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Comment

Attorney Malpractice—A "Greenian" Analysis

I. INTRODUCTION

The past several years have witnessed significant changes in the law of attorney malpractice. Erosion of doctrines which have heretofore been advantageous to attorneys has caused an increase in the vulnerability of attorneys to suit for malpractice. Further, clients are apparently more willing than ever to sue their attorneys, resulting in an increase in both the number and size of recoveries. Because of the increased vulnerability of attorneys to malpractice actions, a knowledge of the elements of a cause of action for malpractice, as well as the recent developments in the area, is essential to the legal practitioner.

In order to present a coherent analysis of legal malpractice, this comment will be structured according to the form of analysis advocated by Leon Green. Green’s form of analysis provides a useful and logical framework with which to analyze negligence cases in

1. Luvera, *How to Avoid Legal Malpractice*, 31 Mo. B.J. 127, 127 (1975). Successful claims against attorneys increased by 25 percent in the years 1970 to 1975, and the upward trend is continuing. The size of claims recovered has climbed as well, up more than one-third since 1965. Id.

The following is a breakdown of the major grounds for malpractice liability: errors involving statutes of limitations, missed appearances in court, misfiled documents, failure to file lawsuits on time, and similar "forgetfulness" (45%); errors in legal judgment (25%); unclear relationship between clients and lawyers (21%); alleged fraud on the part of a lawyer (9%). Id.

2. Leon Green is currently a professor of law at the University of Texas, and was formerly the Dean of the School of Law at Northwestern University. He is the author of numerous books and articles on the study of tort law.

Green writes that the correct identification and formulation of the basic issues in negligence cases is essential to the proper resolution of the cases. See Green, *Identification of Issues in Negligence Cases*, 26 Sw. L.J. 811, 811 (1972) [hereinafter cited as Identification of Issues]. According to Green, the following elements are necessary for the proper formulation of the issues, in their logical sequence:

1. Causation—is there a causal connection between defendant’s conduct and plaintiff’s injury?

2. Duty—assuming that a causal connection has been established, did defendant owe plaintiff a duty which protects plaintiff against the risk of injury he has suffered?
general, and is applicable to attorney malpractice cases in particular. This comment will formulate and discuss the issues of attorney malpractice in their proper order: causation, duty (focusing on the issue of privity), negligence (discussing primarily developments in the applicable standard of care), damages, and defenses.

II. CAUSATION—THE CAUSAL RELATION

"The identification of a defendant and proof of a causal connection between his conduct and the victim's injury is a gateway issue that cannot be ignored in any negligence case . . . ."3 Green defines causal relation as a neutral issue of fact, blind to right or wrong, which is a simple inquiry into the fact of defendant's contribution to the injury.4 It is essential that this causal relation be established first, for without it plaintiff has no case, and all other issues are moot.5

To prove causal relation, many courts have developed the "but for" test: "[T]he defendant's conduct is not a cause of the event, if the event would have occurred without it."6 It is, therefore, necessary that as a first step in proving a cause of attorney malpractice, the plaintiff prove that "but for" the attorney's conduct, plaintiff

3. Negligence—if defendant's duty extended to plaintiff, did defendant violate this duty by breaching the applicable standard of care?
4. Damages—if defendant violated the standard of care, what amount of damages is owed to plaintiff?
5. Defenses—what may defendant show to disprove any of these requisites?


3. Identification of Issues, supra note 2, at 813.
4. Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543, 548-49 (1962). See also W. Prosser, Torts § 41, at 237 (4th ed. 1971). Causal relation, an issue of fact, must be distinguished from proximate cause, an issue of law. Both Green and Prosser relate the concept of proximate cause to that of duty. In considering whether an actual cause of plaintiff's injury is a proximate cause of that harm, a court should focus on the policy issues which determine the extent of the original obligation and of its continuance—that is, the duty defendant owes to plaintiff to protect him from the risk of harm incurred—rather than at the mechanical sequence of events which contributes to causation in fact. Id. at 244; L. Green, Rationale of Proximate Cause 11-14, 39-43 (1927).

5. Green, supra note 4, at 549. There is great advantage in considering the causal issue first; defendant's conduct is a factual issue, as is the victim's injury, and the causal relation between the two is a factual concept. Duty, negligence and damages are legal issues which will not even arise unless the causal relation is first established. Id.

6. W. Prosser, supra note 4, § 41, at 239. The "but for" test is at most a rule of exclusion, however, for even if the event would not have occurred "but for" defendant's conduct, it still does not follow that liability exists, since other considerations, such as duty, may prevent it. Id.
would not have suffered harm. It is clear that plaintiff has the burden of proving causal relation between defendant's conduct and the injury. In many cases, however, this burden presents no problem to plaintiff as the causal relation between defendant's conduct and plaintiff's injury is so obvious that the issue is not contested. For example, if an attorney overlooks an outstanding lien in approving an abstract, that conduct is clearly the cause of the plaintiff being subject to the lien.

In addition to proving causal relation, it has been argued that in a suit for giving erroneous advice, plaintiff should be required to prove that the advice was the sole proximate cause of the loss suffered. Most courts have rejected this contention, however, and have held that erroneous advice need only be a cause of the injury. This result is supported by important policy considerations. To require plaintiff to prove that defendant's conduct was the sole cause of the injury would be to subject plaintiff to an impossibly heavy burden of proof. Causation, after all, cannot be proved with mathematical precision.

Notwithstanding the fact that plaintiff need only prove defendant's conduct to be a cause of the injury, plaintiff still faces a difficult burden of proving causal relation in the case of loss caused by the negligent conduct of litigation. When charging his attorney with negligence in litigation, plaintiff must prove that but for the attorney's conduct, the original action would have been success-

7. Id. at 241: "[Plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that conduct of the defendant was a substantial factor in bringing about the result."


11. See W. PROSSER, supra note 4, § 41, at 242: "[Plaintiff] need not negative entirely the possibility that the defendant's conduct was not a cause, and it is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise.

12. Comment, New Developments in Legal Malpractice, 26 Am. U.L. Rev. 408, 433-34 (1977) ("A client faces the most difficult burden of proving causation when he alleges that his attorney was negligent in preparing or conducting litigation."); Comment, Legal Malpractice, 27 Ark. L. Rev. 452, 466 (1973) ("in many circumstances the burden of proving causation is an extremely difficult one to meet").
ful,13 or that the case would have succeeded on appeal.14 Such proof can only be established by trying the original action in the malpractice action—the so-called “suit within a suit.”15 In order to prevail in a malpractice action, plaintiff must prove the existence of a sound claim or defense in the original action, or that the defendant negligently failed to effect an appeal that would have been sustained. In addition, even if the original claim was valid, some jurisdictions have required that plaintiff prove that the original defendant was solvent to the extent of the judgment.

16 As one commentator states: “If the plaintiff in a malpractice action would have lost the original suit notwithstanding the attorney’s negligence, then that negligence did not cause any injury in fact, and no liability attaches.”17

13. See, e.g., Trustees of Schools of Township 42 N. v. Schroeder, 2 Ill. App. 3d 1009, 278 N.E.2d 421 (1971) (on a counterclaim against attorney for malpractice for failing to raise an appeal, client must prove that the cause of action would have succeeded but for attorney’s conduct); Masters v. Dunstan, 256 N.C. 520, 124 S.E.2d 574 (1962) (although attorney was negligent in defending his client in litigation, there is no liability where client had no meritorious defense). See also Cook v. Superior Court, 19 Cal. App. 3d 832, 97 Cal. Rptr. 189 (1971); Freeman v. Rubin, 318 So. 2d 540 (Fla. Ct. App. 1975).

