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Attorney Accountability in Kentucky—Liability to Clients and Third Parties

By Gerald P. Johnston*

**INTRODUCTION**

For more than a century, decisions in Kentucky¹ and throughout this country² have held attorneys liable to former clients for professional negligence. In fact, one of the earliest reported attorney malpractice decisions in the United States is Kentucky’s first such case, Eccles v. Stephenson.³ However, until the 1960s the prevailing judicial attitude in legal malpractice suits was one of protectionism toward the legal profession.⁴ That attitude has now changed as courts in the past twenty years have overturned age-old barriers which had long discouraged the successful pursuit of such suits.⁵ During this period of rapid and dra-

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3 6 Ky. (3 Bibb) 517 (1814).


5 In 1958 and 1961, the California Supreme Court overturned the long-standing
matic transformation, the number of malpractice claims escalated at a hectic rate. While the courts in Kentucky have not been on the cutting edge of these developments in the legal malpractice area, they have made startling expansions of liability in malicious prosecution actions brought against lawyers. Overall, Kentucky courts have established an increasingly favorable climate for claimants in attorney accountability actions.

This Article will review significant national trends which are occurring in the two major areas of attorney liability: (1) liability to clients for legal malpractice and (2) liability to third persons for malicious prosecution. Kentucky decisions will be analyzed and compared with nationwide developments throughout the discussion.

privity rule which had protected attorneys from suits by any person other than their immediate clients. Lucas v. Hamm, 364 P. 2d 685 (Cal. 1961), cert. denied, 368 U.S. 987 (1962) (allowing beneficiaries under a will to sue the testator’s attorney for negligent will preparation); Biakanja v. Irving, 320 P.2d 16 (Cal. 1958) (balancing various factors such as foreseeability of harm and degree of injury to the third party). In 1969, two decisions held that the statute of limitations does not necessarily start to run at the date of the negligent act or omission in a legal malpractice case, but may be extended by other considerations such as when the claimants discovered or should have discovered the attorney’s negligence. Heyer v. Flaig, 449 P.2d 161, 166 (Cal. 1969); Mumford v. Staton, Whaley & Price, 255 A.2d 359, 367 (Md. 1969).

6 For a discussion of these developments on a national level, see R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 6 (2d ed. 1981); Avery, Significant Current Trends Affecting Malpractice Liability of Lawyers in the Fields of Real Property, Probate and Trust Law, 13 REAL PROP. PROB. & TR. J. 574 (1978); Zilly, Recent Developments in Legal Malpractice Litigation, 16 LITIGATION 8 (Fall 1979).

7 According to the Wall Street Journal, clients are suing their lawyers more than twice as frequently as a decade ago. Flanagan, Malpractice Suits, Fueled by Recession, Spell Boom Times for Sellers of Liability Insurance, Wall St., J., June 23, 1980, at 48, col. 2. The rapid rise in malpractice claims also is reflected in the substantial increase in malpractice insurance premiums that generally occurred in the 1970s. See Bridgman, Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff’s Case, 30 S.C.L. REV. 213, 216 n.10 (1979); Sheehan, The History of Lawyers’ Professional Liability Insurance, 13 FORUM 808, 812-14 (1977-78); Stern, Legal Malpractice Part I—Are You Really Protected By Your Malpractice Policy?, 14 TRIAL 23 (Dec. 1978); Cost of Malpractice Insurance Is Now a Concern for Lawyers, N.Y. Times, June 18, 1975, at 44, col. 1.

The rise in malpractice litigation, and the increasing attention paid it by attorneys, are evidenced by the fact that during a 30-month period from January 1975 through June 1977, 22 law review articles and nine books were published on legal malpractice, and the fact that six separate programs on attorney malpractice were presented at a single convention of the American Bar Association at its national meeting in 1977. Avery, supra note 6, at 574-75.
I. LEGAL MALPRACTICE

A. Attorney-Client Relationship

A cause of action for legal malpractice is generally founded on the attorney-client relationship and the responsibilities that arise from that relationship.\(^8\) While it usually is not necessary to categorize a malpractice action as founded on tort or breach of contract,\(^9\) it is important for a claimant to establish the existence of a duty to exercise reasonable care owed by the attorney to the claimant.\(^10\) This issue can arise both at the start and end of the attorney-client relationship. If the attorney can show that no such relationship ever came into existence, then no duty is owed the claimant, and the attorney, for example, cannot be held liable for not filing suit within the limitations period.\(^11\) However, no particular formality is required, and courts are clearly inclined to find that a sufficient relationship existed so as to place on the attorney the duty to act reasonably to protect the other party's interest.\(^12\)

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\(^8\) See R. Malles & V. Levit, supra note 6, § 101 at 171.

\(^9\) See, e.g., Lucas v. Hamm, 364 P.2d at 689; Comment, New Developments in Legal Malpractice, 26 AM. U.L. REV. 408, 436-41 (1977). Classification of a legal malpractice suit as based upon tort or contract may still have some significance in jurisdictions which do not have a separate statute of limitations specifically applicable to legal malpractice actions. In these jurisdictions, casting the malpractice claim in terms of a contractual cause of action might extend the time for filing suit, since the limitations period for breach of contract generally is longer than for a cause of action in tort. See, e.g., Hillhouse v. McDowell, 410 S.W.2d 162 (Tenn. 1966) (cause of action for attorney malpractice governed by six-year statute of limitations relating to contracts, not one-year statute of limitations for personal injury). See also Foulks v. Falls, 91 Ind. 315 (1883); Bland v. Smith, 277 S.W.2d 377 (Tenn. 1955); Schirmer v. Nethercutt, 288 P. 265 (Wash. 1930).

\(^10\) See, e.g., Eccles v. Stephenson, 6 Ky. (3 Bibb) at 517; Humboldt Bldg. Ass'n v. Ducker's Ex'x, 64 S.W. at 671. See R. Malles & V. Levit, supra note 6, § 101.

\(^11\) See, e.g., Brandlin v. Belcher, 134 Cal. Rptr. 1 (Ct. App. 1977), where the court held that the attorney, who had previously represented the deceased in a divorce action, had not entered into an attorney-client relationship with her in regard to the amendment of an inter vivos trust, and was therefore not liable to the beneficiaries for failure to amend the trust.

\(^12\) See, e.g., Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261,
without a clear-cut retention of his or her services, has generally been held sufficient to establish the attorney's duty to the "client." 13

Liability for legal malpractice can also hinge on the issue of whether the attorney-client relationship has terminated. 14 A Kentucky decision rendered at the turn of the century, Hey v. Simon, 15 held that employment of an attorney engaged to prosecute several claims terminated with entry of final judgment, unless his services were retained further by the client, even though the attorney failed to advise the client regarding appeal of the judgment. It is doubtful that a court would reach the same conclusion today under the circumstances of that case. 16 Nonetheless, an attorney cannot be held liable for acts or omissions when it is clearly demonstrated that his or her services were no longer retained.

B. Standard of Care

When a cause of action for legal malpractice was first recognized in England, lawyers apparently were liable only for acts of gross negligence. 17 While there is some trace of this reduced stan-
standard in the early cases decided in this country, the rule quickly evolved that an attorney was liable for any failure to exercise the skill and knowledge ordinarily possessed by others in the profession. Although the precise wording may vary from state to state, and even from decision to decision within a single jurisdiction, legal malpractice cases are now governed by a general standard, modified to incorporate the level of competency of others similarly engaged in the practice of law. Thus, lawyers, as members of a learned profession, are not held to a reasonable person standard as such, but are held to a higher standard based upon the reasonable conduct of others practicing the same profession.

Kentucky's highest court in Humboldt Building Ass'n v. Ducker's Ex'x, decided more than eighty years ago, summarized the standard of care in legal malpractice cases in a manner that is still generally applicable today: "[A]n attorney 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 employment."

1. Mistakes in Judgment

The Humboldt opinion points out, however, that a lawyer generally is not liable for a "mistake in judgment." Characterizing acts or omissions as "mistakes in judgment" has been an effective shield against malpractice claims, but in the past decade a number of cases have narrowed the scope of its use, at least in

Ass'n v. Ducker's Ex'x, 64 S.W. at 672; R. MALLEN & V. LEVIT, supra note 6, § 5.

See e.g., Suydam v. Vance, 23 F. Cas. 477 (C.C.N.D. Ind. 1820) (No. 13,657); Pennington's Ex's v. Yell, 11 Ark. 212 (1850); Holmes v. Peck, 1 R.I. 242 (1849).

Savings Bank v. Ward, 100 U.S. at 195; Humboldt Bldg. Ass'n v. Ducker's Ex'x, 64 S.W. at 671.


64 S.W. at 671.

Id. at 672-73.

Id. at 671.

non-litigation settings. For example, in Smith v. Lewis, a client sued the lawyer who had represented her in an earlier divorce for his failure to assert that she had a community property interest in her husband's National Guard retirement benefits. The attorney argued that the law was so unclear with regard to classification of such retirement benefits that the exercise of his judgment in advising his client that her husband's benefits were not community property should not be subject to question. In affirming a $100,000 jury verdict against the attorney, the California Supreme Court held:

> With respect to an unsettled area of the law, . . . an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem . . . .

In contrast to Smith, the courts are still inclined to give attorneys broad latitude in making tactical decisions during the course of actual litigation. Yet, none of the courts in this country has gone as far as the judiciary in England and several other common law countries, where trial attorneys are held to be absolutely immune from malpractice claims arising out of the conduct of litigation.

Two recent cases illustrate the broader leeway granted attorneys in this country for judgments made during litigation. In the first case, Stricklan v. Koella, the Tennessee Court of Appeals

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26 Id. at 591.
27 Id. at 595.
28 See, e.g., Frawe v. Essling, 282 N.W. 2d 493 (Minn. 1979); Sanders v. Smith, 496 P.2d 1102 (N.M. Ct. App. 1972); Cook v. Irion, 409 S.W.2d 475 (Tex. Civ. App. 1966). See also C. Kindregan, Malpractice and the Lawyer 16 (rev. ed. 1981); R. Mallen & V. Levit, supra note 6, § 578; Mallen & Evans, supra note 24 at 308-12.
29 This judicial inclination is undoubtedly attributable to the fact that in every litigated case, there is a winner and a loser, and in view of the outcome, it is not unusual for a client who lost to be critical of the attorney's performance. Thus, as a consequence of the very nature of the litigation process, an attorney engaged in litigation is considered to be entitled to additional protection against malpractice claims.
30 546 S.W.2d at 810.
held that an attorney was not liable for refusing to use trial tactics that were dictated by the client, such as moving for a change in venue and filing transcripts of depositions that had been taken in the case, where such actions would have served no useful purpose. While the court seemed inclined to adopt an absolute rule precluding malpractice suits when the allegations arise from the conduct of a case during trial, it settled for a less comprehensive approach:

We do not hold that there generally is no cause of action against an attorney for his negligence or malpractice [during litigation]; we only hold . . . there can be no cause of action against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of the facts.31

In the second case, also applying Tennessee law, the Sixth Circuit Court of Appeals recognized a professional judgment exception for claims arising out of litigation tactics, but applied it more cautiously. In this case, Woodruff v. Tomlin,32 the defendant-attorney had previously represented the plaintiff in a personal injury suit brought in state court. The Sixth Circuit construed Strictlan v. Koella as standing for the proposition that a lawyer is not liable for acts or omissions in conducting litigation which are based upon an "honest exercise of professional judgment"33 and agreed that such a rule was sound in order to avoid baseless suits by clients who had litigated and lost.34 While upholding most of the rulings of the trial court, the court of appeals did, however, overturn the judgment n.o.v. which had been granted in the defendant-lawyer's favor as to several of plaintiffs' claims. These claims included allegations relating to the failure of the attorney during the prior state court proceeding to interview certain potential witnesses suggested by his clients and to argue that violation of a Tennessee statute relating to proper operation of a motor vehicle constituted a separate basis of liability.35

31 Id. at 814.
32 616 F.2d 924 (6th Cir. 1980).
33 Id. at 930.
34 Id.
35 Id. at 933-35.
No recent Kentucky cases have dealt with so-called “mistakes in judgment” arising in the trial context. The Kentucky Court of Appeals’ decision in Daugherty v. Runner, however, was rendered in an analogous situation. In Daugherty, the estate of a woman who was seriously injured in an automobile accident and who died a month later in a hospital brought a malpractice claim against the attorney it had retained to file suit for personal injuries arising out of the accident. The attorney did not bring a medical malpractice action for the allegedly inadequate treatment the decedent had received as a patient, and that action became barred by the statute of limitations. In the subsequent legal malpractice action, the attorney claimed that he was employed only to represent the decedent in connection with the automobile accident, as reflected by the written retainer agreement. The jury apparently agreed with him. It rendered a verdict for the defendant-attorney, although it also found that if the medical malpractice suit had been prosecuted, decedent’s estate would have recovered $146,123.75.

The court grudgingly upheld the jury’s verdict, but made it clear that attorneys owe a duty to their client to investigate the facts, much as the attorney in Smith v. Lewis was required to research the law and not simply exercise his judgment in a vacuum:

We are not ready to hold that Mr. Runner had absolutely no duties to his client with regard to a medical malpractice action simply because the written [employment] contract did not specifically mention a malpractice suit. To do so would require the client, presumably a layman who is unskilled in the law, to recognize for himself all potential legal remedies. An attorney cannot completely disregard matters coming to his attention which should reasonably put him on notice that his client may

37 Id. at 15, 17-18.
38 The written employment contract provided that Runner was to “institute a claim for damages against any and all responsible parties as a result of injuries received upon the 22nd day of February, 1972.” Id. at 14 (emphasis added).
39 Id.
40 See notes 25-27 and accompanying text supra for a discussion of the Smith v. Lewis decision.
have legal problems or remedies that are not precisely or totally within the scope of the task being performed by the attorney.  

The decision in Daughtery v. Runner places a heavy burden upon Kentucky attorneys retained for litigation purposes to undertake a thorough factual investigation and prosecute every possible cause of action that might be asserted on a client's behalf. Daughtertv arguably sets as high a standard of care as the California Supreme Court established in Smith v. Lewis, where it was held that an attorney is required to perform a reasonable amount of research into the state of the law in order properly to exercise his judgment and advise his client as to an appropriate course of action. As a consequence, it would seem that little life remains in the "mistake in judgment" doctrine in Kentucky, except perhaps in the area of litigation tactics, as illustrated by Strichtlan v. Koelella and Woodruff v. Tomlin.

2. The Need for Expert Testimony

The principle issue in a legal malpractice case is whether the defendant-attorney's conduct met or exceeded the degree of care and skill expected of a reasonably competent lawyer under the same circumstances. This all-important question is generally left for determination by a jury, placing an attorney charged with malpractice at a distinct disadvantage because jurors do not see members of the legal profession as particularly sympathetic figures. Thus, plaintiffs in a malpractice action who can get cases
to the jury are likely to be compensated for any loss they may have suffered, regardless of who was responsible for that loss.\textsuperscript{44} 

Counterbalancing this inherent advantage to some extent is the fact that plaintiffs in malpractice actions usually must obtain the expert testimony of an attorney in order to establish the standard of care applicable to the defendant-attorney and prove that the defendant's conduct fell short of that standard.\textsuperscript{45} This need for expert testimony parallels the situation in medical malpractice actions, where expert medical testimony is normally required in order to establish malpractice against a physician.\textsuperscript{46} Although only a few cases are directly in point, it is clear that plaintiffs who bring a legal malpractice action against an attorney run a substantial risk of having their case dismissed unless a lawyer can be retained to serve as an expert witness on their behalf.\textsuperscript{47} 

Because of the need for expert testimony, a claimant in a legal malpractice suit must not only find an attorney willing to

\textsuperscript{44} The lawyer's dilemma should not be overstated, however. In Daugherty v. Runner, for example, the claimant in a legal malpractice action got his case to the jury, which found for the attorney-defendant, even though its verdict indicated that if the original medical malpractice suit had been filed within the statute of limitations, the claimant would have recovered more than $146,000. 581 S.W.2d at 14. For a discussion of this case and the puzzling verdict returned by the jury, see notes 36-41 and the accompanying text supra.

