THE HEART OF ATTORNEY MALPRACTICE: A DISCUSSION OF THE STANDARDS OF CARE REQUIRED OF ATTORNEYS

I. INTRODUCTION

The problem of malpractice by attorneys is a very serious one facing the legal profession today. Although an attorney is not a "guarantor against errors in judgment," he is required to possess a certain degree of knowledge, skill, and ability.[1] The elements for attorney's malpractice are the same as for an ordinary negligence action. The plaintiff must present evidence which "establishes the applicable standard of care, demonstrates that this standard has been violated, and develops a casual relationship between the violation and the harm complained of."[2] The primary focus of this paper will be upon the "applicable standard of care." Initially, however, this paper will examine when the standard of care required of the attorney is to be determined.

II. WHEN THE STANDARD OF CARE IS TO BE DETERMINED

In *Martin v. Northwest Washington Legal Services*[3] a client instituted an action against the law firm for alleged malpractice. The plaintiff's claim centered in part around Northwest's failure to advise the plaintiff of any rights she possibly had in her husband's military pension and failure to seek a division of that pension in a divorce proceeding.[4] Northwest argued that it was not negligent in failing to seek a division of the pension due to the unsettled nature of the law concerning the character of military pensions at that time.[5] Northwest, relying on *McCarty v. McCarty*, argued that if it had urged the court to divide the pension in 1974, "it would have been asking the court to commit an

---

1. Lamb v. Barbour, 188 N.J. Super. 6, 455 A.2d 1122, 1125 (1982).

2. O'Neil v. Bergan, 452 A.2d 337, 341 (D.C.App. 1982).

3. Martin v. Northwest Washington Legal Services, 43 Wash. App. 405, 717 P.2d 779 (1986).

4. *Id.* at 781.

5. *Id.* at 782 (while the divorce action was pending, the United States Supreme Court held in *McCarty v. McCarty*, 453 U.S. 210 (1981), that "a military pension was not a community asset which could be divided by the court." The law in Washington, however, based on *Payne v. Payne*, 82 Wash. 2d 573, 512 P.2d 736 (1973), was that military pensions were community property to the extent that they were earned during the marriage).

error of law."[6] In other words, Northwest argued that although military pensions were community property in 1986, this was not clearly decided in 1974 when the divorce proceeding was litigated.[7] The court accepted this proposition by holding that the "standard of care to be exercised and the scope of the attorney's duty to the client are determined at the time the services are rendered rather than at the time of the trial."[8]

A similar situation was presented in *Smith v. Lewis*.[9] In this case, the plaintiff alleged that the defendant negligently failed to assert her community interest in the retirement benefits of her husband in the divorce proceeding.[10] The California Supreme Court, while recognizing that the pension is considered community property today, stated:

> We cannot, however, evaluate the quality of defendant's professional services on the basis of the law as it appears today. In determining whether defendant exhibited the requisite degree of competence in the handling of plaintiff's divorce action, the crucial inquiry is 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."[11]

Based on this sampling of opinions and others,[12] it seems clear that for attorney malpractice the primary focus will be upon the quality of advice at the time it is given. Subsequent developments in the law which may make the attorney's advice entirely incorrect should not be considered. The attorney's conduct, viewed in the context of the law

---

6. *Id.*

7. *Id.* (in October of 1982 Congress enacted the Uniform Services Former Spouses Protection Act which effectively overruled *McCarty v. McCarty*).

8. *Id. Accord* Walker v. Bangs, 92 Wash. 2d 854, 601 P.2d 1279 (1979) (the court in *Martin*, however, did find Northwest negligent because the defendant never discussed the pension with the plaintiff or the court.).

9. Smith v. Lewis, 118 Cal. Rptr. 621, 530 P.2d 589 (1975).

10. *Id.* at 591 (the defendant contended that the law characterizing retirement benefits was "so unclear at the time he represented plaintiff as to insulate him from liability for failing to assert a claim therefore on behalf of his client").

11. *Id.* at 593 (the California Supreme Court held, however, for the plaintiff ruling that the law concerning the community character of retirement benefits was not as unclear as defendant had argued).

12. *See e.g.*, Gruse v. Belline, 138 Ill. App. 3d 689, 93 Ill. Dec. 297, 486 N.E.2d 398 (1985). ("Attorney's conduct is to be viewed in the context of events prevailing at the time of the alleged malpractice, not in light of subsequent developments.").

as it existed at that time, will be measured against the applicable standard of care. There is, however, variation amongst these standards.

