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COMMENTARY

PROFESSIONAL RESPONSIBILITY: THE LAWYERS TASK OF SISYPHUS*

F. ANTHONY BREWSTER**

The Law, wherein, as in a magic mirror, we see reflected not our own lives, but the lives of all men that have been! When I think on this majestic theme my eyes dazzle.

Oliver Wendall Holmes, Jr.

The practice of law has always demanded the highest and best efforts of the lawyer. While Shakespeare waggishly proposed to solve mankind's troubles by ridding the world of lawyers, we have somehow managed to survive the cure proposed by the "immortal bard" and flourish as a noble profession especially equipped to deal with the troubles of our fellow men. This does not mean that the message in Shakespeare's jest should fall on deaf ears. Shakespeare, we submit, really meant that lawyers often seem to be at or near the center of trouble and, consequently, are subject to the accusation of being a cause of the problem and not a vital contributor to its solution. This article will not deal with the image of the lawyer, tempting subject that it is, but rather with the responsibilities imposed upon him as a professional "problem-solver" in a society whose demands often exceed its rewards.

The law is in a state of transition

Clearly, the demands of the practice are heavier today than ever before. Clients are asking lawyers with increasing frequency to account for their actions. While the causes for increased client awareness of the frailty of lawyers have been and will continue to be the subject of wide discussion and speculation, perhaps some consensus may be reached that two reasons for that increased awareness and concomitant desire for accountability are (1) broader coverage of sensational and "political" trials by all types of recognized communication—with the never-ending

* A word about the title: Sisyphus was a King in Greek mythology who was condemned to Hades. His task there was to roll a huge stone up a hill. Whenever Sisyphus stopped for breath, the stone rolled back. His task was thus never completed.

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¹ Dick: "The first thing we do, let's kill all the lawyers."

Jack Cade: "Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo a man? Some say the bee stings: but I say, 'tis the bee's wax; for I did but seal once to a thing, and I was never mine own man since." *King Henry, VI, Part II*, Act IV, Scene 2.

accompanying comments on lawyers' techniques and strategy and (2) the increased general level of education and intellectual awareness of laymen. Additional causes for awareness include an emerging public resentment against anyone claiming professional (or any other) immunity, the increased complexity of laws, rules and regulations which ought to lead lawyers at least to some measure of specialization and, lastly, the gradual demise of the practice of "professional silence" (to protect fellow lawyers) in response to the public hue and cry of a "credibility gap" between what lawyers say and what they do.

Whatever the causes may be, the trend to greater responsibility and accountability is unmistakable. Lawyers must respond positively in order to continue to enjoy the respect and confidence of the public. To be meaningful, our response should be based on an awareness of the principal areas of our vulnerability. One of our faithful companions, *American Jurisprudence*, provides, by way of illustration and not limitation, a listing of those items which may be the areas of our greatest vulnerability:

1. Non-observance of local statutes.
2. Negligence in initiating and conducting litigation.
3. Appellate matters.
4. Negligent title searches.
5. Negligent preparation of legal instruments.
6. Negligent failure to file papers.
7. Negligent handling of collections.
8. Commingling of funds.
9. Failure to adhere to statutes of limitation (the most common source of exposure).
10. Acting beyond the scope of delegated authority.
11. Making unauthorized appearances.
12. Fraud.
13. Vicarious liability for actions of associates or assistants.

While the client expects his lawyer to use his "best efforts" in the preparation and advocacy of his case, the lawyer, regardless of the theory propounded, has historically been held to have the duty to exercise reasonable care and skill as a member of a learned profession in a position of confidence and trust.² Long ago, the United States Supreme Court cogently stated the lawyer's responsibility:

When a person adopts the legal profession, and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties; and if injury results to the client

² *National Savings Bank v. Ward*, 100 U.S. 195 (1880). However, the standard of care required of a Wisconsin attorney may be somewhat stronger:

If an attorney . . . acts with a proper degree of attention, and with reasonable care, and *to the best of his skill*, he will not be responsible [for injuries which might arise from his actions]. (Emphasis added). *Malone v. Gerth*, 100 Wis. 166, 75 N.W. 972 (1898).

from a want of such a degree of reasonable care and skill, the lawyer may be held to respond in damages to the extent of the injury sustained. . . . [L]awyers do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard. Unless the client is injured by the deficiencies of his lawyer, he cannot maintain any action for damages; but if he is injured, the true rule is that the lawyer is liable for the want of such skill, care and diligence as men of the legal profession commonly possess and exercise in such matters of professional employments.³

Justice Clifford stated the then-classic prerequisite of privity for liability when he noted that "[p]roof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the [malpractice] action." While the duty of the lawyer to his client has not changed substantially in the years since *Ward*, the prerequisite of privity in actions based on negligence in discharging the duty of care has faced mounting attacks.⁴

More and more the action is now premised on the classic concept of negligence (duty, breach, cause and damage) and is bottomed in tort rather than contract law.⁵ The lawyer's position of trust and confidence based upon his superior technical knowledge makes him responsible not only to those with whom he has contracted, but also may make him responsible to all of those whom he may reasonably expect to be affected by his professional actions. The lawyer generally has been held, in the discharge of his professional duty, to the level of proficiency commonly possessed and exercised by fellow lawyers in his community; *but*, since the malpractice suit now increasingly is bottomed in tort, he may not rest secure in the knowledge that the ordinary tolling of the applicable statute of limitations establishes a perimeter to his exposure.

