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# COMMENTS

## AN ATTORNEY'S LIABILITY TO HIS CLIENT

It is not improbable that the young lawyer, in preparing for his profession, has given little, if any, thought to his possible liability to his client for negligence or lack of skill. What follows is an attempt to place before members of the Bar a general survey of the attorney's duty to his client and his liability for the breach of that duty. There has been much litigation on the subject, evidencing the need for such a discussion.

The relationship of attorney and client is generally governed by the law of agency.<sup>1</sup> This relation, by its very nature, is one of great trust and confidence.<sup>2</sup> The attorney undertakes to protect and care for the rights and interests of the client and, in so doing, he is bound to exercise the highest degree of honor, integrity and fidelity.<sup>3</sup> A breach of fidelity to the client's interest, or a failure to use reasonable care in the conduct of the business in which he is employed not only gives the client a right to redress for damages suffered,<sup>4</sup> but subjects the attorney to the summary jurisdiction of the court for dereliction of duty.<sup>5</sup> In addition to this, he may suffer public humiliation for having failed in his duty or trust. We are concerned here only with the attorney's liability to his client.

It is generally stated that the duties and liabilities between attorney and client are the same as those between physician and patient.<sup>6</sup> In the absence of express agreement an attorney who holds himself out for public employment impliedly warrants to his employer that he possesses that reasonable degree of learning and skill ordinarily possessed by members of the profession. He contracts that he will use reasonable and ordinary care and diligence in the exertion of his skills and the application of his knowledge to accomplish the purpose for which he is employed.<sup>7</sup> If he fails in either respect he will be responsible to his client for the loss which the failure causes.<sup>8</sup> The lawyer does not, however, *guarantee* the soundness of his opinion, or that the outcome of litigation will be successful. He is not answerable for an *error of judgment* in his conduct of a case, or for every

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1. MECHEM, *OUTLINES OF AGENCY* § 76 (4th ed. 1952).

2. *Harvey v. Rowe*, 141 Fla. 287, 192 So. 878 (1940); *Kloss v. State*, 95 Fla. 433, 116 So. 39 (1928); *United States v. Pittman*, 80 Fla. 423, 86 So. 567 (1920); STORV, *COMMENTARIES ON EQUITY JURISPRUDENCE* § 311 (1835).

3. *Kloss v. State*, 95 Fla. 433, 116 So. 39 (1928).

4. *Fiske v. Duder*, 125 F.2d 841 (8th Cir. 1942).

5. *Holland v. Flournoy*, 142 Fla. 459, 195 So. 138 (1940); *In re Clifton*, 115 Fla. 168, 155 So. 324 (1934); *Gould v. State*, 99 Fla. 662, 127 So. 309 (1930).

6. *Slade v. Harris*, 105 Conn. 436, 135 Atl. 570 (1927); *Olson v. North*, 276 Ill. App. 457 (1934); *McCullough v. Sullivan*, 102 N.J.L. 381, 132 Atl. 102 (1926).

7. *McCullough v. Sullivan*, 102 N.J.L. 381, 132 Atl. 102 (1926).

8. *Watson v. Calvert*, 91 Md. 25, 45 Atl. 879 (1900).

mistake which may occur in practice.<sup>9</sup> Thus, the attorney contracts that he has reasonable skill and knowledge—but not that he is infallible.

The degree of skill and knowledge required in a particular case is usually considered with reference to the locality of practice.<sup>10</sup> Attorneys who practice in a metropolis may be charged with a higher degree of care than members of a rural bar,<sup>11</sup> but the latter should be no less well versed than the former in general principals of law.<sup>12</sup> The distinction on the basis of locality is clearly set forth in *Fenaille v. Coudert* where the court said:

In assuming the employment of plaintiffs, the skill and knowledge they professed, must be considered with reference to the locality of their practice. In the absence of any express declaration on the subject, they will be presumed to have held themselves out as possessing such skill and knowledge as attorneys practicing (in the state of New York) might reasonably be supposed to possess, and no more. As attorneys of New York they are not presumed to know the laws of a foreign state. Nor did they impliedly undertake that they had such knowledge, by accepting an employment which . . . was, in terms, limited to drawing a contract in all respects binding between the parties.<sup>13</sup>

The attorneys in this case had been employed to draw a contract for building on lands in New Jersey. They failed to advise their clients of the laws of that state respecting the necessity of filing of such contracts for the protection against claims of workmen and material men under the mechanics' lien law.