III. THE LOCAL STANDARD

To prove an attorney has been negligent, the plaintiff must show that the attorney has breached a duty.[13] Much like in an ordinary negligence action where the defendant has the duty to act like a reasonable man, the attorney owes a certain duty to his client. What that duty or standard is comprises the key factor in attorney malpractice. There are four possible standards that are used by the courts. The first is the local or community standard. Under this standard an attorney is "obligated to exercise that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in his locality."[14] The attorney, therefore, owes his client the "ordinary and reasonable level of skill, knowledge, care, attention, and prudence common to members of the legal profession in the community."[15] When the attorney's services do not comply with this standard of care, the plaintiff has a cause of action for malpractice.[16]

The Supreme Court of Vermont in *Russo v. Griffin*[17] made a careful study of the locality rule. The *Russo* court explained that the "locality rule is an exclusive product of the United States . . . (and) was first applied to the medical profession approximately a century ago when there existed a great disparity between standards of practice in large urban centers and remote rural areas."[18] The court opined that the basis of the rule was an attempt to protect the rural practitioner "who was presumed to be less adequately informed and equipped than his big city brother."[19]

The *Russo* court then launched into a stinging criticism of the locality rule. The majority thought the rule immunized persons who were the sole practitioners in their community from malpractice liability.[20] It also promotes a "conspiracy of silence" in the plaintiff's community which often "effectively precludes plaintiffs from retaining qualified ex-

---

13. Lamb v. Barbour, 188 N.J. Super. 6, 455 A.2d 1122, 1125 (1982).

14. Gifford v. New England Reinsurance Corp., 488 So. 2d 736, 739 (La. App. 2d Cir. 1986).

15. Mylar v. Wilkinson, 435 So. 2d 1237, 1239 (Ala. 1983).

16. *Id.*

17. Russo v. Griffin, 510 A.2d 436 (Vt. 1986).

18. *Id.* at 437.

19. *Id.*

20. *Id.*

perts to testify on their behalf."[21] The court then discarded the defendant's argument that the rejection of the locality rule in medical malpractice was "inapposite" to legal malpractice. The *Russo* court disagreed by holding:

> The ability of the practitioner and the minimum knowledge required should not vary with geography. The rural practitioner should not be less careful, less able or less skillful than the urban attorney. The fact that a lower degree of care or less able practice may be prevalent in a particular local community should not dictate the standard of care.[22]

This total repudiation of the locality standard appears to be well founded. A negligent attorney should not be able to avoid malpractice liability only because the other attorney in his community is just as negligent.

IV. The Statewide Standard

The second possible standard for attorneys is a statewide standard. Under this standard an attorney is held to "that degree of skill, diligence, and knowledge commonly possessed and exercised by a reasonable, and prudent lawyer in the practice of the law in the state."[23] Under the state standard an attorney's services to his client must be equal in competency to that found throughout his state. This standard eliminates any possible discrepancies that could be found among the various communities.

The argument can be made that this is a more exacting standard for a rural attorney to fulfill. If one accepts the premise that urban attorneys are generally more competent than rural lawyers,[24] then the state standard could be viewed as raising the degree of care required of rural attorneys. Under this theory, the state standard raises the degree of skill for the rural attorneys for they are not only being compared to the lawyers in their own small community, but also to the lawyers in the large city fifty miles down the road. If the above presumption is correct, then including the big-city attorneys raises the standard of care for the rural practitioners. Based on the above assumption

---

21. *Id.*

22. *Id.* at 438.

23. Martin Bros. v. Hjellum, 359 N.W.2d 865, 872 (N.D. 1985), *see also* Feil v. Wishek, 193 N.W.2d 218 (N.D. 1972).

24. Russo v. Griffin, 510 A.2d 436, 437 (Vt. 1986) (the *Russo* court adopted this premise as the underlying reason for the local standard).

it must follow that the converse is also true for the urban lawyers. By utilizing the state standard, the skill of the rural attorneys also is considered which might then lower the degree of skill required by the urban lawyers. Both of these conclusions, however, rest upon the historical premise that urban attorneys are more qualified than their rural counterparts. The locality rule, therefore, may be seen as favoring the rural lawyers while the state standard would be a more exacting standard for them to fulfill.

V. The Legal Profession Standard

A third possible standard for attorney's malpractice is the "legal profession standard." This standard stipulates that an attorney owes his client a "duty to employ that degree of knowledge, skill and judgment ordinarily possessed by members of the legal profession."[25] Crucial to an understanding of this standard is to ascertain a definition of "legal profession." The Georgia Supreme Court did that in *Kellos v. Sawilowsky*.[26] Georgia precedent had established the standard of care to be that of the "legal profession generally."[27] The Georgia Supreme Court granted certiorari to determine what this standard encompassed. The court framed the issue as whether the "applicable standard of skill, prudence and diligence of attorneys practicing is that of the 'locality' (*i.e.*, the state of Georgia) or of the legal profession generally, *if these standards differ*."[28] (Emphasis added). The court held that in theory there was very little difference between a state standard and the legal profession standard for it was a "distinction without a difference."[29] For practical applications in pleading, however, the *Kellos* court held that the "applicable standard in Georgia is that of the practitioners in Georgia, there being no ascertainable standard of 'the legal . . . profession generally.' "[30] Quite clearly, the Georgia Supreme Court has interpreted the standard of "the legal profession generally" to mean a state standard.