\textsuperscript{45} C. Kindred, supra note 28, at 34-35; R. Mallen & V. Levit, supra note 6, § 665.

\textsuperscript{46} A. Holder, Medical Malpractice Law 60-61 (1975); W. Prosser, supra note 20, § 32, at 164-65.

\textsuperscript{47} In Wright v. Williams, 121 Cal. Rptr. 194 (Ct. App. 1975), the claimants, who had brought suit against their former attorney for his mistakes in checking title to a vessel which they had subsequently purchased, had their action dismissed when they failed to produce an expert witness to testify on their behalf that the defendant's conduct fell below the applicable standard of care for lawyers engaged in such work. Several other cases serve to illustrate the problems that can be presented if the malpractice claimant does not produce an attorney at trial who is qualified to testify as an expert witness. See, e.g., Palmer v. Nissen, 256 F. Supp. 497, 500-01 (D. Me, 1966); Olson v. North, 276 Ill. App. 457, 486-88 (1934); Cook v. Irion, 409 S.W.2d at 477-78.
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represent his interests, but also a second lawyer who is both willing and qualified to testify as an expert. Just a decade ago, grave concern was expressed about the possibility of a “conspiracy of silence” in the legal profession which would preclude successful litigation of malpractice claims against attorneys.\(^4\) In the last few years, however, innumerable legal malpractice suits have been filed and prosecuted in virtually every jurisdiction in this country.\(^4\) That is not to say, of course, that a claimant may not still face some difficulty in retaining the services of an attorney and locating an expert.\(^5\)

In a jurisdiction such as Kentucky, which is not heavily populated\(^5\) and has less than 8,000 lawyers admitted to practice within its borders,\(^5\) it may be difficult, particularly in smaller communities, to retain one attorney to represent a malpractice claimant and to employ yet another to testify as an expert. Such a thesis is impossible to prove or disprove, since there is no way of determining the number of potential claimants who did not as-

\(^4\) The so-called “conspiracy of silence” or refusal of physicians to testify in medical malpractice cases can be an insurmountable barrier to the prosecution of such claims. H. Jacobs, The Spectre of Malpractice 25-31 (1978); Belli, An Ancient Therapy Still Applied: The Silent Medical Treatment, 1 VILL. L. REV. 250 (1956); McCoid, The Care Required of Medical Practitioners, 12 VAND. L. REV. 549, 631 (1958-59). The possible existence of a similar “conspiracy” in the legal profession was once thought of as preventing successful claims for legal malpractice. See, e.g., Haughey, Lawyer’s Malpractice: A Comparative Appraisal, 48 NOTRE DAME LAW. 888, 904 (1973); Peacock, Legal Malpractice, 1968 TRIAL LAW. GUIDE 333, 336; Wade, supra note 2, at 774; Wallach & Kelly, Attorney Malpractice in California: A Shaky Citadel, 10 SANTA CLARA LAW. 257, 265-66 (1970).


\(^5\) R. Malen & V. Levit, supra note 6, at § 254 at 333.

\(^5\) According to the 1970 United States Census, Kentucky has an average of 81.2 persons per square mile as compared to a national average of 57.5 persons per square mile. More densely populated states include New York with 381.3 persons per square mile, Ohio with 260.0 persons per square mile and California with 127.6 persons per square mile. 1970 CENSUS OF POPULATION, vol. 1, part 1, § 1, table 11 (1973).

\(^5\) According to Bette K. Wilson of the Kentucky Bar Association and managing editor of the Kentucky Bench and Bar, approximately 7,890 lawyers are admitted to practice in Kentucky. Telephone interview (June 3, 1982).
sert their claims because they could not find attorneys willing to handle their cases or expert witnesses to testify on their behalf.\textsuperscript{53} But two recent cases in Kentucky indicate that it may not be as difficult to prosecute suits against attorneys as many in the legal profession may have believed.

The first case, \textit{Daugherty v. Runner},\textsuperscript{54} focused on whether an attorney was guilty of malpractice for failing to file a medical malpractice claim on behalf of his client, even though the terms of the retainer agreement appeared to limit the representation to matters relating to injuries sustained in a motor vehicle accident.\textsuperscript{55} Not only was the plaintiff able to find one lawyer to litigate the legal malpractice claim, but also another lawyer\textsuperscript{56} who testified at trial that the defendant-attorney’s failure to inquire into his client’s cause of death and his failure to review the hospital records “was not consistent with good legal practice and, in fact, was a substantial departure therefrom.”\textsuperscript{57} It is one thing for an attorney to serve as an expert witness in an obvious case of professional negligence, such as where a title search failed to uncover a plainly recorded prior lien,\textsuperscript{58} but the malpractice issue in \textit{Daugherty} was anything but clear-cut. If indeed a widespread “conspiracy of silence” exists in legal malpractice, one would expect to see evidence of its existence in a case like \textit{Daugherty}, where the defendant-attorney’s conduct was not shocking, clearly unethical, or otherwise indicative of gross incompetence.

\textsuperscript{53} The difficulty in locating reliable information even with regard to those malpractice claims that have been filed is the subject of two excellent articles. See Pfennigstorf, \textit{Types and Causes of Lawyers’ Professional Liability Claims: The Search for Facts}, 1980 Am. B. Found. Research J. 255; Note, \textit{Improving Information on Legal Malpractice}, 82 Yale L.J. 590 (1973).

\textsuperscript{54} 581 S.W.2d at 12.

\textsuperscript{55} Id. at 14, 17-18.

\textsuperscript{56} The defendant-attorney practiced in Louisville, Kentucky, and the legal malpractice claim was tried before the Jefferson County Circuit Court located there. The court of appeals’ decision, in referring to the expert testimony offered in favor of the claimant in the legal malpractice suit, described the expert as a “local lawyer,” meaning, presumably, that he also practiced in the Louisville area. \textit{Id.} at 17-18.

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} There are several legal malpractice decisions in Kentucky where an attorney has been sued for negligently examining title to real property. See, \textit{e.g.}, Owen v. Neely, 471 S.W.2d at 703; Humboldt Bldg. Ass’n v. Ducker’s Ex’x, 64 S.W. at 671; Morehead’s Trustee v. Anderson, 100 S.W. at 340 (dicta).
Another recent Kentucky case also highlights this point. *Raine v. Drasin* was a malicious prosecution "countersuit" brought by two physicians who had been named as defendants in a prior medical malpractice lawsuit. Not only did the doctors succeed in retaining an attorney to represent them, but they also found another lawyer who testified as an expert on their behalf that the defendant-attorneys "did not comply with the standard of care for ordinary and prudent lawyers." This evidence was held to be material to the issue of "probable cause" in the malicious prosecution proceeding. The attorneys' conduct in naming the two physicians as defendants in the medical malpractice action was clearly unjustified but, still, if "a conspiracy of silence" existed among Kentucky lawyers, one would expect to find some evidence of it in this suit which sought and recovered punitive damages.

It thus appears that lawyers in this state should not rely too much upon the unwillingness of their colleagues at the bar to represent legal malpractice claimants or to testify as experts in such cases. It undoubtedly is true that the necessity of locating not one but at least two attorneys serves as a damper to prosecution of such claims. However, even where a lawyer from the same city or county cannot be secured to serve as plaintiff's expert witness, an attorney from another jurisdiction might be found for that purpose.

59 621 S.W.2d 895 (Ky. 1981).
60 Id. at 901. The expert witness in *Raine v. Drasin* was identified as Professor David Leibson, a member of the Ethics Committee of the Louisville Bar Association. Id. at 900-01.
61 Id. at 901.
62 The underlying suit was filed initially against the hospital where the claimant's shoulder was fractured during treatment for a heart attack. Eight months after the original complaint had been filed, the attorneys for the plaintiff filed an amended complaint joining Drs. Drasin and Fadel as defendants. Both physicians had been brought into the case *after* claimant's shoulder had been injured. Fadel, an orthopedic surgeon, was called in to treat the shoulder, and Drasin, a radiologist, read the x-rays. Furthermore, answers to interrogatories and testimony at a deposition, both of which occurred *prior to* the filing of the amended complaint, revealed that neither physician had been contacted until after the shoulder had been fractured. Id. at 898.
63 The original malicious prosecution complaint in *Raine v. Drasin* sought both compensatory and punitive damages against the two attorneys. In fact, $30,000 of the total of $50,000 awarded the doctors by the jury was allocated to punitive damages. Id.
64 In the Tennessee case of *Woodruff v. Tomlin*, 423 F. Supp. at 1284, the plaintiff
3. Higher Standard for Specialists

Commentators have long predicted that an attorney who specializes in an area and who commits a mistake or error in his or her specialty will be held to a higher standard of care based upon the degree of skill and knowledge of other attorneys also specializing in such field. To date, however, only a few cases have focused on this issue. The first was *Wright v. Williams*, where an attorney made a mistake in checking title to a vessel which the plaintiffs planned to buy. Because of the error, the ship which was purchased could not be utilized for its intended purpose, and the purchasers subsequently brought a malpractice action against the attorney who verified the title. At trial, the

used an Arizona attorney as an expert witness who testified against the defendant-lawyers as to how they should have investigated and tried the original personal injury suit. In *Walker v. Bangs*, 601 P.2d 1279 (Wash. 1979), the Washington Supreme Court upheld the lower court's decision to allow a visiting law professor to serve as an expert witness for the plaintiff in a legal malpractice action because of his experience in maritime personal injury suits, even though he was not admitted to practice law in that state. And in a multimillion dollar malpractice suit brought against a well-known plaintiff's lawyer in Toledo, Ohio, plaintiff's counsel admitted that he had some difficulty finding a lawyer in Toledo willing to testify, but then used a Cleveland attorney as an expert witness on plaintiff's behalf. Tybor, $2M Awarded for Legal Malpractice, NATL L.J., May 26, 1980, at 3, col. 1.

In medical malpractice cases, it is a widely accepted principle that a physician who is a specialist in a particular area of medicine is held to a higher standard of care based upon the level of competence of other doctors specializing in the same field of medicine. See, e.g., Robbins v. Footer, 553 F.2d 123, 126 (D.C. Cir. 1977); Karp v. Cooley, 493 F.2d 408, 410 (5th Cir. 1974); Carmichael v. Reitz, 95 Cal. Rptr. 381, 383 (Ct. App. 1971); Deutsch v. Shein, 597 S.W.2d 141, 143 (Ky. 1980); Blair v. Eben, 461 S.W.2d 370, 373 (Ky. 1970); Halligan v. Cotton, 227 N.W.2d 10, 12 (Neb. 1975); Park v. Chessin, 387 N.Y.S.2d 204, 211 (Sup. Ct. 1976). Such a standard of care, which varies from specialty to specialty, is relatively easy to apply in a field such as medicine in which there is a high degree of well-defined specialization, based upon national boards of certification, and where the fact of such specialization is generally known to patients seeking medical services. For a summary of medical education, training and the recognized medical specialties, see 1 LAWYERS' MEDICAL CYCLOPEDIA §§ 1.4-.10 (3d ed. 1981); G. Greenwood & R. Fredericksen, SPECIALIZATION IN THE MEDICAL AND LEGAL PROFESSIONS 11-47 (1964).

121 Cal. Rptr. 194 (Ct. App. 1975).

The claimants first consulted an attorney of one of the purchasers, but he concluded the matter was not within an area of his expertise and referred it to the defendant-attorney, who specialized in maritime law. The second attorney failed to note that the ves-
plaintiffs failed to offer expert testimony to establish the standard of care of an attorney specializing in maritime law; the appellate court affirmed the trial court's dismissal in favor of the defendant-attorney because of this failure of proof.68

More directly on point is the recent California Court of Appeals' decision of Horne v. Peckham.69 In Peckham, a general practitioner set up a short-term trust and the transfer of property to that trust ultimately proved to be ineffective to shift income from the donor-parents to the beneficiary-son.70 After paying an income tax deficiency, the donor-parents brought a malpractice action against the general practitioner. In affirming a jury verdict against the attorney, the appellate court held that a general practitioner has a duty to refer such a matter to a tax specialist, and the failure to do so could, in and of itself, form the foundation of a legal malpractice suit.71 The court in Peckham further indicated that if a general practitioner undertakes a legal assignment which reasonably should have been referred to a specialist, and a mistake or error occurs, the general practitioner would be held to the higher standard of care of the specialist.72

Such cases could present a serious problem for attorneys practicing in Kentucky. To the extent that lawyers in this jurisdiction limit their practice to one or two areas of the law, they will likely be held to the higher standard of care of attorneys specializing in the same field or fields. Of even greater concern, sel had once been owned by an alien, which meant that it could not be used by the purchasers for commercial purposes, as intended, because of the provisions of the Merchant Marine Act of 1920. Id. at 196.

68 Id. at 199-200.
69 158 Cal. Rptr. 714 (Ct. App. 1979).
70 Id. at 718-20.
71 Id. at 720. The jury instruction in question, regarding the duty of a lawyer in general practice to refer a specialized matter to an attorney who specializes in the field, was based upon a medical malpractice form contained in the California Book of Approved Jury Instructions. Id.

A general practitioner in the medical profession has long been held to have a duty to refer his patients to specialists where other reasonably competent physicians would have made such a referral under the circumstances. See, e.g., Simone v. Sabo, 231 P.2d 19, 22 (Cal. 1951) (duty of dentist in general practice to refer patient to specialist); McCoid, supra note 48, at 597-98; Annot., 21 A.L.R.3d 953 (1968).

72 158 Cal. Rptr. at 720. The court held that California's recognition of legal specialties and the "reality" of specialization justified a jury instruction regarding a higher standard of care applicable to attorneys when undertaking sophisticated tax work. Id.
however, is the impact of decisions such as Peckham on general practitioners whose numbers one would expect to be proportionately higher in a state such as Kentucky. The problem is compounded further by the fact that attorneys practicing in less populous communities may find that the duty to refer set out in Peckham cannot be met in many situations where there may be no other lawyers within reasonable proximity who have greater expertise in the particular area of law in question.73

The fact that there is no case law in Kentucky on the impact of specialization on the standard of care in legal malpractice does not provide much solace to the practitioner in this state. Commentators, as well as some courts, have looked to medical malpractice cases for precedent, and have followed that precedent to the letter.74 Thus, the medical malpractice decisions in Kentucky75 form a firm analogy upon which to hold attorneys in this jurisdiction to the higher standard of care of a specialist when a case involving that issue is presented to the courts for resolution.76

73 For example, suppose an individual wanted to explore the possibilities of incorporating a farm or other family business for estate planning reasons, as suggested in an article he or she read. See generally Kess & Westlin, Planning for the Farmer and Rancher, ESTATE PLANNING GUIDE (CCH) ¶¶ 310-13 (4th ed. 1982). If the area in which the individual lived was not near any medium-sized or large cities, it is likely that no lawyers in or near his or her home would be specialists in taxation, business law or estate planning. In such a case, the possibility of referral is not meaningful because the client may not want to travel 100 or so miles for an appointment with an attorney who happens to specialize in the field in question.


75 See, e.g., Deutsch v. Shein, 597 S.W.2d at 141 (board certified internist); Prewitt v. Higgins, 22 S.W.2d 115 (Ky. 1929) (exodontist).

