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Legal Malpractice—Expansion of the Standard of Care: Duty to Refer—*Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979)

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LEGAL MALPRACTICE—EXPANSION OF THE STANDARD OF CARE: DUTY TO REFER—*Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979).

I. INTRODUCTION

In *Horne v. Peckham* an action in malpractice was brought against attorney Jordan Peckham in connection with drafting documents to establish a "Clifford trust."¹ A jury awarded plaintiffs Roy and Doris Horne \$64,983.31,² and a California district court of appeal affirmed.³ In affirming, the court of appeal held that the trial court correctly instructed the jury that it is malpractice for an attorney not to refer his client to a specialist if under the circumstances a reasonably diligent general practitioner would do so.⁴

1. *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979).

The Clifford trust derived its name from the 1940 U.S. Supreme Court decision in *Helvering v. Clifford*, 309 U.S. 331 (1940). In *Clifford*, a husband established a five year trust with certain securities serving as the corpus. He declared himself trustee and his wife beneficiary. Although the wife was to receive the income accruing during the five year period, the husband retained the right to accumulate income as well as complete control over the corpus of the trust. The *Clifford* Court held that "the short duration of the trust, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22(a) [now I.R.C. § 61(a), defining gross income]." *Id.* at 335.

To a large extent, the so-called "Clifford rules" were incorporated into the Internal Revenue Code (I.R.C.) of 1954. I.R.C. §§ 673–675, 678. A taxpayer may not avoid taxes by assigning income to an individual in a lower tax bracket (*e.g.*, the taxpayer's child or parent). According to the Clifford rules and the I.R.C. provisions, she may, however, transfer tax liability by placing "income-producing property" into a trust for at least 10 years. J. STANLEY & R. KILCULLEN, *FEDERAL INCOME TAX LAW* 280–83 (6th ed. 1974). The "trust income is then taxable to the beneficiary who frequently pays no taxes at all because of the increased personal exemptions and low-income allowances." *Id.* at 281. *See also* M. CHIRELSTEIN, *FEDERAL INCOME TAXATION*, §§ 8.04–9.01 (2d ed. 1979).

2. 97 Cal. App. 3d at 407, 158 Cal. Rptr. at 715. Apparently, damages were largely based on the additional income tax the plaintiffs were required to pay when the IRS determined that tax liability had not been transferred by the Clifford trust. *See* Appellant's Petition for Rehearing at 1, *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979). Defendant Peckham petitioned for rehearing on the ground that "increased income tax liability cannot constitute compensable damages." *Id.* To support this proposition, Peckham quoted from *Daly v. Kling*, 2 Civ. No. 56075 (Cal. 2d App. Dist., August 23, 1979), which was decided approximately one month after the *Horne* court affirmed the trial court's decision: "[A]lthough a financial *gain* caused by a wrongdoer may result in a tax liability to the person who sustained the gain, the amount of the tax liability does not enhance or increase the damages for which the wrongdoer is liable." Appellant's Petition for Rehearing at 1, *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979) (quoting *Daly*) (emphasis in original). Peckham's petition for rehearing was denied. 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979).

Costs of suit in the amount of \$3,595.17 were also assessed against Peckham, bringing the total damage award, including appropriate interest, to \$90,921.15, as of May 5, 1977. Respondent's Reply Brief at 1–2, *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979).

3. 97 Cal. App. 3d at 418, 158 Cal. Rptr. at 722.

4. *Id.* at 414–15, 158 Cal. Rptr. at 720. Furthermore, the *Horne* court held, *inter alia*, that there

The circumstances underlying this malpractice action began in 1967 when plaintiff Horne went to attorney Peckham and asked him to establish a Clifford trust.⁵ Peckham testified that he told the plaintiff he “had no expertise in tax matters . . . [but] if somebody else could figure out what needed to be done, [he] could draft the documents.”⁶ Peckham consulted briefly with Thomas McIntosh,⁷ an alleged tax expert,⁸ concerning the trust. Following this consultation, Peckham proceeded to draft the trust documents⁹ without researching the tax consequences of the contem-

was evidence from which the jury could reasonably find that Peckham committed malpractice by failing to conduct adequate research. See note 10 and accompanying text *infra*.

5. *Id.* at 407, 158 Cal. Rptr. at 716. See generally note 1 *supra* (definition of Clifford trust).

Originally, a patent, with a ten year remaining life, for production of a wood product called “Perfect Plank Plus” was to serve as the corpus of the contemplated trust. *Id.* (A patent provides protection for seventeen years, allowing an inventor to “exclude others from making, using, or selling the invention throughout the United States.” 35 U.S.C. § 154 (1976)). Later, plaintiff asked Peckham if a five year, non-exclusive license of the patent rights, rather than the patent itself, could be put into the trust. The license permitted the corporation to produce Perfect Plank Plus for two years with an option to renew for three additional years in exchange for royalties. 97 Cal. App. 3d at 407–08, 158 Cal. Rptr. at 716. Attorney Peckham testified that he told Horne he did not know whether the license could effectively be put into the trust, but that he would discuss it with a tax expert. See notes 7 & 8 and accompanying text *infra*.