14. Better Homes, Inc. v. Rodgers, 195 F. Supp. 93 (N.D.W. Va. 1961) (where attorney failed to prosecute timely appeal, plaintiff may not recover where there was a failure to prove that appeal would have resulted in reversal of trial court); Kilmer v. Carter, 274 Cal. App. 2d 81, 78 Cal. Rptr. 800 (1969) (failure to prosecute appeal did not amount to negligence inasmuch as the client would have lost the case on appeal); Pusey v. Reed, 258 A.2d 460 (Del. Super. 1969) (to sustain malpractice action for failure to take an appeal, it must be shown that more favorable result would have been reached on appeal).

15. See Coggin, Attorney Negligence—A Suit Within A Suit, 60 W. Va. L. Rev. 225 (1958). Some commentators emphasize that the purpose of a suit within a suit is to ascertain the amount of damages. Id. at 233-34; Gillen, Legal Malpractice, 12 Wash. U.L.J. 281, 292-93 (1973). Although this may be one function of the procedure, its main function is to ascertain whether there exists a causal relation between defendant’s conduct and plaintiff’s injury. Indeed, in certain cases of attorney misconduct it would not seem necessary to prove monetary damages to sustain a cause of action. See note 17 infra.


17. Comment, New Developments in Legal Malpractice, supra note 12, at 434. This statement is correct only to the extent that “injury in fact” is defined to mean monetary damages, and only to the extent that monetary damages are a necessary element of Green’s causal relation test. It may be argued, however, that while “injury”—given its broadest meaning—is a necessary element of causal relation, monetary damages are not, and are a separate issue to be resolved at a different stage of the proceedings.

It is not hard to imagine a situation in which an attorney’s conduct could cause injury without causing monetary damages. If, for example, an attorney failed to file suit within the applicable statute of limitations, plaintiff would have suffered injury even though it be shown that plaintiff would not have recovered in the original action. In the first place, even if it were shown
Although it has been argued that the California Supreme Court has recently relaxed the suit within a suit requirement, it is unlikely that the requirement would or could be abandoned. The suit within a suit requirement may place a heavy burden of proof upon plaintiff, but it still remains an accurate means of proving causation in an attorney malpractice action.

III. DUTY—THE PRIVITY ISSUE

Assuming that a causal connection is established, plaintiff must then establish a duty the defendant owes the plaintiff which protects the plaintiff against risk of the injury which was suffered. The scope of duty is always an issue of law for the court, and how far this duty to protect plaintiffs will extend is decided on the basis of public policy.


19. Comment, New Developments in Legal Malpractice, supra note 12, at 435, argues that the interpretation found in Note, supra note 18, is incorrect. The jury in Smith was instructed that, in order to hold the defendant attorney liable, it must find both that he was negligent and that his negligence was the cause of plaintiff's injury. By finding for the plaintiff, the jury impliedly found that both conditions were met.

20. Plaintiff's burden of proof may not be as great as it seems, particularly in those cases in which the source of the suit is the attorney's failure to bring a case to trial, rather than the attorney's negligence at trial. If defendant attorney's defense is to prove that plaintiff would not have recovered in the original suit, he or she may very well be handicapped by not having access to evidence available to the original defendants.

21. The duty is the exercise of ordinary care or some more exacting care commensurate with the dangers involved. The duty of care may be based on a statute, some common law principle or undertaking, or on the inadequate performance of a contract. The Negligence Action, supra note 2, at 378.

22. Identification of Issues, supra note 2, at 811. The extent of a defendant's duty has often been treated as a question of proximate cause. Id. at 815; W. Prosser, supra note 4, § 42, at 244. See note 4 supra.

23. The Negligence Action, supra note 2, at 378; W. Prosser, supra note 4, § 42, at 244. Public policy enables a court to exclude or include the risks of injury sought to be brought under the protection of the particular duty owed the victim. According to Green, there are five factors of policy which have the
In the area of attorney malpractice, even though a causal connection has been shown between the attorney's conduct and the plaintiff's injury, the attorney will not be liable unless he or she had a duty to protect plaintiff from the risk of harm. Traditionally, attorneys owed a duty only to those with whom they were in privity of contract,24 and this rule until recently has been immutable.25

The requirement of privity in attorney malpractice cases was established in the United States in Savings Bank v. Ward.26 In this case the defendant attorney had examined title to a piece of real estate for the owner of the land, and certified the title as valid. On the strength of this certification plaintiff loaned the owner a large sum of money, which was subsequently lost when the title

greatest significance in the determination of the scope of duties: (1) the administrative factor, (2) the ethical or moral factor, (3) the economic factor, (4) the prophylactic factor, and (5) the justice factor. Green, The Duty Problem in Negligence Cases (pt. 1), 28 COLUM. L. REV. 1014, 1034 (1928). The administrative factor is of paramount importance to a court when asked to extend the scope of a duty. A court will not extend a duty if to do so would be unduly burdensome or expensive; if a court is requested to extend a duty of protection owed by defendants to a new class of plaintiffs, the court will not do so unless the class can be easily defined, the plaintiffs as individuals can be determined with a minimum of effort, and the new class of plaintiffs is reasonably limited. Id. at 1035-45.

The remaining factors are more difficult to articulate and apply. The moral or ethical factor is the most compelling influence on judges when administrative considerations offer no obstacles. This factor is composed of those philosophical, religious and ethical tenets which are the unarticulated moral foundations of society. Such tenets are the free will of an individual, the capability to care for oneself, the "goodness" or "badness" of one's conduct, and the "practical affairs of everyday life." Green, The Duty Problem in Negligence Cases (pt. 2), 29 COLUM. L. REV. 255, 255 (1929). The economic, prophylactic and justice factors are concerned with future conduct. Damages are imposed, not merely for the individual offender's lesson, but to prevent future harms as well. Further, judges will take the economic factor into account when, all other factors being equal, they place the loss where it will be felt the least and can best be borne. Finally, other factors being equal, judges will give attention to the parties before them, rather than concentrate solely on the legal aspect of the case. The injured plaintiff "captures the heart of judge and jury alike. This, according to Green, is the justice factor. Id. at 255-56.

25. See, e.g., McGlone v. Lacey, 288 F. Supp. 682 (D.S.D. 1968) (where there is no attorney-client relationship there can be no breach or dereliction of duty by attorney and therefore no liability); Jacobsen v. Overseas Tankship Corp., 11 F.R.D. 97 (E.D.N.Y. 1950) (although an attorney must exercise good faith in dealing with the third party, there is no liability to the third party unless fraud, falsehood, or collusion is established); Weigel v. Hardesty, 549 P.2d 1335 (Colo. App. 1976) (while fulfilling obligation to client, attorney is liable for injuries to third parties only when conduct is fraudulent or malicious); Averill, Attorney's Liability to Third Persons for Negligent Malpractice, 2 LAND & WATER L. REV. 379, 380 (1967).
26. 100 U.S. 195 (1879).
turned out to be invalid. Although it was conceded that had the attorney made a proper title search he would have discovered the fatal flaw, the Court held that the attorney was not liable to plaintiff for the amount lost. The Court adhered to the general rule that an attorney owes a duty only to those with whom he is in privity of contract, 27 obviously fearing the "absurd consequences" 28 that would ensue if the rule were otherwise, in that "there [would be] no point at which such actions will stop." 29 Most courts still adhere to the requirement of privity in legal malpractice actions, 30 although there have been attempts to circumvent the rule. 31

The privity requirement fulfills the function of protecting attorneys from an undue burden of liability. 32 If an attorney were liable for every consequence of an action to every person that that action affected, the practice of law would be prohibitively expensive and many attorneys would be discouraged from practicing. Yet the issue remains as to whether adherence to a strict requirement of privity is worth the cost of preventing worthy, innocent plaintiffs from recovering. Further, the requirement of privity in attorney malpractice cases is assuming an even more anomalous position in light of the relaxation of privity requirements in other areas of tort law. 33