76 The national trend toward official recognition of legal specialization also undoubtedly adds impetus to imposition of a higher standard of care on specialists. To date, nine states (Arizona, California, Florida, Georgia, Iowa, New Jersey, New Mexico, South Carolina, and Texas) have enacted programs of “certification” or “designation” of fields of specialization in the law. 28 C.L.E. REG. 115 (1982). For a description of the various types of official plans of specialization and certification, see ZEHNLE, SPECIALIZATION IN THE LEGAL PROFESSION 20-29 (1975).

This movement toward legal specialization made rapid strides in the mid-1970s. During the last decade, almost every jurisdiction in this country has considered adoption of a specialization plan. See ABA Standing Committee on Specialization, State Status Report, in ABA INFORMATION BULLETIN No. 6, at 23-28 (1980). This trend has now slowed considerably. See Brink, New Era in Specialization, in ABA INFORMATION BULLETIN No.
In addition, the United States Supreme Court’s decision in Bates v. State Bar of Arizona, which permits lawyers to advertise the field or fields in which they practice, or that their practice is limited to one or more fields, is also likely to raise the standard of care. If, for instance, a lawyer advertises that his or her practice is limited to a particular area of the law and subsequently commits a mistake or error in handling a client’s case within such area, such a “holding out” of special capability would in all likelihood result in the application of a standard of care based upon the performance level expected of other reasonably competent lawyers specializing in that particular field.

4. Locality Rule

In contrast to medical malpractice, the geographic area in

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6, at 1, 3 (1980), where the Chairman of the ABA Standing Committee on Specialization conceded that there have been substantial setbacks in the movement toward official recognition of legal specialization. For an excellent discussion of the reasons behind this loss of momentum, see the Arkansas Supreme Court’s comments in In re Amendments to the Code of Professional Responsibility, and Canons of Judicial Ethics, 590 S.W.2d 2 (Ark. 1979).

To the extent that a state recognizes some form of legal specialization, a lawyer who opts for specialization will undoubtedly be held to a higher standard of care in any malpractice suit arising out of an error committed while undertaking a matter within that field of specialty.

78 The Code of Professional Responsibility, as amended, permits lawyers to advertise the field or fields of law that they are engaged in, or to indicate that their practice is limited to one or more areas. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)(2) & 2-105(A)(2).
80 The “locality rule” has played a major role in medical malpractice decisions. See McCoid, supra note 48, at 569-75; Waltz, The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation, 18 DePaul L. Rev. 408 (1969). Early medical malpractice decisions held the defendant-physician to a standard of care of other doctors practicing in the same locality. See, e.g., Force v. Gregory, 27 A. 1116, 1116 (Conn. 1893); Small v. Howard, 128 Mass. 131 (1880); Hathorn v. Richmond, 48 Vt. 557, 558-63 (1876); Huttner v. MacKay, 293 P.2d 766, 769 (Wash. 1956). A “same or similar community” test was soon substituted for the strict locality rule, however, because of concern that the standard of care would be based in some geographic areas upon the practices of only a few physicians and in order to counteract the “conspiracy of silence” among physicians practicing in the same locality. See, e.g., Harvey v. Kellin, 566 P.2d 297, 300-02 (Ariz. 1977);
which an attorney practices has had little impact to date on the applicable standard of care in legal malpractice cases.\(^8\) Many of the leading cases define standard of care without reference to the locality in which the attorney practiced.\(^8\) Other well-known decisions make only passing reference to the area of the defendant-attorney's practice in discussing the standard of care, and that aspect has generally had little or no effect on the outcome of the cases.\(^8\) Thus, with a few exceptions discussed below, the geographic region in which an attorney practices has not been a significant factor in legal malpractice decisions.

Two jurisdictions have specifically adopted a statewide standard of care in legal malpractice cases, on the grounds that lawyers are generally required to pass a bar examination to demonstrate their competence to practice in a given jurisdiction.\(^8\) While such a position offers a certain logical, if oversimplified approach,\(^8\) it is interesting to note that the Supreme Court of the

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\(^1\) C. Kindregan, supra note 28, at 30-37; R. Mallen & V. Levit, supra note 6, \$ 254; Comment, New Developments in Legal Malpractice, 26 Am. U.L. Rev. 408, 415 (1977) [hereinafter cited as Comment, New Developments]; Comment, Attorney Malpractice—A "Greenian" Analysis, 57 Neb. L. Rev. 1003, 1017-20 (1978) [hereinafter cited as Comment, "Greenian" Analysis].

\(^2\) See, e.g., Savings Bank v. Ward, 100 U.S. at 199-200; Lucas v. Hamm, 364 P.2d at 689; Daugherty v. Runner, 581 S.W.2d at 15-16; Hodges v. Carter, 80 S.W.2d at 146.

\(^3\) See, e.g., Smith v. Lewis, 530 P.2d at 592 n.3; Olson v. North, 276 Ill. App. at 478-83; Ramp v. St. Paul Fire & Marine Ins. Co., 269 So. 2d 239, 244 (La. 1972).


\(^5\) It should be noted that physicians, as well as lawyers, are licensed to practice on a state-by-state basis; yet, there is little indication in medical malpractice cases that a state-
State of Washington, which initially adopted the statewide rule, seems to have departed from that standard in a recent case.66

Several courts appear to have adopted a standard of care based upon the conduct of lawyers in a particular community in situations where such an approach makes particular sense because of the local nature of the substantive issues being litigated.67 Thus, for example, in a suit involving a lawyer's failure to note a possible defect during a title search, it seems appropriate to judge the attorney's conduct by the standards of the legal community in which the property is located, since the question of what constitutes a cloud on title may vary from area to area even within a state.68 On the other hand, attorneys practicing in fields in which federal statutes or causes of action are involved should be held to a standard which goes beyond state lines, as the nature of such practice is nationwide in character.69

To date, there have been no Kentucky cases on the significance of geographic area in terms of the standard of care applicable in legal malpractice. Here, as in many other aspects of

wide standard of care should be applied. Furthermore, one of the arguments given in favor of a statewide standard for lawyers—that such lawyers are required to pass bar examinations on a state-by-state basis—does not apply to the thousands of lawyers admitted in numerous jurisdictions by reciprocity, without having to take a bar examination in their new locale. Certainly it would make no sense whatsoever to have two standards in a given jurisdiction, one for attorneys who passed the bar examination in that state and another for lawyers admitted on motion after practicing elsewhere.

66 See Walker v. Bangs, 601 P.2d 1279 (Wash. 1979). In Walker, the Washington Supreme Court decided in favor of allowing a witness to qualify as an expert in a legal malpractice case, even though the witness was not admitted to practice in that state. It is true that the malpractice claim related to a Federal maritime personal injury case, and the proposed expert had considerable experience in another jurisdiction trying such cases. Id. at 1282-84. The fact remains that the case seems inconsistent with two prior Washington decisions which clearly establish a statewide standard of care for legal malpractice cases. See cases cited in note 85 supra.

67 See Palmer v. Nissen, 256 F. Supp. at 501 (under applicable county standards, defects in title not considered material); Ramp v. St. Paul Fire & Marine Ins. Co., 254 So. 2d at 82-83 (malpractice in advising children about their rights as forced heirs to take against their deceased father's will under unique Louisiana state law.)

68 See 256 F. Supp. at 497.

legal malpractice, it is useful to explore the same issue in the context of medical malpractice. At the turn of the century, Kentucky's highest court, in Burk v. Foster, departed from the "same locality" rule in medical malpractice cases in favor of a standard based upon "similar communities." This generally remained the law in Kentucky for some seventy years, until Blair v. Eblen, which is one of the leading decisions in this country holding that "locality" is just one of a number of factors to be considered in determining whether or not a physician used the care and skill expected of a reasonably competent physician "acting in the same or similar circumstances." In the process, the court in Eblen made it clear that it was overruling its earlier decision in Burk v. Foster, which it described as an outmoded rule designed to protect country doctors in 1902.

By analogy to the medical malpractice cases, it seems likely that Kentucky courts, when confronted with the issue, will similarly hold that a rural or small town lawyer's conduct should not be compared to a standard based on the care reasonably expected from other attorneys practicing in the same or similar communities, but to a broader, more strenuous standard where the importance of the locality of the defendant-attorney's practice is less significant. It is hoped, however, that the courts will not blindly apply the rationale of Blair v. Eblen to similar issues arising in legal malpractice cases, but will consider whether it is realistic or desirable to hold all lawyers throughout the state to the same standard of care, without regard to the obvious differences in such things as availability of research materials and facilities, opportunities to practice in particular fields, availability of other attorneys for consultation or referral and other practical barriers which a lawyer practicing in less populous areas must face. Fur-

90 69 S.W. 1096 (Ky. 1902).
91 Id. at 1097.
92 461 S.W. 2d 370 (Ky. 1970).
93 Id. at 373.
94 69 S.W. at 1096.
95 Id.
96 The possibility of a distinction between lawyers practicing in large cities and their counterparts in less populous areas was first made in Pitt v. Yalden, 98 Eng. Rep. at 75, where the court noted: "[T]hey were country attorneys [sic]; and might not, and probably did not know that this point was settled here above." The argument has been made, rather
thermore, strong policy considerations favor wide distribution of attorneys to make legal services readily available to members of the public living in all regions of the state. Any rule which would hold rural or small town practitioners to the same standards as their larger city colleagues might, over an extended period of time, have the needless effect of discouraging lawyers from practicing in the less populous areas and leaving the residents of those areas without legal services.

This is not to say that our legal system should sanction local, substandard legal usages which are clearly contrary to good practice. A number of decisions already have held that bad customs in the local legal community, no matter how widespread, cannot excuse the negligent conduct of a lawyer who followed the prev-

persuasively, that there are vast differences in resources and opportunities for lawyers based upon the size of the locality where they practice, and that, therefore, it would be inherently unfair to hold small town practitioners to the same standard of care as their metropolitan area colleagues. Comment, "Greenian" Analysis, supra note 81, at 1018-19. A significant number of commentators, however, take the opposite view that rural practitioners should be held to the same standard as their metropolitan counterparts. See, e.g., R. MALLEN & V. LEVIT, supra note 6, § 254; Comment, THE ILLINOIS Legal Malpractice Tort: Basic Tenets and Recent Trends, 1980 U. ILL. L.F. 427, 443-44; Comment, New Developments, supra note 81 at 417.

The 1902 decision of Burk v. Foster addressed this issue in a medical malpractice context, comparing the capabilities of the city practitioner with his rural counterpart and drew a number of distinctions which, it is submitted, still have considerable merit, if not in medicine, then for purposes of legal malpractice:

[i]t may be recognized that the most efficient and talented in the [medical] profession generally, and very naturally, seek better and more lucrative fields for employment; that those living in a sparsely settled neighborhood will not have, in any probability, the experience, the opportunity for acquiring skill by practice in such cases, that comes to the practitioner of medicine and surgery in the city. It generally follows, then, that the practitioners in rural localities have not the same degree of skill, or knowledge, or education that may be found in large cities and populous communities.

69 S.W. at 1097.

97 The president of the New York City Bar Association, Orville H. Schell, has expressed his concern that 60% to 90% of the public do not receive adequate legal services. The Organized Bar: Self-Serving or Serving the Public? Hearing Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. of the Judiciary, 93d Cong., 2d Sess. 64, 74 (1974). The American Bar Association's six-year study of legal needs in this country confirmed Orville Schell's concerns. B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC 253-65 (1973). The need for improved delivery of legal services is the genesis behind such programs as prepaid legal services and legal clinics. See Christensen, Toward Improved Legal Service Delivery: A Look at Four Mechanisms, 1979 AM. B. FOUND. RESEARCH J. 277.
alent practice in his or her locale. Nor, for that matter, should the collegiality among a small, close knit local bar preclude institution of legal malpractice suits, since a "same or similar community" standard should provide sufficient leeway to permit a claimant to locate a lawyer from some different area or state to offer his or her opinion as to the applicable standard of care and whether the defendant-attorney's conduct fell below that standard.

5. Relationship between Ethics and Malpractice

To establish the applicable standard of care in a legal malpractice action, it seems appropriate to look at pertinent ethical provisions which would govern the same or similar conduct of an attorney in disciplinary proceedings. The real question here is not whether the ethical principles have any relevancy, but the extent to which a violation of such ethical provisions should serve to establish an attorney's negligence in a private malpractice action.

Some decisions still reflect the early judicial attitude that an attorney's contravention of an ethical rule has no bearing on the malpractice issue, and thus refuse to admit any evidence relating to provisions of that jurisdiction's code of professional responsibility. Other courts, reflecting what now appears to be a majority view, will admit testimony of code infractions as some evi-

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99 For a discussion of the "conspiracy of silence" in the legal profession, see notes 48-64 and the accompanying text supra.

100 The Model Code of Professional Responsibility attempts to exclude use of its provisions in malpractice litigation. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1969). As the accompanying "Preamble" also makes clear, however, this Code does govern conduct of lawyers for the benefit of society at large; therefore, by inference, it would seem that these same provisions should have some application to an attorney's obligation to his or her clients. For a discussion of the relationship between ethics and legal malpractice, see R. MALLEN & V. LEVIT, supra note 6, §§ 7-8.

idence that the defendant-attorney's conduct fell below the requisite standard of care owed to a client. The final step in this progression would, of course, lead to the conclusion that a violation of one of the terms of the code of professional responsibility constitutes negligence per se and a finding of malpractice, much in the manner that proof of a violation of a criminal statute is often conclusive in the imposition of civil liability. To date, however, courts have been hesitant to adopt this latter rule, although in the last few years several commentators have strongly urged application of this negligence per se approach.

The various codes of professional conduct also differ on the effect of an attorney's violation of an ethical provision. The American Bar Association (ABA) Model Code of Professional Responsibility, which is currently in effect in virtually every state, provides unequivocally that it does not establish standards for purposes of an attorney's liability in a civil action. In contrast, the 1981 version of the proposed ABA Model Rules of Professional Conduct (the so-called "Kutak" rules) did not try to discourage use of ethical violations in private civil suits, and admitted that the proposed rules "may have relevance in determining civil liability," but then urged that the rules "not be uncritically incorporated in that context," as the purposes of private redress can be different from the goals of the disciplinary process.


103 W. PROSSER, supra note 20, § 36, at 190-204.


105 "The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct." MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1969) (emphasis added).


107 Id. It is significant to note, however, that the amendments to the so-called Kutak rules adopted by the House of Delegates of the American Bar Association on August 10, 1982, substantially softened the earlier position quoted in the text on the interrelationship
Two reported Kentucky decisions have already ruled on the applicability of ethical provisions to civil liability of attorneys. The first, *Hill v. Willmott*, was decided by the Kentucky Court of Appeals in 1978. The plaintiff had argued that violation of the Code provided a basis for the redress of private grievances, but the court summarily rejected that contention:

The sole remedial method for a violation of the Code is the imposition of disciplinary measures. Nowhere does the Code of Professional Responsibility or the Kentucky Supreme Court Rule attempt to establish standards for civil liability of attorneys for their professional negligence. This is not to say that a cause of action cannot be asserted for negligence on the part of an attorney. All we are holding is that the duty set forth in the Code and the Rules establishes the minimum level of competence for the protection of the public and a violation thereof does not necessarily give rise to a cause of action.

