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1968

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Recommended Citation

Gaspare A. Corso Jr., Opinions of Counsel: Responsibilities and Liabilities, 17 Clev.-Marshall L. Rev. 375 (1968)

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Opinions of Counsel: Responsibilities and Liabilities

Gaspare A. Corso, Jr.*

OPINION, as defined in *Black's Law Dictionary* is "A document prepared by an attorney for his client, embodying his understanding of the law as applicable to a state of facts submitted to him for that purpose."

Webster defines *Opinion* as an expression of professional judgment, "judgment or belief resting on grounds insufficient to produce certainty." We live an existence saturated by opinion; indeed little could be accomplished without it. Lawyers, however, while they may give opinions to their families and friends, *do not give opinions to their clients*. Again turning to Webster: Opinion, by way of counsel as "worthy or expedient to be followed" is *advice*. This semantic distinction, subtle as it may seem, is critical if we are to develop an awareness of the "pitfalls of professionalism."

When a lawyer, in his professional capacity, takes pen in hand, he thereby commits his advice to paper. This is true regardless of whether the writing be an *opinion letter* as such, a contract, a will, a deed, mortgage or whatever. Implicit in any action he undertakes is the assurance that he advises as to its propitiousness much in the manner of the late *Letras Comunicatorias* in Spanish Law which in and of themselves authenticate and give faith to their contents.¹

I have surveyed the views of lawyers and laymen in an effort to ascertain: what lawyers intend their opinion letters to be, what clients expect when they request opinion letters, and what is expected by various governmental agencies from lawyers representing clients before such agencies. One must keep in mind that individual interpretations vary greatly and must often be qualified; however, it is possible to draw some enlightening generalities in the broad area of opinions in general. Of necessity, though quotes will be isolated as such, sources may not be revealed. Interviews were done on a cross-sectional basis, including individual practitioners in practice for one to ten years, ten to twenty years, and twenty years and over. Larger firms, two or three-man firms, heavy metropolitan areas, smaller cities and rural areas were sampled. There were, interestingly enough, few significant differences in the views among the various groups sampled.

An appropriate starting point is the frank assertion that lawyers, as a group, do not as a rule expect to be held strictly accountable for their written advice.

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¹ 52 C.J.S. 1053 (1947).

The average lawyer does not contemplate making decisions for his client, but rather sees himself as an advisor, pointing out the legal ramifications of a given situation. The younger and the rural individual practitioner is apt to seek out more information from his client than is his older, more experienced or metropolitan counterpart. The large firm will undertake the most extensive survey of a client's situation. Few lawyers feel obligated to explore with a client the various alternatives to a contemplated business transaction. The prevailing attitude is one of "give the client what he wants; he doesn't come to you to be told *what* to do, rather *how*." Most lawyers have in their minds the words *gross negligence*, or the phrase *standard of competence of lawyers in the community*. Few can readily envision a situation where they might be held liable for their *opinion*. It is generally felt that in the area of professional judgment, only the most gross abuse could possibly warrant a claim of liability for negligence: "It's a matter of judgment." The consensus of those sampled seems to be that no attorney can be held accountable under the law for not being right. "One must surely be willfully and wantonly negligent precedent to being held liable for his advice." Almost invariably those queried use adjectives in connection with culpable negligence such as: deliberate, willful, intentional, or horrendous in nature. "Liability will not attach in a situation where you have taken an incorrect position, but would most commonly occur where counsel has failed to do anything at all." Without exception, the first example given in any interview of this nature is failure to act within a given statute of limitations.

Formats of opinion letters vary greatly. Generally, the youngest group and the larger firms will tend to encompass more in the way of research and precedent. This may be due, in part, to the young lawyer's enthusiasm to impress the client with his vast knowledge and the large firms' desire to justify their billing. Few lawyers make a practice of citing cases or precedent to any extent in their written opinions, except in cases where individual clients have expressed a desire for this approach.

"Your client comes to you because he assumes you know the law . . . he assumes you are keeping pace with the changes."² A client, in most cases, expects to be fully, accurately and correctly informed.³ Interviews show that relatively few clients are happy with what they receive from their lawyers. "What I want and *** what I get are two different things," and many corporate executives feel that too often opinions of counsel leave them where they started.

As pointed out earlier, most lawyers are not strongly inclined to

² Public Relations Corner, 3 Ohio Bar 74 (1967).

