Goodman v. Walker, 30 Ala. 482 (1857) (testimony that defendant had consulted a "distinguished attorney" and the distinguished attorney's opinion of defendant's actions was excluded); Gambert v. Hart, 44 Cal. 542 (1872); Gimbel v. Waldman, 84 N.Y.S.2d 888 (Sup. Ct. 1948); Livingston v. Cox, 8 Watts & S. 61 (Pa. 1844).

38. *See, e.g.*, Rhine v. Haley, 238 Ark. 72, 378 S.W.2d 655 (1964); Automobile Underwriters v. Smith, 131 Ind. App. 454, 166 N.E.2d 341 (1960); Cochrane v. Little, 71 Md. 323, 18 A. 698 (1889).

39. Olson v. North, 276 Ill. App. 457 (1934) is apparently the only case reported in which testimony by other attorneys played a significant role in framing the applicable standard; all twelve witnesses were presented by the defendant to show the professional acceptability of his conduct. Plaintiff presented no experts. *See also* Palmer v. Nissen, 256 F. Supp. 497, 500 & n.8 (S.D. Me. 1966).

40. Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966) (based on the *Olson* case); Rhine v. Haley, 238 Ark. 72, 378 S.W.2d 655 (1964).

plaintiffs to present such evidence, since the expertise of the judge removes the necessity for it. Under the majority approach, the judge may sometimes act as an expert witness, informing the jury from his private knowledge as to what is customary legal conduct. But in either case, this procedure of proof making would be contrary to our traditional views of the allocation of functions between judge and litigants. Allowing the judge to act as the sole expert witness is subject to the same objection as allowing him to determine the ultimate fact of negligence.[41]

In spite of the assertion that the rules of evidence are the same for legal as for medical malpractice, it is clear that the majority of courts treat the problem of particularizing the legal standard of care in a unique manner, and in recent years a few courts have responded to this apparent anomoly. In *Olson v. North,* which is likely to become a major case in the field, the court asserted that "the rules of evidence governing the trial of cases for malpractice against a lawyer are the same as those against a doctor or dentist."[42] But the court went beyond holding such evidence merely admissible: a jury verdict for the plaintiff was overturned "because there was no expert testimony to show that he (the defendant) did not exercise that degree of care and skill in the defense of Olson as used by other skillful and reputable lawyers in such cases. . . ."[43] *Olson* clearly requires expert testimony for the establishment of a prima facie case of legal malpractice and places the original burden of presenting that evidence on the plaintiff. A number of recent cases have reviewed and adopted the principles of the *Olson* case.[44]

Requiring the plaintiff to go forward with testimony by other attorneys seems clearly correct. It is not merely a matter of form, but has significant relations to the burden and risks of persuasion, and to judicial control of the jury. It is not discernible how a jury of laymen, without the aid of such testimony, could determine whether an attorney had exercised the care of the average member of his profession. In view of the complexity of law and of legal practice, the confusion would be great in many cases, such as those involving the rule against perpetuities, if the jury were permitted to rely solely upon its own knowledge and experiences. Moreover, placing the original burden to present expert testimony upon the plaintiff treats legal malpractice like other forms of

41. See text accompanying notes 32, 33 *supra.* Although there is a rubric that all men are presumed to know the law, an argument that proper legal practice is a matter within the layman's knowledge is obviously false. Laymen probably have no more idea what constitutes proper legal practice than what is proper medical practice. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963).

42. Olson v. North, 276 Ill. App. 457, 475-77 (1934).

43. *Id.* at 477.

44. Dorf v. Relles, 355 F.2d 488, 492 (7th Cir. 1966); Cook v. Irlon, 409 S.W.2d 475 (Tex. Civ. App. 1966).

professional negligence and reduces the likelihood that disgruntled clients will begin ill-founded suits. Finally, it accords with basic principles of the Anglo-American judicial system that plaintiffs bear the burden of establishing their right to legal assistance and to compensation.