The rule is different if the attorney specifically contracts to perform particular services in a place foreign to his place of practice. He is then held to the same standard as lawyers in that foreign place. An attorney who undertook to prepare a chattel mortgage to be *filed* in another state was held liable for damages to his client where the mortgage did not comply with the statutes of that state. The court said that every lawyer should know that the law governing the creation of liens on personal property by chattel mortgage is statute law, and that the statute law of one state differs from that of another. If he is not familiar with the statutes it is his duty to inform himself; not to do so and to prepare the documents in such a manner that they have no legal potency is a negligent discharge of his duty.<sup>14</sup> The attorney, therefore, like any other workman, by undertaking the work represents that he is capable of performing it in a skillful manner. Borrowing the words of advice given by the court in *Degen v. Steinbrink*, "If the

9. *O'Barr v. Alexander*, 37 Ga. 195 (1867); *Morris v. Muller*, 113 N.J.L. 46, 172 Atl. 63 (1934); *McCullough v. Sullivan*, 102 N.J.L. 381, 132 Atl. 102 (1926); *Olson v. North*, 276 Ill. App. 457 (1934).

10. *Fenaille v. Coudert*, 44 N.J.L. 286 (1882).

11. *WEEKS ON ATTORNEYS* § 289 (1892).

12. *MECHEM ON AGENCY* § 2192 (2d ed. 1914).

13. 44 N.J.L. 286, 291 (1882).

14. *Degen v. Steinbrink*, 202 App. Div. 477, 195 N.Y. Supp. 810 (1st Dep't 1922), *aff'd*, 236 N.Y. 669, 142 N.E. 328 (1923).

attorney is not competent to skillfully and properly perform the work, he should not undertake the service."<sup>15</sup>

In determining the degree of skill required reference is also made to the particular duty which the attorney undertakes to perform.<sup>16</sup> A lawyer claiming to be a general practitioner must possess the skill and exhibit the diligence of an ordinary lawyer. A person claiming to be a tax expert, admiralty lawyer or other specialist, while not expected to be an expert outside his own field, must exercise due skill and diligence in his specialized field.<sup>17</sup> In other words, if the lawyer holds himself out as an expert in taxation, it is not unreasonable to expect him to possess the same degree of skill and knowledge as the reasonable tax expert in his locality.

Before entering into a discussion of liability for specific acts of negligence and unskillfulness, let us consider the courts' views as to the attorney's duty to continue the relationship once established, and his duty to sever it if his interest becomes adverse to that of the client.

Owing to the relationship between the attorney and his client and to the influence of the attorney over the client growing out of that relation, the courts scrutinize most closely *all* transactions between them.<sup>18</sup> Justice Story in his *Commentaries on Equity Jurisprudence*<sup>19</sup> said:

The situation of an attorney, or solicitor, puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. Hence the law, with wise providence, not only watches over all transactions of parties in this predicament; but often interposes to declare transactions void, which, between other persons would be unobjectionable.<sup>20</sup>

It is generally recognized that the client has a right to terminate the relationship between himself and attorney, with or without cause, at his election. The existence or nonexistence of a valid cause bears only to the attorney's right to compensation.<sup>21</sup> But the attorney, once he accepts employment, is obligated to conduct to its termination any action in which he represents his client. He cannot sever the relationship except for good cause.<sup>22</sup> The relation is of the highest confidential character. The contract of employment implies that the attorney shall render faithful and honest service. He has no right to use his position as an attorney to bargain for a

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15. 202 App. Div. 477, 482, 195 N.Y. Supp. 810, 814 (1st Dep't, 1922), *aff'd*, 236 N.Y. 669, 142 N.E. 328 (1923).

16. *Cox v. Sullivan*, 7 Ga. 144 (1849).

17. See note 11 *supra*.

18. *Davant v. Lambdin*, 135 Fla. 700, 186 So. 201 (1939); *Halstead v. Florence Growers' Ass'n*, 104 Fla. 21, 139 So. 132 (1932); *Williams v. Bailey*, 69 Fla. 225, 67 So. 877 (1915).

19. Section 311 (1835).

20. *Cf. Halstead v. Florence Growers' Ass'n*, 104 Fla. 21, 139 So. 132 (1932); *Pinkington v. Rose*, 88 Fla. 547, 102 So. 751 (1925).

21. *Carey v. Gulfport*, 140 Fla. 40, 191 So. 45 (1939); *Goodkind v. Wolkowsky*, 132 Fla. 63, 180 So. 538 (1938); *United States v. Pittman*, 80 Fla. 423, 86 So. 567 (1920).