³ Dulberg v. Mock, 1 N.Y. 2d 54, 150 N.Y.S. 2d 180, 133 N.E. 2d 695 (1956).

urge their clients one way or another. However, it is a very real fact that this is precisely what the vast majority of clients want: to be told, in no uncertain terms, what they can and should do. The president of a large multi-state corporation said that he likes people to take a position, that he wants them to help him arrive at a decision. It is immediately apparent that although the lawyer, from his earliest days in law school, has been thoroughly impressed with the non-existence of the absolutely *sure thing* in law, and the fact that, in reality, the *black letters* are few, the client has not been so informed or convinced. Many clients feel that somewhere the answer to their problems must be engraved explicitly on the books. This explains the same clients' impatience with counsel when they don't seem to come up with the *word from Sinai* which the client expects. From the standpoint of the corporate executive, one of the most discouraging aspects of any situation is to find his counsel vacillating and indecisive. "I want an answer and I never get it." "I get a choice of three, four, or five alternatives, with always a hitch to them." ". . . (lawyers) are pretty weak when they give you their opinion, . . . you don't know where you are, . . . this is worth nothing to you really." "They lack crispness and positive approach. . . ."

The corporate or business client wants his attorney to function as an *insider* so to speak, to be affirmative in his approach, and positive in his opinion. Whether or not counsel chooses to exhaust cases or precedent is of secondary concern to all but the most astute and sophisticated executive. The typical executive is apt to be impressed not so much with the attorney's briefing ability as he is to be flattered by recognition of his powers of comprehension. It is also worthy of note that, regardless of formal education, corporate executives are, as a rule, perceptive and impatient individuals. They recognize *hedging* for what it is and are not apt to appreciate it.

Once having had favorable experience with his counsel's advice and having been impressed with the competence of such counsel, the average businessman is apt to rely completely and unhesitatingly upon such counsel's advice in the future. On the other hand, larger corporations, especially, secure in the knowledge that they can afford to go "first class" have very little patience with what they might consider less than competent legal counsel. William B. Robinson, Chairman of the Board of Coca-Cola Co., has stated: "In a way, you might liken the general (corporate) counsel to a doctor in China who is paid just so long as the patient remains well."⁴

While clients are apt to blame the lawyer when his advice has proven less than adequate or has gotten them into trouble, only the rare

⁴ Robinson, Proceedings of Fordham Law School Institute on Corporate Counsel 9 (1959).

exception might consider such counsel legally accountable from a negligence standpoint. The majority of executives do feel that the lawyer, in fact he has led them *down the garden path* should, under the circumstances, come to the rescue—at a significantly reduced fee.

It is incumbent upon the lawyer dealing with government agencies in his client's behalf to fully appreciate exactly what his client desires to accomplish. A thorough understanding of statutory provisions and the regulations of the agency in question should be a "condition precedent" to any opinion rendered in this area.⁵ The client's success or failure in dealing with such agencies will rest almost entirely on the skill of his legal counsel in drafting the necessary filings.⁶

Of significance is the fact that while one may not find cases in which clients have instituted actions against their own counsel, on the basis of *incompetence* in handling their affairs, the Securities and Exchange Commission has expressed no such reluctance along these lines. Schedule A of the Securities and Exchange Commission Regulations, now rescinded, provided that attorneys practicing before the Commission file certificates stating they were aware of penal provisions of the Federal Code relating to practice before the Commission. The Securities and Exchange Commission has instituted and continues to institute "interbureau" proceedings against lawyers based upon incompetence and lawyers have been suspended from practice before the Commission on the basis of such misfeasance.⁷

Counsel having difficulty wading through the "quagmire" of bureaucratic regulatory requirements would do well to heed Shakespeare's admonition:

For many men that stumble at the threshold are well foretold that danger lurks within. Henry the Sixth, Part III, Act 4, Scene 7.

Philip Habermann, in his article, "Preventive Law"⁸ depicts the plight of a man who was contemplating the purchase of a business and went to a lawyer to have the contract of sale drafted. The lawyer, without further ado, did exactly what he was asked, made no inquiries except for those absolutely essential to his form, gave it to his client, and collected his fee. As the tale unfolds, the client's deal fell through, he "lost his shirt."

Mr. Habermann then proceeds with his diagnosis of the transaction, pointing out what the lawyer should have done. However, nowhere, except by implication in the use of the word *should*, is there any suggestion

⁵ Redick, Draftsmanship, 64 Business Lawyers Institute 7.01 (1964).

⁶ *Ibid*; See also Armstrong, Legal Aspects of Work of the S.E.C., 16 Fed. B. J. 3 (1956).

⁷ See generally: 17 C.F.R. § 201 S.E.C., Rules of Practice (Revised 1 Jan. 1967).

