

Inadequate Preparation by an Attorney as a Basis for Malpractice Liability or Disciplinary Action

Once an attorney undertakes the representation of a client, it becomes his obligation to exercise proper care to safeguard the client's interest. When a lawyer has accepted employment in a matter with which he is unfamiliar, this obligation entails the study necessary to make him competent in the matter. The Disciplinary Rules of the American Bar Association state that "a lawyer shall not handle a legal matter without preparation adequate in the circumstances."¹

Although it would be difficult to examine the entire spectrum of litigation dealing with legal malpractice, cases demonstrate that the errors upon which negligence suits are based frequently involve an inadvertent mistake on the part of an attorney. Nonetheless, several decisions have found lawyers liable for their failure to prepare adequately with regard to a legal matter. Because the failure to ascertain relevant legal principles may result in substantial liability for damages or potential disciplinary action for gross negligence, the cases dealing with inadequate preparation are of grave concern. Accordingly, this comment will attempt to outline the extent to which an attorney may be found culpable for rendering improper advice to his client because he failed to investigate properly the applicable rule of law or failed to conduct any research into a legal matter with which he was entrusted.²

The Standard of Care

In determining the standard to which lawyers must conform, courts generally define malpractice as a failure of the attorney to use the requisite care or skill demanded of his profession.³ The early case

1. Disciplinary Rule 6-101(A)(2) ABA CODE OF PROFESSIONAL RESPONSIBILITY (1972).

2. Suits for malpractice have generally arisen in two ways: (a) a client sues his attorney for damages caused by his negligence; or (2) an attorney sues his client for legal fees and the client asserts malpractice as a defense.

3. A number of cases have deviated from this general standard. Early decisions suggest that a lawyer was liable to his client for the conduct of litigation only when he was chargeable with gross negligence or want of skill. *Mardis' Adm'rs v. Shackelford*, 4 Ala. 493 (1842); *Evans v. Watrous*, 2 Port. 205, 210 (Ala. 1835); *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 227-28 (1850). *But see Goodman v. Walker*, 30 Ala. 482, 495-96 (1857) (suggesting the phrase "gross negligence" inaccurate in reference to the liability of an attorney to his client). Today, however, it is well-

settled that an attorney undertaking to perform services on behalf of a client must possess and exercise the skills of a "reasonably prudent" attorney under the circumstances. Annot., 45 A.L.R.2d 5, 7 (1956).

Some courts have required a lawyer to exercise the same diligence in his client's affairs as a man of ordinary prudence gives to his own important business. *Williams v. Knox*, 10 N.J. Super. 384, 390, 76 A.2d 712, 715 (Super. Ct. 1950) (dictum). Other decisions have stressed the nature of the law which the attorney was required to understand and to apply. These decisions state that an attorney is liable for failure to understand and to apply those rules and principles of law that are clearly defined in the elementary books or that have been declared in duly reported cases. See *Martin v. Burns*, 102 Ariz. 341, 429 P.2d 660 (1967) (it is negligence not to know a rule which is clear although recently enacted); *Boss-Harrison Hotel Co. v. Barnard*, 266 N.E.2d 810 (Ind. App. Ct. 1971) (good advocacy demands a regular reading of Advance sheets of West Publishing Company).

Subjective standards are also considered by courts. The degree of knowledge and skill ordinarily possessed by local attorneys has often been deemed significant. By comparing defendant lawyer's conduct to the average lawyer's conduct in the same or similar locality, a court gives cognizance to the fact that customary legal practice varies not merely with resources and opportunities available to the attorney but also from one community to another. *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954) (attorney liable for want of that degree of knowledge and skill which others similarly situated normally possess).

But even though a "community standard" has a pragmatic rationale, it no longer is widely adhered to. And even the jurisdictions which continue to recognize the community standard have held that the relevant community encompasses the entire state where the attorney is practicing, thus emphasizing bar admission standards, education, and resources within the state while largely ignoring important factors such as access to resources and an attorney's experience. *Gillen, Legal Malpractice*, 12 WASHBURN L.J. 281, 290-91 (1975). See *Muse v. St. Paul Fire & Marine Ins. Co.*, 328 So. 2d 698 (La. 1976); *Rolfstad v. Hanson*, 221 N.W.2d 734 (N.D. 1974); *Feil v. Wishek*, 193 N.W.2d 218 (N.D. 1971); *Cook v. Clausing*, 73 Wash. 2d 393, 438 P.2d 865 (1968). But see *Gleason v. Title Guarantee Co.*, 300 F.2d 813 (5th Cir. 1962).

Other courts have based their findings on an evaluation of the defendant-attorney's intellectual capacity and experience. *Palmer v. Nissen*, 256 F. Supp. 497 (D. Me. 1968) ("his own best judgment to the best of his personal ability"); *Hill v. Mynatt*, 59 S.W. 163, 166 (Tenn. Ch. App. 1900) ("does the best he can"); *Denzer v. Rouse*, 48 Wis. 2d 528, 180 N.W.2d 521 (1970) (dictum) ("must exercise his best judgment in light of his education and experience"). A subjective standard was also used in *Lynn v. Lynn*, 4 Wash. App. 171, 480 P.2d 789, 792 (1972), which held that where a party was seeking a new trial, the test of skill and competence of counsel was whether, after examining the entire record, the complaining party was afforded a fair trial. Cf. *Nause v. Goldman*, 321 So. 2d 304 (Miss. 1975) (examining the nature of the particular business undertaken).

Although judicial attempts to establish a precise formula within which legal malpractice could be defined have resulted in some inconsistency and divergence between jurisdictions, the majority rule seems to be 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. *E.g.*, *Davis v. Associa-*

of *National Savings Bank v. Ward*⁴ established the judicial approach toward malpractice which in most respects exists today. There the defendant-attorney was employed by a real estate purchaser to examine grantor's title to certain property in order to determine if that property was sufficient security for a loan. The attorney reported to plaintiff-bank that the title of grantor was good and unencumbered. Plaintiff then loaned \$3,500 to the alleged owner and accepted the property as security. Later the bank learned that the borrower did not own the property and was in fact insolvent.