Three and a half years later, when virtually the same issue reached the Kentucky Supreme Court in *Raine v. Drasin*, it received a considerably warmer welcome. As in *Willmott*, this case involved a physician's countersuit against attorneys who had instituted an unsuccessful medical malpractice action, and one of the issues was whether the expert testimony of a lawyer who was a member of the Ethics Committee of the Louisville Bar Association should have been admitted regarding the defendant-attorneys' violation of a provision of the ethics code. The Court upheld introduction of such testimony on the grounds that such evidence could be offered to establish lack of probable cause, one of the key elements in a malicious prosecution suit. On the basis of the decision in *Drasin*, there can be little doubt that in the future the Kentucky Supreme Court will permit proof of an ethics viola-

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between ethical standards and attorney liability: "Violation of a Rule should not itself give rise to a cause of action nor should it create any presumption that an independent legal duty has been breached . . . . [The Rules] are not designed to be a basis for civil liability . . . ." *Model Rules of Professional Conduct, Scope* (Final Draft August 10, 1982).

108 561 S.W.2d at 331.
109 *Id.* at 333-34.
110 621 S.W.2d at 895.
111 *Id.* at 900-01.
tion to show that an attorney's conduct fell below the requisite standard of care in a legal malpractice action.

Thus, proof of a violation of the ABA Model Code of Professional Responsibility may play a considerable role in malpractice litigation. The most directly applicable provisions appear in Canon 6 of the current ABA Code, which states that a lawyer should represent a client "competently." Disciplinary Rule 6-101 provides, inter alia, that a lawyer shall not "handle a legal matter which he knows or should know he is not competent to handle . . .", or "neglect a legal matter entrusted to him." While an attorney who violates such provisions might be liable for malpractice, it is no easier to establish that a lawyer took on a matter that he or she was not competent to handle or that he or she neglected a legal matter, than it is to prove that the attorney was professionally negligent for failing to comply with the standard of care applicable in the particular circumstances. On the other hand, some specific Code provisions dealing with attorney competence could be directly relevant in a lawyer's defense against a claim of malpractice. If, for example, a former client brought suit on the grounds that an attorney had accepted employment in a matter about which the attorney had no prior training or experience, the attorney might counter by arguing that he or she intended, through additional research, to become sufficiently competent to handle the matter, citing EC 6-1, EC 6-3, and EC 6-4 of the Code of Professional Responsibility as direct support for his defense. It would be hard to establish that a lawyer did not utilize the required degree of care on behalf of a client if the attorney's conduct was in direct compliance with the aspirational Ethical Considerations in effect in a particular jurisdiction.

Other Disciplinary Rules are more specific in nature, and therefore might provide a more logical basis on which to contend that failure to adhere to an ethical requirement constitutes proof of negligence. For example, under DR 4-101 a lawyer is required

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112 Canon 6 of the ABA Model Code of Professional Responsibility provides that "A Lawyer Should Represent a Client Competently."


114 Id. at DR 6-101(A)(2).

115 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-1, 6-3 & 6-4 (1969).
to preserve the confidences and secrets of a client. If an attorney's failure to do so resulted in a financial loss to the client, such as where a valuable trade secret is allowed to fall into the hands of a competitor during the course of negotiations or litigation, then violation of a specific provision in DR 4-101 would seem to be directly applicable in a subsequent malpractice suit against the attorney.\footnote{Assume, for purposes of illustration, that an attorney was retained to defend a patient infringement suit. If, in the process of discovery, the defendant's attorney failed to review documents prior to turning them over to plaintiff's counsel, and plaintiff thereby uncovered a valuable secret formula belonging to defendant that was not germane to the subject matter of the litigation, then defendant's attorney would presumably be liable for malpractice to the client for any financial losses traceable to disclosure of the formula. In such a case, the provisions of DR 4-101 dealing with the attorney's obligation to preserve the secrets of the client would be directly relevant in any malpractice action brought against the attorney. See \textit{Model Code of Professional Responsibility} DR 4-101(A), (B)(1) & (D) (1969).} A similar situation is presented in the area of conflicts of interest, governed by DR 5-101 through DR 5-106, where an attorney's violation of a specific ethical provision would seem to have direct relevance in a malpractice suit seeking to hold the attorney liable for any resulting financial loss to the client.\footnote{See, e.g., \textit{Ishmael} v. Millington, 50 Cal. Rptr. 592 (Dist. Ct. App. 1966). In \textit{Ishmael}, the defendant-lawyer in a malpractice case had previously and improperly represented both husband and wife in a divorce, without making full disclosure of his dual representation. The court cited both the California and the ABA ethics provisions requiring loyalty to a client and the duty not to represent conflicting interests unless full disclosure has been made and the parties have then consented to such representation. \textit{Id.} at 596.}

Finally, the increasing willingness of Kentucky's highest court to discipline attorneys for negligence is a reliable indication of its future attitude in civil suits for legal malpractice. Courts in Kentucky and elsewhere historically have been reluctant to discipline an attorney for a single act of carelessness or neglect such as would support a malpractice suit. Instead, courts usually have reserved suspension or disbarment from practice for particularly egregious cases of repeated instances of neglect or habitual disregard of clients' interests.\footnote{See, e.g., ABA Comm. on Ethics and Professional Responsibility Informal Op. 1273 (1973); \textit{Sanchez} v. State Bar of Cal., 555 P.2d 889 (Cal. 1976); Kentucky State Bar Ass'n v. Booth, 444 S.W.2d 122 (Ky. 1969); \textit{In re Beck}, 252 N.W.2d 795 (Mich. 1977); \textit{In re Fraser}, 523 P.2d 921 (Wash. 1974).} In recent years, however, the Su-
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Supreme Court of Kentucky has shown a greater willingness to impose severe discipline for single or isolated acts of carelessness, including suspension or disbarment in such circumstances. The imposition of discipline for a single act of neglect, and the severity of the discipline levied in such cases suggest rather clearly that the Kentucky Supreme Court will look with favor on malpractice suits involving similar issues of attorney negligence.

6. Strict Liability in Legal Malpractice

Negligence has long been the cornerstone of liability in actions brought against physicians, lawyers, accountants and other professionals for mistakes or errors committed during the performance of services. In the medical field, though, there has been considerable evidence of a shift toward greater accountability. The doctrine of res ipsa loquitur has been widely utilized to alleviate some of the difficulties in proving negligence, and there is a discernable movement toward strict liability in medical malpractice.

[Carelessness or negligence—even gross carelessness or negligence—has never been considered by the courts as grounds for the disbarment of an attorney... Carelessness and negligence, want of skill and ability, manifest themselves and carry with them their own punishment. They repel rather than attract clients for an attorney. For carelessness and negligence an attorney is answerable in damages. An attorney may be disbarred only when it is made to appear that he is lacking in honesty, probity, or good moral character.

Id. at 558.

119 See, e.g., Kentucky Bar Ass'n v. Littleton, 560 S.W.2d 5 (Ky. 1977); Kentucky Bar Ass'n v. Martin, 558 S.W.2d 173 (Ky. 1977); Kentucky Bar Ass'n v. Jansen, 459 S.W.2d 140 (Ky. 1970).

120 See W. Prosser, supra note 20, § 32, at 161-62.

121 See A. Holder, supra note 46, at 60-61; W. Prosser, supra note 20, § 39, at 223, 225-28.

122 See, e.g., Clark v. Gibbons, 426 P.2d 525, 535-40 (Cal. 1967) (Tobriner, J., concurring); Hoven v. Kelble, 256 N.W.2d 379, 385-93 (Wis. 1977); Epstein, Medical Malpractice: The Case for Contract, 1976 AM. B. FOUND. RESEARCH J. 87, 96-128. The fact that physicians carry malpractice insurance undoubtedly is a factor in the increase in liability, since the cost of compensating victims of unfortunate medical errors can thus be readily spread among a large number of people. See K. Brown, Medical Problems and the Law 220 (1971). The author, a physician, attributes the number and size of verdicts in medical malpractice cases to a number of factors, including the fact that "[p]atients know
On the other hand, liability of lawyers to their clients for acts of carelessness or poor judgment remains firmly posited in the law of negligence. Although several commentators have urged that lawyers' accountability should be extended by applying implied warranties to legal services or by imposing strict liability, the courts have not shown an inclination to expand liability by substituting other concepts for negligence. Even the doctrine of res ipsa loquitur has largely remained unused in legal malpractice. Recognition of a higher standard of care for lawyers practicing in traditional areas of specialization, however, has already begun to increase an attorney's malpractice exposure. In addition, at least three California decisions rendered in the last decade have imposed such high standards of care that they indicate the start of a trend which could lead to strict liability in legal malpractice.

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126 See the text accompanying notes 65-80 supra for a discussion of legal specialization and its impact on the standard of care in legal malpractice.

127 In Smith v. Lewis, 530 P.2d at 589, for example, an attorney who had represented the plaintiff in an earlier divorce proceeding was held liable for his failure to undertake reasonable research in order to ascertain the relevant principles with regard to doubtful or unsettled areas of the law. Id. at 593-96. The defendant-attorney previously had represented the wife of a National Guard officer in a divorce action, but had failed to assert any community property rights in the state or federal retirements benefits of his client's husband. Ms. Lewis later sued Smith for this omission and was awarded a $100,000 jury verdict which was upheld on appeal. Id. at 597, 600.

In Bucquet v. Livingston, 129 Cal. Rptr. 514 (Ct. App. 1976), the court held that allegations that the drafting error of a general practitioner who had prepared a trust had
In this regard, the 1978 Kentucky Court of Appeals' decision of Daugherty v. Runner \^{128} imposes a similarly high standard on lawyers that goes considerably beyond the degree of care that historically had been applied in this jurisdiction. In Daugherty, the court upheld a jury verdict in favor of the defendant-attorney, but at the same time the court twice indicated its own disagreement with the jury's decision. \^{129} Although unwilling to disturb the verdict, the court made it clear that lawyers have a duty to bring all relevant matters to their clients' attention even where such information is clearly beyond the scope of employment, because of the clients' lack of training in the law and consequent inability to protect their own interests. \^{130} This requirement imposes a heavy burden on lawyers which goes well beyond any duty previously asserted in legal malpractice cases decided in Kentucky. \^{131}

caused taxation not intended or anticipated by the client stated a cause of action for legal malpractice. The attorney had drafted a revocable inter vivos trust which contained a "marital deduction" portion and a "family" portion, and was intended to pass the estate to the client's wife and child with minimum federal and state tax liability at the deaths of the client and his wife. \textit{Id.} at 515-16. However, the trust provided that on the client's death his wife would retain the power to revoke the trust for her life. \textit{Id.} at 516. The inclusion of this power for the wife's life created a general power of appointment in her, which would have incurred a federal estate tax at her death under I.R.C. § 2041. When she renounced the power during her life and thus avoided the estate tax, the renunciation still incurred a federal gift tax, as well as a state gift tax. \textit{Id.} at 517.

And in Horne v. Peckham, 158 Cal. Rptr. at 714, a general practitioner was held liable for failing to refer the preparation of a Clifford, or short-term, trust to a tax specialist, even though the idea of such a trust originated with the client; the attorney told the client that he was not experienced in such matters; the client's accountant provided research assistance; the client decided on the type of property to be used to fund the trust, switching at the last minute from the transfer of a patent to the trust to the transfer of a non-exclusive license in that patent; and the general practitioner had questioned the client's tax lawyer about the effectiveness of transferring such a non-exclusive patent to such a trust. \textit{Id.} at 715-16. However, other facts tended to offset these circumstances. For instance, the only research source the general practitioner consulted was a two-volume set of American Jurisprudence on federal taxation; his "consultation" with the tax attorney was, at best, brief; and the tax attorney, unbeknownst to the defendant-lawyer, had been licensed to practice law for less than a year, although he had previously worked for several years as a tax accountant. \textit{Id.} at 716.

\^{128} 581 S.W.2d at 12.
\^{129} The Court stated: "While we may have found differently had we sat as jurors in this case, we believe there is sufficient evidence to support this jury's verdict . . . ." \textit{Id.} at 18. The court later reiterated this reaction. \textit{Id.} at 20.
\^{130} See the court's statement on this point, quoted in the text accompanying note 41 \textit{supra}.
\^{131} Here, as in medical malpractice, the trend toward greater accountability prob-
C. Proof of Causation

In any cause of action the plaintiff must prove that the defendant's act or omission was a proximate cause of his or her injuries. This essential element is no different in a legal malpractice case than it is in any other suit founded upon negligence.\(^\text{132}\) There are, however, several aspects of causation in legal malpractice that can present unusual and complex problems of proof.\(^\text{133}\)

1. Proving a "Suit Within a Suit"

Many legal malpractice cases are posited on the negligent failure of an attorney to take certain steps during litigation, and the consequent loss to a client of a possible recovery in the original suit. This situation is often presented when an attorney has failed to initiate an action within the statute of limitations period, and the client subsequently brings a malpractice suit claiming that if the suit had been timely filed the plaintiff would

\(^{132}\) For a discussion of proximate causation in malpractice suits, see the numerous cases cited in R. MALLEN & V. LEVIT, supra note 6, § 102 n.68.

\(^{133}\) Even after the often difficult causal connection between an attorney's negligence and his former client's injury has been shown, equally onerous problems in proving damages can be presented. See, e.g., Floro v. Lawton, 10 Cal. Rptr. 98 (Dist. Ct. App. 1960). In Floro, the defendant-attorney was allowed to avoid liability by showing that the defendant in the original suit was judgment proof. Thus, even if the attorney had not been negligent, the client still would not have been compensated because any award would not have been collectable. Id. at 106. For a discussion of the general rules applicable to the recovery of compensatory damages in legal malpractice suits, see Budd v. Nixen, 491 P.2d 433, 436 (Cal. 1971); Prentice v. North Am. Title Guar. Corp., 381 P.2d 645, 647 (Cal. 1963); Mitchell v. Transamerica Ins. Co., 551 S.W.2d 586, 588 (Ky. Ct. App. 1977).
have received a favorable award. But the same issue can be raised by other circumstances after a lawsuit has been lost and the client attributes his or her misfortune to the attorney's lack of skill or diligence. For example, if an attorney failed to argue a particular substantive point or did not interview certain additional witnesses, the client could contend that the lawyer's omission was the cause of the unfavorable decision.

Proof of the causal connection between an attorney's negligence and the plaintiff's claim that he or she would otherwise have prevailed in a prior action has been referred to as proving "a suit within a suit." In such a case the plaintiff must first prove that the defendant-lawyer had been negligent, and then establish that if the lawyer had not been negligent the original claim would have been successfully prosecuted. With regard to this latter causal factor, the jury sitting in a malpractice action must determine what recovery, if any, the plaintiff would have received if the attorney had handled the original matter competently. In effect, the plaintiff must try the original cause of action as part of the required proof in the malpractice claim.

Several fairly recent Kentucky cases serve to illustrate the problems and pitfalls in proving "a suit within a suit." In Mitchell v. Transamerica Insurance Co. plaintiffs brought suit against their former attorney for allowing the one-year Kentucky

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135 For example, in Smith v. Lewis, 530 P.2d at 588, the attorney failed to raise and argue the client's community property interest in her husband's retirement benefits. For further discussion of Smith v. Lewis, see note 127 supra and the text accompanying notes 25-27 supra.

136 See the discussion of Woodruff v. Tomlin, 593 F.2d at 33, in the text accompanying notes 32-35 supra (a case involving an attorney's failure to interview witnesses).

137 The phrase "a suit within a suit," which is widely used, is apparently attributable to a 1958 law review article—Coggin, Attorney Negligence . . . A Suit Within a Suit, 60 W. VA. L. REV. 225 (1958). The Kentucky Court of Appeals used this terminology in Daugherty v. Runner, 581 S.W.2d at 13.