27. Id. at 200.
28. Id. at 203.
29. Id.
31. In order to circumvent the requirement of privity it has been argued that an attorney's liability should be predicated on a third party beneficiary contract theory. Averill, supra note 25, at 386. See generally J. CALAMARI & J. PERILLO, CONTRACTS §§ 17-1 to 11 (1977). This theory has been applied where the attorney's negligent drafting of a will has caused harm to one of the beneficiaries. See, e.g., Buckley v. Gray, 110 Cal. 339, 42 P. 900 (1895). A third party beneficiary contract will not provide any relief, however, where the court finds plaintiff to be merely an incidental beneficiary of the contract and, therefore, not within the rule. Id. at 339, 42 P. at 901; J. CALAMARI & J. PERILLO, supra § 17-2(b), at 607.
33. The "assault upon the citadel of privity," Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931), began with MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1915). The New York Court of Appeals there held that an automobile owner could bring an action directly against the manufacturer for injury caused by a defective wheel despite the lack of privity. Since
In the area of products liability, one rationale for abandoning the privity requirement is that a consumer not in privity with the manufacturer is the person most likely to be injured by a defective product, and is least able to protect against the injury. A similar situation arises in provision of certain kinds of legal services. When an attorney negligently writes a will or searches a real estate title, those not in privity will suffer the consequences of any misfeasance. It is, therefore, logical that the privity requirement be relaxed in the area of attorney malpractice, if the end in view is protection of innocent parties.

The courts have begun to abolish the privity requirement in areas other than products liability. In Glanzer v. Shepard for example, defendant was engaged in business as a public weigher. Defendant was hired by a merchant to weigh 905 bags of beans which he then sold to plaintiff. Defendant weighed the beans and certified the weight; plaintiff relied on the certification when he purchased the beans, but when the actual weight turned out to be less than the amount certified he sued defendant for the amount he had overpaid the seller.

In an opinion written by Judge Cardozo, the New York Court of Appeals affirmed a directed verdict for plaintiff. Judge Cardozo imposed a duty on defendant which would extend to all who relied on his certifications, not merely to those in privity with him. The duty was deemed to arise not because of the character of the act's consequences but from the "proximity or remoteness" of those consequences in the mind of the actor.

The importance of Glanzer lies in the fact that it extended the decision in MacPherson v. Buick Motor Co. beyond the realm of products liability to the point where "[o]ne who follows a common calling may come under a duty to another whom he serves, though a third may give the order or make the payment." Under appropriate circumstances—as when an attorney drafts a will or certifies a title—this rule would apply to an attorney.

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36. Id. at 240, 135 N.E. at 276.
37. Id. at 240, 135 N.E. at 276.
38. Id. at 240, 135 N.E. at 276.
40. MacPherson, the privity requirement has been eliminated in products liability cases. See, e.g., Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 80 N.W.2d 873 (1958); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).
In 1931 the New York Court of Appeals again considered the privity issue in *Ultramares Corp. v. Touche.*\(^{42}\) Defendants were public accountants who had been employed by a company to certify the validity of a balance sheet, which would establish its financial condition. Defendants, knowing that their certification would be used for the purpose of obtaining credit, certified the company as being financially sound when it was actually insolvent. Plaintiff relied on this certification by loaning the company substantial sums of money, which were later lost when the company declared bankruptcy.

Surprisingly, the New York Court of Appeals did not follow *Glanzer,* but held the accounting firm not liable because of lack of privity.\(^{43}\) The court distinguished *Glanzer* on the basis that in *Glanzer* the certification of weight was intended by defendant to be used primarily by plaintiff, thus creating a "bond . . . so close as to approach that of privity,"\(^{44}\) while in *Ultramares* the situation was otherwise. In the latter case the service was intended primarily for the use of the hiring company and only incidentally for the use of plaintiff and others to whom the company might later show the balance sheet.\(^{45}\) The distinction that the court drew between *Glanzer* and *Ultramares* is that in the former the class of third party beneficiaries was small, determinate, and known to the defendant, while in the latter case the class of third party beneficiaries was potentially large, indeterminate, and not known to the defendant.\(^{46}\)

Although not clearly articulated as the basis for its holding, the New York Court of Appeals apparently used policy considerations in deciding how far the duty owed by defendants extended.\(^{47}\) The indeterminate size of the class which would make use of defendant's balance sheet would cause insurmountable administrative difficulties, leading the court to restrict the duty to cover only those within an easily determinable class.\(^{48}\)

The administrative difficulties which were responsible for the result in *Ultramares* could be avoided if a clearly articulated test for determining the scope of duty in the absence of privity were

\(^{42}\) 255 N.Y. 170, 174 N.E. 441 (1931).
\(^{43}\) Id.
\(^{44}\) Id. at 182-83, 174 N.E. at 446.
\(^{45}\) Id. at 183, 174 N.E. at 446.
\(^{46}\) Imposition of a duty toward a large indeterminate class of plaintiffs raises the specter of extremely large recoveries, especially in a sensitive profession such as accounting. In *Glanzer* the damages alleged were small and more within control of the defendants. This, as much as anything, may account for the difference in result between the two cases. Averill, *supra* note 25, at 391.
\(^{47}\) See note 23 & accompanying text *supra.*
\(^{48}\) See note 23 *supra.*
developed. Such a test was first articulated by the California Supreme Court in *Biakanja v. Irving*. The case involved a notary public who agreed and undertook to prepare a valid will for the decedent. Not being a lawyer, the notary public apparently failed to carry out the requisite formalities for validation of the will. When the will failed, the sole beneficiary under the will sued the notary for negligence. Because the beneficiary had had no contract with the notary, privity was the pivotal issue.

In affirming the beneficiary's verdict in the trial court, the California Supreme Court discussed the rapid developments in the law on this problem, particularly in the area of products liability. The court noted that liability to third persons for injury to an "intangible interest" was not so well established, but formulated a rule which articulated the policy considerations inherent in the question of scope of duty:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.

The significance of *Biakanja* is that it clearly defined the factors to be used in determining when a defendant's duty extends to a third party not in privity. But if there was any doubt that *Biakanja* would be restricted to its facts, this was quickly dispelled by *Lucas v. Hamm*, decided by the same court three years later.

Defendant, a practicing attorney, was employed by the testator to draft his will. Plaintiffs were the beneficiaries under a residuary trust set up in the will. After the death of the testator, the attorney informed the beneficiaries that the trust provision he had drafted was void as a violation of the rule against perpetuities. The beneficiaries settled an attack against the trust, and sued the attorney for the difference between the amount they would have received under the trust and the amount for which they settled.

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49. 49 Cal. 2d 647, 320 P.2d 16 (1958).
50. Id. at 649-50, 320 P.2d at 18-19.
51. Id. (citing Glanzer and *Ultramares*).
52. *Biakanja v. Irving*, 49 Cal. 2d at 650, 320 P.2d at 19. These factors are similar to those posited by Green as having the greatest significance in determining the scope of duty. See note 23 supra. Indeed, Green's assertion that the administrative factor is the most significant element in determining expansion of the scope of duty is borne out by the *Biakanja* test. The first four factors of the *Biakanja* test deal with identifying individual plaintiffs and defining the class of future plaintiffs, both prime administrative concerns.
Privity was again the issue, and the court reaffirmed the test set out in Biakanja. Five of the same factors were repeated. A new factor replacing the fifth factor was "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession." The court held that the first five factors all pointed toward imposing liability upon the attorney. In considering whether the recognition of liability to third parties would place an undue burden on the profession, the court reasoned that although in some situations liability could be large and unpredictable in amount, this is also true of an attorney's liability to a client. The court held that an extension of liability to third parties would not place an undue burden on the profession, particularly in light of the fact that "a contrary conclusion would cause the innocent beneficiary to bear the loss."

Lucas v. Hamm establishes that privity is not a bar to actions by third parties against attorneys, so long as certain factors apply. The majority of courts still require privity in attorney malpractice actions but there is evidence that this is changing.