On the basis of these facts, the United States Supreme Court set forth the standard of liability in an action for legal malpractice:

When a person adopts the legal profession, and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties; and if injury results to the client from a want of such a degree of reasonable care and skill, the attorney may be held to respond in damages to the extent of the injury sustained.⁵

Continuing, the Court declared:

. . . 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 responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is that if he acts with a proper degree of skill, and with reasonable care and to the best of his knowledge, he will not be held responsible.⁶

Application of the Standard of Care

In order to understand the nature of a lawyer's liability in situations in which he has failed to undertake the study necessary to make him competent in a matter, it is important to realize that liability will not always exist where an attorney has omitted to do

tion Indemnity Corp., 56 F. Supp. 541 (M.D. Pa. 1944); *Theobald v. Byers*, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (Dist. Ct. App. 1961).

4. 100 U.S. 195 (1879). As the facts indicate, *National Savings Bank* did not deal with an attorney's failure to prepare adequately. Nevertheless, the standard of "reasonableness" which it established is used by courts in determining whether an attorney is liable for his failure to research a legal question.

5. *Id.* at 198.

6. *Id.* at 198.

something on his client's behalf. This principle results from the application of the "reasonable skill" test⁷ enunciated in *National Savings Bank v. Ward*. In fact, the use of a standard of "reasonableness" raises provocative questions in a number of areas in which an attorney is guilty of "sins"⁸ of omission rather than those of commission.

One such area concerns an attorney's duty with regard to advice on the law of a jurisdiction other than the one where he is practicing. In such instances, an attorney may be guilty of negligence for his failure to know the law of the foreign jurisdiction and for his failure to employ counsel from the foreign jurisdiction to aid in the formulation of his opinion.

As a general rule, an attorney who offers mistaken advice on foreign law is subject to no special liability other than the normal

7. The "reasonable skill" test creates an interesting situation in the area of legal specialization. Although there is a notable absence of case law with respect to the standard applicable to a lawyer who holds himself out as a specialist in some particular area of law, it would seem logical that such specialists be held to the standard of a specialist in his field rather than that of a general practitioner. Gardner, *Attorney's Malpractice*, 6 CLEV.-MAR. L. REV. 264 (1957).

Another problem created by the development of specialization is whether a lawyer has a duty to consult a legal specialist. Few courts have discussed this issue. However, in *Lucas v. Hamm*, 11 Cal. Rptr. 727 (Dist. Ct. App. 1961), it was suggested by the California District Court of Appeals that an attorney had a duty to consult an expert on matters outside the competence of the ordinary lawyer. *Id.* at 731. See DR 6-101(A)(1), ABA CODE OF PROFESSIONAL RESPONSIBILITY (1972).

8. No, you never get any fun / Out of things you haven't done, / But they are the things that I do not like to be amid, / Because the suitable things you didn't do give you a lot more trouble than the unsuitable things you did. / The moral is that it is probably better not to sin at all, but if / some kind of sin you must be pursuing, / Well, remember to do it by doing rather than by not doing.

Ogden Nash, *Portrait of the Artist as a Prematurely Old Man*, 100 AMERICAN POEMS OF THE TWENTIETH CENTURY (1st ed. 1966).

The earliest case to deal with a lawyer's liability for omitting to perform his duties was a 1796 decision, *Stephens v. White*, 2 Wash. 203 (Va. 1796). There the plaintiff's action was premised upon his attorney's failure to file a declaration of the amount of damages owed plaintiff by a third party. As a result of this failure, the judgment plaintiff had obtained against the third party was reversed. The defendant attorney attempted to excuse his negligence by claiming that his client had not compensated him for his work, and thus, he owed no duty of care to such client. The court rejected this defense and concluded that once an attorney undertook to conduct a suit, but was guilty in the management of it, a good cause of action lay against the attorney provided his negligence resulted in a loss to his client.

liability for erroneous opinions.⁹ But whether an attorney will be liable for a negligent omission if he fails to employ local counsel when he is called upon to give advice on foreign law is a matter for some debate. On one hand, a client may have contracted for the opinion of a particular lawyer and not that of an attorney from a foreign jurisdiction. It could also be argued that by employing local counsel an attorney has made an unlawful delegation of duty. On the other hand, a valid argument may be made for the proposition that by not employing local counsel, an attorney has failed to exercise reasonable care and skill in the preparation of his opinion.¹⁰

Nevertheless, once an attorney engages foreign counsel, he may be held for negligence in his selection.¹¹ In *Tormo v. Yormark*,¹² defendant-attorney recommended an out-of-state attorney who embezzled plaintiff's funds. The court concluded that the failure of the referring attorney to make such inquiries as was required by ordinary prudence into the out-of-state attorney's background was for a jury to decide, and that on the facts, negligence was not found, although it could have been. In *Wilderman v. Wachtell*,¹³ the defendant-lawyer was found to have exercised due care in selecting foreign counsel and was thus not liable for that attorney's negligence.

Another area in which a lawyer may escape liability despite the fact that he omitted to take certain actions on behalf of his client is that of litigation. During litigation an attorney is required to make difficult decisions as to what tactics and strategy would be most beneficial to his client's cause. Because the employment of

9. Martindale, *Attorney's Liability in Non-Client and Foreign Law Situations*, 14 CLEV.-MAR. L. REV. 44, 63 (1965) (hereinafter cited as Martindale). But defendant-attorney may not assert that he is not required to know foreign law. *In re Roel*, 3 N.Y.2d 224, 165 N.Y.S.2d 31, 144 N.E.2d 24 (1957) (Mexican lawyer not duly admitted to New York bar could not legally give advice on New York law); *Degen v. Steinbrink*, 24 App. Div. 477, 195 N.Y.S. 810, *aff'd* 236 N.Y. 669, 142 N.E. 328 (1922). In addition, it would seem that an attorney who holds himself out as an expert in the law of a foreign jurisdiction and then gives an erroneous opinion thereon will be liable not only for his negligence in arriving at his opinion, but also for negligent misrepresentation. See *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

10. Martindale at 64. See Disciplinary Rule 6-101(A)(1), ABA CODE OF PROFESSIONAL RESPONSIBILITY (1972).

11. *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975).

12. *Id.*

13. 149 Misc. 623, 267 N.Y.S. 840, *aff'd without opinion*, 241 App. Div. 812, 271 N.Y.S. 754 (1933).

tactics is not subject to precise evaluation, courts and commentators have recognized that attorneys are vested with broad discretionary powers in conducting litigation. Nevertheless, decisions have reviewed the adequacy of evidence introduced at trial,¹⁴ the number of witnesses called on client's behalf,¹⁵ and the sufficiency of the defenses presented.¹⁶ Furthermore, counsel's duty to make appropriate objections¹⁷ and to properly examine prospective jurors¹⁸ has also been subjected to judicial scrutiny.