Locality of Practice

In medical malpractice actions, it is an established principle that the standard of care which the defendant must meet to avoid liability is that of the average physician in the same or similar locality. A physician "is only required to possess the skill and learning possessed by the average of his school of the profession in good standing in his locality. . . ."[45] Locality of practice, as a limiting factor in the standard of care, serves to indicate to the trier of fact that the character of a physician's experience and knowledge, as well as customary professional conduct, varies significantly from one community to another.[46] It also operates to exclude testimony by physicians who, because they practice in different communities, are not aware of the whole environment in which the defendant-physician acted.

In legal malpractice, the courts rarely mention the locality in which the defendant-attorney practices as an element of the standard of care. Even when mentioned by the court, locality of practice has not been considered a paramount factor in determining the propriety of the defendant-attorney's conduct.[47] When testimony by other attorneys is admissible or required, the defendant may naturally tend to draw heavily upon the local bar for his expert testimony and thereby automatically place a locality of practice limitation upon the standard of care.[48] But when the duty to go forward with expert testimony falls upon the plaintiff, and natural tendency to draw upon the local bar ceases to operate; consequently, if locality is to be considered, it becomes necessary to impose a requirement that testimony to be given with reference to the locality in which the defendant practices.[49]

The substantive question, however, is whether a locality of practice

45. Moeller v. Hauser, 237 Minn. 368, 54 N.W.2d 639 (1952) (emphasis added). *Accord*, Ayers v. Parry, 192 F.2d 181, 184 (3d Cir. 1951); Adkins v. Ropp, 105 Ind. App. 331, 14 N.E.2d 727 (1938). *See generally*, McCoid, *supra* note 13.

46. *See*, McCoid, *supra* note 13 at 569-75. *See also* Baker v. United States, 343 F.2d 222 (8th Cir. Iowa 1965); Moeller v. Hauser, 237 Minn. 368, 54 N.W.2d 639 (1952).

47. *See, e.g.*, Theobald v. Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961); Hillegas' Adm'r. v. Bender, 78 Ind. 225, 227 (1881); Cochrane v. Little, 71 Md. 323, 18 A. 698 (1889); Hodges v. Carter, 239 N.C. 517, 80 S.E. 144 (1954). *But cf.* Rhine v. Haley, 238 Ark. 72, 378 S.W.2d 655 (1964).

48. *See, e.g.*, Rhine v. Haley, 238 Ark. 72, 74, 378 S.W.2d 655, 662 (1964); Olson v. North, 276 Ill. App. 457, 478-84 (1934) (all twelve defense witnesses came from the local bar).

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

limitation should be a part of the standard of professional care for attorneys. By omitting the locality of practice element, courts may overlook differences in resources and opportunities for experience among attorneys in widely varying communities. For example, the attorney in an industrial, metropolitan area is generally considered more sophisticated than the attorney in a small, rural community,[50] problems which are common to the legal profession in one locality may be largely unknown in another, and specialization in law is almost exclusively a metropolitan phenomenon.[51] However, a form of specialization occurs whenever attorneys in one locale are, through experience, peculiarly knowledgable about a particular type of legal problem.[52] Because it does not contain a locality of practice limitation, the present standard takes an overly simplistice view of the profession and allows testimony by attorneys who are unfamiliar with the practice of law in the defendant's community.

Moreover, it would seem that a locality of practice limitation on the standard of care is even more appropriate in legal malpractice than in medical malpractice. What constitutes customary legal practice varies, not merely with the resources and opportunities available to the attorney in his community, but also from one community to another. Thus what constitutes proper legal practice in one community may not be proper in another, even though the external resources and other features of the communities are identical.[53]

More significantly, an attorney's conduct is frequently influenced by the characteristics of the community in which he practices. In a recent Texas case, *Cook v. Irlon*,[54] plaintiff's attorney in a personal injury action filed suit against only one of three possible defendants. When the client failed to recover, he sued his former attorney for malpractice, alleging that the attorney was negligent in failing to join all three possible defendants to the personal injury suit. The client was permitted to

50. Pitt v. Yalden, 4 Burr. 2060, 98 Eng. Rep. 74 (K.B. 1767) (the court noted that the defendants were". . . country attornies and might not and probably did not know that this point [of law] was settled here above."); Cantrall, *supra* note 5; Isaacs, *Liability of the Lawyer for Bad Advice*, 24 CALIF. L. REV. 39, 40, n.7 (1935); Note, *Legal Effects of Attorney Specialization*, 30 ALBANY L. REV. 281 (1966).