⁸ 37 Clev. B. Ass'n J. 277 (Oct. 1966).

that our young businessman might have a legal right to have been informed as to the obvious factors which to him proved disastrous.

This parable raises the issue: Is the association of lawyer and client to be regarded as no more than a *cash and carry* relationship?

Professional liability, an area governed mostly by common law, has changed relatively little over the years.⁹ The authorities, and on this point they are numerous, have reached a laudable degree of unanimity in their conclusion that an attorney shall be held to that standard of skill and knowledge ordinary and common, reasonable, normal, requisite, fair and average and within *minimum professionally acceptable practices*; further such skill shall be exercised with ordinary and reasonable skill, care, prudence, diligence and dispatch.¹⁰

It would seem, at first blush, that the matter has been fairly well determined. In reality, the opinions cited provide little in the way of objective criteria. We are afloat here on a vast sea of norms such as the *ordinary*, the *reasonable*, and the *prudent*. These are words that defy definition beyond the specifics of a given moment.

A lawyer is by definition one "skilled in the law,"¹¹ however the law is seldom exact in a scientific sense.¹² We are left then with the problem of applying the indefinite criteria of the norm to the "imperfect"¹³ science of the law. Earlier cases chose to avoid the problem by applying the extreme requirement of gross negligence. Later cases however tend towards a more sophisticated application of the *gross* requirement. In *Glenn v. Haynes*¹⁴ "gross negligence" was found to be that which is less than reasonable care.

Ordinarily, reliance upon advice of counsel will be held justifiable where such advice comes within the scope of the attorney's professional undertaking as opposed to a mere offhand opinion not involving such professional knowledge.¹⁵ This justification extends beyond formal litigation and includes such undertaking as the preparation of legal documents.¹⁶ However, the attorney is not a guarantor of results, nor

⁹ Curran, Professional Negligence—Some General Comments, in Roady and Anderson, Professional Negligence 11 (1960).

¹⁰ See generally: Lemley, Due Care in Drafting Real Property Descriptions, 7 Clev.-Mar. L. Rev. 324 (May 1958); 87 A.L.R. 2d 991, 992 (1963); 96 A.L.R. 2d 827 (1964); 7 C.J.S., Attorney and Client § 143 (1937) at 980; 6 Ohio Jur. 2d, Attorneys at Law § 45 at 62, 63 (1954).

¹¹ 7 C.J.S., Attorney and Client § 3 at 703 (1937).

¹² Citizen's Loan Fund & Savings Ass'n of Bloomington v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890).

¹³ Humboldt Bldg. Ass'n Co. v. Ducker's Ex'x, 111 Ky. 759, 763, 64 S.W. 671 (1901).

¹⁴ Glenn v. Haynes, 192 Va. 574, 66 S.E. 2d 509 (1951).

¹⁵ Reeck v. Polk, 269 Mich. 252, 257 N.W. 698 (1934); Reumping v. Wharton, 56 Neb. 536, 76 N.W. 1076 (1898).

¹⁶ Annot., 87 A.L.R. 2d 992 (1961).

the insurer of his client's cause.¹⁷ He does not agree to possess any manner of infallible judgment, nor will he generally be held liable for this.¹⁸ Thus, when we speak of reliance, such reliance is justified only to the extent of what is ascertained as the accepted standard of performance in a given case. The client will not ordinarily be justified in expectations of perfection, nor will counsel as a rule be held to account for a mere error in judgment, a mistake in an area of law subject to reasonable question¹⁹ or of doubtful or uncertain interpretation.²⁰

Suggestions that the applicable standard of care be considered in light of the specific undertaking are not new, notably in areas where spur of the moment decisions are called for; here we can contrast the nature of courtroom decisions against title abstract work.²¹ More recently, however, evidence has been found of what may become a new standard of accuracy in cases of practice before government agencies, corporate transactions, and financial undertakings.²² Indeed, the Securities and Exchange Commission considers an attorney who administers the legal affairs of a corporation as acting in the capacity of a "quasi-surety."²³

It becomes increasingly true that in situations involving certificates or reports by professionals, even where express warranty is lacking, the holding out of one's professional skill may impose strict liability.²⁴ Although there is no case law pertaining to the possibility or probability of an attorney's liability for negligence in rendering a written opinion as such, there is enough law reaching to almost every related aspect of the profession's service to allow some fairly accurate prognosticating upon such possibility. There is no discernible reason why attorneys should

¹⁷ *Kissam v. Bremerman*, 44 App. Div. 588, 61 N.Y.S. 75 (1899); See generally: *Gardner, Attorney's Malpractice*, 6 Clev.-Mar. L. Rev. 264 (May 1957).