Despite these cases, courts have generally been reluctant to adopt a view which would encourage defeated litigants to bring malpractice suits against attorneys based on omissions by the latter in the conduct of litigation.¹⁹ This is aptly demonstrated in situations in which an attorney is charged with negligence in connection with the defense of a criminal case. As with other malpractice suits against attorneys, the individual practitioner must exercise reasonable skill and care in the conduct of a criminal defense.²⁰ However, there is no presumption of negligence in the event of harm to the criminal defendant. Indeed, the presumption is that the practi-

14. *Niosi v. Aiello*, 69 A.2d 57 (D.C. Mun. Ct. App. 1949); *Case v. Ricketts*, 41 A.2d 304 (D.C. Mun. Ct. App. 1945).

15. *Case v. Ricketts*, 41 A.2d 304 (D.C. Mun. Ct. App. 1945); *Olson v. North*, 276 Ill. App. 457 (1934).

16. *Haggerty v. Watson*, 277 App. Div. 789, 97 N.Y.S.2d 318 (2d Dep't 1950), *aff'd mem.*, 302 N.Y. 707, 98 N.E.2d 586 (1951).

17. *State v. Yates*, 208 Or. 491, 301 P.2d 719 (1956).

18. *Rains v. Schutte*, 53 Ill. App. 2d 214, 202 N.E.2d 660 (1964).

19. The reason for this reluctance lies in the fact that pretrial motions, trial procedure, and to a lesser extent, the wisdom of appealing an adverse decision are all matters purely within the judgment of the individual practitioner. And an attorney will not be held liable for an error in judgment. *Byrnes v. Palmer*, 18 App. Div. 1, 4, 45 N.Y. Supp. 479, 481-82 (2d Dep't 1897), *aff'd*, 160 N.Y. 699, 55 N.E. 1093 (1899):

In litigation a lawyer is well warranted in taking chances. . . . The conduct of a lawsuit involves questions of judgment and discretion, as to which even the most distinguished members of the profession may differ. They often present subtle and doubtful questions of law. If in such cases, a lawyer errs on a question not elementary or conclusively settled by authority, that error is one of judgment for which he is not liable.

Moreover, a lawyer will not be deemed negligent in representing his client simply because the client does not agree with the manner in which his lawyer prepares and presents the case either at trial or on appeal. *Cardarella v. United States*, 258 F. Supp. 813 (W.D. Mo. 1966).

20. *Vance v. Robinson*, 292 F. Supp. 786 (W.D.N.C. 1968).

tioner's duty was properly discharged.²¹ This rule applies whether the alleged acts of negligence occurred in preparation of the trial, during the pretrial proceedings, in the conduct of the trial itself, or upon post trial errors such as failure to prosecute an appeal.²² In addition, even if an attorney may have been negligent in his conduct of the case, his client must prove that had the error not been made, the client would have prevailed.²³

Because of the presumption that an attorney has exercised reasonable care in the defense of his client and because clients must demonstrate that the negligence of their lawyer was the proximate cause of their injury, criminal malpractice suits based on omissions rarely succeed.²⁴

Application of the Standard of Care with Regard to Adequate Preparation

As the areas of litigation tactics and employment of foreign counsel suggest, the standard of "reasonable" care is a flexible one, and its application will not lead to a finding of liability in every instance in which an attorney has omitted to take the steps necessary to protect fully the rights of his client. Moreover, it is a general rule that if the law is unsettled, an attorney is not liable for his errors. Thus, if reasonable doubt may be entertained by well-informed lawyers and the attorney acts in honest belief that his advice and acts are well founded, he will not be liable for errors in judgment.²⁵ However, even as to doubtful matters, an attorney is

21. *Olson v. North*, 276 Ill. App. 457 (1934) (doctrine of *res ipsa loquitur* rejected on this basis).

22. Annot., 53 A.L.R.3d 731, 732-33 (1973).

23. 7 AM. JUR. 2d *Attorneys at Law* § 188 (1963).

24. *Underwood v. Woods*, 406 F.2d 910 (8th Cir. 1969) (failure to depose or take photographs); *Martin v. Hall*, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971) (failure to raise the defense of former jeopardy); *Olson v. North*, 276 Ill. App. 457 (1934) (unskillful examination of witnesses, failure to investigate an alibi, and failure to take fingerprints and ballistic evidence); *Cleveland v. Cromwell*, 128 App. Div. 237, 112 N.Y.S. 643, *adhered to*, 140 App. Div. 897, 126 N.Y.S. 1125 (1908) (failure to read indictment and to advise client that it was invalid on its face). See *Lamore v. Laughlin*, 159 F.2d 463 (D.C. 1947) (refusal to appeal and suppression of evidence tending to show inadequate representation by other counsel at trial). But see *In re Opinion of the Judges*, 221 P. 1040 (Okla. 1924) (neglect or refusal to appeal judgment of death is a failure of counsel's duty).

25. E.g., *Meagher v. Kavi*, 256 Minn. 54, 60, 97 N.W.2d 370, 375 (1959); *Patterson v. Powell*, 31 Misc. 250, 253, 64 N.Y. Supp. 43, 46 (Sup. Ct.) *aff'd*, 56

expected to perform sufficient research to enable him to make the informed judgment to which his client is entitled. An excellent example of this last statement was provided in *Smith v. Lewis*.²⁶

In *Smith*, a client brought action for legal malpractice against her lawyer based on his alleged negligent failure in a prior divorce suit to assert his client's community interest in the retirement benefits of her husband, a former officer in the National Guard. Defendant Lewis contended that the law with regard to such retirement benefits was so unclear at the time he represented plaintiff as to insulate him from liability for failing to assert a claim on her behalf. The Supreme Court of California rejected this contention.²⁷

The Court, while recognizing the general rule that an attorney is not liable for mistaken advice when well-informed lawyers might entertain reasonable doubt as to the proper resolution of the particular legal question involved, nevertheless concluded that even with respect to unsettled areas of the law, an attorney was obligated to undertake reasonable research into a matter in order to ascertain relevant legal principles and to make an informed decision about the conduct of his client's action.²⁸ In reaching its decision, the

App. Div. 624, 68 N.Y. Supp. 1145 (1st Dep't 1900); *Collins v. Wanner*, 382 P.2d 105 (Okla. 1963). But see *Sohn v. Bernstein*, 279 A.2d 529 (Me. 1971). This rule is based on the fact that a lawyer is not bound to possess and exercise the highest degree of skill possible nor is he an insurer of the results of his work. *Great American Indemnity Co. v. Dabney*, 128 S.W.2d 496 (Tex. Civ. App. 1939). Since it is necessary only that he exercise such skill as members of the legal profession commonly employ, a lawyer who acts in honest part, and is actuated by no improper motives, cannot be held liable if he has made a conscious and informed judgment which later proves to be erroneous. *Mazer v. Security Ins. Group*, 368 F. Supp. 418 (E.D. Pa. 1973).