51. *See generally* Cantrall, *supra* note 5; Joiner, *supra* note 5.

52. See discussion by court in Cook v. Irlon, 409 S.W.2d 475, 478-99 (Tex. Civ. App. 1966).

53. For example, in determining marketability of a land title, an attorney relies on local determination of what title defects are significant enough to impair the title. An attorney who pronounced a title marketable according to local standards is not negligent merely because in a similar community the title would have been unmarketable. *See* Gleason v. Title Guarantee Co., 317 F.2d 56, 60 (5th Cir. 1963); Palmer v. Nissen, 256 F. Supp. 497, 501, n.10 (S.D. Me. 1966). *Compare* Fenaille v. Coudert, 44 N.J.L. 286, 290 (Sup. Ct. 1882) *with* Matter of Woods, 158 Tenn. 383, 390-91, 13 S.W.2d 800, 803 (1929) (local filing procedures).

54. 409 S.W.2d 475 (Tex. Civ. App. 1966).

introduce the testimony of an attorney from a small, rural town, 200 miles from the site of the original trial, that all three possible defendants should have been joined. On appeal from a judgment for the client-plaintiff in the malpractice action, the Court of Civil Appeals reversed, noting that the plaintiff's witness was not competent to testify, since the social and economic features of the original trial site, El Paso, Texas, and the possible makeup of the jury would enter significantly into the defendant's election of whom to join.[55]

It would seem that failure to retain local counsel might constitute legal malpractice, where the attorney was aware of his own ignorance of significant local factors which might affect his client's cause. Many courts require attorneys to associate local counsel when they come to practice before foreign tribunals, and at least part of the rationale for such requirements is a court's awareness of the significance of knowledge of local peculiarities, whether legal, social, economic, or racial, to the proper handling of a client's problems.[56] When an attorney's actions have been influenced by knowledge of the peculiarities of a community, it is patently unfair to articulate a standard of care which does not take cognizance of such peculiarities, or to allow testimony by attorneys who are unfamiliar with them. Because of the variation of customary legal practice from community to community, locality of practice should be applied more stringently in legal malpractice than in medical malpractice. In medical malpractice, testimony is frequently taken from physicians in "the same or similar localities."[57] However, the mere fact that two communities are externally similar does not mean that what constitutes proper legal practice is the same in each. Proper legal practice varies with the prejudices, associations, and inter-relations of the people of the community, the jurors, the judge, and all those connected with the judicial process. Proper medical practice, on the other hand, generally does not vary with these kinds of factors.

An analogous problem unique to legal malpractice arises when an attorney licensed to practice in one state undertakes the performance of legal services involving the laws of another state. If the attorney is sued for malpractice, is the standard of care that of an average attorney in the foreign state or of an average attorney in the state in which the defendant

55. *Id.* at 478.

56. *See,* Martin v. Davis, 187 Kan. 473, 357 P.2d 782 (1960); Note, *The Practice of Law by Out of State Attorneys,* 20 VAND. L. REV. 1276, 1286-88 (1967). The practice of associating local counsel as a means of acquiring knowledge of local peculiarities was specifically noted by the court as one reason for the reversal in Cook v. Irlon, 409 S.W.2d 475 (Tex. Civ. App. 1966), discussed *supra* note 55.