An examination of a recent leading case, *Heyer v. Flaig*,⁶ will best illustrate the form and direction of future malpractice actions and hopefully provide us with sufficient basis to take appropriate corrective measures.

An attractive widow with two daughters and a comfortable estate asked her lawyer to prepare a will with the direction to divide her estate equally between the daughters. Upon further investigation, the lawyer learned that she was about to marry a widower with children of his own. She told the lawyer in order to avoid confusion between the two families, she and her husband-to-be wanted to arrange their affairs so as to provide for each child as though the subsequent marriage had

³ *National Savings Bank v. Ward*, 100 U.S. 195 (1880).

⁴ See, *Welder v. Mercer*, ___ Ark. ___, 448 S.W.2d 952 (1970); *Malick v. Migut*, ___ Mich. ___, 177 N.W.2d 200 (1970).

⁵ See note 8, *infra*; see also *Scandett v. Greenhouse*, 244 Wis. 108, 11 N.W.2d 510 (1943).

⁶ 70 Cal.2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969).

never taken place. Accordingly, the lawyer drafted and had her execute a will dividing her estate equally between her two girls.

Several years later, the lawyer received a surprising letter from another lawyer informing him that, upon the death of his client, her will was voided because it failed to make provision for the widower the lawyer knew she would marry—a result required by a statute in effect at the time of drafting. Furthermore, the letter informed the poor fellow that the new lawyer represented the two daughters and they intended to sue him for their lost inheritance, among other things.

The lawyer in this case demurred, and while the trial court sustained his demurrer, the California Supreme Court reversed. In doing so, the court held that the statute of limitations did not begin to run until the death of the testatrix⁷ and that a lawyer is liable not only for the *direct* harm caused by his carelessness, but also for the harm resulting to third parties—even those with whom he has not dealt—if they are in fact injured as a consequence of his actions.⁸

This decision clearly indicates that courts in major populous states are departing from the contractual concept in malpractice actions because of the difficulties of proof for the layman (*i.e.*, professional silence on the question of breach) and the limitation on the measure of damages.⁹ The modern trend, therefore, is to hold an attorney liable for foreseeable injury to a plaintiff such as the beneficiary of a will.¹⁰ Likewise, the lawyer who has notice of possible injury to a third party if he acts on his client's request¹¹ may be found liable for damages.

⁷ While the California court refused to adopt the "postponed accrual" rule of medical malpractice—that the statute of limitations does not begin to run until the negligence is discovered or discoverable—it did find that a third party beneficiary, whose cause of action does not accrue until the testator's death, is not barred by the statute since a separate and distinct duty is owed him. The breach of that duty is the attorney's failure to correct his error prior to the testator's death. After the testator's death, the error is irremediable, and the cause of action accrues. 70 Cal. 2d at 232-33. Wisconsin takes the position that the statute of limitations starts to run when the negligence and resultant injury occurred. *Denzer v. Rouse* 48 Wis. 2d 528, 180 N.W.2d 521 (1970).

⁸ 70 Cal. 2d at 226-27. The *Heyer* decision reaffirms California's break with the absolute privity requirement, first announced in *Lucas v. Hamm*, 15 Cal. Rptr. 821, 364 P.2d 685 (1961). See: Note, "Liability of Attorney to an Intended Beneficiary for Negligent Drafting of a Will," 45 MARQ. L. REV. 459 (1962) discussing the potential implications of *Lucas v. Hamm*.

⁹ Note the necessity of proving the three-fold tort requirement of duty, breach and injury in order to maintain attorney malpractice actions in *State v. Goode* S.D. _____, 171 N.W.2d 733 (1969), and *In re Phelps*, _____ Kan. _____, 459 P.2d 172 (1969), in which it was held that the duty to serve the client exists whether or not compensation is requested or received; *Pusey v. Reed*, _____ Del. _____, 258 A.2d 460 (1969), which requires a showing that the attorney's error was the proximate cause of the injury; and *Woody v. Mudd*, _____ Md. _____, 265 A.2d 458 (1970) and *Brosie v. Stockton*, _____ Ariz. _____, 468 P.2d 933 (1970), where error without damage or injury was held not actionable.

¹⁰ *Heyer v. Flaig*, 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969); *Lucas v. Hamm*, 15 Cal. Rptr. 821, 364 P.2d 685 (1961).