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54. The factor of "the moral blame attached to defendant's conduct," see text accompanying note 52 supra, was omitted, indicating that it was included in Biakanja solely because defendant in that case had violated a statute by undertaking the unauthorized practice of law.

55. Lucas v. Hamm, 56 Cal. 2d at 589, 364 P.2d at 688, 15 Cal. Rptr. at 824.

56. The court noted:

As in Biakanja, one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that the plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of preventing future harm would be impaired.

Id.

57. Id.

58. While the court held that beneficiaries can recover against attorneys who draft wills negligently, it imposed no liability in this particular case. The court held that, as the attorney's error involved the rule against perpetuities—a "technicality-ridden legal nightmare"—the attorney did not as a matter of law violate the applicable standard of care in misapplying the rule. Id. at 592, 364 P.2d at 690, 15 Cal. Rptr. at 826.

59. See note 30 supra.

60. Courts have relaxed privity requirements in actions brought by beneficiaries against attorneys for negligently drafting wills: See Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (C.P. 1966); Succession of Killingsworth, 292 So. 2d 536 (La. 1973). A similar result has been obtained in actions by purchasers of real estate against the sellers' attorneys for approving defective titles. See, e.g., Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149 (1974). In a case expressly following Lucas v. Hamm the Arizona Court of Appeals held that attorneys for the
Adherence to a strict privity requirement is of course more administratively convenient for courts. However, use of the Biakanja-Lucas test for defining the class to whom a duty is owed would ease some of the administrative difficulties, and make it possible to define and predict to whom an attorney owes a duty of care. Further, considerations of preventing future harm point toward abolition of the privity requirement. For example, if privity were a complete bar to an action brought by beneficiaries under a will against an attorney for negligently drafting the will, there would be little or no sanction against the attorney, and hence no impetus to avoid the mistake in the future. After all, the only party who could bring an action would be dead.

Finally, it is more economically just to place the cost of the attorney's misfeasance on the party best able to afford it—the attorney, who can protect against loss by purchasing malpractice insurance. It is totally inequitable to allow the burden of an attorney's misfeasance to rest upon an innocent party, who can do nothing to protect against it.


61. See note 23 supra.
62. It would seem clear under this test that an attorney who drafts a will or searches a title should owe a duty to those who would reasonably be expected to rely on those services. In the case of a will, the class of third party beneficiaries would be small, and usually confined to those who would take under the will. In the case of a title search undertaken at the behest of a seller, the class of prospective buyers/plaintiffs could conceivably be quite large. But even though the transaction would not be intended to directly affect any particular plaintiff, this factor would be overbalanced by the closeness of the connection between the attorney's conduct and the plaintiff's harm, and the foreseeability of harm to prospective purchasers. See text accompanying note 52 supra.
63. A benefit to the legal profession may also accrue from relaxation of the privity requirement. Due to the status and responsible position of attorneys in the community, they must always maintain a high standard of conduct toward the court and community. Maintenance of the privity requirement in attorney malpractice cases, when it has been relaxed in other areas of tort law, is at odds with the high standard of conduct required of attorneys. It smacks of bias on the part of the courts toward the legal profession, giving rise to public skepticism toward the legal system. Elimination of the privity requirement in attorney malpractice cases will not in itself change the public's attitude. But by keeping the privity requirement in attorney malpractice cases consistent with other areas of tort law, the legal profession will be taking a small step toward improvement of its image in this country. Averill, supra note 25, at 402-03.
IV. NEGLIGENCE—THE APPLICABLE STANDARD OF CARE

The third issue in a negligence action is the violation of a duty, or negligence. Assuming it has been established that the conduct of defendant contributed to plaintiff's injury, the risk of which falls within the scope of defendant's duty, plaintiff must still prove that defendant violated a duty to plaintiff with respect to the injury suffered. "This is the negligence issue, the heart of the negligence action." It is the function of the trial judge to determine whether the evidence is sufficient to raise the issue, and if it is, to submit it to the jury.

Just what constitutes the standard of care in legal malpractice cases is open to some question. Plaintiffs used to be required to prove that their attorney had been grossly negligent in order to recover. Most courts now, however, require proof only of simple negligence. A typical statement of this standard of care is found

64. See § II of text supra.
65. See § III of text supra.
67. Id. Green notes that even after causal relation and breach of duty have been established, many courts still insist that the jury find that the defendant's negligence was a proximate cause of plaintiff's injury. The Negligence Action, supra note 2, at 381. According to Green, proximate cause is a false issue under modern negligence doctrine; it is a throwback to early common law actions such as trespass where liability turned on cause. Under modern negligence doctrines, liability turns on fault or negligence rather than cause. The only cause issue in negligence is causal relation. Proximate cause is a "dead doctrinal limb" which should have been lopped off long ago, and should not now be used by courts to defeat innumerable cases which have already been subjected to the litigation process and resolved in plaintiff's favor. Id.
68. Evans v. Watrous, 2 Port. 205 (Ala. 1835) (attorney not liable to client unless guilty of "crassa neglentia"); Mardis' Adm'r's v. Shackleford, 4 Ala. 493 (1842) (an attorney is liable only for gross negligence, which is usually a question of fact for the jury); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889) (no recovery for error in the conduct of litigation unless errors relied on were "very gross").

The rationale behind the requirement of proof of gross negligence was stated in Babbitt v. Bumpus, 73 Mich. at 338, 41 N.W. at 419:

[T]he fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing as to the application of the law to a given state of facts, and even the ablest jurists find themselves frequently differing as to both, shows both the fallacy and danger of any other doctrine . . . .

There is considerable doubt, however, as to whether a different standard of care from that of ordinary negligence was actually intended. See Wade, The Attorney's Liability for Negligence, in PROFESSIONAL NEGLIGENCE 222 (T. Roady & W. Anderson eds. 1960).
in *Hodges v. Carter.*

Ordinarily 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 similarly 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.

However, there has not been a definitive statement of the standard of care required in attorney malpractice actions, and the standard varies from jurisdiction to jurisdiction. For example, some courts apply an objective standard of care, which judges an attorney's conduct against the action other attorneys would have taken in similar circumstances. Others apply a subjective standard which takes into account the good faith effort of an attorney to exercise his or her best judgment.

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70. Leach, 213 Minn. 360, 6 N.W.2d 819 (1942); Gabbert v. Evans, 184 Mo. App. 283, 166 S.W. 635 (1914); Malone v. Gerth, 100 Wis. 166, 75 N.W. 972 (1898); Annot., 45 A.L.R.2d 5 (1956).

71. 239 N.C. 517, 80 S.E.2d 144 (1954).

72. *See, e.g.,* Theobald v. Byers, 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864, 865 (1961) (attorney must use "such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise"); Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 146, 23 N.E. 1075, 1076 (1889) (attorney must exercise skill commensurate with that possessed by "well informed members of his profession"); Cochrane v. Little, 71 Md. 323, 332, 18 A. 698, 701 (1889) (attorney must use "a fair average degree of professional skill and knowledge").

73. Theobald v. Byers, 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864, 865-66 (1961) (attorney must use "such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise"); Cochrane v. Little, 71 Md. 323, 331-32, 18 A. 698, 701 (1889) (client has a right to "a fair average degree of professional skill and knowledge").

74. Palmer v. Nissen, 256 F. Supp. 497, 501 (D. Me. 1966) (attorney required only to act "with good faith, to the best of his skill"); Stevens v. Walker & Dexter, 55 Ill. 151, 153 (1870) (attorney will not be held responsible if he acts "to the best of his skill and knowledge"); Hodges v. Carter, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954) (attorney must exercise his "best judgment"); Denzer v. Rouse, 48 Wis. 2d 528, 534, 180 N.W.2d 521, 525 ("an attorney is bound to exer-
Aside from these differences, which focus on the formulation of the standard of care, there remains the issue of how high the standard of care should be within different areas of the profession. The question remains as to whether there should be different standards of care for attorneys practicing in different localities, and whether there should be a higher standard of care for specialists.