138 See generally C. KINDREGAN, supra note 28, at 24-31; R. MALLEN & V. LEVIT, supra note 6, §§ 656-57.

139 551 S.W.2d at 586.
limitations period to run on their personal injury claims arising out of an automobile accident that occurred in Kentucky. The Kentucky Court of Appeals overturned the trial court's award of damages because plaintiffs failed to prove the causal connection between the attorney's negligence and their entitlement to a recovery in the action which was not timely filed. This sound conclusion was based upon the fact that the plaintiffs had subsequently retained a second lawyer who had the foresight to file suit in Indiana where the tortfeasor also could be served, thereby benefitting from Indiana's two-year statute of limitations, and the lawsuit was settled for $60,000.

*Daughtery v. Runner* also illustrates the problems in proving "a suit within a suit." In this legal malpractice action, the plaintiff-client had to establish that the defendant-attorney had acted negligently in not filing a medical malpractice suit and then had to prove what the recovery would have been had the medical claim been prosecuted in a timely fashion. The plaintiff failed to convince the jury that the attorney had been at fault in not pursuing the medical malpractice cause of action. Interestingly, the jury also found that if the original suit had been brought, the plaintiff would have recovered $146,123.75.

140 KRS § 413.140(1)(a) (1972).
141 551 S.W.2d at 588.
142 Id. at 587.
144 551 S.W.2d at 588.
145 581 S.W.2d at 12.
146 581 S.W.2d at 14. The jury's verdict in *Daughtery* is somewhat of an anomaly. If plaintiffs in a legal malpractice suit can get their case to the jury, then the chances of a favorable verdict are considered to be very high. See note 44 supra for a discussion of this point. It appears here as if the jury was confused by the case, or at least by the form of the special verdict, as reflected by the verdict that was returned. If the jury believed that the defendant-attorney was not negligent, then it served little purpose to determine that $146,123.75 would have been recovered under the prior medical malpractice suit. Conversely, if the jury felt that the plaintiff had been deprived of an award of $146,123.75, then one would expect that same jury, if it understood the case before it and the consequences of its answers to the special verdict, would find the defendant negligent so that the plaintiff would be entitled to the specific recovery. While the jury's finding is not inconsistent or contradictory in a legal sense, it seems illogical from a practical standpoint. At any rate, it would certainly be foolhardy for lawyers to take too much comfort from the jury's verdict for the attorney in *Daughtery* or to expect that another jury might be similarly confused in a comparable legal malpractice "suit within a suit."
2. Intervening Causes

As was indicated in *Mitchell v. Transamerica Insurance Co.*, a lawyer can be relieved of the consequences of his own negligence as a result of action taken by a subsequently retained attorney. But what if the second attorney is also negligent and also fails to take actions which would have prevented injury to the plaintiff-client?

It is a basic tenet of negligence law that a tortfeasor’s conduct does not have to be the sole cause of a claimant’s injuries, so long as it is a substantial and proximate cause. On the other hand, the law also recognizes that certain subsequent events may be considered “superseding causes” that can interrupt the causal chain between the first tortfeasor’s negligence and the ultimate injury. Several legal malpractice cases, including two leading ones from Kentucky, address this question of intervening causes which may relieve a person of the consequences of his negligence.

In one Kentucky case, *Wimsatt v. Haydon Oil Co.*, plaintiff Carrico brought suit against his former attorneys for their failure to bring an action within the one-year statute of limitations for personal injuries arising out of a motor vehicle accident. The attorneys had brought timely suit for the wrongful death of plaintiff’s wife and for property damage, but did not realize until after a year had passed that plaintiff had suffered substantial personal injuries. Plaintiff then dismissed the original attorneys.

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147 551 S.W.2d at 586. See the text accompanying notes 140-44 supra for a discussion of *Mitchell* and the “suit within a suit” requirement.

148 See *Deutch v. Shein*, 597 S.W.2d at 143-44; *Claycomb v. Howard*, 493 S.W.2d 714, 718 (Ky. 1973); W. Prosser, *supra* note 20, § 41, at 235-41.

149 W. Prosser, *supra* note 19, § 44, at 270-89; 2 Restatement (Second) of Torts § 440 (1965). A “superseding cause” is nothing more than an “intervening cause” which has risen to a certain undefined level and thereby broken the causal chain between the defendant’s negligence and the plaintiff’s injury, thus relieving the defendant of liability. See 2 Restatement (Second) of Torts § 411 comment on subsection (2) (1965).


151 *Daugherty v. Runner*, 581 S.W.2d at 12; *Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908 (Ky. 1967).

152 414 S.W.2d at 908.

153 *Id.* at 909. Carrico’s substantial personal injuries apparently first came to the at-
and retained a second attorney who promptly filed an amended complaint for plaintiff's personal injuries. The trial court dismissed the amended complaint, holding that the personal injury claim was barred by the statute of limitations. No appeal was taken from this judgment. Plaintiff then filed a legal malpractice suit against his original attorneys, charging them with negligence in failing to assert his personal injury claim within the statute of limitations.

In defense of the malpractice action, the defendant-attorneys claimed that the failure to appeal the trial court ruling dismissing the amended complaint was the cause of plaintiff's damages, not any neglect on their part. Defendants contended that the amended complaint should have been allowed to stand since it related back to the original cause of action, and the Kentucky Court of Appeals in the subsequent malpractice suit agreed, albeit by a divided vote. But the court further held that the defendant-attorneys could not escape responsibility for their malpractice merely because the plaintiff had not pursued a perfect course of legal action. Thus, the failure to appeal the erroneous dismissal was held not to constitute a superseding cause that would relieve the original attorneys of the consequences of their negligence.

iation of his lawyers during his deposition, taken some 14 months after the accident occurred. Id.

A majority of the court believed that only one cause of action arose from the collision between Carrico's automobile and the truck owned by Haydon Oil Co. Thus, the personal injuries to Carrico were part of the same "conduct, transaction or occurrence" as the claims for his wife's wrongful death and the property damage to their car. Id. at 911. The dissent, however, believed that a number of causes of action arose from the accident, each with its own statute of limitations; thus, there was no "relation back" of the cause of action for his injuries. Id. at 913. (Montgomery, J., dissenting).

The court could not find any discernable difference between the facts in Wimsatt and those in cases in which personal injuries have been followed by less than adequate medical treatment and the injured individual is allowed to recover for the full extent of his or her injuries if proof is offered to show the injured party exercised reasonable care in selecting the treating physician. Id.

It is interesting to contrast the court's decision in Wimsatt v. Haydon Oil Co. with a well-known malpractice suit arising 13 years earlier in North Carolina, Hodges v. Carter, 80 S.E.2d at 144. In Hodges, the defendant-attorneys filed suit on behalf of the plaintiff against five fire insurance companies doing business in the state but incorporated elsewhere. The attorneys attempted to serve the companies through the state commis-
The second Kentucky case dealing with the failure of a subsequent attorney to exculpate the first attorney's negligence is the now-familiar *Daugherty v. Runner.*\(^{158}\) Although many of the court's comments in this case can technically be considered dicta because it upheld the jury verdict in favor of the defendant-attorney,\(^{159}\) these statements have had a considerable impact on the law of legal malpractice in this state. In *Daugherty*, the defendant-attorney's failure to file a medical malpractice claim within one year of the claimant's death formed the basis of the malpractice suit. However, the decedent's estate retained the services of a second lawyer several days before the expiration of the one-year period for the expressed purpose of filing a medical malpractice claim. Inexplicably, no such claim was filed within that period.\(^{160}\) The estate then turned the case over to still a third attorney who, a year and a half after claimant's death, filed a med-

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\(^{158}\) 581 S.W.2d at 12.

\(^{159}\) Id. at 18, 20.

\(^{160}\) Id. at 15, 18.
ical malpractice suit that was dismissed as barred by the one-year statute of limitations. No appeal was taken from that decision.

According to the court in the subsequent malpractice suit, the trial court's dismissal may have been erroneous. In spite of this, the court concluded that the alleged negligence of the subsequent attorneys was not, as a matter of law, a superseding cause which would relieve the first attorney of his negligence. Either of the subsequent attorneys could have avoided the problem allegedly created by the first attorney by acting promptly or by appealing. But as was indicated in Wimsatt, such intervening factors do not relieve the first attorney from the consequences which his negligence originally set in motion.

The court in Daughterty, however, failed to address a crucial question. A decision that an intervening cause does not relieve the first tortfeasor of the effect of his negligence necessarily presupposes that the person was in fact negligent. Here, however, the medical malpractice matter had been turned over to another attorney while a few days still remained in the one-year period dating from the claimant's death. Unless it can be said that a lawyer is negligent in not filing a cause of action well within the statute of limitations period, it seems that the first attorney should be relieved of any continuing accountability when the medical malpractice aspects of the case were referred to another attorney before the statutory period had run.

161 Id. at 14, 18.
162 Id. at 14 n.1.
163 Unless there is an issue of fact as to whether an act or event actually occurred, the question of whether an intervening act constituted a superseding cause which would relieve a prior tortfeasor of the consequences of negligence is a matter for determination by the court in Kentucky and should not be submitted to a jury. House v. Kellerman, 519 S.W.2d 380 (Ky. 1974). In other jurisdictions it is considered a factual issue for determination by the jury. See R. Malleen & V. Levit, supra note 6, § 102. See generally W. Prosser, supra note 20, § 45, at 289-90.
165 361 S.W.2d at 15, 18. The retention of this second lawyer, who accepted a retainer fee, followed two earlier, unsuccessful attempts to retain other attorneys to handle the medical malpractice claim. Id. at 18.
166 Once the client had turned the medical claim over to another attorney, Runner had no further responsibility for that matter and therefore was no longer in a position to have filed suit within the limitations period.
ATTORNEY ACCOUNTABILITY IN KENTUCKY

It is virtually impossible to know when a subsequent causal factor will be deemed to supersede an original act of negligence in any cause of action, but as a general proposition, the first tort-feasor is rarely given a reprieve from the consequence of his or her negligent actions.\textsuperscript{167} This is certainly the case in legal malpractice, as reflected by \textit{Wimsatt} and \textit{Daugherty}, as well as by decisions reached in other jurisdictions.\textsuperscript{168} However, the concepts of intervening and superseding causes involve decisions of policy,\textsuperscript{169} no matter how well disguised,\textsuperscript{170} and these policy considerations are undoubtedly reflected in legal malpractice decisions, including, in particular, \textit{Daugherty v. Runner}, where the court could have easily relieved the original attorney of liability.

\textbf{D. Defenses}

Many of the defenses available in a negligence suit apply, at least in theory, to a legal malpractice action.\textsuperscript{171} Attention is fo-

\begin{itemize}
\item Shelly v. Hansen, 53 Cal. Rptr. at 20, is analogous. There, a legal malpractice action was brought against two attorneys who successfully represented the claimant for failure to file suit within the applicable two-year statute of limitations. The court held that when the responsibility for bringing suit shifted to the second attorney, the first attorney had no further duty to the client and thus could not be negligent for not filing suit within the statutory period. \textit{Id.} at 22-23. As the court succinctly put the matter:
\begin{quote}
To warrant recovery for this type of negligence plaintiff must first plead and prove that at the critical times in question there existed the relationship of attorney and client with its accompanying responsibilities \ldots. During the last seven months of the statutory period, the responsibility for filing the breach of contract action lay with Hansen (the second attorney) and not with Docken (the first attorney); furthermore, even if the latter had wished to do so, the proceeding could not have been instituted by him due to the termination of his employment as above stated. Stated otherwise, if Docken then had no duty to perform, how can it be properly urged that such duty was negligently carried out?
\end{quote}
\textit{Id.} at 23.

\textsuperscript{167} See generally \textit{W. Prosser, supra note 20}, § 44, at 270-89. \textit{Contra} Robinson v. Butler, 33 N.W.2d 821, 824 (Minn. 1948). In \textit{Robinson}, a passenger’s unexpected reaction in a situation brought about by the negligence of another motorist was held to be “so extraordinary that it must be said to constitute an efficient intervening cause” which relieved the driver from the consequences of his negligence. \textit{Id.} at 824.

\textsuperscript{168} See \textit{R. Mallem & V. Levit, supra note 6}, § 102.

\textsuperscript{169} See \textit{Howard v. Mt. Sinai Hospital, Inc.}, 217 N.W.2d 383, 385 (Wis. 1975); \textit{W. Prosser, supra note 20}, § 44, at 270-72, 283, 285-86.

\textsuperscript{170} See the excellent discussion of this point by the late Justice Lukowsky in Deutsch v. Shein, 597 S.W.2d at 143-44.

\textsuperscript{171} See \textit{R. Mallem & V. Levit, supra note 6}, §§ 350-66; \textit{C. Kindregan, supra note}
cused here, however, on two defenses which have long shielded attorneys from valid legal malpractice claims—the statute of limitations and lack of privity. In the last decade or two, courts throughout the country have begun to alleviate the harshness of these rules, and the reaction in a given jurisdiction to proposed changes in these defenses is a solid indicator of the prevailing attitudes toward legal malpractice.

1. Statute of Limitations

As a general rule, the statute of limitations for a cause of action based upon negligence begins to run at the time of occurrence of the negligent act or omission.\textsuperscript{172} In medical malpractice, this precept once applied with a vengence. The Kentucky Court of Appeals in \textit{Carter v. Harlan Hospital Association},\textsuperscript{173} for instance, held that a patient's claim against her surgeon was properly dismissed when she sued after the one-year statute of limitations period had run, even though she did not discover the cause of her discomfort until thirty months after her operation, when forceps were discharged from her \textit{bowels}.\textsuperscript{174} \textit{Carter} remained the law in Kentucky until \textit{Tomlinson v. Siehl},\textsuperscript{175} where it was held that the statute did not begin to run on causes of action against physicians until the negligent act was actually discovered.\textsuperscript{176} The \textit{Tomlinson} decision placed Kentucky among the growing num-

\textsuperscript{173} 97 S.W.2d 9 (Ky. 1936).
\textsuperscript{174} Id. at 10. For similar application of the statute of limitations to medical malpractice cases arising in other jurisdictions, see Pasquale v. Chandler, 215 N.E.2d 319 (Mass. 1966); Vaughn v. Langmack, 390 P.2d 142 (Or. 1964); Hawks v. DeHart, 146 S.E.2d 166 (Va. 1966).
\textsuperscript{175} 459 S.W.2d 166 (Ky. 1970).
\textsuperscript{176} Id. at 168. A year later, in Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971), the Court modified the discovery rule adopted in \textit{Tomlinson} to provide that the limitations
number of jurisdictions to adopt the "discovery" rule or a comparable doctrine to alleviate the harshness which often resulted from strict application of the statute of limitations to medical malpractice actions.\textsuperscript{177}

The courts have been considerably slower in adopting the discovery rule to toll the statute of limitations in legal malpractice suits.\textsuperscript{178} Several recurring situations illustrate the unfortunate consequences that can result from application of the general rule that the limitations period commences at the date of the negligent act.\textsuperscript{179} If, for example, an attorney who had been hired to search title to real estate negligently failed to detect a lien on the property, that omission might not surface for a number of years after the limitations period had run.\textsuperscript{180} Another common circumstance occurs when an attorney negligently permits a person named beneficiary in a will also to serve as a witness. The conse-

\textsuperscript{177} See, e.g., Huysman v. Kirsch, 57 P.2d 908 (Cal. 1936); Morgan v. Grace Hospital, Inc., 144 S.E.2d 156 (W.Va. 1965). See generally W. Prosser, \textit{supra} note 20, \$ 31, at 144-45, nn. 56-60.

\textsuperscript{178} See R. Mallen & V. Levit, \textit{supra} note 6, \$\$ 373-94.