26. 118 Cal. Rptr. 621, 530 P.2d 589 (1975).

27. Nor did the Court believe Lewis's actions to be for tactical advantage.

. . . [A]n attorney engaging in litigation may have occasion to choose among various alternative strategies available to his client, one of which may be to refrain from pressing a debatable point because the potential benefit may not equal detriment in terms of expenditure [at] time and resources or because of calculated tactics to the advantage of his client. But . . . "[t]here is nothing strategic or tactical about ignorance . . .". In the case before us, it is difficult to conceive of the tactical advantage which could have been served by neglecting to advance a claim clearly in plaintiff's best interest. . . . 118 Cal. Rptr. at 627, 530 P.2d at 595.

28. Even if defendant Lewis had undertaken adequate research, the case seems to indicate that liability for negligence would have still existed since defendant was experienced in the field of domestic relations and had been exposed to

Court stated the applicable test for determining the skill and competence of an attorney to be:

. . . whether his advice was so legally deficient when it was given that he may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.'²⁹

On the basis of this test, defendant Lewis was held to have been negligent for failing to undertake research into applicable principles of law, which in turn, prevented him from exercising an informed judgment with regard to his client's rights.³⁰

In concluding that attorney Lewis had failed to exercise reason-

the community property aspects of pensions. In fact, on three prior occasions defendant had asserted community property claims to pensions and other retirement benefits. 118 Cal. Rptr. at 628, 530 P.2d at 596.

29. 118 Cal. Rptr. at 627, 530 P.2d at 595.

30. . . . [H]ad defendant conducted minimal research into either hornbook or case law, he would have discovered with modest effort that General Smith's state retirement benefits were likely to be treated as community property. . . . 118 Cal. Rptr. at 623, 530 P.2d at 596.

Although a majority of decisions indicate that the question of negligence is one of fact, *e.g.*, *O'Neil v. Gray*, 30 F.2d 776 (2d Cir.), *cert. denied*, 279 U.S. 865 (1929); *Floro v. Lawton*, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98, 109 (Dist. Ct. App. 1960); *Fowler v. American Fed'n of Tobacco Growers, Inc.*, 195 Va. 770, 80 S.E.2d 554 (1954); many courts are reluctant to submit the issue to a jury. *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685 (1961), *cert. denied*, 368 U.S. 987 (1962); *Cannon v. Baron*, 289 So. 2d 835 (La. 1974); *Hill v. Mynatt*, 59 S.W. 163, 166 (Tenn. Ch. App. 1900). *But see* *Tormo v. Yormark*, 398 F. Supp. 1159 (1975); *Suritz v. Kelner*, 155 So. 2d 831 (Fla. 1963). This reluctance is understandable, for the allocation of responsibility between judge and jury in legal malpractice suits produces difficulties not found in ordinary negligence cases. After all, judges are lawyers and this fact invariably affects their attitudes toward malpractice suits. While some judges may be sympathetic toward their fellow attorneys, other judges may emphasize the improvement of the legal profession and thereby treat an erring attorney with excessive harshness. Moreover, judges are exposed to a wide range of legal issues and, as a consequence, they may be justified in feeling that they are uniquely qualified to evaluate the difficult problems which face the defendant-attorney. Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1295, 1306 (1963).

However, the theory upon which an attorney's liability for malpractice is based is that the ordinary lawyer, in similar circumstances, would not have acted in the same manner as defendant did. Because the conduct of the ordinary attorney is of critical importance, the issue of negligence should be submitted to the jury unless it is clear that the defendant did not meet the standard of care normally required of attorneys.

able skill in the practice of his profession, the Court examined a number of factors. Among them were: (1) whether the potential benefit to be gained from pressing an unclear or debatable point of law exceeded the detriment for not doing so in terms of expenditure of time and resources; (2) whether there was a tactical advantage to be gained from the omission; (3) whether the nature of the matter was so "esoteric" or "difficult" that a lawyer could not reasonably be expected to be aware of it or of its probable resolution; (4) whether the omission related to a central issue; (5) whether there was material available which would have disclosed the proper solution to the problem; and (6) whether there was any significant authority in opposition to this material.

The application of these factors to the facts of the case resulted in a number of findings by the Court. First, it was obvious that the amount of time necessary to research the matter was of small import considering the fact that the husband's retirement benefits constituted the only significant asset available to the community property. And because the extent and division of community property is the central issue of any divorce proceeding, no tactical advantage could be gained from the attorney's failure to determine the range and scope of community assets obtainable by his client. Furthermore, the problem dealt with by Lewis was not so difficult that "even careful and competent attorneys occasionally fall prey to its traps." Finally, there existed a plethora of material concerning the appropriate rule had the defendant chosen to read it, and none of this material contradicted the appropriate rule nor supported the advice which the defendant had given his client.³¹ Thus, the Court held that attorney Lewis's actions clearly constituted negligence and that plaintiff's \$100,000 recovery against him was thereby warranted.³²

As *Smith* demonstrates, a practitioner is not presumed to know

31. Although the Court found that there was reasonable argument to support the characterization of General Smith's federal benefits (as opposed to his state benefits) as separate property, the existence of this ambiguity did not excuse the attorney's negligence since the evidence at trial showed that the defendant had failed to conduct any reasonable research into the proper characterization of retirement benefits under community property law.

32. The general rule is that plaintiff is entitled only to be made whole, *i.e.*, when the attorney's negligence lies in his failure to press a meritorious claim, the measure of damages is the value of the claim lost. 118 Cal. Rptr. at 628, 530 P.2d at 597.

all of the law. A lawyer is required to exercise reasonable skill, however, and implicit in this requirement is his ability to discover and to apply unambiguous and authoritative statements of law. Indeed, it would seem that an effort to identify the appropriate rule of law is fundamental to the "reasonably skillful" practice of the legal profession.