¹⁸ *Humboldt Bldg. Ass'n Co. v. Ducker's Ex'x*, *supra* note 13; *Spangler v. Sellers*, 5 F. 882 (C.C.S.D. Ohio, 1881). See also *Great American Indemnity Co. v. Dabney*, 128 S.W. 2d 496 (Tex. Civ. App. 1934).

¹⁹ *Gardner, op. cit. supra* note 17.

²⁰ *Citizens Loan Fund & Savings Assn. of Bloomington v. Friedley*, *supra* note 12; *Rapuzzi v. Stetson*, 160 App. Div. 150, 145 N.Y.S. 455 (1914).

²¹ *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P. 2d 685, 15 Cal. Rptr. 821 (1961). Here the court, regarding accuracy of information stated "he (counsel) failed, but his failure fell within the limitations imposed by his undertaking."

²² *Green, The Duty to Give Accurate Information*, 12 U.C.L.A. L. Rev. 464, 485 (1964-65) ". . . the 'duty of care' concept found in the physical injury negligence cases, with their extravagant defensive layout, intensified procedural ordeal and their unpredictability of result, seems to serve no useful function."

²³ Personal Interview, S.E.C. official.

²⁴ *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); See generally: *Curran, op. cit. supra* note 9 at 8.

not be held to the same degree of accuracy as accountants, or bank personnel.²⁵

Courts have been strict where the handling of security documents is concerned. It is generally held that the attorney will be responsible in the preparation and filing of written instruments, in recording such instruments, where necessary, or in the duty to inform client of the necessity for such recordation, for the enforceability of such instruments, for errors in preparation of accounts or for failure to observe statutory requirements.²⁶

“An attorney’s duty, where he is specially instructed, is to follow the instructions of his client, . . . the attorney is not free . . . to use his own discretion to the contrary.”²⁷ Such instructions when expressly given, must be obeyed *to the letter*.²⁸ The attorney-client relationship is essentially one of agency²⁹ and the attorney’s acts and omissions will be imputed to his client,³⁰ although this would not extend to illegal action without consent of the client.³¹ This is not to say that such unauthorized acts may not ultimately be ratified by the client.³²

Except where statutes of limitations are concerned, whether the action lies in contract or in tort is not of great significance to this discussion, nor is it likely to be of great significance in the future. As the law has developed to date, the action will usually lie in either area.³³ The relationship of attorney-client must exist.³⁴ The relationship, how-

²⁵ *International Products Co. v. Erie R.R.*, 244 N.Y. 331, 155 N.E. 662, 56 A.L.R. 1377 (1927); See Green, *op. cit. supra* n. 42 at 484: “What the cases under study boil down to is that when information purports to be factually accurate, there is no room left for ‘exercise of due care’ as a defense”; See also Maurer, *Ethical and Legal Problems of the Corporate Counsel*, *The Business Lawyer* 817 (1966). “There appears to be little if any reason for effecting a distinction between legal and non-legal advice or service if negligently rendered.”

²⁶ *McCullough v. Sullivan*, 102 N.J.L. 381, 132 A. 102, 43 A.L.R. 928, 25 N.C.C.A. 834: Held, in effect, that attorney is insurer of the validity of mortgage; See generally: 87 A.L.R. 2d 992, 993 (1963).

²⁷ *W. L. Douglas Shoe Co. v. Rallwage*, 187 Ark. 1084, 63 S.W. 2d 841 at 843 (1933).

²⁸ *Ramage v. Cohn*, 124 Pa. Super. 523, 189 A. 496 (1937).

²⁹ *Cornell v. Edson*, 78 Wash. 662, 139 P. 602, 51 L.R.A. (n.s.) 279 (1914).

³⁰ *Mosher v. Mutual Home & Sav. Ass’n*, 35 Ohio L. Abs. 445, 41 N.E. 2d 871 (1941); *American Export & Inland Coal Corp. v. Matthew Addy Co.*, 112 Ohio St. 186, 147 N.E. 89 (1925); *Bogart v. George K. Porter Co.*, 193 Cal. 197, 223 P. 959, 38 A.L.R. 823 (1924): it must appear that such knowledge was present in the attorney’s mind when he acted for the client; *Fletcher v. Allen*, 51 Cal. App. 774, 197 P. 952, 38 A.L.R. 822 (1921).

³¹ *Mefford v. State*, 13 Ohio App. 106, 31 Ohio Ct. App. 543 (1920).

³² *Sproul v. Lloyd*, 96 N.J.L. 314, 115 A. 667 (1921).