A. The Locality Standard

In cases of medical malpractice the rule is well established that a physician will be held to a standard of care based on the actions of doctors in the same or a similar locality. The object of this qualified standard was to protect the country physician, who did not have access to new techniques and developments available to urban doctors. In most cases of legal malpractice, however, a standard based on locality is seldom mentioned, or if mentioned is not considered a decisive factor in determining the propriety of the attorney's conduct. But even though modern technology may have eliminated one rationale in favor of a local standard of care, a strong argument may still be made that legal malpractice

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76. McCoy, supra note 75, at 33.

77. Cf. Pitt v. Yalden, 98 Eng. Rep. 74, 75 (K.B. 1767) (defendant-attorneys relieved of liability because "they were country attornies; and might not, and probably did not know that this point [of law] was settled here above"). The reason for not recognizing a locality standard of care is obvious: one who passes a state bar examination presumably is competent to practice anywhere in the state. Comment, 26 Am. U.L. Rev., supra note 12, at 416-17.

78. Theobald v. Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961); Hillegas' Adm'r v. Bender, 78 Ind. 223 (1881); Cochrane v. Little, 71 Md. 323, 18 A. 698 (1889).

79. One commentator urges:

Today, methods of rapid transportation and easy communication virtually have eliminated the need for different standards. The duty of
should be judged on the basis of local conditions of practice.  

Notwithstanding the fact that modern technology has contributed greatly to standardizing the practice of law, the fact remains that differences in resources and opportunities exist for attorneys in widely varying communities. For example, attorneys in large metropolitan areas are generally considered to be more sophisticated than their rural counterparts, and problems which are common to a city practice may be unknown in a small rural community. It would thus seem unfair to hold a small town attorney with limited resources to the standard of care of an attorney practicing in a large city, where greater resources would be available and where local procedures and practices might well be more stringent.

Moreover, even if no difference exists in resources or sophistication from one community to another, it is still likely that differences in customary legal practice will develop. Attorneys may be influenced in their conduct by the characteristics of the community in which they practice. In *Gleason v. Title Guarantee Co.* for example, defendant was an attorney who undertook to certify titles to property for plaintiff. Because of a land boom in the county, the attorney did not make title examinations on his own, but depended on local title companies. The information which the title companies used was not up to date at the time of the attorney's certification, and prior encumbrances not listed in the certifi-

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80. See Note, supra note 71, at 782 (locality of practice limitation on standard of care is even more appropriate in legal malpractice than in medical malpractice).

81. *Id.* This conclusion is based in part upon the fact that urban attorneys engage in specialization more than rural attorneys. Cantrall, *A Country Lawyer Looks at "Specialization,"* 48 A.B.A.J. 1117 (1962); Comment, *Legal Effects of Attorney Specialization,* 30 Ala. L. Rev. 282 (1966). The conclusion that urban attorneys are more sophisticated than rural attorneys may be borne out statistically. To the extent that large firm practices are concentrated in large cities, with rural practices being primarily solo, the statistics found in Ladinsky, *The Impact of Social Backgrounds of Lawyers on Law Practice and the Law,* 16 J. Legal Ed. 127 (1963) are applicable. Ladinsky reports that 73 percent of the attorneys in large firms surveyed attended national or "prestige" law schools (Chicago, Columbia, Harvard, Michigan, and Yale), while only 14 percent of the attorneys in solo practice attended such schools. *Id.* at 132.

82. 317 F.2d 56 (5th Cir. 1963).
cation caused plaintiff's title to fail. The court held that evidence was properly admissible as to the standard of care of professional conduct prevailing in the county at the time.\textsuperscript{83} Thus, an attorney who pronounces a title marketable according to local standards would not necessarily be negligent merely because in a similar community the title would have been unmarketable.

A similar result obtained in \textit{Cook v. Irion}.\textsuperscript{84} Plaintiffs sued their attorney, alleging that he was negligent in suing only one of three possible defendants in a personal injury case. Plaintiffs submitted testimony of an attorney from a small town 200 miles away from the forum of the original action. The testimony was to the effect that the defendant attorney violated the standard of care of the average practitioner in the state in not suing all three possible defendants.\textsuperscript{85} The court held that an attorney practicing in a vastly different locality would not be qualified to second guess the judgment of an experienced attorney of the forum county—which had a much higher population than the county in which the witness practiced.\textsuperscript{86}

Many courts still adhere to a state-wide standard of care, however.\textsuperscript{87} One writer suggests a solution for the apparently conflicting rules: whenever an attorney's conduct is challenged in light of a state law or procedure, a statewide standard should be used; but in the absence of a state law question, the conduct of an attorney who has acted in accordance with local procedures should be measured by a community standard.\textsuperscript{88} Adoption of a locality rule may cause some problems,\textsuperscript{89} but it would in fact operate to recognize actual practice in attorney malpractice actions, and would help to standardize such actions. As it stands now, when testimony by other attorneys is necessary to establish a standard of care, the

\textsuperscript{83} \textit{Id.} at 60.
\textsuperscript{84} 409 S.W.2d 475 (Tex. Civ. App. 1966).
\textsuperscript{85} \textit{Id.} at 477.
\textsuperscript{86} \textit{Id.} at 478.
\textsuperscript{87} \textit{See}, \textit{e.g.}, Feil v. Wishek, 193 N.W.2d 218, 224-25 (N.D. 1971) (attorney who failed to advise clients to file a sales agreement in accordance with state law found negligent) Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 395, 438 P.2d 865, 866 (1968) ("The standards of practice for lawyers in this jurisdiction . . . are the same throughout the state, and do not differ in its various communities."); Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975) (expressly following \textit{Cook}). \textit{Cf.} Watkins v. Sheppard, 278 So. 2d 890 (La. App. 1973) (attorney must use degree of care exercised by attorneys practicing in the community).
\textsuperscript{88} \textit{Comment}, 26 AM. U.L. \textit{Rev.}, \textit{supra} note 12, at 416. Such a rule may, of course, create more problems than it solves. It may be quite difficult to determine when a state or local procedure is involved, or there may be a combination of the two. Further, and more importantly, such a rule would be contrary to the policy of promoting uniform legal practice throughout a state.

\textsuperscript{89} \textit{See} note 88 \textit{supra}. 
defendant would tend to draw heavily upon the local bar for his or her testimony, and thereby automatically place a locality of practice limitation upon the standard of care. Plaintiff, however, would have no tendency to draw upon the local bar, but would instead use testimony of an attorney from another locality to try to establish a different or higher standard of care. At least by imposing a standard of care based on local conduct in legal malpractice cases, attorneys would have a better idea of what type of conduct constitutes negligence, and much confusion over conflicting standards of care could be eliminated.

B. The Standard of Care for Specialists

It is well established in the field of medical malpractice that a physician who holds him or herself out as a specialist will be held to a higher standard of care than one who is a general practitioner. The issue remains, however, as to whether attorneys who specialize should be held to a higher standard of care than general practitioners. Despite statements to the effect that the duties and liabilities of attorneys and physicians are analogous, courts have been hesitant to ascribe a higher standard of care to attorneys who specialize. In one case, for example, an attorney’s

91. Note, supra note 71, at 781.
93. The American Bar Association permits attorneys to designate themselves as Patent Lawyers (providing they are admitted to practice before the United States Patent Office) or Trademark or Admiralty Lawyers, if they are actively engaged in those areas of law. ABA CODE OF PROFESSIONAL RESPONSIBILITY Dr 2-105(A1) (1970). Similarly, the American Bar Association permits the certification of attorneys as specialists under state law. Id. at EC 2-14. Beyond these areas of specialization sanctioned by the American Bar Association, the fact of attorney specialization, especially in urban areas, is well known. Comment, supra note 81, at 282-83.
94. See Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 145, 23 N.E. 1075, 1076 (1899):

Attorneys are very properly held to the same rules of liability for want of professional skill and diligence in practice, and for erroneous 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.