22. *Feur v. Feur*, 156 Fla. 117, 22 So.2d 641 (1945).

personal advantage with the adversaries in the action.<sup>23</sup> If, at any time, the interest of the attorney becomes adverse or hostile to his client, he should cease to represent him. In such case he must give due notice of his withdrawal in order that his client may secure other counsel.<sup>24</sup>

It is exceedingly difficult, if not impossible, to lay down a general rule which should control the measure of liability in all cases. The lawyer is said to be liable to his client for ordinary neglect or want of skill.<sup>25</sup> What constitutes want of skill or ordinary neglect must be decided by the facts of the particular case under consideration,<sup>26</sup> and, of course, this is a question for the jury.<sup>27</sup> It has been held, however, that the attorney is entitled to a presumption that he has properly discharged his duty until the contrary is shown.<sup>28</sup>

In a suit against an attorney for negligence the client must prove the attorney's employment, his neglect of a reasonable duty, and that such negligence resulted in, and was the proximate cause of his loss.<sup>29</sup> Proving loss may be difficult in certain cases. In *Roehl v. Ralph*<sup>30</sup> the attorney failed to file an answer in an action on a note. It was held that the client could not recover unless he could show that he had a defense to the note which the court could have submitted to the jury in the action.<sup>31</sup>

The client must, of course, be prompt in bringing his action so as not to be barred by the statute of limitations.<sup>32</sup> When an attorney is chargeable with negligence or want of skill his contract is violated and the right of action commences. In *Wilcox v. Plummers*<sup>33</sup> a promissory note was placed in the hands of an attorney for collection. He instituted suit against the drawer, but neglected to do so against the indorser. The drawer proved insolvent. The attorney then sued the indorser but because of a misnomer of the plaintiffs was nonsuited. By this time, action against the indorser was barred by the statute of limitations. It was agreed that the attorney was liable to the client for his blunder, but it was held that the cause of action started against the attorney at the time the blunder was committed

23. *Chalfield v. Simonson*, 92 N.Y. 209 (1883).

24. *United States v. Pittman*, 80 Fla. 423, 86 So. 567 (1920).

25. *Cox v. Sullivan*, 7 Ga. 144 (1849).

26. *O'Barr v. Alexander*, 37 Ga. 195 (1867).

27. *O'Neill v. Gray*, 30 F.2d 776 (2d Cir. 1929) (Attorney brought an action against a defendant as a corporation, when in fact it was not. He failed to amend the complaint or file a new one before the statute of limitations barred the action. It was held for the jury to decide whether or not the conduct of the litigation was reasonably skillful); *Slade v. Harris*, 105 Conn. 436, 135 Atl. 570 (1927); *Werle v. Rumsey*, 278 N.Y. 186, 15 N.E.2d 572 (1938).

28. *Slade v. Harris*, 105 Conn. 436, 135 Atl. 570 (1927).

29. *Kendall v. Rogers*, 181 Md. 606, 31 A.2d 312 (1943); *Watson v. Calvert*, 91 Md. 25, 45 Atl. 879 (1900); *Morris v. Muller*, 113 N.J.L. 46, 172 Atl. 63 (1934).

30. 84 S.W.2d 405 (Mo. App. 1935).

31. See *Weekley v. Knight*, 116 Fla. 721, 156 So. 625 (1934).

32. *Wilcox v. Plummers*, 29 U.S. 172 (1830); *Browder v. DaCosta*, 91 Fla. 1, 109 So. 448 (1926); *Galloway v. Hood*, 69 Ohio App. 278, 43 N.E.2d 631 (1941).

33. 29 U.S. 172 (1830).

and not when the statute of limitations barred the action against the indorser. Therefore, the client's action was barred.<sup>34</sup>

The usual case against an attorney is based upon his neglect to perform the services which he agrees to perform, expressly or impliedly, when he accepts employment by a client.<sup>35</sup> He is answerable for his neglect to his immediate employer only, and not to the latter's assigns or any other third person, with whom the attorney is not in privity.<sup>36</sup> But once the attorney and client relationship is established, the attorney's obligation to his client is the same whether he is paid by the state or the client, and whether he is paid much or little, or nothing at all.<sup>37</sup>