³³ *Lucas v. Hamm*, *supra* note 21 (express contract); *Lindner v. Eickel*, 34 Misc. 2d 840, 232 N.Y.S. 2d 240 (1962), *Aff’d* 233 N.Y.S. 2d 238 (implied contract); *Floro v. Lawton*, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960) (negligence); See, for statement of traditional view, 7 C.J.S., *Attorney and Client* § 155 at 994, 995 (1937).

³⁴ See generally: *Blaustein*, *Liability of Attorney to Client in New York for Negligence*, 19 *Brooklyn L. Rev.* 233, 243 (1953).

ever, is not dependent upon the payment of a fee and courts will not ordinarily entertain a plea of no consideration.³⁵ The crucial element is the standard of care exercised by counsel even when his services are gratuitous, or voluntarily undertaken.³⁶

In those actions where a tortious element is lacking, privity has been a major issue. The traditional doctrine in an action based on contract has been that in the conduct of his professional duties the attorney's liability extended to his client alone and not to third parties.³⁷ While this is *said* to be the majority rule today,³⁸ its applicability, in light of many modern decisions is very much in question.³⁹

Negligence per se is not applicable in this area and in order to sustain a claim of negligent conduct, there must be a showing of fact.⁴⁰ Traditionally it has been incumbent upon the plaintiff to show damages, the proximate cause, or the "sole" proximate cause, of which, was defendant's negligence.⁴¹ However, it is not surprising to find that this requirement has apparently gone the way of so many obstacles which would interfere with the redistributive temper of modern courts. It should be sufficient today to effect a showing of a proximate cause in meeting the requirement.⁴²

Much of the difficulty in the area of causation centers around what might properly be designated the *but for* rule, the necessity of showing that, lacking the alleged negligence on the part of counsel, the result would have been otherwise.⁴³ The courts in *Feldsman v. McGovern*⁴⁴ stated, in sustaining defendant's demurrer: "A former client, . . . must plead and prove that if the attorney had performed the act it would have resulted beneficially to the client." In *Storer v. Miller*,⁴⁵ a corporate officer brought suit against his attorney for alleged mis-

³⁵ *Bresette v. Knapp*, 159 A. 2d 329 (Vt. 1960); *Glenn v. Haynes*, *supra* note 14.

³⁶ See *Gediman v. Anheuser Busch*, 299 F. 2d 537 (2d Cir. 1962).

³⁷ See generally 6 Ohio Jur. 2d Attorney and Client, § 52 (1954).

³⁸ *Knepper*, Professional Malpractice, Practicing Law Institute Handbook 4 (March 1967).

³⁹ *Glanzer v. Sheppard*, 233 N.Y. 236, 135 N.E. 275, 23 A.L.R. 1425 (1922): Cardozo, "We state the defendant's obligation therefore, in terms, not of contract merely, but of duty . . ."; *Lucas v. Hamm*, *supra* n. 21; *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P. 2d 16 (1958) question of foreseeability, privity not required; See *Ultramares Corp. v. Touche*, *supra* n. 24; See, generally: *Green*, *op. cit. supra* n. 22 at 483; Also see *Wade*, *The Attorney's Liability For Negligence*, 12 Vand. L. Rev. 755 (1958-1959).

⁴⁰ *Biakanja v. Irving*, *Id.*; *Ewing v. McNairy and Claffin*, 20 Ohio St. 315 (1870).

⁴¹ *Harter v. Morris*, 18 Ohio St. 492 (1869).

⁴² *Modica v. Crist*, 120 Cal. 2d 144, 276 P. 2d 614 (1954); *Ward v. Arnold*, 52 Wash. 2d 581, 328 P. 2d 164 (1958) ". . . the law does not require that negligence of the defendant must be the sole cause. . . ."

⁴³ *General Accident Fire & Life Assur. Corp. Ltd. v. Cosgrove*, 257 Wis. 25, 42 N.W. 2d 155 (1950); *Haggerty v. Watson*, 302 N.Y. 707, 98 N.E. 2d 586 (1951).

⁴⁴ 44 Cal. App. 2d 566, 112 P. 2d 645 (1941).