See also Note, supra note 71, at 772.
95. It has been argued that since attorneys do not have formal advanced training
actions were measured by the abilities of the average attorney, with no mention of special skill or expertise, even though he had represented himself as especially qualified in the defense of criminal cases.\footnote{96}

Given the realities of modern legal practice, it is logical to hold attorneys who specialize to a higher standard of care than general practitioners. A client frequently selects an attorney specifically because that attorney restricts his or her practice to a field in which the client has a problem. The client expects such an attorney to possess a higher degree of knowledge and skill than a general practitioner. Indeed, a client will often pay a premium in the form of a higher fee in order to obtain a higher degree of skill. This expectation should be protected by the courts.

There are two theories under which a higher standard of care for the legal specialist may be formulated and applied.\footnote{97} The first is the "holding out" approach. Under this theory, attorneys who represent themselves as specialists will be held to the standard of care of specialists, whether they are specialists in fact or not.\footnote{98} The underlying rationale would be to fulfill the just expectations of the client. The holding out approach is especially helpful in that it avoids the difficulties of identifying the uncertified defendant-specialist, since the holding out exists independently of any formal recognition of specialization.\footnote{99}

In \textit{Wright v. Williams},\footnote{100} the California Court of Appeals applied the holding out theory and held an attorney who represented himself as a specialist to a higher standard of care. The attorney, a specialist in maritime law, was sued for negligence in failing to in-

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\footnote{96}{Olson v. North, 276 Ill. App. 457 (1934).}
\footnote{97}{Note, \textit{supra} note 71, at 787.}
\footnote{98}{\textit{RESTATEMENT (SECOND) OF TORTS} § 299A, Comment d (1965) follows this approach.}
\footnote{99}{An actor undertaking to render services may represent that he has superior skill or knowledge, beyond that common to his profession or trade. In that event he incurs an obligation to the person to whom he makes such a representation, to have, and to exercise, the skill and knowledge which he represents himself to have. Thus a physician who holds himself out as a specialist in certain types of practice is required to have the skill and knowledge common to other specialists.}
\footnote{100}{47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975).}
form plaintiffs about a flaw in the title to a boat they intended to buy. The court held that "a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." Thus, whether or not attorneys are engaged in a formally recognized speciality, as long as they hold themselves out as specialists so as to create justifiably high expectations in their clients, they should be held to the higher standard of care.

The second approach for imposing a higher standard of care is based on the subjective, personal qualifications of attorneys rather than on any representation of specialization. Under some subjective articulations of the standard of care, attorneys are required to exercise their own best judgment, to the best of their skill. As fiduciaries and agents of their clients, it is arguable that attorneys who possess knowledge and skills superior to those of general practitioners would not discharge their duty to their clients unless they exercised that superior skill and knowledge.

101. *Id.* at 810, 121 Cal. Rptr. at 199. The court of appeals based its holding on the prior case of Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), which stated that the standard of care applicable to attorneys for malpractice is that of members of the profession "in the same or a similar locality under similar circumstances." *Id.* at 355 n.3, 530 P.2d at 592 n.3, 118 Cal. Rptr. at 624 n.3. The Wright court reasoned that one who holds himself out as a legal specialist performs in circumstances similar to other specialists but not to general practitioners. Wright v. Williams, 47 Cal. App. 3d at 810, 121 Cal. Rptr. at 199.

102. The holding out approach may be extended beyond the mere holding out as a specialist. The fact that some lawyers charge higher fees for the same services than others might raise higher expectations in clients. If this is the case, lawyers who charge higher fees should be held to a higher standard of care than other lawyers in order to insure that the just expectations of the client are fulfilled and that the client gets what he or she pays for. This may be a weak argument, however, in light of the rule which makes it unnecessary to show that a fee was paid in order to hold an attorney liable for malpractice. The duty to exercise the requisite care and skill is imposed upon the attorney when the case is undertaken regardless of whether compensation is to be received. See Spangler v. Sellers, 5 F. 882 (C.C.S.D. Ohio 1881); Moormen v. Wood, 117 Ind. 144, 19 N.E. 739 (1889); Annot., 45 A.L.R.2d 5, 14 (1956). If it is not necessary to show that a fee was paid in order to hold an attorney liable, *a fortiori* the amount of fee paid should be irrelevant in regard to the standard of care.

103. *See* note 74 & accompanying text supra.

104. *Restatement (Second) of Agency* § 379, Comment c (1958) ("it would be the ordinary understanding that [an agent] is to exercise any special knowledge or skill which he may have"); *Restatement (Second) of Torts* § 299, Comment f (1965) ("If the actor possesses special competence, he must exercise it, not only in his profession, trade, or occupation, but also whenever a reasonable man in his position would realize that its exercise is necessary to the reasonable safety of others.").
One case has in fact been decided under this rationale, although the standard of care owed to the client was founded upon an express contract, rather than implied from the agency relationship. In *Childs v. Comstock*, defendant attorneys had been retained to protest the imposition of a duty upon the client's imports. When the duty was upheld, the attorneys failed to make a timely appeal. They sought to excuse their failure to appeal on the ground that notice of decisions was given irregularly. The court held them liable:

The defendants were experts in that line of business, and . . . 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. . . .

. . . [The attorneys'] liability depends upon their contract. They expressly agreed to "take all such steps as may be requisite . . . to prosecute [the cases now pending] to a conclusion." 106

The court went on to hold that the defendant attorneys had violated their express duty to their client under the contract, as well as their implied duty arising from their superior skill and knowledge.

The problem with this subjective approach is that it would not allow an unambiguous recognition of legal specialization. 107 It would be preferable to recognize that legal specialization is a fact of legal practice, and to simply state that the standard of care must be higher when an attorney is a legal specialist. 108

C. Strict Liability

One possible means of setting the standard of care would depend not on what lawyers represent themselves to be, but on what they undertake to do. 109 Thus, if an attorney undertook to certify something as a fact, he or she would be held strictly liable for such certification, but an attorney merely venturing an opinion would be held to the normal standard of care. 110 According to Leon

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105. 69 A.D. 160, 74 N.Y.S. 643 (1902).
106. *Id.* at 165-66, 74 N.Y.S. at 646-47.
108. *Id.* It is evident, of course, that application of a higher standard of care for specialists will cause some difficulties. In the area of proof, for example, when it is necessary for a plaintiff to employ expert testimony in order to establish that a higher standard of care exists, there is a danger that the need for expert testimony will make attorneys reluctant to testify against their brethren, giving rise to a "conspiracy of silence" in the legal profession. Comment, *supra* note 81, at 286-87.
110. One court states the distinction this way:
Green, a professional who certifies something as a fact has a duty not merely to use care and be diligent, but to be accurate.\textsuperscript{111} Under this analysis the risk of injury falls upon the person who undertakes to speak, whether the mistake is intended or is the result of innocent error.\textsuperscript{112}

The reason behind this rule is simple. Most certifications of fact arise in the area of financial transactions—accountants prepare and certify balance sheets,\textsuperscript{113} public weighers weigh and certify goods,\textsuperscript{114} and warehousemen give information as to the storage of goods.\textsuperscript{115} In financial transactions, certainty, ease in determining liability and uniformity in result are extremely important.\textsuperscript{116} In order to give the law in this area the required degree of predictability and decisiveness a rule of strict liability must be used.\textsuperscript{117}