As to the layman it is generally stated that ignorance of the law is no defense. This rule applies with equal, if not greater, force to the attorney. He is liable for loss resulting to the client as a consequence of his ignorance or nonobservance of the rules of the courts in which he practices.<sup>38</sup> If a statute or decision of his own state has been published long enough to justify the belief that it was known to the profession, then a disregard of such law renders the lawyer accountable for losses.<sup>39</sup> He is liable for negligence if he knew the law and misapplied it, or for want of skill if he was ignorant of it.<sup>40</sup> In *Schirmer v. Nethercutt*<sup>41</sup> the client hired the attorney to draw the last will and testament of his grandmother. The attorney permitted the client, named as a beneficiary in the will, to act as a witness thereto. As a result the client lost the entire value of the money and property he would have received. The attorney was held liable for this loss. In another case an attorney was held liable where, having procured funds for a client under disability, he paid the funds to a court which was without jurisdiction, under well settled law, to receive such fund.<sup>42</sup> On the other hand the attorney is not liable for errors in *judgment* upon points of new occurrence, or of doubtful construction.<sup>43</sup>

When the attorney is employed for the purpose of advising his client and the client relies on this advice, the attorney is liable for the resulting damages if he has not exhibited a fair degree of professional skill and knowl-

34. *Wilcox v. Plummers*, 29 U.S. 172 (1830). *But cf.* *Browder v. DaCosta*, 91 Fla. 1, 109 So. 448 (1926); *Galloway v. Hood*, 69 Ohio App. 278, 23 N.E.2d 631 (1941).

35. *Weekly v. Knight*, 116 Fla. 721, 156 So. 625 (1934).

36. *Savings Bank v. Ward*, 100 U.S. 195 (1879) (Attorney held not liable for giving, in answer to a casual inquiry, erroneous information as to the contents of a deed where the relation of attorney and client did not exist); 3 SHEARMAN AND REDFIELD ON NEGLIGENCE § 584 (Rev. Ed. 1941).

37. *Wilson v. State*, 222 Ind. 63, 51 N.E.2d 848 (1944); *Rosc v. Davis*, 288 Ky. 674, 157 S.W.2d 285 (1941).

38. *Michigan Central R.R. v. Morgan*, 227 Mich. 491, 198 N.W. 967 (1924); *In re Woods*, 158 Tenn. 383, 13 S.W.2d 800 (1929).

39. *Fenaille v. Coudert*, 44 N.J.L. 286 (1882). *But cf.* *Degen v. Stienbrink*, 202 App. Div. 477, 195 N.Y. Supp. 810 (1st Dep't 1922), *aff'd*, 236 N.Y. 669, 142 N.E. 328 (1923).

40. *In re Woods*, 158 Tenn. 383, 13 S.W.2d 800 (1929); *Gimbel v. Waldman*, 193 Misc. 758, 84 N.Y.S.2d 888 (Sup. Ct. 1948).

41. 157 Wash. 172, 288 Pac. 265 (1930).

42. *In re Woods*, 158 Tenn. 383, 13 S.W.2d 800 (1929).

43. *O'Barr v. Alexander*, 37 Ga. 195 (1867).

edge.<sup>44</sup> An attorney was held liable for damages based on his negligence in advising his clients that a certain contract for the sale of real estate, which the clients were about to take over by assignment, was a legal, valid and enforceable contract, when in fact it was not.<sup>45</sup> However, an attorney was held not liable because of a mistake in the expression of an *opinion* as to the probabilities of realizing a certain sum for the sale of real property.<sup>46</sup>

The same rules apply as to liability for negligence and want of skill in searching titles. The client is entitled to a good and marketable title, that is, a title free from reasonable doubt.<sup>47</sup> An attorney who certifies a title to be perfect, or that the property is unencumbered, is liable for any loss to his client, if, in fact, there is a cloud upon the title or an incumbrance upon the property which a reasonably careful search would have disclosed.<sup>48</sup>

While the degree of knowledge and skill is the same, the lawyer seems to enjoy more freedom from liability in the actual conduct of litigation than in any other phase of his activity.<sup>49</sup> The reason for this relative freedom of liability is because litigation necessarily involves questions of judgment. As has been said, attorneys are usually not liable for errors of judgment.<sup>50</sup> In *Byrnes v. Palmer* the court said:

In a litigation a lawyer is well warranted in taking chances. To some extent litigation is a game of chance. 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.<sup>51</sup>

The attorney has sufficient control over the litigation, without consulting his client, to make agreements respecting procedure which do not affect the substantive rights of the client.<sup>52</sup> But failure to take the necessary steps for due entry and enrollment of a judgment after it is received will render the attorney liable for any loss sustained by the client.<sup>53</sup> In one case, after successfully prosecuting a suit for his client, the attorney was instructed by the court to prepare findings. Because of an error in the preparation (which was also overlooked by the court) the case was reversed. It was held that

44. *Kendall v. Rogers*, 181 Md. 606, 31 A.2d 312 (1943); *Byrnes v. Palmer*, 18 App. Div. 1, 45 N.Y. Supp. 479 (2d Dep't 1897).