\textsuperscript{180} Although not involving statutes of limitations, a number of legal malpractice cases in Kentucky have arisen as a result of allegedly negligent title searches. See, e.g., Owen v. Neely, 471 S.W.2d at 705; Morehead's Trustee v. Anderson, 100 S.W. at 340 (dicta); Humboldt Bldg. Ass'n v. Ducker's Ex'r, 82 S.W. at 969; Humboldt Bldg. Ass'n v. Ducker's Ex'r, 64 S.W. at 671. Owen v. Neely involved discrepancies between a deed description and a survey description which were not noted by the examining attorney. The court overturned the summary judgment which had been granted in favor of the attorney, on the grounds that it was a question of fact for the jury whether the attorney, in the exercise of due care, should have conducted further investigation or reported the discrepancies to his client. 471 S.W.2d at 708. An interesting question raised but not resolved by Owen v. Neely is the extent to which attorneys performing a title search can protect themselves by the use of reservations and disclaimers in the title opinion. \textit{Id.} at 707-08.
quences of that action generally would not become known until the testator died and the will was offered for probate. The passage of time from the negligent act to its discovery would usually exceed the statutory period and bar any cause of action against the attorney. Commencing in the late 1960s, however, courts in this country started to react to these obvious injustices, and, borrowing freely from medical malpractice cases, began to apply the "discovery" rule in actions for legal malpractice. Once this breakthrough was made, many other jurisdictions rapidly adopted the same resolution. While this precise issue has not been presented in a legal malpractice context in Kentucky, the courts of this state have not hesitated to expand the "discovery" rule beyond medical malpractice when the need has arisen. In Louisville Trust Co. v. Johns-Manville Products Corp., the Kentucky Supreme Court applied the "discovery" rule in a products liability action against the decedent's employer for injuries from a latent disease caused by exposure to asbestos. The action was brought within one year of the diagnosis of decedent's illness, but that was nearly five years after the decedent had left the defendant's employment. The same approach would undoubtedly have been used to deal with limitations problems in legal malpractice suits. The matter became moot, however, when the 1980 Kentucky legislature adopted the following statute of limitations provision:

[A] civil action . . . arising out of any act or omission in

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182 The Maryland Court of Appeals was the first court to apply the "discovery" rule in a legal malpractice context. Mumford v. Staton, Whaley & Price, 255 A.2d 359 (Md. 1969). Although reaching the same result in a similar factual setting, the California Supreme Court in Heyer v. Flaig, 449 P.2d 161 (Cal. 1969), technically did not base its decision upon the "discovery" rule. Clear adoption of the "discovery" rule to toll the statute of limitations in legal malpractice cases came two years later in California. Neel v. Magana, Olney, Levy, Cahart & Golfand, 491 P.2d 421 (Cal. 1971).


184 580 S.W.2d 497 (Ky. 1979).

185 Id. at 499.
rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured.\textsuperscript{186}

A companion provision was simultaneously added to define "professional services" as "any services rendered in a profession required to be licensed, administered and regulated as professions in the Commonwealth of Kentucky."\textsuperscript{187} That definition clearly and unequivocally covers the legal profession, and by reason of this recently enacted legislation, the statute of limitations for a cause of action for legal malpractice in Kentucky now incorporates the "discovery" rule.

2. \textit{Privity}

For almost a century, the universally accepted rule in legal malpractice decisions was that an attorney was not liable to any person other than the immediate client, even though the attorney's negligence may have injured someone else.\textsuperscript{188} Application of this privity doctrine proved particularly severe when the attorney's services were intended to benefit a third party. That individual, rather than the client, was the one likely to be injured if the professional services were rendered in an incompetent manner.\textsuperscript{189} Yet courts consistently denied the right to maintain a malpractice action to plaintiffs who could not establish privity.\textsuperscript{190}

Two decisions of the California Supreme Court some twenty years ago broke through the privity barrier in certain legal malpractice situations. In \textit{Biakanja v. Irving},\textsuperscript{191} the California court

\textsuperscript{186} KRS § 413.245 (Supp. 1980).
\textsuperscript{187} KRS § 413.243 (Supp. 1980).
\textsuperscript{188} See \textit{Savings Bank v. Ward}, 100 U.S. at 195.
\textsuperscript{189} See, \textit{e.g.}, \textit{id.} (purchaser injured due to faulty title examination); \textit{Mickel v. Murphy}, 305 P.2d 993 (Cal. Dist. Ct. App. 1957) (error in will causing injury to disappointed legatee); \textit{Buckley v. Gray}, 42 P. 900 (Cal. 1895) (will error); \textit{Williams v. Plogar}, 215 N.W.2d 149 (Mich. 1974) (negligent title examination); \textit{Maneri v. Amodeo}, 238 N.Y.S.2d 302 (Sup. Ct. 1963) (will error).
\textsuperscript{190} See note 189 supra for a list of decisions discussing this point. \textit{See also} \textit{Jacobsen v. Overseas Tankship Corp.}, 11 F.R.D. 97 (E.D.N.Y. 1950); \textit{Rose v. Davis}, 157 S.W.2d at 284; \textit{Kasen v. Morrell}, 183 N.Y.S.2d 928 (Sup. Ct. 1959); \textit{Hakala v. Van Schaick}, 12 N.Y.S.2d 928 (Sup. Ct. 1939).
\textsuperscript{191} 320 P.2d at 16.
held that a disappointed beneficiary under an invalid will could sue a notary public who had negligently prepared the will, overruling its oft-cited decision rendered under similar facts more than fifty years earlier.\(^{192}\) Several years after Biakanja, the California court in Lucas v. Hamm\(^{193}\) put to rest any doubts about whether Biakanja applied only to suits involving will drafting errors committed by persons not authorized to practice law. It held that a disgruntled beneficiary could maintain a cause of action for legal malpractice against the lawyer who had drafted the will, even though the decedent and not the beneficiary had been the client who was in privity of contract with the attorney.\(^{194}\) However, the floodgates of third party malpractice litigation were not thrown wide open, because the California court substituted a balancing-of-factors test for the old privity doctrine, so that new requirements had to be met before someone other than a client could sue an attorney for negligent acts or omissions.\(^{195}\) Many other jurisdictions have followed the Biakanja and Lucas holdings.\(^{196}\) As a consequence, the absence of privity will no

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\(^{192}\) The Biakanja decision overruled Buckley v. Gray, 42 P. at 950, which had been reaffirmed in California one short year prior to Biakanja. See also Mickel v. Murphy, 305 P.2d at 993.

\(^{193}\) 364 P.2d at 685.

\(^{194}\) Id. at 688-89. Lucas v. Hamm is infamous for its holding that a lawyer is not necessarily negligent for violating the rule against perpetuities. This aspect of the California Supreme Court's decision has, unfortunately, tended to eclipse the ruling that a disgruntled beneficiary can bring a malpractice suit against the lawyer who drafted the faulty will or trust, even though not in privity with him. It should be noted, however, that while Lucas v. Hamm has not been directly overruled on this point of substantive law (e.g., malpractice for violating the rule against perpetuities), it has been largely discredited in subsequent California decisions. See Smith v. Lewis, 530 P.2d at 595-96; Horne v. Peckham, 158 Cal. Rptr. at 720-21; Bucquet v. Livingston, 129 Cal. Rptr. at 518-19; Wright v. Williams, 121 Cal. Rptr. at 197.

\(^{195}\) The following factors were utilized by the California Supreme Court to determine the propriety of a legal malpractice suit brought by someone other than the immediate client: the extent to which the legal services were intended to benefit the third person; the foreseeability of the injury to the third party; the certainty that the third party would have benefitted but for the attorney's negligence; the policy of preventing future harm by permitting persons other than the client to recover since the client himself is unable to recover; and the extent to which imposition of liability might result in an undue burden on the legal profession. 364 P.2d at 688.

longer automatically shield an attorney from malpractice liability to persons other than the client.

Kentucky law on this issue is not as well defined as in many other jurisdictions, but the cases do indicate that the privity rule may no longer be the law, at least when the attorney's services were intended to benefit a third party. *Rose v. Davis*197 decided in 1941, was the leading Kentucky decision in this area until recently. In *Rose*, the plaintiff's malpractice suit grew out of an earlier divorce action in which the attorney had represented the plaintiff's wife. The trial court had granted the divorce and had awarded the wife $60 a month in alimony. That judgment was reversed on appeal on the ground that the wife had a living husband at the time of her marriage to the plaintiff, and the latter marriage was therefore bigamous and void.198 The plaintiff then brought an action against his former wife's lawyer to recover the amounts he had paid in alimony and court costs. The court in the malpractice action upheld the demurrer which had been entered in the defendant-attorney's favor because of the lack of privity between the parties.199

Although *Rose v. Davis* technically remains the law in Kentucky, the Kentucky Court of Appeals' 1978 decision of *Hill v. Willmott*200 strongly indicates that the courts in this jurisdiction are ready to allow a third party to institute a malpractice suit against a lawyer where it has been anticipated that the attorney's services would benefit that person. *Hill* was a physician's countersuit against an attorney who had previously represented the plaintiffs in an unsuccessful medical malpractice action against the same physician. Instead of basing his cause of action upon the usual malicious prosecution grounds, the physician relied upon a

197 157 S.W.2d at 284.
198 Id.
199 Id. The court explained:
An attorney is not ordinarily liable to third persons for his acts committed in representing a client. It is only where his acts are fraudulent or tortious and result in injury to third persons that he is liable. To hold an attorney responsible for the damages occasioned by an erroneous judicial order, even though the error be induced by him, would make the practice of law one of such financial hazard that few men would care to incur the risk of its practice.

Id. at 284-85.
200 561 S.W.2d at 331.
negligence theory. The physician contended, without success, that an attorney owes a duty of care to the party against whom suit is brought, based upon certain ethical principles set forth in the Code of Professional Responsibility.\textsuperscript{201} While rejecting negligence as a foundation for such a countersuit, the court in \textit{Hill v. Willmott} proceeded to indicate that there could be situations where a person other than the client would have a cause of action for malpractice against an attorney:

The California appellate court recently confronted this problem [whether an attorney owes a duty to a third person] in \textit{Donald v. Garry}, . . . and reached a workable solution. Therein an attorney employed by a collection agency to bring an action for the collection of a debt owed to a client of the agency was held liable to the individual creditor despite the absence of privity of contract when the collection proceeding was dismissed for lack of diligent prosecution due to the attorney's negligence. In so holding, the court stated that 'An attorney may be liable for damage caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity . . . .' \textit{We believe this to be a proper statement of the law in this Commonwealth.}\textsuperscript{202}

The relaxation of the statute of limitations and the erosion of the privity doctrine modify two technical defenses that had for years been formidable barriers to prosecution of legal malpractice cases.\textsuperscript{203} As a consequence, legal malpractice claims are certain to increase, both in Kentucky and nationwide, in the years to come.

\section*{II. Countersuits Against Attorneys}

As has been noted, an attorney can be held accountable for mistakes or errors on a professional negligence theory to a former

\begin{footnotes}
\item \textsuperscript{201} \textit{Id.} at 333.
\item \textsuperscript{202} \textit{Id.} at 334 (emphasis added).
\end{footnotes}
client or to a third party who was the intended beneficiary of the legal services. In addition, an attorney also may be liable on the basis of an intentional tort—malicious prosecution—to persons against whom he has previously brought suit.

Originally available as a cause of action only when the initial litigation was criminal in nature, malicious prosecution has long been extended to cover civil actions as well.\footnote{W. Prosser, supra note 20, §§ 119-20, at 834-56; Birnbaum, Physicians Counterattack: Liability of Lawyers For Instituting Unjustified Medical Malpractice Actions, 45 Fordham L. Rev. 1003, 1020-33 (1977); Note, Liability for Proceeding With Unfounded Litigation, 33 Vand. L. Rev. 743, 745-54 (1980). However, the courts in England severely limit the types of injury for which compensation can be received in malicious prosecution actions in situations where the original proceedings were civil rather than criminal, and this "English" or "special injury" rule has been adopted in a substantial number of American jurisdictions. See Ammerman v. Newman, 384 A.2d 637 (D.C. App. 1978); O'Toole v. Franklin, 569 P.2d 561 (Or. 1977); W. Prosser, supra note 20, § 120, at 851; Birnbaum, supra at 1021-22.}

A cause of action for malicious prosecution requires proof of the following elements: (1) institution by the defendant of a prior suit which terminated in the defendant's favor; (2) lack of probable cause in bringing the prior suit; (3) malice in prosecuting the original suit; and (4) damages as a consequence of the initial proceedings.\footnote{See Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); O'Toole v. Franklin, 569 P.2d at 561; Mallen, An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort, 46 Ins. Couns. J. 407, 410, 420-21 (1978); Note, supra note 204, at 745-54; Note, Promoting Recovery by Claimants in Iowa Malicious Prosecution Actions, 64 Iowa L. Rev. 408 (1979).}

The damages requirement can be difficult to satisfy, particularly in those jurisdictions that follow the so-called "English" rule which requires showing of a "special injury."\footnote{See, e.g., Birnbaum, supra note 204, at 1022; Note, supra note 206, at 408; Note, Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?, 26 Case W. Res. L. Rev. 653, 678 (1976).}

Lack of "probable cause" and "malice" have also been substantial barriers precluding recovery in suits posited on malicious prosecution.\footnote{See Hunter v. Beckley Newspapers Corp., 40 S.E.2d 332, 337 (W. Va. 1946); W. Prosser, supra note 20, §§ 119-20, at 834-56; Birnbaum, Physicians Counterattack: Liability of Lawyers For Instituting Unjustified Medical Malpractice Actions, 45 Fordham L. Rev. 1003, 1020-33 (1977); Note, Liability for Proceeding With Unfounded Litigation, 33 Vand. L. Rev. 743, 745-54 (1980). However, the courts in England severely limit the types of injury for which compensation can be received in malicious prosecution actions in situations where the original proceedings were civil rather than criminal, and this "English" or "special injury" rule has been adopted in a substantial number of American jurisdictions. See Ammerman v. Newman, 384 A.2d 637 (D.C. App. 1978); O'Toole v. Franklin, 569 P.2d 561 (Or. 1977); W. Prosser, supra note 20, § 120, at 851; Birnbaum, supra at 1021-22.}

However, when examined separately, these four requirements do not appear all that difficult to prove. Even though the plaintiff in a malicious prosecution action has the burden of proving the absence of "probable cause,"\footnote{See Hunter v. Beckley Newspapers Corp., 40 S.E.2d 332, 337 (W. Va. 1946); W. Prosser, supra note 20, §§ 119-20, at 834-56; Birnbaum, Physicians Counterattack: Liability of Lawyers For Instituting Unjustified Medical Malpractice Actions, 45 Fordham L. Rev. 1003, 1020-33 (1977); Note, Liability for Proceeding With Unfounded Litigation, 33 Vand. L. Rev. 743, 745-54 (1980). However, the courts in England severely limit the types of injury for which compensation can be received in malicious prosecution actions in situations where the original proceedings were civil rather than criminal, and this "English" or "special injury" rule has been adopted in a substantial number of American jurisdictions. See Ammerman v. Newman, 384 A.2d 637 (D.C. App. 1978); O'Toole v. Franklin, 569 P.2d 561 (Or. 1977); W. Prosser, supra note 20, § 120, at 851; Birnbaum, supra at 1021-22.} the de-
scription of this prerequisite is similar to the negligence standard.\textsuperscript{209} And while "malice" can be shown through hatred or ill-will, it can also be inferred from a lack of probable cause.\textsuperscript{210}

Nonetheless, causes of action for malicious prosecution have met with little success over the years, and are not favored by the courts.\textsuperscript{211} At the heart of the unfavorable judicial disposition toward this cause of action are two conflicting policy considerations: (1) a desire to protect people from unwarranted and vexatious litigation and (2) a concern that individuals have ready access to our court system for the redress of their grievances and compensation for their injuries, and that their lawyers be able to prosecute their clients' cause zealously and forcefully.\textsuperscript{212}

Malicious prosecution was long considered an aberrant cause of action offering such little chance of success that practicing


\textsuperscript{210} The highest court in Kentucky has defined "probable cause" necessary to support a malicious prosecution action arising out of a civil suit as follows: "[a]ll that is necessary to establish 'probable cause' is to show that it [the plaintiff in the underlying proceeding] reasonably believed it had a chance to win the original case." Harter v. Lewis Stores, Inc., 240 S.W.2d at 88. See Burt v. Smith, 73 N.E. 495, 496 (N.Y. 1905), appeal dismissed, 203 U.S. 129 (1906).