Two cases serve to illustrate this rule. In \textit{Biakanja v. Irving},\textsuperscript{118} defendant, a notary public, undertook to prepare a will for the testator. Defendant failed to fulfill the technical requirements necessary for validation of a will, and when the will failed the sole beneficiary thereunder sued defendant for the difference between the amount she would have received under the will and the amount she actually did receive. The court found the defendant liable for failure to use due care, but the situation actually gave rise to a duty on the part of defendant to assume the risk of having

\begin{itemize}
  \item In a 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. But passing titles, as a rule, is of an entirely different nature. A purchaser of real estate is entitled not only to a good, but to a marketable, title . . . . It is therefore the duty of a conveyancer to see that his client obtains a marketable title, and to reject titles involved in doubt, unless the client is fully informed of the nature of the risk, and is willing to accept it. A careful lawyer might readily advise a client that he was entitled to a piece of real property, and that it was proper to bring an action for its recovery, while at the same time he would unhesitatingly reject a title which involved the same question as to which he advised a suit.
  \item \textit{Byrnes v. Palmer}, 18 A.D. 1, 4-5, 45 N.Y.S. 479, 481-82 (1897).
  \item Green, supra note 109, at 467.
  \item Id. at 472.
  \item Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).
  \item Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).
  \item International Prods. Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 662 (1927).
  \item Green, supra note 109, at 472.
  \item Id. at 470-71. Unlike strict liability cases, where the rule of liability is uniform, negligence cases concentrate on the individual nature of each case, and "uniformity and certainty of result are not only impossible but undesirable." Id. at 471.
  \item 49 Cal. 2d 647, 320 P.2d 16 (1958).
\end{itemize}
failed in his undertaking. Plaintiff's injuries were in the nature of those incurred in financial transactions, and, because defendant undertook in essence to certify a fact, "[t]he duty imposed by the defendant's undertaking was to prepare and to execute a will in compliance with the statutory requisites of the law of California vesting in the plaintiff the property of the testator at the latter's death, and not merely to use due care to do so."  

In *Lucas v. Hamm*, however, an attorney undertook to draw a will, one portion of which failed as being in violation of the rule against perpetuities. Rather than holding the attorney strictly liable, the court properly applied a standard of ordinary care. In this case "[t]he conduct of the attorney at the level here involved lies in the area of professional judgment of the legalist on a question of law about which no one's opinion can be certain . . . ." The undertaking of defendant in *Lucas* was not in the nature of certifying a fact, which involved mere application of definite procedures as in *Biakanja*. *Lucas* involved the exercise of legal judgment, and the attorney's actions were more in the nature of a statement of opinion.

Thus, one who undertakes to give information of fact should be held strictly liable for misstatements of fact, while a standard of ordinary care should apply to one who undertakes to exercise judgment. Similarly, one who undertakes to certify ascertainable facts should be held to a strict standard, while one who undertakes to give advice and opinion should be held to a standard of ordinary care.

V. DAMAGES

Assuming that a plaintiff's protected interest has been injured by defendant's negligent conduct, the issue remains as to what compensation should be awarded. Leon Green posits a rule for determining what items of damages should be allowed: "[E]very item of loss for which the plaintiff may recover must be found by the court to fall within the scope of the defendant's duty with respect to the risk of injury imposed on the plaintiff." The problem of determining what damages to award "is the same as that of defining the scope of the protection afforded by the rule invoked for the protection of the injured interest." In other words, when

119. Green, supra note 109, at 479-80.
120. Id. at 479.
122. Green, supra note 109, at 481.
123. Id. at 482.
124. Green, supra note 66, at 46.
125. L. Green, supra note 4, at 187.
a rule is established that defendant owes plaintiff a duty, the scope of the duty is co-extensive with the items compensable in damages. Both the scope of the duty and the items compensable in damages are determined by public policy.126

According to one source,127 there is little that is unusual in the law of damages as applied to attorney malpractice. The amount of damages to be awarded should compensate for the injury plaintiff received. If the attorney's negligence caused plaintiff to lose title to property, the measure of recovery is the value of the property.128 And if the attorney is negligent in prosecuting plaintiff's claim, the amount recoverable in the malpractice action is the amount that would have been secured in the original action but for the negligence.129 Further, if plaintiff would have recovered punitive damages in the original action, but due to the attorney's negligence the action is not brought, plaintiff can recover the amount of punitive damages from defendant.130 And where a suit is dismissed due to the attorney's negligence, plaintiff is entitled to recover from the attorney for additional costs and expenses incurred in attempting to reinstate the action.131 However, damages may not be reduced by any contingent fee the attorney might have earned had his or her responsibilities been successfully carried out,132 but a malpractice judgment may be reduced if plaintiff's own negligence has contributed to the loss.133 All of these items of damages clearly fall within the scope of defendant's duty to plaintiff.

There is, however, one area of damages seldom mentioned or employed in attorney malpractice cases—punitive damages. Punitive damages are "sums awarded apart from any compensatory

126. An example from the field of attorney malpractice will illustrate the rule. If an attorney who undertakes to draft a will owes a duty of care to third party beneficiaries of the will, he or she will be liable to them if the will is drafted negligently. Damages will be the difference between the amount that the beneficiaries would have received under a properly drafted will and the amount they actually receive. This would be a proper element of damages because the attorney's duty to the third party beneficiaries is to protect them against just such losses. But assume that the house of one of the beneficiaries has been repossessed because he counted on receiving the entire amount of the legacy under a properly drafted will. Even though this injury flowed from the attorney's negligence it would not be a proper element of damages. It would be beyond the scope of the duty the attorney owes to the third party beneficiaries. See generally L. Green, supra note 4, at 186-94.

127. Wade, supra note 68, at 233.
or nominal damages, usually as punishment or deterrent levied because of particularly aggravated misconduct on the part of the defendant.\textsuperscript{134} The functions of punitive damages are fourfold:\textsuperscript{135} (1) to punish the wrongdoer; (2) to deter the wrongdoer and potential wrongdoers from similar misconduct in the future; (3) to encourage injured plaintiffs to act as private attorneys general and thus increase the number of wrongdoers brought to justice; and (4) to compensate the injured plaintiff for those injuries caused by defendant's conduct which are not compensable at law.

Punitive damages are not awardable in all cases, and there are some limitations on when an award of punitive damages is proper. Since it is defendant's mental state rather than outward conduct that is said to justify a punitive award,\textsuperscript{136} the defendant must be shown to have the requisite evil intent in order to justify a punitive award. Anything that negates a bad state of mind, such as where defendant is found to have acted in good faith, will preclude a punitive award.\textsuperscript{137} Moreover, punitive damages will not be awarded unless the plaintiff has suffered actual damages.\textsuperscript{138}

Although not frequently used, punitive damages have occasionally been approved in attorney malpractice cases. In \textit{Hill v. Montgomery},\textsuperscript{139} for example, the defendant-attorney had falsely represented to plaintiff that he had secured a divorce for her, making this representation solely in order to get his fee. This false information led plaintiff to a second marriage that made her indictable for a felony. The court held the attorney liable for punitive damages, citing the "perfidy" of his conduct and the dangers incident thereto as a justification for the award of such damages.\textsuperscript{140} Similarly, the court in \textit{Hall v. Wright}\textsuperscript{141} held an attorney liable for punitive damages after he made fraudulent representations to his client which caused her to lose her home. And, in \textit{Singleton v.}
Foreman,\textsuperscript{142} an attorney was held liable for punitive damages where he had so verbally abused, insulted and oppressed his own client as to cause her extreme mental pain and suffering.

As illustrated by the above cases, the area of attorney malpractice is peculiarly suited to the use of punitive damages. Because of the nature of the legal profession the attorney occupies a position which requires the highest of moral standards. Being privy to sensitive information about clients, attorneys have great potential for abusing their position and causing great harm to their clients, as occurred in each of the above cases. In order to insure against attorneys abusing their position of power some deterrent is essential. One possible deterrent is the threat of punitive damages. Such was the rationale behind the decision to impose punitive damages in Hill:

\begin{quote}
In the honorable calling professed by him the law required of [the attorney] the utmost degree of fidelity toward all who might employ him. So deeply imbedded is that idea in our jurisprudence, so jealous is the law of the rights of a client dealing with his attorney, that not only is the attorney precluded from taking advantage of his superior knowledge and skill to the detriment of his client, but in all controversies between them the burden is on him to show that he truthfully informed his client as to all the facts and his rights in the premises.\textsuperscript{143}
\end{quote}

The deterrent effect of punitive damages would be even more pronounced in those situations in which there is no other official sanction against the attorney's misconduct. In Singleton, for example, the attorney could have been disciplined for failing to carry out his contract with the client,\textsuperscript{144} but it is doubtful that under the ABA Code of Professional Responsibility he could be punished for abusing and oppressing his client—which was, after all, the most shocking element of his conduct.