57. See cases cited *supra,* notes 49, 50, 51.

is licensed? An early New Jersey case, *Fenaille v. Coudert*,[58] held that a New Jersey attorney who undertook to prepare a contract for filing in another state was not negligent, as a matter of law, in failing to ascertain and comply with the statutes of the foreign state: "[a]n attorney is not to be presumed to know the law of a foreign jurisdiction."[59] Apparently the client could not reasonably expect the same quality of legal service, with respect to foreign law, from the New Jersey attorney as he could from an attorney licensed to practice in the foreign state. Significantly, the court in *Fenaille* did not mention that the defendant practiced in a metropolitan border area between the two states involved and, from his location and experience, might easily have ascertained the law of the foreign state.

The New York courts have reached the opposite conclusion. In *Degen v. Steinbeck,* after rejecting the New Jersey approach, the Court of Appeals held:[60]

> [w]hen a lawyer undertakes to prepare papers to be filed in a state foreign to his place of practice, it is his duty, if he has not knowledge of the statutes, to inform himself, for like any artisan, by undertaking the work, he represents that he is capable of performing it in a skillful manner.

A recent federal case, involving Indiana law, reviewed the two approacses and adopted the New York rule as the better.[61] In *Weldman v. Wachtell,*[62] on facts virtually identical to those in *Degen,* a New York supreme court held that an attorney, who used reasonable care in selecting an associate counsel from a foreign state, would not be liable for a negligent error of the foreign attorney, in interpreting the law of the foreign state, which he adopted. Apparently, his duty to ascertain the foreign law was discharged by obtaining competent counsel in the foreign state. The court also noted that the client would have a cause of action against the associate attorney.[63] With this refinement, New York's approach seems preferable, since it protects the client from his attorney's ignorance of foreign law, provides a relatively easy means for the attorney to discharge his duty to ascertain foreign law, and allows the client to procede

58. 44 N.J.L. 286 (Sup. Ct. 1882).

59. *Id.* at 289. The case is more extensively discussed in Comment, *Attorney Malpractice, supra* note 30, at 1298-99. The treatment of medical malpractice where the conduct was in another state is similar. Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958).

60. 220 App. Div. 477, 479-80, 195 N.Y.S. 810, 814 (1933). *See also In re* Roel, 3 N.Y.2d 224, 165 N.Y.S.2d 31 (1957).

61. Rekeweg v. Federal Mut. Ins. Co., 27 F.R.D. 431 (N.D. Ind. 1961).

62. 149 Misc. 623, 267 N.Y.S. 840 (Sup. Ct. 1933).

63. *Id.* at 624, 267 N.Y.S. at 841.

against the associate counsel when a negligent error relating to the laws of that state is made by the associate counsel.

SPECIALIZATION: NATURE OF THE DEFENDANT'S PRACTICE

It is an established principle of tort law[64] and of medical malpractice,[65] that if a professional person holds himself out as possessing greater skills and greater knowledge than the average member of his profession, he will be held to a higher standard of care than a general practitioner. Thus a medical specialist must possess and exercise the skill and care customarily exercised by physicians in the same specialty.[66] This principle recognizes and protects the higher expectations of the patient who has sought the services of one with purportedly superior capabilities. At the same time, it protects both the specialist and the general practitioner by ensuring that each will be judged by standards appropriate to his professional level.[67] The development of widely recognized specialties, requiring post-graduate training and subject to certification by professional or governmental boards, have made it appropriate and possible for the courts to rely on standards of customary care established for specialists as distinct groups.

In spite of the frequently asserted similarity between medical and legal malpractice, the courts have been unwilling to recognize the legal specialist. The experience and expertise of the defendant-attorney in the subject committed to him by the client are not considered in articulating the applicable standard of care. In *Olson v. North,* for example, although the defendant held himself out as "especially qualified in the defense of criminal cases, including murder cases," his liability for malpractice in the conduct of a murder trial was based upon the abilities of the "average attorney," with no reference to his experience and expertise, in the articulation of the standard.[68]

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64. RESTATEMENT (SECOND) OF TORTS § 299A, comment d (1957); W. PROSSER, LAW OF TORTS § 32, at 165-66 (3d ed. 1964).