⁴⁵ 2 N.Y. 2d 817, 159 N.Y.S. 2d 834 (1957) (Stockholders' derivative action).

handling of a stockholder's action against the officer, the court dismissed the action by stating, in effect, that the negligence complained of would not have made any difference. The situation with which we are concerned has been appropriately described as a "suit within suit."⁴⁶

The validity of an action notwithstanding, a plaintiff must generally allege and prove actual damages in order to effect recovery.⁴⁷ Any such recovery will normally be limited to losses actually sustained,⁴⁸ which amount may properly take into consideration the fee paid.⁴⁹

Statutes of limitation in malpractice claims against attorneys will vary depending upon whether plaintiff pursues his action in contract or tort.⁵⁰ In any event, the bar of the applicable statute will constitute a valid defense.⁵¹ Statutory provisions of the various states must be closely scrutinized to determine their provisions and the application of such provisions.⁵² In *Peters v. Powell*⁵³ the defendant contended that the action was barred by Section 50 of the New York Civil Practice Act which provides a two year statute for "an action to recover damages for assault, . . . or malpractice." The court stated that though the statute does apply to doctors and dentists, it does not apply to lawyers. The rationale of this decision would appear somewhat questionable because notable also is a recent New York decision stating that even fraudulent concealment will not toll the statute in a malpractice action for negligence.⁵⁴ There has been a great deal of disagreement among authorities concerning when the statute in such cases commences to run. Among the times adopted are: that which the negligence complained of occurs,⁵⁵ the time at which the contract of employment is terminated,⁵⁶ or the time at which actual damages are incurred.⁵⁷ The statute governing the

⁴⁶ See *Coggin, Attorney Negligence . . . A Suit Within a Suit*, 60 W. Va. L. Rev. 225 (1958).

⁴⁷ *Harter v. Morris*, *supra* n. 41; See, generally: 7 C.J.S. Attorney and Client, § 127 at 963, § 154 at 994, § 157 at 997, 998 (1937).

⁴⁸ *Fabry v. Joy*, 104 N.J. L. 617, 141 A. 780 (1928); See, generally 87 A.L.R. 2d 995 (1963), regarding mitigation of damages; and *note*, *McGregor v. Wright*, 117 Cal. App. 186, 3 P. 2d 624 (1931) (nervous shock and injury to reputation held too remote and speculative).

⁴⁹ *Pete v. Henderson*, 124 Cal. App. 2d 487, 269 P. 2d 78 (1954).

⁵⁰ *Bland v. Smith*, 197 Tenn. 683, 277 S.W. 2d 377 (1955) (regarding election of remedies).

⁵¹ *Hayes v. Ewing*, 70 Cal. 127, 11 P. 602 (1886); *Rhines' Adm'rs v. Evans*, 66 Pa. 192, 5 Am. R. 364 (1871).

⁵² *Ibid*: *Sullivan v. Stout*, 120 N.J.L. 304, 199 A. 1, 118 A.L.R. 211; *Hart v. Guardian Trust Co.*, 52 Ohio L. Abs. 225, 75 N.E. 2d 570 (1945).

⁵³ 22 Misc. 2d 510, 196 N.Y.S. 2d 304 (1960); Appeal dismissed 214 N.Y.S. 2d 684 (1960).

⁵⁴ *Siegel v. Kranis*, 52 Misc. 2d 80, 274 N.Y.S. 2d 968 (1966).

⁵⁵ *Fort Myers Sea Food Packers, Inc. v. Steptoe and Johnson*, 253 F. Supp. 626 (D.D.C. 1966); reversed 381 F. 2d 261 (1967).

⁵⁶ *McWilliams v. Hackett*, 19 Ohio App. 416 (1923).

⁵⁷ *Fazio v. Hayhurst*, 247 Cal. App. 192, 55 Cal. Rptr. 370 (1966), court also stated: "A cause for damages arising out of an attorney's malpractice survives his death."

bringing of malpractice actions in Ohio establishes a period of one year and the cause of action, based upon *Galloway v. Hood*,⁵⁸ overruling previous decisions to the contrary, accrues at the time of the alleged negligent misconduct.

Most of the activity in the field of what is most commonly regarded as *malpractice*, in actuality there is no special doctrine of malpractice as such,⁵⁹ has been directed toward the medical profession. There exists in cases involving medical malpractice, much concern with the expert testimony rule, which requires that expert medical testimony must be offered. The rule would appear to stem from the technical ramifications of the medical profession as compared with the more discretionary nature of the law. It might be worth noting that with increasing specialization in many highly technical fields of law, it is probable that this requirement will be given more attention in the future.⁶⁰

Res ipsa loquitur is of relatively recent origin in its application to the field of professional liability,⁶¹ although the doctrine has been expanded over the years in cases of known human agency,⁶² it has not found its way into cases involving legal practice.