¹¹ *Blizzard v. Brown*, 152 Wis. 160, 139 N.W. 737 (1913); *Hubbard v. McLean*, 115 Wis. 9, 90 N.W. 1077 (1902).

The transition to the tort theory as the basis of professional responsibility and concomitant liability has seen a corresponding rise in the number of successful actions reported at the appellate level.¹² We suspect it has also triggered the informal and unreported disposition of many other cases in the interest of justice and equity. Consider these fact situations and try to imagine their informal disposition:

1. Assume A, your client, and B are in a partnership to sell real estate. A and B purchase land and plat it but fail to have their wives sign the plat before recordation. A retains you to represent the partnership in the sale of lots within the plat. Buyer C executes a standard offer to purchase for one lot and A accepts. C's attorney, after examination, insists that the plat is defective because the wives of A and B failed to join in the plat and no memo of partnership has been recorded. You argue that the plat is valid. C then purchases a lot somewhere else. You commence an action for specific performance. C demurs and is sustained. A now claims malpractice, alleging negligent failure to detect and cure the defect in the plat, and asks you to pay damages for his loss of sale to C.

2. A, your client, receives an offer to purchase some of his real estate from buyer C. While in C's office, A receives the offer in writing and also some earnest money. The offer provides that A must make written acceptance of its terms within four days. At that time you advise A that he has the deal for sure if he agrees at any time within the four days. C orally confirms this fact. A leaves the office without giving a written acceptance. Two days later C telegrams a revocation of his offer. A claims reliance on your advice about the four-day period which resulted in a loss of sale and seeks damages from you.

3. A requests that you draft a will containing a testamentary trust which qualifies for the marital deduction. You fail to include the requisite power of appointment. The Internal Revenue disallows the deduction, resulting in \$10,000 additional Federal estate taxes. Beneficiaries in interest demand reimbursement from you for the \$10,000 loss.

4. A requests that you arrange the execution of his will which you drafted. You permit C, the husband of A's stepdaughter, to be one of the two witnesses to the will execution. A dies and the will is offered in probate where it is determined that the will was improperly executed because C was a witness. The will is voided and A now is intestate. B, as A's stepdaughter, has no standing, since A died intestate, and loses

¹² See the cases collected in *Attorney and Client*, WEST'S SEVENTH DECENNIAL DIGEST, 1956-66, vol. 3, (1967). The fact that reported Wisconsin malpractice cases have not increased in number over the past several decades is probably not indicative of the national trend. Perhaps Wisconsin attorneys and clients are more amenable to informal resolution of difficulties than those in other states, particularly Florida and California.

A's bequest to her due to her husband's incompetency as a witness for that one bequest. B seeks damages from you for loss of her inheritance.

These situations are not extraordinary and could occur at any time in a busy law office to a busy lawyer. The consequences of any of the situations would not be pleasant to the lawyer involved.

Coping with the law in transition is a Jason's quest

We do not intend to create the impression that we mourn the apparent demise of the all-knowing and untouchable "counsellor." If that were ever the case, it certainly is not an impression that we or society should perpetuate. However, there is significant difference between convincing clients that we lawyers are human and not perfect,¹³ and allowing the creation of a new image—that the lawyer is an easy mark for litigation.

The increase in threatened and litigated malpractice actions demonstrates that we face an increasing challenge of matching our claims with predicted results and that we take great pains through conferences, correspondence and file memos to communicate the risks and uncertainties in attaining such results. In plain terms, we should be brave mice and bell our own cat! The lawyer who does this limits his exposure to subsequent litigation by the angry or disappointed client when the results do not meet the expectations.

We mentioned earlier the demands of the law. One of those demands is an awareness of the areas of exposure which may already lie ticking away in inactive files or crouched and waiting in the next appointment. A system of continuing review—retrospectively and prospectively—will serve to encourage the practicing lawyer to take steps to avoid or, at the very least, minimize exposure arising from a "rush" or even incomplete job.¹⁴ This kind of review would have saved the lawyer in *Heyer* not only the expenses of litigation, but the seriously damaging impact of the malpractice action upon his professional reputation.¹⁵

We owe it to ourselves, to our noble profession, and to the public we serve to be ever vigilant, ever better lawyers. As aptly stated by Alexander Pope:

A man should never be ashamed to own he has been in the wrong, which is but saying, in other words, that he is wiser today than he was yesterday.

¹³ In *Heyer v. Flaig*, plaintiff sought not only \$50,000 in damages for loss of inheritance, but also \$50,000 in punitive damages.

¹⁴ "No attorney is held to the rule of infallibility," *People v. Vasquez*, 189 N.Y.S.2d 955 (1959); this may be wishful thinking in the years ahead.

¹⁵ In *Heyer v. Flaig*, the court found a breach of duty in the attorney's "failure to advise the testatrix of the possible undesired consequences if she died without having changed her will." *Id.*, 230.