But despite vague allusions concerning the failure of attorneys to qualify themselves properly for a legal undertaking, courts have seldom held that attorneys are liable for damages solely on the basis that they failed to research a legal problem adequately. This view has resulted in part from the fact that there is rarely sufficient evidence that a lawyer has handled a legal matter "without preparation adequate in the circumstances." In addition, few rules of law are established to a degree that they are satisfactory authority in every factual situation with which they deal. Thus, attorneys often escape liability on the grounds that the specific application of the law is unclear.

For this reason *Smith* is important in that it is one of the few cases to deal at length with the relation between a negligent omission and the defendant's failure to conduct reasonable research into a matter with which he was entrusted. In determining that Lewis's lack of research into the proper characterization of retirement benefits under community property law caused his failure to assert his client's community interest in the retirement benefits of her husband, the California Supreme Court examined the ambiguity, complexity, and familiarity of a point of law and found that a careful, informed lawyer could not have failed to know what the appropriate rule was if he had read the pertinent materials. Thus, the Court's ruling would appear to reduce a plaintiff's burden of showing whether his attorney has undertaken research into a matter.³³ In-

33. The degree of care required of an attorney is a question of law, but the care actually exercised in a given situation is a question of fact to be determined by the jury. 7 AM. JUR. 2d *Attorneys at Law* § 189 (1963). Thus, laymen may consider the testimony of attorneys as to what ordinarily careful and prudent practitioners would do in the same or similar circumstances provided such testimony does not usurp the authority of the court to advise the jury as to matters of law. *Rhine v. Haley*, 238 Ark. 72, 378 S.W.2d 655 (1964).

A number of cases have recognized the admissibility of expert evidence as to an individual attorney's negligence, or with respect to the general standard of practice of other members of the profession. Annot., 17 A.L.R.3d 1442 (1968). In some circumstances, the opinions of experts may be essential to prove the standard of care an attorney must meet. *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966); *Watkins*

deed, if a rule is established and a lawyer renders advice or takes action inconsistent with it, it may be presumed that he has not studied the rule. At the same time, *Smith* apparently negates an attorney's defense that his advice was based on his prior study and knowledge of a particular legal principle and that subsequent developments concerning that principle had merely made its application uncertain.³⁴

v. Sheppard, 278 So. 2d 890 (La. 1973). However, in other instances the failure of an attorney to use due care may be so obvious that expert testimony is unnecessary. *Suritz v. Kelner*, 155 So. 2d 831 (Fla. App. 1963); *Baker v. Beal*, 225 N.W.2d 106 (Iowa 1975); *Muse v. St. Paul Fire & Marine Ins. Co.*, 328 So. 2d 698 (La. 1976).

34. A number of other defenses, however, are available to attorneys on the issue of negligence. An attorney will be protected from liability provided he acts honestly and in good faith, with reasonable skill and learning and an ordinary degree of care. *E.g.*, *Shobeck v. Leach*, 6 N.W.2d 819 (Minn. 1942). And the mere fact that an attorney's decision is ultimately determined to be incorrect will not by itself establish negligence, *Smith v. St. Paul Fire & Marine Ins. Co.*, 344 F. Supp. 555 (M.D. La. 1972), for diligence and good faith are often elements negating an unfavorable result to a lawyer. *Talbot v. Schroeder*, 13 Ariz. App. 230, 475 P.2d 520 (1970). Nor is an attorney deemed negligent where he has exercised a valid, informed judgment concerning an uncertain matter, *Leighton v. New York, Susquehanna & W. R.R.*, 303 F. Supp. 599 (S.D.N.Y. 1969), an unsettled point of law, *Smith v. Lewis*, 118 Cal. Rptr. 621, 530 P.2d 589 (1975), or litigation strategy and tactics, *Pineda v. Craven*, 424 F.2d 369 (9th Cir. 1970).

Absent unusual circumstances, attorneys are not required to determine whether their clients have furnished false or misleading information even though such information may be the basis of the attorneys' erroneous advice. *Milliner v. Elmer Fox & Co.*, 529 P.2d 806 (Utah 1974). And in some instances, a client has a duty to advise his lawyer on pertinent matters. *Boley v. Boley*, 506 S.W.2d 934 (Tex. Civ. App. 1974). Furthermore, a lawyer may escape liability where there is actual or constructive consent to his actions by his client or his contract does not charge him with a particular duty. *E.g.*, *Busey v. Perkins*, 168 Md. 19, 176 A. 474 (1935). In addition, an attorney who has received assurance from the court that he would be given notice of proceedings which would enable him to protect his client's rights is not negligent in his justifiable reliance upon such assurance. *Kizer v. Martin*, 132 So. 2d 14 (Fla. 1961). Finally, the defense of contributory negligence occasionally bars a client's recovery. *Ismael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (Dist. Ct. App. 1966). However, when clients fail to act regarding matters specifically within attorneys' expertise, such failure does not constitute contributory negligence unless the attorney explicitly advised the client to take action. *Feil v. Wishek*, 193 N.W.2d 218 (N.D. 1971).

On the other hand, a defense based upon a client's inability to pay his attorney's fee is not valid. Counsel's duty to an indigent is basically the same as that owed to any other client. *In re Phelps*, 204 Kan. 16, 459 P.2d 172 (1969). Thus, the fact that a client is indigent or has not paid the balance of his attorney's fee is insufficient excuse for the latter's failure to comply with proper legal procedures. *Ganey v. State*, 101 So. 2d 827 (Fla. 1958).

In addition, *Smith* may have begun a trend toward an increased duty on the part of lawyers to seek clarification of ambiguous statements of law. In a case decided a year after the *Smith* decision, a Louisiana appellate court, in *Muse v. St. Paul Fire & Marine Insurance Co.*,³⁵ found an attorney negligent for failing to research adequately a legal problem. In *Muse* the client brought a malpractice action against his attorney, Tyler, for the latter's failure to question the validity of a hospital's claim of subrogation to the client's rights against his disability insurer. Upon the defendant-attorney's advice that he was obligated to do so, the client used a portion of the proceeds from his disability insurance to pay for his hospital bill. Later the client learned from another lawyer that the hospital, under Louisiana statutes, did not have a lien on such insurance proceeds. On the basis of this discovery, the client sought reimbursement from the defendant-attorney for the \$1,873.33 which the client had erroneously paid the hospital.