\textsuperscript{212} For a discussion of these conflicting considerations, see Bickel v. Mackie, 447 F. Supp. at 1376; Norton v. Hines, 123 Cal. Rptr. at 240-42; Ammerman v. Newman, 384 A.2d at 641; Berlin v. Nathan, 381 N.E.2d at 1371-72; Hill v. Wilmott, 561 S.W.2d at 334-35; Raine v. Drasin, 621 S.W.2d at 895; Mayflower Indus. v. Thor Corp., 83 A.2d at 296; O'Toole v. Franklin, 569 P.2d at 564.

Since a prior party's lawyer can also be held liable for malicious prosecution in filing a groundless action, the courts have expressed concern that too rigorous enforcement of the policy against unfounded lawsuits will result in an unwillingness of lawyers to undertake difficult, unpopular and complex matters because of a fear of retaliation in the event the original cause proves unsuccessful. See, e.g., Norton v. Hines, 123 Cal. Rptr. at 237; Friedman v. Dozorc, 50 U.S.L.W. 2331 (Mich. Nov. 23, 1981). See Mallen, supra note 206, at 409-10.
lawyers hardly gave it any thought.\textsuperscript{213} In recent years, however, malicious prosecution and similar intentional torts such as abuse of process have become a favorite of irate physicians who have been the subject of unsuccessful medical malpractice suits.\textsuperscript{214} While a physician could also proceed against the original plaintiff in the medical malpractice litigation,\textsuperscript{215} it is the attorney who represented the former patient, rather than the patient, who has had to bear the brunt of these malicious prosecution countersuits.\textsuperscript{216} Despite the popularity of such physicians' countersuits, they have been almost uniformly unsuccessful other than as a device for retaliation and harassment.\textsuperscript{217}

Incensed physicians have also attempted to base their countersuits upon a negligence cause of action, which would be easier to prove than malicious prosecution.\textsuperscript{218} Such efforts have been uniformly futile because courts are unpersuaded that a lawyer who brings suit on behalf of a client also owes a duty of care to the party being sued.\textsuperscript{219} One such fruitless effort can be found in

\textsuperscript{213} See, e.g., Mallen, supra note 206, at 408 ("in the history of American jurisprudence few former adversaries have been able to show that an attorney acted with malice and without probable cause"); Note, supra note 207, at 678 ("The infrequency of actions for malicious prosecution and their consistent lack of success indicates the difficulties confronting the physician who pursues such a cause of action").

\textsuperscript{214} See R. MALLEN & V. LEVIT, supra note 6, § 45, at 95-97; Birnbaum, supra note 204, at 1004.

\textsuperscript{215} In a suit against the plaintiff in a prior proceeding, that party may be able to assert the advice-of-counsel defense—that the defendant in the malicious prosecution suit was following the advice of his or her attorney in filing the original suit. This generally will suffice to show the requisite "probable cause" to refute a charge of malicious prosecution. Alexander v. Alexander, 229 F.2d 111, 117 (4th Cir. 1956); Warner v. Gulf Oil Corp., 178 F. Supp. 481 (M.D.N.C. 1959); Harter v. Lewis Stores, Inc., 240 S.W.2d at 86; Lexington Cab Co. v. Terrell, 137 S.W.2d 721 (Ky. 1940); Weidlich v. Weidlich, 30 N.Y.S.2d 326, 332 (N.Y. Sup. Ct. 1941); Johnson v. Moser, 72 P.2d 715 (Okla. 1937).

\textsuperscript{216} See R. MALLEN & V. LEVIT, supra note 6, § 45, at 95-98. But just as a client can assert an advice-of-counsel defense, the attorney may be aided by showing that there was reasonable reliance upon factual information provided by the client. Id. § 45, at 117-18.

\textsuperscript{217} See the discussion of cases in C. KINDREGAN, supra note 28, at 25-27; R. MALLEN & V. LEVIT, supra note 6, § 45.


\textsuperscript{219} According to a recent decision of the Michigan Supreme Court: "Assuming that an attorney has an obligation to his client to conduct a reasonable investigation prior to bringing an action, that obligation is not the functional equivalent of a duty of care owed to the client's adversary. Such a duty is inconsistent with basic precepts of the adversary system." Friedman v. Dozorc, 50 U.S.L.W. at 2331.
Hill v. Willmott, where the physician eschewed a cause of action for malicious prosecution in favor of negligence. In affirming the trial court's dismissal of the physician's negligence action, the Kentucky Court of Appeals set forth various policy reasons for limiting the physician's recourse to a less-than-favored cause of action for malicious prosecution and the more demanding standard of proof required for establishing an attorney's lack of "probable cause" for instituting the original suit. While conceding that the same evidence that was offered to prove negligence would also be material to the question of "probable cause" in a malicious prosecution suit, the court in Willmott clearly voiced its opinion that application of a lower negligence standard in such countersuits would be disastrous. These statements in Hill v. Willmott appear consistent with the law of malicious prosecution both as it has developed in Kentucky and as that cause of action has existed in other jurisdictions in this country.

The Kentucky Supreme Court's 1981 decision in Raine v. Drasin has abruptly altered the rationale of Hill v. Willmott and the evolution of the law of malicious prosecution in Kentucky. If for no other reason, the case is significant because it is one of only a handful of appellate decisions involving countersuits which has affirmed a trial court's decision in favor of a physician. But there is much more to Raine v. Drasin that makes it

220 561 S.W.2d at 331.

221 In Hill, the Kentucky Court of Appeals stated: "To allow a party to bring a negligence action against the adverse attorney would have a chilling effect on the number of meritorious claims filed and this cannot be tolerated under our system." Id. at 335.

Similarly, in Tool Research & Eng'g Corp. v. Henigson, 120 Cal. Rptr. 291 (Cal. Ct. App. 1975), the California court said: "The key to the protection of the basic legal concept allowing free access to the courts is the element of 'probable cause' in an action for malicious prosecution. Any less demanding standard would make the attorney... an insurer to his client's adversary that his client will win in litigation."

222 561 S.W.2d at 335.

223 621 S.W.2d at 895.

224 Other than the Kentucky Supreme Court decisions in Raine v. Drasin and Mahaffey v. McMahon, 630 S.W.2d 68 (Ky. 1982), only two decisions apparently have been reported in which a physician's successful countersuit against an attorney who previously had brought a medical malpractice claim have been upheld on appeal. See Bull v. McCuskey, 615 P.2d 937 (Nev. 1980) (action for abuse of process upheld, including jury verdict of $35,000 in compensatory and $50,000 in punitive damages); Peerman v. Sidicane, 605 S.W.2d 242 (Tenn. Ct. App. 1980) (malicious prosecution and abuse of process; award of $3,000 in compensatory and $8,500 in exemplary damages upheld). See generally R. MALLEN & V. LEVIT, supra note 6, § 45, at 95-98 & nn.57-58.
noteworthy than just its ultimate holding.

The underlying suit in *Raine v. Drasin* was a medical malpractice action brought by a man named Browning, represented by Raine and Highfield, against two doctors, Drasin and Fadel. Browning had suffered a massive heart attack and had been rushed to the emergency room of a local hospital. After his release, Browning contacted Raine about the possibility of a suit for an injury to his shoulder which had occurred during his hospitalization. Raine drafted and filed the complaint against the hospital, and thereafter prepared an amended complaint, which joined Drs. Drason and Fadel as defendants.

The problems with the amended complaint were that Drasin was the radiologist who read the x-rays after Browning's shoulder was fractured, and Fadel was an orthopedic surgeon who treated the shoulder after it had been injured. The evidence indicated that Raine knew or should have known that the two doctors could not have been involved in causing the injury which formed the basis of the medical malpractice suit because that fact was evident from the hospital records that Raine had reviewed and from testimony at a deposition given prior to the filing of the amended complaint. Subsequently, when Raine was apprised of these facts by the doctors' attorney, he agreed to dismiss the action against them voluntarily. Raine's willingness to drop suit against the doctors obviously did not appease them, as they

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225 Actually, Highfield only signed the complaint as an accommodation to Raine, because Raine represented another hospital and preferred not to disclose his representation of Browning. 621 S.W.2d at 898, 902-03.

226 Highfield also signed the amended complaint as an accommodation to Raine. *Id.*

227 *Id.* at 898.

As part of an action for malicious prosecution, a plaintiff must prove that the underlying suit brought against him or her had been terminated in his or her favor. W. PROSSER, supra note 6, § 120, at 853-54. The Kentucky Supreme Court in *Raine v. Drasin* held that the voluntary dismissal agreed to by the attorneys constituted a "favorable termination" so as to support the malicious prosecution action. 621 S.W.2d at 899-900.

The decision in *Raine v. Drasin* on this particular point may have some undesirable consequences. Although the attorney may properly be subject to criticism for his conduct in filing suit against two doctors who clearly were not involved in the alleged act of malpractice, and this was known or should have been known by the attorney, the fact remains that once opposing counsel brought these facts to the attorney's attention he immediately filed an "agreed order of dismissal." *Id.* at 898-99. This aspect of the attorney's conduct was laudable. Yet, if the attorney had insisted on a settlement before filing the dismissal, he would have precluded a finding of favorable termination. See *id.* at 899-900;
then filed suit for malicious prosecution and abuse of process, seeking compensatory and punitive damages.

At the conclusion of the countersuit, the jury awarded the physicians $20,000 in compensatory and $30,000 in punitive damages on their malicious prosecution claims. On appeal, the Kentucky Court of Appeals upheld the trial court's dismissal of the abuse of process claim and agreed with the award of compensatory damages against Raine. However, it reversed the trial court's judgment against Highfield on the ground that the evidence failed to establish that he lacked probable cause in filing the medical malpractice suit. The punitive damages award against Raine also was set aside, and that issue was remanded to the lower court for retrial.

On discretionary review, the Kentucky Supreme Court reinstated the award of punitive damages against Raine, and otherwise affirmed the decision of the Court of Appeals, including that court's approval of the compensatory damages award against Raine and the dismissal of the action as to Highfield. In the process, however, the Supreme Court needlessly confused the law in Kentucky on the nature of damages recoverable in a malicious prosecution action, and quietly lowered the quantum of proof necessary to establish a lack of "probable cause," so that this element may be no more difficult to prove than negligence.

Even before Raine, it was not altogether clear whether Kentucky, like the majority of states, allowed the recovery of general

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W. Prosser, supra note 6, §120, at 854. Unfortunately, it is doubtful that an attorney like Raine will so readily agree in the future to such a voluntary dismissal, without the further annoyance and delay of an agreed compromise or settlement.

229 An action for "abuse of process" arises when someone makes use of a legal process or procedure for an improper purpose, causing damage to another. Lack of probable cause need not be established, nor does the plaintiff have to show that the underlying action terminated in favor of the original defendant. See generally W. Prosser, supra note 6 § 121, at 855-58; Birnbaum, supra note 204, at 1033-42.

230 More precisely, the jury returned a verdict of $5,000 for pain and suffering and $5,000 for humiliation and loss of reputation in favor of each physician, as well as granting each $15,000 in punitive damages. The total verdict of $50,000 was apportioned by the jury, with $37,500 allocated against defendant Raine and $12,500 against Highfield. 621 S.W.2d at 899.

231 Id. at 898.

232 Id.

233 Id. at 903. But see the dissenting opinion by Justice Lukowsky. Id. at 903-06.
damages in a malicious prosecution action based upon a prior civil suit, or whether, as has generally been assumed, it followed the “English” rule requiring a showing of “special injury” before damages arising from a civil prosecution could be awarded.\textsuperscript{234} Simply stated, the “special injury” rule requires the defendant in the original action to show that he incurred an injury and damage other than that generally suffered by defendants in similar litigation.\textsuperscript{235}

The Court of Appeals’ decision in \textit{Raine v. Drasin} seemed to concede that the “special injury” requirement applied in Kentucky; the court upheld the award of such damages after finding that the allegations in the original medical malpractice complaint were libelous per se and, thus, had “assailed” the physi-

\textsuperscript{234} Woods v. Finnell, 76 Ky. (13 Bush) 628 (1878), established the rule in Kentucky governing recovery of damages for malicious prosecution. The Court said:

> It must appear that the action was founded in malice, instituted without probable cause, and that the plaintiff has been damaged.

> When the reputation has not been assailed, or the defendant imprisoned, or his property seized, or its use prevented, the damages should be confined to the loss of time, and the reasonable expenses incurred in the defense of the action beyond the ordinary costs.

\textit{Id.} at 633-34. See \textit{Raine v. Drasin}, 621 S.W.2d at 903-04 (Lukowsky, J., dissenting).

In \textit{Smith v. Smith}, 178 S.W.2d 613, 614 (Ky. 1944), the Court indicated a preference for the English “special damage” rule, and stated that it had been adopted in Kentucky in \textit{Woods v. Finnell}. Seven years later, the Court made a similar statement but with somewhat less conviction: “The rule [as to damages] seems to be that the institution of a civil suit maliciously and without probable cause is a sufficient basis for an action for malicious prosecution where one has suffered special damages.” \textit{Harter v. Lewis Stores, Inc.}, 240 S.W.2d at 86.

In \textit{O'Toole v. Franklin}, the Oregon Supreme Court listed 17 American jurisdictions that follow the English rule restricting damages, and 23 states that impose no conditions on the recovery of damages in malicious prosecution actions. 569 P.2d at 564 nn. 3 & 4. Kentucky was listed as one of the jurisdictions following the strict English rule. \textit{Id. See also Note, supra note 207, at 657; Note, supra note 206, at 413; Note, supra note 204, at 748. One student commentator has argued persuasively that Kentucky has been incorrectly designated as following the English or “special injury” rule, derived from a misreading of \textit{Woods v. Finnell}. See Note, \textit{Malicious Prosecution Liability of Plaintiff's Counsel For an Unwarranted Medical Malpractice Suit—New Developments in Physician Counter-suits for Unfounded Medical Malpractice Claims—Raine v. Drasin}, 7 No. KY. L. REV. 265, 281-83 (1980). There is much to be said for this latter position, based upon a close reading of \textit{Woods v. Finnell}, which appears to reject the English position. \textsuperscript{235} See, e.g., Bickel v. Mackie, 447 F. Supp. at 1379; Ammerman v. Newman, 384 A.2d at 641; O’Toole v. Franklin, 569 P.2d at 563-64. \textit{See generally} R. MALLEN & V. LEVIT, \textit{supra} note 6, at 60.
The Supreme Court, on the other hand, brushed aside the Court of Appeals' finding which permitted recovery of special damages. It then proceeded to allow the same damages as compensation for the "humiliation, mortification and loss of reputation" the physicians suffered, without explaining how such damages could be recovered if Kentucky, as generally believed, requires a showing of special injury. In fact, no other jurisdiction following the "special injury" rule appears to have allowed damages for such things as humiliation and loss of reputation. The ambiguous nature of the Supreme Court's holding in *Raine* on the issue of recoverable damages in a malicious prosecution cause of action is all the more inexcusable because this question had specifically been raised on appeal: "Since there was no showing of special damages, was the award of other compensatory damages proper?" Now, as a result of the decision in *Raine v. Drasin*, the law in Kentucky on the recovery of damages in a malicious prosecution action is confused and uncertain.