One of the more unique aspects of professional negligence cases, especially where physicians and attorneys are concerned, is what has been referred to as the conspiracy of silence.⁶³ One gets the impression that laymen, writers, and even the judiciary⁶⁴ tend to over-dramatize the fact that there exists on the part of many professionals a hesitancy to public consciousness of negligence liability. It has been suggested that such unwillingness to testify has been the major reason for the inroads made by *res ipsa loquitur* in the medical malpractice field. Such "conspiracy" notwithstanding, it is doubtful whether any degree of rank injustice has resulted. One must bear in mind that in the area of professionalism pecuniary loss is frequently not the greatest concern. The professional's reputation is his livelihood and any claim of negligence may result in serious, if not crucial, damage to his stature and integrity. It has been observed that use of such terms as *malpractice* or *mis-*

⁵⁸ 69 Ohio App. 278, 24 Ohio Op. 66, 43 N.E. 2d 631 (1941).

⁵⁹ Long & Gregg, Property and Liability Insurance Handbook 454 (1965).

⁶⁰ *Donaldsen v. Maffucci*, 397 Pa. 548, 156 A. 2d 835 (1959): "Where the common knowledge or experience of laymen is not sufficient . . . expert testimony in support of the plaintiff's claim is an indispensable requisite to establish a right of action."

⁶¹ *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P. 2d 687, 162 A.L.R. 1258 (1944).

⁶² *Harland, Res Ipsa Loquitur in Malpractice Cases in Canada*, 10 Clev.-Mar. L. Rev. 302 (1961).

⁶³ Curran, *op. cit. supra* note 9 at 10.

⁶⁴ *Leavell v. Alton Ochsner Medical Foundation*, 201 F. Supp. 805 (E.D. La. 1962): "Thus the plaintiff's case here flounders before it begins on the rock of self-interest"; *Brown v. Keaveny*, 326 F. 2d 660 (D.D.C. 1963).

feasance is to be regretted in that they too often carry with them unfortunate and unjustified connotations of intent or complete incompetency.⁶⁵

There are approximately 3,300 fire and casualty insurance companies in the United States, which number does not include 1,700 legal reserve life, 53 reciprocals, the 14 Lloyd's and 2,000 unreported mutuals.⁶⁶ Of these, fewer than twenty-five underwrite lawyers professional liability, and of those that do, a large percentage undertake such writing on a limited or restricted basis. This market has shown little growth since 1964.⁶⁷ The fact is that most companies, including some of the largest, will not write professional liability insurance.⁶⁸ Specific loss figures in the area of lawyers liability are difficult to assess as companies do not generally segregate specific lines of this nature in their profit and loss statistics. It is, however, general knowledge within the industry that the experience has not been favorable and heavy losses in professional liability lines have been offsetting gains in other, more profitable areas. London is still the major market for this coverage and many domestic companies are 100% reinsured in London.

In spite of the recent surge in the writing of lawyers liability coverage, it is somewhat surprising that the majority of lawyers practicing individually, or in small firms, are not insured for professional liability.⁶⁹

Lawyers professional liability is one of the few specialty coverages which has been standardized in form by the National Bureau of Casualty Underwriters. It is not unusual, however, for companies to deviate from this bureau form and in any event, the insured should read his policy to be assured of his protection. Not only do companies tend to deviate from the National Bureau but many today are also revising and changing their policies repeatedly in an attempt to keep pace in a field of relatively recent development where policy construction has not yet been refined and clarified through judicial interpretation.⁷⁰

It is important to note that all policies provide separate insuring clauses for individual and partnership protection. In the case of a partnership, both the liability of the partnership and the liability of each individual member must be provided for.

Under policy provisions captioned "Insuring Agreements," coverage is provided for liability due to any act or omission of the named insured.

⁶⁵ Renswick, *Res Ipsa Loquitur in Hospital & Malpractice Cases*, 9 *Clev-Mar. L. Rev.* 199 (1960).

⁶⁶ Orner, *Fate of Small and Medium Sized Companies Eyed at Arizona I-Day*, *The National Underwriter* 33 (March 24, 1967).

⁶⁷ *The Insurance Market Place*, 4th Annual Ed. 28, 29, 30 (1966).

⁶⁸ Editorial, *The National Underwriter* 47 (Nov. 25, 1966).

⁶⁹ Curran, *op. cit. supra* n. 9, at 10.

⁷⁰ Seybold, *Disputes Under Professional Liability Policy, Liability Insurance Litigation*, *Practicing Law Institute* 12 (Mar. 11-12, 1966).