There are two slight variations upon the legal profession standard. There is the basic standard requiring the skill possessed by members of

---

25. Myers v. Beem, 712 P.2d 1092, 1094 (Colo. App. 1985); *see also* Beer v. Florsheim, 465 N.Y.S.2d 196, 198 (A.D. 1 Dep't 1983), Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982).

26. Kellos v. Sawilowsky, 325 S.E.2d 757 (Ga. 1985).

27. Gibson v. Talley, 156 Ga. App. 593, 275 S.E.2d 154 (1981).

28. *Kellos*, 325 S.E.2d at 757.

29. *Id.* at 758.

30. *Id.*

the legal profession. There is also, however, the variation requiring an attorney to "exercise on his client's behalf the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated . . . ."[31] The conclusion could be reached that this is another way to state the locality rule, or at least, it is very similar to it.

VI. The Jurisdiction Standard

The fourth possible standard is that a lawyer must provide services with "that degree of care, skill and diligence which is commonly possessed and exercised by attorneys in practice in the jurisdiction."[32] This would seem to be another manner in which to describe a state-wide standard. This conclusion was reached by the Vermont Supreme Court in *Russo v. Griffin*.[33] The *Russo* court rejected the locality rule and held that a lawyer is held to the standard of care "possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction."[34] The court also stated that "in selecting a territorial limitation on the standard of care, we believe that the most logical is that of the state."[35] Obviously, Vermont is equating the jurisdiction standard with the state standard. This conclusion appears to be the logical choice. A contrary result, however, was reached by the Mississippi Supreme Court.

In *Hutchinson v. Smith*[36] the Mississippi Supreme Court adopted the jurisdiction standard for attorney's malpractice. The court clearly required that attorneys possess the skill of "attorneys in practice in the jurisdiction."[37] A week later the same court held that basically the same standard was applicable to both attorneys and physicians for malpractice.[38] The court stated, however, that "both are required to use that degree of care, skill and diligence which is commonly possessed and exercised by attorneys/physicians in that locality."[39] This inconsistency

---

31. Lamb v. Barbour, 455 A.2d 1122, 1125 (N.J. Super. A.D. 1982); *see also* Kurtenbach v. TeKippe, 260 N.W.2d 53, 55 (Iowa 1977), O'Neil v. Bergan, 452 A.2d 337, 341 (D.C. App. 1982).

32. Hutchinson v. Smith, 417 So. 2d 926, 928 (Miss. 1982); *see also* Cook, Flanagan & Berst v. Clausing, 438 P.2d 865, 867 (Wash. 1968).

33. Russo v. Griffin, 510 A.2d 436 (Vt. 1986).

34. *Id.* at 438.

35. *Id.*

36. Hutchinson v. Smith, 417 So. 2d at 928.

37. *Id.*

38. Dean v. Conn, 419 So. 2d 148, 150 (Miss. 1982).

39. *Id.*

is very difficult to reconcile. To further confuse matters, in a subsequent case the Mississippi Supreme Court held lawyers to the standard of "members of the legal profession similarly situated."[40] As was previously stated, this standard appears to be the locality rule in different language. Therefore, the Mississippi Supreme Court has interpreted the jurisdiction standard to be a local standard. Following a central theme of this paper, this interpretation favors the rural lawyer.

VII. CONCLUSION

The general trend appears to be movement away from the locality standard towards a state standard. An excellent example of this is the development found in Vermont. In *Hughes v. Klein*[41] the Vermont Supreme Court stated that the "standard for legal services, as in other professions, is the exercise of the customary skill and knowledge which normally prevails at the time and place."[42] Quite clearly, Vermont had adopted the local or community standard. In *Russo v. Griffin*,[43] however, the Vermont Supreme Court adopted a statewide standard and expressly overruled *Hughes v. Klein*. The rejection of the locality rule appears to be a wise choice. Under the broader statewide standard, attorneys across the state are held to the same degree of care. This provides some uniformity throughout the state and prevents a negligent attorney from hiding behind the shield of his city's boundaries.

Keith J. Pflaum

40. Hickox v. Holleman, 502 So. 2d 626, 634 (Miss. 1987).
41. Hughes v. Klein, 427 A.2d 353 (Vt. 1981).
42. *Id.* at 354.
43. Russo v. Griffin, 510 A.2d 436 (Vt. 1986).