Relying on these facts, the court found that Tyler had negligently breached his duty to his client by failing to recognize the possible invalidity of the hospital's claim and to advise his client of this possibility. The opinion concluded that a reasonable standard of professional conduct in such situations required a study of the applicable statutes. Continuing, the decision reasoned that the appropriate statutes in this instance, although somewhat unclear and ambiguous, were such that, had the defendant undertaken a careful perusal of them they would have indicated to a reasonably prudent attorney that the liability of his client to the hospital was doubtful.

Both *Smith* and *Muse* demonstrate that lawyers are potentially liable for their failure to research adequately a legal problem. No longer can attorneys in giving advice rely categorically on what the law was two years ago or even six months ago. Upon presentation of each problem, counsel should endeavor to discover the existing rule of law at that particular moment. This naturally increases the duty of attorneys to keep up with changes and developments in law. And although this duty has become difficult to fulfill in recent years due to the rapid expansion and growing complexity of law and legal procedure, it is not an absolute one. As *Smith* and *Muse* indicate, "sufficient knowledge to make an informed judgment", or "reasonable consideration of applicable legal rules and principles" are all that is required of a reasonably prudent attorney. In both

35. *Muse v. St. Paul Fire & Marine Ins. Co.*, 328 So. 2d 698 (La. 1976).

instances the defendant failed to meet this standard.³⁶ Indeed, evi-

36. Proof that an attorney has failed to exercise reasonable skill and diligence will not automatically render a practitioner liable. Indeed, there exist a number of ways a lawyer's liability may be limited or even precluded.

First, an attorney may assert any defenses held by an original defendant. In *Gibson v. Johnson*, 414 S.W.2d 235, 239 (Tex. Civ. App. 1967), the opinion stated:

The attorney stands in exactly the same position as that in which the defendant in the lost suit would have stood in the trial against him, and is entitled to present to the jury every fact that would have tended to lessen the damages against the defendant.

Second, an attorney may assert that a suit against him is barred by the statute of limitations. When a lawyer presents this defense, courts must first determine whether the suit sounds in contract or tort and which statute is thereby applicable. Despite a desire to protect clients from the negligence of their attorneys, courts throughout the country are not in agreement as to the nature of a cause of action in malpractice. Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1295 (1963). Some courts have held that liability may exist if an attorney neglects to provide the services which he agreed to perform for a client or which by implication he agreed to do when he accepted employment. *Solomon v. Myer*, 116 So. 2d 37 (Fla. 1959); *Rooker v. Bruce*, 45 Ind. App. 57, 90 N.E. 86 (1909); *Sullivan v. Stout*, 120 N.J.L. 304, 199 A. 1 (Ct. Err. & App. 1938); *Linder v. Eichel*, 34 Misc. 2d 840, 844, 232 N.Y.S.2d 240, 245 (Sup. Ct.), *aff'd mem.*, 17 App. Div. 2d 735, 233 N.Y.S.2d 238 (1962). Still other courts have stated that the attorney-client relationship creates a duty to employ due care, the violation of which gives rise to liability in tort. *Kenler v. Canal Nat'l Bank*, 489 F.2d 482 (1st Cir. 1973); *Weiner v. Moreno*, 271 So. 2d 217 (Fla. 1973); *Kendall v. Rogers*, 181 Md. 606, 31 A.2d 312 (1943); *Galloway v. Hood*, 69 Ohio App. 278, 43 N.E.2d 631 (1941).

The determination of the nature of the cause against an attorney is important because normally the statute of limitations for torts is less than that for contract actions. Rothstein, *Lawyers' Malpractice*, 9 TR. LAW Q. 33, 40 (1973). Thus, if the shorter statute has already run the client will seek to sue in contract so that his malpractice action will not be barred. *Id.* Moreover, the measure of damages recoverable for breach of contract is ordinarily more restrictive than are the rules governing tort recovery. See *Hadley v. Baxendale*, 156 Eng. Rep. 145, (Ex. 1854); PROSSER, TORTS §§ 47-50 (2d ed. 1955).

Because the gravamen of the action is negligence, the better view would seem to be that attorney-malpractice suits are tort actions. However, where the complaint specifically charges that the defendant-counsel guaranteed specific results, an action for breach of contract will lie against him.

Regardless of whether a tort or contract statute is applicable, courts have generally held that a cause of action accrues, and the statute begins to run, when the attorney commits the negligent act, rather than when its effect is discovered. *E.g.*, *Sullivan v. Stout*, 120 N.J.L. 304, 199 A. 1 (Ct. Err. & App. 1938); *Cornell v. Edsen*, 78 Wash. 662, 139 P. 602 (1914); Annot., 118 A.L.R. 215 (1939). This rule is awkward and often unjust in instances where the client does not become aware of his lawyer's error until much later, and by that time, the client's original cause of action becomes barred by the statute of limitations. In order to mitigate the

potential harshness of this rule, a New York case, *Siegel v. Kranis*, 29 App. Div. 2d 477, 288 N.Y.S.2d 831 (1968), adopted the "continuous treatment" approach familiar to medical malpractice suits. That is, the statute of limitations does not begin to run during the existence of a continuous attorney-client relationship.

Because this "continuous treatment" theory is unavailable in a number of legal malpractice cases due to the temporary nature of many attorney-client relationships, two decisions have embraced the "discovery" rule. *Neel v. Mangana*, 98 Cal. Rptr. 837, 491 P.2d 421 (1971); *Mumford v. Staton*, 254 Md. 697, 255 A.2d 359 (1969). These cases held that where the client is unaware of his attorney's error, the appropriate period for purposes of the statute of limitations begins with the date of discovery or the date when the client in the exercise of due diligence should have discovered the lawyer's negligent act. Although the "discovery" rule has not received widespread recognition, it would seem a valid and equitable approach to the problem of when a client's action accrues, and would do much to alleviate the severity of the now accepted rule that the statute of limitations begins to run upon the occurrence of the negligent act.