65. *See, e.g.,* Ayres v. Parry, 192 F.2d 181 (3d Cir. 1951), *cert. denied,* 343 U.S. 980 (1952); Harris v. Campbell, 2 Ariz., App. 351, 409 P.2d 67 (1965); Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953). *See generally* Rosenbaum, *The Degree of Skill and Care Legally Required of a Medical or Surgical Specialist,* 49 MEDICO-LEGAL J. 85 (1932).

66. *See,* cases cited *supra* note 66; Sinz v. Owens, 33 Cal. 2d 749, 205 P.2d 3 (1949); Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953); Josselyn v. Dearborn, 62 A.2d 174 (Me. 1948) (osteopath); Facer v. Lewis, 326 Mich. 702, 40 N.E.2d 457 (1950) (X-ray technician).

67. *See generally* McCoid, *supra* note 13; Rosenbaum, *supra* note 66.

68. Olson v. North, 276 Ill. App. 457, 475 (1934). *See also* Montrose v. Baggott, 161 App. Div. 494, 146 N.Y.S. 649 (1914), *resettled,* 176 App. Div. 883, 161 N.Y.S. 1135 (1916), *rev'd on rehearing,* 176 App. Div. 931, 162 N.Y.S. 1132 (1917), *appeal dismissed,* 220 N.Y. 686, 116 N.E. 1062 (1917). *But cf.* Peterson & Wallace v. Frazer, 79 S.W. 1077, 1080 (Tex. Civ. App. 1904) (standard of care one of "ordinary skills of attorneys versed in the particular field.").

Although occasionally there are dicta that the expertise of the defendant in a particular area of law should be considered, the early case of *Childs v. Comstock*[69] is the only case found in which a court recognized the specialized character of an attorney's practice as a significant factor in determining the applicable standard of care. In *Childs,* the defendant-attorneys were retained to protest the imposition of a duty upon the client's imports. When the duty was upheld by the Board of General Appraisers, the defendants failed to make a timely appeal, although such an appeal would clearly have reversed the Board's decision. The defendants then sought to excuse their failure to appeal on the ground that the Board followed a unique policy in giving notice of its decisions. Rejecting this claim, the court held the defendants liable because:[70]

> [t]he defendants were experts in that line of business, and aside from these protests they represented a very large percentage of all protests filed against the imposition of tariff duties that were heard before the board of general appraisers. They were familiar with the practice of the government officials and aware of the risk in relying on the irregular practice in the transmission of notices of their decisions by the board of general appraisers.

Although one writer asserts that a legal specialist "will be held to the legal skill and knowledge common among such specialists,"[71] no case law is cited in support of the assertion, and it is believed that *Childs* is the only case on point.

A number of reasons might be advanced for disregarding legal specialization. Generally, attorneys do not become specialized by the same process as physicians; few attorneys undertake formal advanced study in particular fields of the law.[72] Legal specialization is primarily the result of a de facto process of limiting and concentrating a practice of law to particular, narrow areas. But the fact that legal specialization occurs in this manner does not make it any less real. The attorney who has for a number of years maintained a practice heavily concentrated in, for example, labor law, tax law, or municipal bonds can reasonably be expected to provide a higher quality of service within this area than a general practitioner or a specialist in some other area.

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69. 69 App. Div. 160, 74 N.Y.S. 643 (1902).
70. *Id.* at 165, 74 N.Y.S. at 649.
71. Wade, *supra* note 26, at 764.
72. *See generally* Heckerling, *Legal Education for Certified Specialization,* 13 CLEV.-MAR. L. REV. 569 (1964).

It is true that attorneys are not licensed by the state[73] nor by other associations[74] to practice as legal specialists. The Canons of Professional Ethics do not permit public announcement of an attorney's expertise in a particular area.[75] Although licensing by some official body would be helpful in establishing standards for legal specialists, it obviously has nothing to do with the fact that specialization exists.[76] Without doubt, the public, especially businesses, now expect and find specialized legal services in "departments" of larger law firms. Even small firms and sole practitioners often specialize. Obviously legal specialization is a fact which the rules of legal malpractice must eventually reflect.