45. *Fabrey v. Jay*, 104 N.J.L. 617, 141 Atl. 780 (1928).

46. *Reumping v. Wharton*, 56 Neb. 536, 76 N.W. 1076 (1898).

47. *Byrnes v. Palmer*, 18 App. Div. 1, 45 N.Y. Supp. 479 (2d Dep't 1897).

48. *Lawall v. Gorman*, 180 Pa. St. 532, 37 Atl. 98 (1897); *Hill v. Cloud*, 48 Ga. App. 506, 173 S.E. 190 (1934).

49. *McCoy v. Hydrick*, 143 S.C. 135, 141 S.E. 174 (1928).

50. *O'Barr v. Alexander*, 37 Ga. 195 (1867); *McCullough v. Sullivan*, 102 N.J.L. 381, 132 Atl. 102 (1926); *Rapuzzi v. Stetson*, 160 App. Div. 150, 145 N.Y. Supp. 455 (3rd Dep't 1914).

51. *Byrnes v. Palmer*, 18 App. Div. 1, 3, 45 N.Y. Supp. 479, 481 (2d Dep't 1897).

52. *Cahaley v. Cahaley*, 216 Minn. 175, 12 N.W.2d 182 (1943).

53. *Atlantic Coast Line R.R. v. Holliday*, 73 Fla. 269, 74 So. 479 (1917).

the mistake was inexcusable.<sup>54</sup> The fact that the trial court overlooked the error did not release the attorney from responsibility to his client.

Not only is the attorney liable for his own lack of skill and negligence but, under the general rules of partnership and agency, he is liable also for that of his partners<sup>55</sup> and of his clerks.<sup>56</sup> If a member of a firm of attorneys is acting within the scope of his employment, the partners are jointly and severally liable for his acts<sup>57</sup> with or without their knowledge of participation.<sup>58</sup> It is obvious, therefore, that the attorney should use extraordinary care in selecting his partners and clerks.

The standards set by the legal profession are high. It is apparent from this discussion that the courts will not hesitate to hold the attorney liable for failure to maintain these standards. While preparing this paper the problems herein were discussed with several young attorneys and law students. The general consensus of opinion was to the effect that the problem would be adequately solved by insurance coverage. True, this would protect both the client and the attorney from financial loss, and, by all means, the client's interest should be so protected. But the immediate financial loss is not the only problem involved. No insurance can pay for the public humiliation suffered by the attorney nor repair his ruined reputation. It cannot replace the loss of dignity to the profession as a whole caused by the negligence of a few of its members. While the field of preventative law has not progressed as far as the field of preventative medicine, the interests of the client, the attorney and the profession would be greatly advanced if the individual attorney would practice preventative law on himself.

NICHOLAS A. CRANE

## FACTORS AFFECTING PUNITIVE DAMAGES

### INTRODUCTION

The doctrine of punitive damages is so well settled that a dissertation on its *raison d'etre* would be of little value. Briefly, however, exemplary or punitive damages are generally awarded when the wrong has been committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation or with reckless indifference for the rights of others.<sup>1</sup> Punitive damages have been awarded in contract actions, but such awards are relatively rare. Generally, punitive damages are not recoverable in a breach of

54. *Armstrong v. Adams*, 102 Cal. App. 677, 283 Pac. 871 (1929).

55. *CRANE ON PARTNERSHIPS* § 54 (2d ed. 1952); 3 *SHEARMAN AND REDFIELD ON NEGLIGENCE* § 586 (Rev. ed. 1941).

56. *Armstrong v. Adams*, 102 Cal. App. 677, 283 Pac. 871 (1929).

57. *Rouse v. Pollard*, 130 N.J. Eq. 204, 21 A.2d 801 (Ct. Err. & App. 1941); *Riley v. Larocque*, 163 Misc. 423, 297 N.Y. Supp. 756 (Sup. Ct. 1937).

58. *Priddy v. MacKenzie*, 205 Mo. 181, 103 S.W. 968 (1907); *Model Building and Loan Ass'n v. Reeves*, 201 App. Div. 329, 194 N.Y. Supp. 383 (1st Dep't 1922). *But cf. Wildermann v. Wachtell*, 149 Misc. 623, 267 N.Y. Supp. 840 (Sup. Ct. 1933).

1. *Dr. P. Phillips & Sons v. Kilgore*, 152 Fla. 578, 12 So.2d 465 (1943).