The liability referred to is the legal liability, in his professional capacity as a lawyer. Should a lawyer undertake to guarantee specific results in a given situation thereby contracting beyond the ordinary standards of care or should he venture into unrelated fields he will most likely find himself beyond the scope of his policy coverage.⁷¹

Of particular note is the provision found in most policies to the effect that settlement may be undertaken only with the written consent of the named insured. This is a feature unique to professional liability policies and is in apparent recognition of the value of the professional reputation as discussed previously.

Of great significance are the unique policy period provisions found in many policies. These provisions are quite broad and care must be taken to ascertain what a given policy provides. While such provisions are generally patterned after the National Bureau, there are many variations, particularly with respect to the discovery period for claims occurring within the policy term and with respect to provisions for undiscovered claims arising prior to the inception date of the policy. It should be noted that this provision will generally apply only if such claims are reported prior to expiration of the policy, and also that such coverage is excess, not pro-rata, over other valid insurance.

There are several basic exclusions involving dishonesty, claims by salaried employees and bodily injury or property damage. However, this is another area of wide variation. The National Bureau form lists five *major* exclusions and the various policies available are likely to deviate markedly, most significantly in areas of fiduciary undertakings and real estate title and abstract work. It would be wise to scrutinize any given form to determine its exact exclusions.

Of significance in the handling of professional liability claims for lawyers is the fact that the insured lawyers may often desire to handle the claims themselves. Though the idea of the lawyer undertaking to straighten such matters out for himself seems plausible to some,⁷² the majority of claims executives would take a dim view of such a procedure. A further observation of some significance in this area of claim handling would be the relative absence of what are ordinarily considered nuisance settlements. The lawyer is apt to regard the paying of such claims as an admission of negligence and thus be much less receptive to buying his peace than would be many other less sophisticated professionals.⁷³

⁷¹ See *Strauss v. New Amsterdam Cas. Co.*, 30 Misc. 2d 345, 216 N.Y.S. 2d 861 (1961); *American Fire and Cas. Co., Orlando, Fla. v. Kaplan*, 183 A. 2d 914 (D.C.D.C. 1962); Also see *Bancroft v. Indemnity Insurance Company of North America*, 203 F. Supp. 49 (W.D. La. 1962) aff'd 309 F. 2d 959 (1962).

⁷² Dean, *Professional Liability Claims, The Independent Adjuster* (Fall 1963).

⁷³ Curran, *op. cit. supra* n. 9 at 10.

Conclusion

For those who feel that the whole idea of an attorney being held responsible for less-than-adequate advice or complete failure of advice is unworthy of serious concern, the time is fast approaching when these heads had better come out of the sand!

Despite the inexplicable feeling of security on the part of many otherwise sophisticated members of the legal profession, "rumblings" in the area of professional negligence, lawyers' negligence in particular, have been growing louder in recent years. Among members of the professions, claims against lawyers are exceeded in frequency and costliness only by the medical and insurance fields.⁷⁴ The growth of claims over the last decade has been labeled staggering⁷⁵ and it continues to increase rapidly.

Little has been said here which uses the terminology of the main topic, opinion letters; however, it is impossible to isolate the written words as such from the sphere in which they are to be utilized. Any opinion, written or oral, express or implied, general or specific, can only be judged within the general prevailing legal atmosphere of attorney-client relationship and the standards of responsibility and accountability incident thereto.

This examination of today's atmosphere makes it apparent that we are going through an evolutionary process, not so much in our conception of the duty of the attorney to his client but in our willingness to recognize the accountability aspect so long recognized in other areas where a similar duty is found to lie. Modern courts are more inclined to add muscle to the recognition that "With representation . . . goes responsibility."⁷⁶

Consider again the plight of the young businessman in light of Judge Tindal's statement in 1834:

It may be assumed as a general principle that an attorney . . . undertakes, and is bound to take care, that his client does not enter into any covenant or stipulation that may expose him to a greater degree of responsibility than is ordinarily attached to the business at hand, or at all events, that he does not do so until the consequences have been explained to him.⁷⁷

How much of a risk are you going to let your client run?

How much of a risk *can you afford* to let your client run?

⁷⁴ Kabler, *The National Underwriter* (June 22, 1962). See Hutcheson, *Lawyers, How is your Malpractice?* 30 *Ins. Counsel J.*, 423 (1963).

⁷⁵ Keatley, *Professional Men Face More Damage Claims Charging They Erred*, *The Wall Street Journal* 1 (July 26, 1962).

⁷⁶ Hon. William K. Thomas, 38 *Clev. B. Ass'n J.* 45 (Jan. 1967).

⁷⁷ *Stannard v. Ullithome*, 10 *Bing.* 491, 131 *Eng. Reprint* 985 (1834); *Annot.*, 43 *A.L.R.* 933 (1926).