A third factor which has occasioned the most difficulty to plaintiffs seeking recovery for legal malpractice has been the necessity of proving that the damages claimed resulted from their attorneys' negligence. The measure of damages in such litigations is usually the sum which the client would have recovered in the original action if he was a plaintiff in that suit, or, if he was a defendant, the amount of the judgment imposed upon him. *Lewis v. Collins*, 260 So. 2d 357 (La. Ct. App. 1972) (plaintiff is entitled only to be made whole, the measure of damages being the value of the claim lost). Expenses or costs incurred by the client because of his attorney's negligence have in some circumstances been included as an element of damages. *Cornelissen v. Ort*, 132 Mich. 294, 93 N.W. 617 (1903); *Jacobsen v. Peterson*, 103 A. 983 (N.J. 1918); *Boyles v. Krebs & Shultz Motors, Inc.*, 18 App. Div. 1010, 239 N.Y.S.2d 143 (1963). *Contra*, *Niosi v. Aiello*, 69 A.2d 57 (D.C. Mun. Ct. App. 1949). Similarly, fees paid to an attorney before the discovery of his negligence may also be used to determine damages. *Pete v. Henderson*, 124 Cal. App. 2d 487, 269 P.2d 78 (1954).

In order to obtain damages, however, a client must prove that had defendant-attorney not been negligent, the claim lost would have been recovered or the judgment suffered avoided. *Maryland Cas. Co. v. Price*, 231 F. 397 (4th Cir. 1916); *Thompson v. D'Angelo*, 320 A.2d 729 (Del. 1974); *Cannon v. Baron*, 289 So. 2d 835 (La. 1974); *Murphy v. Stringer*, 285 So. 2d 340 (La. 1973); *Roehl v. Ralph*, 84 S.W.2d 405 (Mo. Ct. App. 1935). This requirement necessitates that the jury in the malpractice case consider two actions, or as it is commonly referred to, "a suit within a suit." Accordingly, the client seeking recovery for malpractice is faced with the difficult task of proving his attorney's negligence and that had his negligence not occurred the client's original action would probably have been successful. It should also be noted that in cases where an attorney has rendered improper or erroneous advice, liability will not be found unless the client can demonstrate that he relied on the improper advice to his detriment. *Eckert v. Schaal*, 251 Cal. App. 2d 1, 58 Cal. Rptr. 817 (Dist. Ct. App. 1967). Moreover, plaintiff must establish the specific sum he would have recovered had the original action terminated in his favor. *Better Homes Inc. v. Rodgers*, 195 F. Supp. 93 (N.D. W.Va. 1961); *W.L. Douglas Shoe Co. v. Rollwage*, 187 Ark. 1084, 63 S.W.2d 841 (1933), and additionally, he must demonstrate that the initial defendant was solvent to the extent of the judgment. *Sitton v. Clements*, 257 F. Supp. 63 (E.D. Tenn. 1966); *Piper v.*

Green, 216 Ill. App. 590, 592 (1920). Finally, a client is apparently required to meet his burden of proof by demonstrating by a preponderance of evidence that the attorney's negligence was the legal cause of his loss. *Collins v. Slocum*, 317 So. 2d 672, 680 (La. 1975); *Toomer v. Breaux*, 146 So. 2d 723 (La. Ct. App. 1962).

These general principles have been applied in a wide variety of circumstances with the result that many lawyers who were apparently guilty of malpractice were nonetheless excused from liability. However, an attorney's negligence may violate his professional responsibility to his client for which he is subject to disciplinary action. *In re Daggs*, 384 Mich. 729, 187 N.W.2d 227 (1971) (failure to diligently prosecute a suit on behalf of a client warranted three month suspension); *In re Lanza*, 24 N.J. 191, 131 A.2d 497 (1957) (delay in prosecution of client's cause without more was not malpractice but was sufficient to warrant a reprimand).

A fourth concept which minimizes the chances of a client's recovery for his attorney's negligence is that of privity. The general rule that an attorney is liable only to persons with whom he has dealt was first established in *National Savings Bank v. Ward*, 100 U.S. 195 (1879). And although this rule is widely adhered to, a few cases have created an exception by extending the doctrine of third-party beneficiaries to malpractice suits. *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); *Licta v. Specter*, 26 Conn. Supp. 378, 225 A.2d 28 (C.P. 1966); *Woodfork v. Sanders*, 248 So. 2d 419 (La. Ct. App.), *writ denied*, 259 La. 759, 252 So. 2d 455 (1971) (legatee was a subscribing witness and therefore disqualified as a beneficiary); *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897); *Schirmer v. Nethercutt*, 157 Wash. 172, 288 P. 265 (1930); *Anderson v. Spriesterbach*, 69 Wash. 393, 125 P. 166 (1912). *Contra*, *Dundee Mortgage & Trust Inv. Co. v. Hughes*, 20 F. 39 (C.C. Ore. 1884); *Maneri v. Amodeo*, 38 Misc. 2d 190, 238 N.Y.S.2d 302 (Sup. Ct. 1963); *Kawn v. Morrell*, 18 Misc. 2d 158, 183 N.Y.S.2d 828 (Sup. Ct. 1959); *Currey v. Butcher*, 37 Ore. 380, 61 P. 631 (1900). This exception has usually been applied to two types of circumstances. In the first type, suit is brought by a third-party who, in making a loan or purchasing land, relied upon a faulty title opinion rendered by defendant-attorney. *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897); *Anderson v. Spriesterbach*, 69 Wash. 393, 125 P. 166 (1912). In the second, a beneficiary under a will, who has lost all or part of his inheritance, brings an action claiming that the loss was due to defendant-attorney's negligence in drafting the instrument. *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); *Licta v. Specter*, 26 Conn. Supp. 378, 225 A.2d 28 (C.P. 1966); *Woodfork v. Sanders*, 248 So. 2d 419 (La. Ct. App.), *writ denied*, 259 La. 759, 252 So. 2d 455 (1971); *Schirmer v. Nethercutt*, 157 Wash. 172, 288 P. 265 (1930). Even in these instances, however, liability will not arise unless certain requirements are met. For example, in an action by a third party on a title opinion, recovery will be granted only if the plaintiff can show that the attorney was aware that the third-party relied on his (attorney's) legal advice. *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897); *Anderson v. Spriesterbach*, 69 Wash. 393, 125 P. 166 (1912). Also, in a suit on a negligently drawn will, the disgruntled beneficiary must demonstrate that there originally existed an attorney-client relationship between the defendant and the benefactor out of which the negligent act arose. *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); *McGlone v. Lacey*, 288 F. Supp. 662 (D.S.D. 1968); *Bresette v. Knapp*, 121 Vt. 376, 159 A.2d 329 (1960). But despite the fact that such restrictions offer substantial protection from liability, attorneys should be aware that privity no longer represents an absolute barrier to recovery. *Lucas v. Hamm*, 56 Cal. 2d at 589, 15 Cal. Rptr. at 821.

dence in both cases disclosed that the lawyers involved had not undertaken even minimal research into the problems, but instead, had assumed the law to be in accordance with their advice, an assumption which was apparently premised on their "prior" knowledge of the law.