Two approaches might be taken to the formulation and application of higher standards of care for the legal specialist. The first may be called the "holding out" approach. In medical malpractice, it is well established that if a physician holds himself out as a specialist, he will be held to standards appropriate to a specialist, even though in fact he is not a specialist.[77] By analogy, an attorney who holds himself out as a legal specialist, should be held to a standard of care appropriate to a legal specialist.[78] The "holding out" approach avoids the difficulties arising from the uncertified character of the defendant-specialist, since the "holding out" exists independently of a formal recognition of legal specialization. However, the idea of a "holding out" connotes scienter, or something very like a wilful misrepresentation by the attorney to his client. The strictures of the Canons of Professional Ethics against public announcements of expertise in a particular field of the law, as well as the difficulty of proving a representation by the attorney and reliance by his client, would substantially impair the utility of the "holding out" approach in reaching the majority of legal specialists.

A second theory for a higher standard of care for the legal specialist could be developed from the subjective element in the currently articulated standard of care. Since the attorney, as a fiduciary and agent of his client,

73. *See generally* 5 AM. JUR. *Attorneys at Law* §§ 19-28 (1936); 41 AM. JUR. *Physicians and Surgeons* §§ 32-37 (1942).

74. Although the ABA has had a number of committees on legal specialization, such recognition is currently given only to patent attorneys and proctors in admiralty. *See* ABA CANONS OF PROFESSIONAL ETHICS, No. 46 does not permit a "public" announcement of specialization, but does permit an attorney to make known his "availability to act as an associate of other lawyers in a particular branch of the law."

76. Indeed, recognition of legal specialists for malpractice purposes might foster the creation of evaluative organizations. Until formal recognition occurs, standards for legal specialists may be established by testimony of attorneys shown to be engaged in similarly specialized practices.

77. Epstein v. Hirschon, 33 N.Y.S.2d 83 (Sup. Ct. 1942); McCoid, *supra* note 13.

78. One who holds himself out as an attorney is held to the standard of care applicable to attorneys, although in fact he is not an attorney. Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958); Foulks v. Falls, 91 Ind. 315 (1883).

is required to "exercise his own best judgment,"[79] and "act to the best of his own knowledge,"[80] it is arguable that an attorney who has knowledge and skills superior to a general practitioner would not discharge his duty to his client unless he exercised that higher skill and knowledge.[81] Under this approach, the client would only need to show that his attorney in fact possessed superior skills and knowledge, which he failed to exercise. It would not be necessary to show a "holding out" by the attorney nor reliance by the client on a representation. Unfortunately, because this approach is initially tied to a subjective element, it would not allow an unambiguous recognition of the fact of legal specialization. Problems of proof and the difficulty of clearly articulating the theory to the jurors would impede its use. It seems preferable to recognize frankly that legal specialization is a fact of contemporary legal practice, and that the whole standard of care, objective and subjective, must be higher when the defendant is a legal specialist. A plaintiff should be permitted to show that from the nature of the defendant's practice and experience, greater skill and care was reasonably expected. Testimony on customary legal practices should then be given with reference to the conduct of attorneys who engage in similarly specialized practices. Finally, the judge should instruct the jury that the experience and expertise of the defendant are to be considered in determining whether or not the defendant has breached his duty.

It is noteworthy that *Degen v. Steinbeck*[82] and *Fenaille v. Coudert*,[83] discussed above with reference to locality of practice, lend collateral support to recognition of legal specialization. Although the result in each case was different, the underlying principles were identical: an attorney is more qualified to practice in some areas of the law than in others. In a sense, an attorney is a specialist in the law of the state in which he is licensed to practice. Thus New Jersey chose to apply a lower standard of care when the attorney stepped outside his state-law speciality.[84] New York, on the other hand, chose to demand a greater effort by the attorney who undertook problems beyond his state law specialty, primarily because it found an implied representation of competence in the fact that the attorney undertook the task.[85]

79. Carter v. Hodges, 239 N.C. 517, 520, 80 S.E.2d 144, 145 (1954); Spangler v. Sellers, 5 F. 882, 887 (C.C.S.D. Ohio 1881).