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236 The Court of Appeals discussed Harter v. Lewis Stores, Inc., 240 S.W.2d at 86, and considered whether the physicians were "assailed" by the earlier medical malpractice suit as that term was used in *Harter*. 621 S.W.2d at 900. The Court of Appeals then analogized the requirement for an "assailed" reputation to the provision of the Restatement of Torts allowing recovery of damages in a malicious prosecution action if the claimant suffered damages to his reputation by an allegation which was defamatory. *Id.* at 901.

237 The Supreme Court stated:

> It is not necessary to decide, as did the Court of Appeals, whether the allegations in the complaint were libelous. The accusation of negligence in the exercise of one's profession certainly can produce mortification, humiliation, injury to the reputation, character and health, mental suffering, and general impairment of social and mercantile standing, all of which are elements of damage in a malicious prosecution action. *H.S. Leyman Co. v. Short*, Ky., 283 S.W. 96 (1926). The award of compensatory damages is affirmed. 621 S.W.2d at 900.

238 *Id.* The Supreme Court's reliance in *Raine v. Drasin* upon *H.S. Leyman Co. v. Short*, 283 S.W. 96 (Ky. 1926) for the award of damages for such things as humiliation and loss of reputation was clearly misplaced. While *Leyman* clearly authorizes damages for such injuries, the malicious prosecution in that case was posited on a prior *criminal* action. 283 S.W. at 98. The "English" or "special injury" rule which places substantial restrictions on the recovery of such damages in a malicious prosecution case is applicable only in situations in which the underlying action was *civil* not criminal. R. *Mallen & V. Levitt*, *supra* note 6, § 46; W. *Prosser*, *supra* note 20 § 119, at 849-50.

239 See, e.g., the cases cited in note 234 *supra*; R. *Mallen & V. Levitt*, *supra* note 6, § 60.

240 621 S.W.2d at 900.
Equally confusing and significant is the Supreme Court’s decision in *Raine v. Drasin* relating to the proof required to show lack of probable cause. In *Hill v. Willmott*, the court had refused to permit a countersuit to be based upon an easier to prove negligence standard and, instead, insisted that such a claimant seek relief through the malicious prosecution cause of action. In *Raine v. Drasin*, however, the Supreme Court impliedly lowered the standard for showing lack of probable cause, so that the requisite proof appeared to be no more than would be necessary to establish negligence on the part of the attorneys in initially filing suit. This relaxation of the “probable cause” requirement can be seen in at least two separate aspects of the decision. First, the principal evidence of lack of probable cause came from the testimony of a member of the Louisville Bar Association’s ethics committee who opined that the defendant-lawyers “did not comply with the standard of care for ordinary and prudent lawyers.” This is identical to the type of evidence that would be offered to prove negligence in a legal malpractice action. Secondly, in spite of the fact that malicious prosecution is an intentional tort, the trial court’s instructions to the jury were needlessly confused with allusions to negligence so that negligence seemed to be emphasized more than probable cause or any other element of malicious prosecution.

The Court of Appeals at least expressed its concern about this problem, but went on to hold that although the instructions were improper, they were not prejudicial to the appellants. In upholding those same instructions, replete as they were with references to negligence, the Supreme Court found “neither error nor prejudice” to the attorney-appellants. Moreover, slackening the requirement for proving lack of probable cause is all the more

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241 561 S.W.2d at 331.
242 *Id.* at 334-35.
243 621 S.W.2d at 901.
245 621 S.W.2d at 901-02.
246 *Id.* at 902.
247 *Id.*
startling when it is realized that "malice," one of the other essential elements in a case of action for malicious prosecution, can be inferred from an absence of probable cause.\textsuperscript{248}

Thus, the Kentucky Supreme Court's decision in \textit{Raine v. Drasin} is significant for a number of reasons. As noted, it is one of the first reported appellate decisions upholding a physician's malicious prosecution countersuit against a lawyer who had previously sued the physician for medical malpractice. It has also apparently liberalized the law on damages in malicious prosecution actions, so that there no longer seem to be any restraints on the amount or nature of compensation recoverable in such a cause of action in Kentucky. And, finally, the Supreme Court seems to have relaxed its requirement for a showing of a lack of probable cause, leaving the impression that the necessary proof is similar to what would be required to establish negligence in a legal malpractice suit. Although malicious prosecution actions were clearly not favored in Kentucky,\textsuperscript{249} that statement can no longer be made after \textit{Raine v. Drasin}.

Many observers undoubtedly believed that the Kentucky Supreme Court had simply overstated its position in \textit{Raine v. Drasin}, and that matters would be brought back into perspective when the Court had another opportunity to review a malicious prosecution case on appeal. Quite the opposite has occurred. On March 30, 1982, the Supreme Court decided another physician's malicious prosecution countersuit, \textit{Mahaffey v. McMahon},\textsuperscript{250} and, if nothing else, the decision in this latest case is a clear indication that the Court has not backed down from its earlier holding in \textit{Raine v. Drasin}. Furthermore, any doubt about the Kentucky Supreme Court's lowering of the "probable cause" requirement also appears to have been put to rest. The fears among members of the bar precipitated by \textit{Raine v. Drasin} were, as it turns out, well justified.

In \textit{Mahaffey}, a woman suffering from abdominal pains underwent surgery which disclosed bladder and liver problems. Al-

\textsuperscript{248} See note 211 \textit{supra} for a list of authorities on this point.

\textsuperscript{249} See, e.g., Hill v. Willmott, 561 S.W.2d at 334; Reid v. True, 302 S.W.2d at 847-48; Davis v. Brady, 291 S.W. at 412-13.

\textsuperscript{250} 630 S.W.2d 68 (Ky. 1982).
most a year later, the patient retained the services of an attorney, McMahon, who filed a medical malpractice suit on her behalf against the surgeon, Mahaffey, on the ground that the surgery was not necessary. Apparently, the allegation that the surgery was not required had no basis other than the patient’s own conclusion, and summary judgment was granted dismissing the malpractice claim. The surgeon then filed a malicious prosecution action against his former patient and her lawyer, and when the former defaulted, the case proceeded against the attorney alone.

The trial court in the countersuit directed a verdict in favor of the lawyer because the surgeon had failed to establish a lack of probable cause in the filing of the original medical malpractice action. On appeal, the Kentucky Supreme Court unanimously reversed, holding that the physician had made out a prima facie case of lack of probable cause by his testimony concerning his treatment of the patient. In essence, the Supreme Court held that an attorney lacks “probable cause” in filing a medical malpractice suit if he or she does not have, prior to filing, expert medical opinion as to the existence of malpractice, unless the doctor’s mistake is so plain and comprehensible that no expert testimony would be necessary to get the case to a jury.

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251 Id. at 69.
252 Id.
253 Id.
254 The Kentucky Supreme Court’s conclusion on the probable cause issue was undoubtedly influenced to some extent by the defendant-attorney’s conduct at trial. In an effort to undercut plaintiff-physician’s proof of an absence of probable cause, at the instigation of the defendant-attorney, both the attorney and his client in the underlying medical malpractice suit invoked the attorney-client privilege to prevent disclosure of what the client had told the attorney about the medical treatment prior to filing of the original suit. Because it felt that such evidence was essential for the physician to prove lack of probable cause, the trial court directed a verdict in the attorney’s favor, and that ruling was affirmed by the Court of Appeals. Id. But the Supreme Court responded differently: “We feel that this is a perversion of the doctrine of the [attorney-client] privilege.” Id. The Supreme Court then went on to hold that the burden of proof on the issue of lack of probable cause could be met by the plaintiff-physician’s testimony alone. Id. at 69-70.
255 In the original medical malpractice action, summary judgment was granted against the patient for failure to offer expert testimony on the malpractice issue. 630 S.W.2d at 70. While recognizing that such medical testimony was not always necessary (e.g., when, to use the Court’s illustration, the wrong leg was amputated), the Court believed that such testimony was essential to determine whether the abdominal surgery was
Mahaffey, expert testimony was required to get the issue of whether surgery was a necessary procedure to the jury. Thus, neither the patient nor the attorney had "probable cause" to file suit since they did not have the benefit of expert medical advice.256

If anything, Mahaffey v. McMahon compounds the problems which first appeared in Raine v. Drasin, and makes a physician's countersuit a viable cause of action because of the relative ease of proving a lack of probable cause. In innumerable medical malpractice claims, subject to a short statute of limitations,257 it may be virtually impossible to secure a medical opinion before suit is filed, although it is anticipated that such an expert will be located before the trial. Now, as a result of the Supreme Court's inexplicable analogy between proof of blatant medical malpractice where expert testimony is not required and the type of case that can safely be filed without the favorable opinion of an expert,258 a

necessary. Id. The Court concluded:

It appears that in this case, involving abdominal surgery with a normal recovery, it would be highly unlikely that any lay opinion or recitation of facts by a layman would be sufficient to satisfy the requirement of probable cause in the absence of some medical testimony to buttress the claim that the operation on Hoskins performed by movant was an unnecessary surgical procedure.

Id.

And while the Supreme Court did not say so directly, if an attorney filed suit prior to obtaining a medical opinion supporting the malpractice claim, expecting to obtain such an expert witness at a later date, and then failed to locate such an expert, that action would leave the attorney open to a subsequent malicious prosecution countersuit, even if the attorney agreed to a dismissal immediately upon determining that such an expert could not be located. See Raine v. Drasin, 621 S.W.2d at 895.

259 630 S.W.2d at 70.

257 See, e.g., KRS § 413.140(1)(e) & (2) (Supp. 1980) (one-year statute applies to a medical malpractice claim unless that period is extended by reason of application of the "discovery" rule).

258 The Court's decision in Mahaffey v. McMahon completely overlooks two clearly justifiable instances in which an attorney should not be exposed to a malicious prosecution countersuit when a medical malpractice action is filed without a medical expert's favorable opinion. First, if the statute is about to run on a medical malpractice claim, time may not permit the securing of such an opinion prior to filing of the complaint. But if suit were not filed for this reason, and the limitations period were allowed to run, an attorney would clearly be liable to the client for legal malpractice. Secondly, if the attorney was experienced in handling medical malpractice suits, he or she could well have sufficient expertise to make a decision as to whether a cause of action was tenable without an expert medical opinion prior to filing suit. Such an attorney should not, by reason of such action, be subject to a malicious prosecution countersuit.
lawyer will often act at his or her own peril if a suit is brought before securing a medical expert. At this point, the medical profession in Kentucky appears to be winning its judicial battle with lawyers, but the real losers may be medical malpractice claimants who have valid cause for complaint but who may encounter some difficulty locating an attorney willing to represent them.259

As malicious prosecution has become a more feasible cause of action, the chance of recovering punitive damages against lawyers also has increased. In a legal malpractice action, such exemplary damages cannot be recovered unless it is shown that the attorney's conduct constituted fraud or some comparable type of willful misconduct.260 In contrast, a successful cause of action for malicious prosecution necessarily involves a finding that the defendant was motivated by "malice," and award of punitive damages is not unusual in such cases.261 In Raine v. Drasin, for example, $30,000 of the $50,000 awarded by the jury represented punitive damages.262 Thus, as a consequence of the Supreme Court's lenient treatment of physicians' malicious prosecution countersuits, Kentucky lawyers may be liable for punitive damages which, for all practical purposes, did not represent much of a risk in legal malpractice suits.263

259 Unwittingly, the Kentucky Supreme Court has broken new ground by its implicit holding in Mahaffey v. McMahon that a lack of probable cause to support a malicious prosecution suit can be established when a medical malpractice suit is filed without benefit of expert medical opinion. By way of contrast, one reported decision directly on point held, after considerable discussion, that the failure to interview witnesses or to obtain competent medical advice does not establish "malice" for purposes of a malicious prosecution suit. Spencer v. Burglass, 337 So. 2d at 596. Other cases similarly support the position that an attorney does not have to obtain a favorable expert opinion before initiating suit. See Ammerman v. Newman, 354 A.2d at 637; Berlin v. Nathan, 381 N.E.2d at 1367. Further, the commentators who have specifically addressed this point uniformly appear to support the position set forth in Spencer v. Burglass. See Birnbaum, supra note 204, at 1018-19, 1028-30; Mallen, supra note 206, at 417; Note, supra note 207, at 680.

260 See R. MALLEN & V. LEVIT, supra note 6, § 315.

261 See, e.g., Bull v. McCuskey, 615 P.2d at 957 (physician's countersuit: jury award of $35,000 in compensatory and $50,000 in punitive damages upheld); Peerman v. Sides, 605 S.W.2d at 242 ($3,000 in compensatory and $8,500 in punitive damages in physician's countersuit). See also Richards v. Superior Court, 150 Cal. Rptr. 77 (Cal. App. 1978); W. PROSSER, supra note 6, § 119, at 550.

262 621 S.W.2d at 898-99.

263 In Kentucky, at least, attorneys should review their professional liability insurance policies to determine what coverage, if any, is provided for malicious prosecution li-
As the popularity of malicious prosecution countersuits has escalated, an ironic twist has occurred. Attorneys are now beginning to resort to this cause of action in retaliation for legal malpractice suits brought by former clients.\(^2\)\(^3\) It is certainly conceivable that such attorney countersuits will discourage the institution of legal malpractice suits, even those that have merit, just as the medical profession believes that physicians' countersuits will have a dampening effect on medical malpractice claims. While the attorney countersuit has yet to surface in Kentucky, the Supreme Court's recent decisions in *Raine* and *Mahaffey* liberalizing the malicious prosecution cause of action in suits brought by doctors may well pave the way for similar successes by irate attorneys.

**CONCLUSION**

The dichotomy in judicial treatment in Kentucky between claims against attorneys based upon malpractice and countersuits posited on malicious prosecution may be more apparent than real. Courts in this state have not been in the forefront of the dramatic changes that have occurred in the law of legal malpractice in the last decade or two, and the decisions rendered during this period have generally upheld lower court determinations in favor of defendant-attorneys. Yet in recent years, the appellate courts in Kentucky have issued strong and unequivocal statements that indicate a judicial attitude favoring increased attorney accountability for professional negligence.

On the other hand, the state inexplicably appears to be on the cutting edge of the law of malicious prosecution as applied in physicians' countersuits against attorneys. Two recent Kentucky Supreme Court decisions have upheld such causes of action in sit-

ability. While such policies generally insure attorneys against claims arising from the rendering of "professional services," such policies often contain a "fraud" exclusion which may apply to *malicious* as well as fraudulent acts, and may exclude from coverage any liability for *punitive* damages. See R. *Mallen & V. Levit*, *supra* note 6, §§ 707 & 718.

\(^2\)\(^3\) See *Wilson v. Brooks*, 369 So. 2d 122 (Ala. 1979); *Lasswell v. Ehrlich*, 416 N.E.2d 423 (Ill. Ct. App. 1981). While only a few cases are reported at the present time, two highly respected commentators have indicated that malicious prosecution countersuits are being pursued today as vigorously by attorneys as by physicians. R. *Mallen & V. Levit*, *supra* note 6, at 345; *Mallen*, *supra* note 206, at 408.
uations where courts in most other jurisdictions have proceeded much more cautiously, to the benefit of the defendant-attorneys. But the two decisions are not particularly intelligible or well-reasoned, and the suspicion lingers that the Court has inadvertently extended the law of malicious prosecution in countersuits against attorneys and will, before too long, clarify its position and return to the judicial mainstream. Even so, there is no question that this jurisdiction has seen and will continue to see an increase in accountability by attorneys to their clients and to other third parties adversely affected by their actions.