Finally, more liberal imposition of punitive damages would encourage clients to act as private attorneys general, to bring wrongdoing attorneys to justice. Even if an attorney's conduct were such as to warrant official sanctions, disciplinary proceedings are seldom undertaken. Use of punitive damages as a "bounty" would be especially useful in the legal profession, where violations of substantive rules are difficult to detect or prove, and when enforcement of the rules is infrequent.\textsuperscript{145}

\begin{footnotesize}
\begin{enumerate}
  \item 142. 435 F. 2d 962 (5th Cir. 1970).
  \item 143. 84 Ill. App. at 303.
  \item 144. ABA Code of Professional Responsibility DR 7-101(A) (1970): "A lawyer shall not intentionally . . . (2) Fail to carry out a contract of employment entered into with a client for professional services . . . ."
  \item 145. Owen, supra note 135, at 1287-89.
\end{enumerate}
\end{footnotesize}
VI. DEFENSES

As a defense to a charge of attorney malpractice, the defendant may of course establish a defense which disproves any of the foregoing requisites of causal relation, duty, breach of duty, and damages.\textsuperscript{146} There are, however, two affirmative defenses that may be raised to a charge of attorney malpractice: contributory negligence and the statute of limitations.

The defense of contributory negligence is seldom raised in attorney malpractice actions, probably because in most instances the client has placed the proceedings entirely under the control of the attorney.\textsuperscript{147} Nevertheless, the defense has been raised successfully in several cases. For example, where the client was himself an attorney who chose the form of pleadings, he could not recover from his attorney when those pleadings failed.\textsuperscript{148} And where a client had directed his attorney to delay filing an appeal, he could not recover from his attorney who did not file the appeal until after the statute of limitations had run.\textsuperscript{149} A client may be contributorily negligent for failing to disclose necessary information or for failing to use reasonable care to obtain information for the attorney.\textsuperscript{150} However, under certain circumstances it may be the duty of the attorney to make inquiries concerning the facts and if he or she fails to do so, the client cannot be held contributorily negligent for failing to volunteer the information.\textsuperscript{151} The duty of an attorney to inquire as to the facts of a case should be a question of law for the court.\textsuperscript{152}

Unlike contributory negligence, the defense of the statute of limitations has been frequently and successfully asserted as a bar to attorney malpractice actions. There are two major issues in the application of the statute of limitations—which statute is applicable, and when it begins to run.\textsuperscript{153}

The limitation periods for contract and tort actions usually differ, with the period for contracts being longer.\textsuperscript{154} Whether the tort

\textsuperscript{146} The Negligence Action, supra note 2, at 375.
\textsuperscript{147} Annot., 45 A.L.R.2d 5, 17 (1956).
\textsuperscript{148} Executrix of Carr v. Glover, 70 Mo. App. 242 (1897).
\textsuperscript{149} Tishomingo Elec. Light and Power Co. v. Gullett, 52 Okla. 180, 152 P. 849 (1915).
\textsuperscript{150} Hanson v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975).
\textsuperscript{151} Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).
\textsuperscript{152} Hanson v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975).
\textsuperscript{153} See § III of text supra. Cf. Hansen v. Wightman, 14 Wash. App. at 87, 538 P.2d at 1245 ("if it cannot be said that the duty to inquire or disclose was present as a matter of law, then it is for the trier of the fact to decide . . . whether negligence existed on the part of the lawyer").
\textsuperscript{154} See Wade, supra note 68, at 234-35.
\textsuperscript{155} See, e.g., Ill. Ann. Stat. ch. 33, §§ 15 & 17 (Smith-Hurd 1966) (providing for a
or contract statute of limitations will apply to an attorney malpractice claim will depend on whether the court characterizes the claim as sounding in tort or contract. A number of courts have held that regardless of how a plaintiff characterizes the claim, an action against an attorney for malpractice is based on breach of contract, and the contract statute of limitations must apply.\textsuperscript{156} Other courts have applied the tort statute of limitations, regardless of whether the attorney-client relationship was based on a contract.\textsuperscript{157} Still others apparently allow plaintiffs to choose the theory upon which they wish to proceed.\textsuperscript{158} And finally, a few courts have reached the preferred position that a cause of action against an attorney for malpractice is an amalgam of both tort and contract theories, and that regardless of how plaintiff characterizes the suit, all malpractice actions should be subject to the same statute of limitations.\textsuperscript{159} This result is based on the rationale that an attorney malpractice action is a hybrid of both tort and contract and that it would be totally unjustified in a malpractice case to reach different substantive results based upon distinctions having their source "solely in the niceties of pleading and not in the underlying realities."\textsuperscript{160}
Which statute of limitations applies is important not only because the statutes of limitation for tort and contract are of different lengths, but also because under a tort cause of action the statute of limitations does not begin to run until the injury is or reasonably should be discovered. Application of the discovery rule to attorney malpractice at first glance appears to be just and equitable—after all, there are many situations in which an attorney's malpractice would not be discovered until long after the negligent act, with often disastrous results. It would be inherently unfair to require an innocent plaintiff to bear a loss simply because the attorney's negligence remained hidden until the statute of limitations had run.

Balancing this consideration, however, is the fact that complete acceptance of the discovery rule would unjustly subject attorneys to increased liability. One of the policies behind statutes of limitations is to keep fraudulent and stale claims from springing up and thereby bring a sense of security to human affairs. It would be unfair to an attorney to subject him or her to liability for a negligent title search, if the mistake were not discovered until a decade after the certification.

One commentator has suggested that in order to resolve this conflict, the cause of action should be required to be brought within two years of the discovery of the injury, but in no case should a cause of action be allowed to be commenced more than six years from the date when the cause of action accrued. Such a rule would create a desirable balance between the policies behind the statute of limitations and the policy of allowing worthy plaintiffs to recover on legal malpractice actions. By setting a realistic time limit on attorneys' potential liability, the policies behind the statute of limitations are fulfilled. Furthermore, by giving plaintiffs a reasonable time in which to discover an attor-


See note 155 & accompanying text supra.

W. Prosser, supra note 4, § 30, at 144-45.

E.g., Hendrickson v. Sears, 359 F. Supp. 1031 (D. Mass. 1973) (defendant-attorney certified title as marketable, nine years later plaintiffs found property to be unmarketable because of undiscovered encumbrances); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 967 (1962) (negligently drafted trust in will not discovered until after death of testator); Eckert v. Schaal, 251 Cal. App. 2d 1, 58 Cal. Rptr. 817 (1967) (negligence of attorney in advising corporate client not discovered until shareholder's derivative action filed more than two years later).

53 C.J.S. Limitations of Actions § 1, at 902-03 (1948).

ney's negligence, the policy of allowing worthy plaintiffs to recover is promoted.

CONCLUSION

Changes in the law of attorney malpractice are necessary to keep this area of the law consistent with other rapidly changing areas of tort liability. Further, the law of attorney malpractice should reflect the ideals of fairness and equity toward which the profession strives. The public should perceive that the law in this area is not biased in favor of attorneys. To this end the profession should be prepared to adopt such necessary changes as the relaxation of the privity requirement and a higher standard of care for specialists. Adoption of such changes would be beneficial not only to the injured plaintiff, but to the profession as a whole.

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