80. *In re* Watts, 190 U.S. 1 (1902); Pete v. Henderson, 124 Cal. App. 2d 487, 269 P.2d 78 (1954). *See also* Glenn v. Haynes, 192 Va. 574, 66 S.E.2d 509 (1951).

81. RESTATEMENT (SECOND) OF AGENCY § 379, comment c (1958); RESTATEMENT (SECOND) OF TORTS § 299, comment f (1965).

82. 202 App. Div. 477, 195 N.Y.S. 810 (1922).

83. 44 N.J.L. 286 (Sup. Ct. 1882).

84. *Id.* at 290.

85. Degen v. Steinbeck, 202 App. Div. 477, 479, 195 N.Y.S. 810, 814 (1922).

One usual result of the recognition of specialization in a profession is some alteration in the standard of care applicable to general practitioners. In medical malpractice, a number of cases have held a general practitioner liable when he failed to refer patients to medical specialists after the need for specialized treatment became apparent.[86] However, no court has yet found an attorney liable for malpractice because he failed to refer a client to a legal specialist. In *Lucas v. Hamm,* however, a lower California court noted that:[87]

> [t]he law today has its specialities, and even as the general practitioner in medicine must seek the aid of the specialist in his profession, so the general practitioner in law, when faced with a problem beyond his capabilities, must turn to the expert in his profession to the end that his client is properly served.

On appeal, the lower court was reversed without mention of the consultation issue.[88] With the recognition of legal specialization, however, recognition of a duty to consult a legal specialist in appropriate situations seems clearly to follow from analogous principles of medical malpractice.

Conclusion

The theory behind the imposition of liability for legal malpractice is that a client has been injured by his attorney's deviation from customary practices of the profession. The currently articulated standard of care for legal malpractice is not adequate to implement this theory. Primarily, this is due to the failure to particularize the general statement of that standard, legal custom, in such a way that jurors can effectively use it to gauge the defendant's conduct in a concrete fact situation. Effective particularization of the standard of care can only occur through the use of testimony of other attorneys to inform the jurors of the customary practices of the profession in the situation confronting the defendant. Moreover, the original burden of presenting such testimony should fall upon the plaintiff. Effective particularization also requires that the locality of the defendant's practice be taken into account. Jurors must be made aware of significant differences in the opportunities for experience and resources among attorneys practicing in widely variant communities. More importantly, jurors must be aware of the propriety of an attorney's conduct turning upon his awareness of peculiarities and characteristics of the community in which he practices. Finally, effective particularization requires a candid

86. Seneris v. Haas, 45 Cal. 2d 811, 291 P.2d 915 (1955); Denison v. Dean, 232 N.Y. 52, 133 N.E. 125 (1921); McCoid, *supra* note 13 at 597.

87. Lucas v. Hamm, 11 Cal. Rptr. 727, 173 (Dist. Ct. App. 1961).

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

recognition of the existence of legal specialization and of the concomitant fact that not all attorneys are equally qualified to handle all legal problems. The jurors should be made aware of the specialized character of an attorney's practice and of the effect of that specialization on the customary quality of performance.

The medical-legal malpractice analogy will undoubtedly remain a significant force in the development of legal malpractice concepts. The utility and correctness of that analogy on many points cannot be doubted. However, an uncritical use of the analogy to expand the concepts of legal malpractice tends to overlook significant differences between the two professions. Medicine tends to be a scientific and objective profession. Law, however, is a practical art. In order to serve his client properly, an attorney must consider the financial situation of his client, the peculiarities and prejudices of judges, jurors, and the public, as well as the political, social, and racial characteristics of the community. Proper medical treatment does not vary with these factors. Any development of legal malpractice rules must take cognizance of the realities of legal practices, as well as the inter-relations of the professions.

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