As a general rule, attorneys are accorded considerable latitude in the exercise of their professional judgment and evaluation of legal issues which have not been specifically resolved by legislation or case law. In such circumstances, an attorney will not be held liable for malpractice so long as his determination of such a question, whether ultimately proved right or wrong, is based upon a valid effort to discover the applicable rules and principles. However, liability will result when a lawyer has failed to execute properly his duty of diligent investigation and research concerning any claim which involves his client.

A Lawyer's Failure to Prepare Adequately Resulting in Disciplinary Action Rather Than a Suit for Damages

In a number of cases it has been held that an attorney's negligence or lack of professional competence in the handling of his client's affairs is a violation of the Canons of Legal Ethics, which warrants disciplinary action against the attorney.³⁷ Despite this general rule, under certain circumstances, decisions have concluded that an attorney should not be disciplined for a mistake in judgment or ignorance of the law.

In *Gould v. State*,³⁸ the court reversed an order of disbarment when the defendant-attorney had been disciplined for failure to diligently prosecute his client's claims, the result of which was the loss of benefits due his client under the claims. Stating that it would be a severe remedy to disbar an attorney for inattention to duty, and ignorance of his client's rights (and the remedies to enforce them), the court held that a mere charge of laziness or inattention to duty without corrupt motive was not a sufficient basis for discipline. Although in *Friday v. State Bar*,³⁹ the defendant attorney was ultimately suspended for soliciting business, the court ruled that punishment was not warranted where an attorney was deficient in legal knowledge. The court reasoned that ignorance of the law in conduct-

37. 7 AM. JUR. 2d *Attorneys at Law* § 15 (1963).

38. 99 Fla. 662, 127 So. 309 (1930).

39. 23 Cal. 2d 501, 144 P.2d 564 (1943).

ing the affairs of his client would not subject a lawyer to discipline provided the attorney had acted in good faith and provided his actions, although negligent, did not violate the oath or duties of an attorney.⁴⁰

Despite the fact that both *Gould* and *Friday* exonerated attorneys when the adequacy of their legal knowledge was questioned, a careful reading of these cases demonstrates that in both, the courts simply refused to equate "mere ignorance of the law" with an act of moral turpitude which is the traditional basis for disciplinary action. In view, however, of an increasing trend toward stricter application of ABA Disciplinary Rules, it would seem that "ignorance of the law," if unreasonable, is presently fertile grounds for disciplinary proceedings against an attorney. Indeed, when an attorney has failed to prepare adequately with regard to a legal matter, the potential for discipline is clear since such negligence is a violation of the Disciplinary Rules of the ABA.⁴¹

An excellent example of the approach a court might be expected to follow with regard to this problem is found in *In re Boland*,⁴² in which an attorney examined title to property which his clients were purchasing and advised them that a mortgage on this property was invalid under federal statute. Acting on their attorney's advice, the clients consummated the transaction. When it later developed that the mortgage was in actuality valid, the clients lost the land due to their inability to pay off the mortgage. The board of law examiners in its report to the court stated that the

40. The only cause for discipline which would appear to be a basis for . . . a charge [of specific misconduct with relation to a client] is a violation of the oath taken by the attorney, or of his duties as such attorney. . . . The oath of an attorney pledges him "faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability." . . . Mere ignorance of the law in conducting the affairs of his client in good faith is not a cause for discipline. The nearest approach to such conduct is negligence as a ground for discipline when the neglect is so serious as to constitute a violation of his oath as an attorney. . . . Conduct of that character, however, embraces more than mere ignorance of the law, as is evident from its nature. Certainly an act committed because of mere ignorance does not constitute moral turpitude. 23 Cal. 2d at 504, 144 P.2d at 567.

41. . . . A lawyer shall not: . . . Handle a legal matter without preparation adequate in the circumstances. Disciplinary Rule 6-101(A)(2), ABA CODE OF PROFESSIONAL RESPONSIBILITY (1972).

42. 140 Wash. 148, 248 P. 399 (1926).

defendant-attorney had merely read over the federal statute in question, and had not examined the notes to the statute. The report continued by saying that if the defendant had read the notes he would have discovered that his interpretation of the statute was erroneous and that courts had determined such mortgages to be valid. The court in accepting the board's recommendation that the attorney be censured for his gross negligence, held:⁴³

. . . [W]hen, as here, the exact question involved has been more than once decided by the court of last resort of his own state, and the rule is well settled throughout the United States, it is gross negligence to permit a client to hazard, perhaps, his little all without any search whatsoever of the authorities.⁴⁴

Although an attorney cannot be expected to know all the law on a given subject, it is his duty, when employed by a client, to ascertain what the appropriate law is, and the greater his ignorance, the greater his duty to inform himself. Thus, members of the legal profession should be aware that the existence of good faith or lack of corrupt motive does not automatically preclude disciplinary action for inadequate preparation. Moreover, the failure to ascertain relevant legal principles may be deemed gross negligence for which discipline is warranted.

Conclusion

Although no client has a right to expect that his lawyer will have immediate solutions to all legal problems, a client does have the right to expect that his attorney will devote his time and energies to maintaining and improving his professional competence, particularly with respect to researching issues, knowing how to employ this research in the solution of problems, and otherwise being sufficiently prepared so that he might advise to the best of his legal talents and abilities.

When a citizen is faced with the need for a lawyer, he wants, and is entitled to, the best informed and most attentive counsel he can obtain. In order to serve his client properly an attorney is obli-

43. The board recommended censure because its members did not think an attorney could be disbarred or suspended for a single act of negligence not amounting to gross incompetency. Boland was suspended, however, on the basis of other charges.

44. 140 Wash. at 143, 248 P. at 402.

gated to utilize his preparation and investigation in providing the most effective service possible. And when an attorney has failed to meet this obligation he may be subjected to substantial liability for damages or even discipline. Thus, it is imperative that attorneys undertake the study necessary to make them competent in a matter, not only for purposes of avoiding personal culpability, but also in order to maintain the high standards of the legal profession and to increase the public's confidence in and respect for the bar.

Wesley Romine