6. 97 Cal. App. 3d at 407, 158 Cal. Rptr. at 716.

7. Peckham talked to McIntosh, an attorney and certified public accountant, about the contemplated trust during a meeting arranged by the Hornes’ accountant, Herbert McClanahan, to discuss the future of the Hornes’ company. *Id.* at 407–08, 158 Cal. Rptr. at 716. According to Peckham’s testimony, he asked whether the license, instead of the patent, could effectively be put into the trust and received an affirmative answer. *Id.* at 408, 158 Cal. Rptr. at 716 (Peckham and McIntosh, however, disagreed on whether the subject of license versus patent arose at the meeting). See note 5 *supra* (discussion of the licensing arrangement).

8. The Hornes’ accountant recommended McIntosh to Peckham as “an expert in deferred compensation and profit-sharing plans.” *Id.* at 408, 158 Cal. Rptr. at 716. Peckham had no knowledge that McIntosh had, at the time Peckham consulted with him, practiced law for less than one year. *Id.*

The *Horne* court did not have to decide whether Peckham had been negligent in consulting with an attorney who had practiced law less than one year, because Peckham asserted simply that he had no duty to refer or to recommend the assistance of a specialist. Peckham did not argue that he had met this duty by consulting with McIntosh. *Id.* at 414, 158 Cal. Rptr. at 720. For a judicial discussion of the liability for negligent referral to another general practitioner, see *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975). In *Tormo*, the client retained a New York lawyer to handle a personal injury claim, and the attorney referred the client to an attorney in New Jersey, where the client had sustained the injury. The referring attorney was not aware that the New Jersey attorney had been indicted for fraud, as his only investigation of the attorney’s qualifications had been to consult a legal directory and determine that the New Jersey attorney was a licensed practitioner. “The court concluded that no further factual investigation need be made since the New York attorney could safely rely upon the determination of New Jersey that by licensing an attorney, he was presumptively fit and competent to practice law.” R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* § 220 (1977) (citing *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975)).

9. The three documents included: (1) an irrevocable trust agreement to terminate in 12 years (1979), with the Hornes and two others as trustees and the Hornes’ three sons as beneficiaries; (2) a five year license agreement between Horne and his incorporated business, Perfect Plank; and (3) an assignment to the trust of the rights under the license agreement. 97 Cal. App. 3d at 408–09, 158 Cal. Rptr. at 716–17.

plated trust.¹⁰ Peckham sent the completed documents to the Hornes' accountant for approval.¹¹

The Internal Revenue Service (IRS) audited the Hornes' tax returns in 1970¹² and determined that the trust did not effectively transfer tax liability.¹³ Consequently, the IRS assessed a tax deficiency against the Hornes.¹⁴ After unsuccessfully challenging the assessment at the first administrative level, the Hornes acknowledged tax liability.¹⁵ The malpractice action against Peckham was commenced in 1972.¹⁶

This note analyzes the *Horne* court's reasoning in expanding the standard of care in legal malpractice actions to include a duty to refer and in holding attorneys to the same standard of care as physicians. This note also evaluates the considerations relevant to distinguishing "specialist" cases from "generalist" cases and the need for expert testimony in determining liability for failure to refer.

II. BACKGROUND: LEGAL MALPRACTICE

Under the English common law, an attorney had an obligation to render legal services commensurate with his professed competence in his "calling." A breach of that obligation resulted in liability for damages

10. According to Peckham's testimony, McClanahan, the Hornes' accountant, "had provided him with ' . . . a couple of pages of translucencies . . . governing Clifford Trusts,' and he also consulted the two-volume annual set of American Jurisprudence on federal taxation, which included a discussion of Clifford Trusts; he otherwise relied on McClanahan's judgment." *Id.* at 407, 158 Cal. Rptr. at 716.

The *Horne* court rejected Peckham's argument that "[i]t is not legal malpractice (negligence) on the part of an attorney general practitioner to draw documents without doing research on a point of law on which there is no appellate decision or statute in point." *Id.* at 409, 158 Cal. Rptr. at 717. In rejecting this argument the court concluded:

The argument has two parts; first, that the trust documents were in fact valid as a tax shelter, second, that even if invalid, their invalidity is so debatable that he should not be liable for making an error regarding a matter about which reasonable attorneys can disagree. He is wrong on both points. The documents are invalid for their intended purpose, and the invalidity is rather obvious. To demonstrate this, one need go no further than the original *Clifford* case [*Helvering v. Clifford*, 309 U.S. 331 (1940)], from which the name "Clifford Trust" is derived, and the legislation it brought about.

Id.

A discussion of the *Horne* court's analysis of the trust's validity and assignment of income is beyond the scope of this casenote.

11. 97 Cal. App. 3d at 408, 158 Cal. Rptr. at 716.

12. Royalties from the license (see note 5 *supra*) were paid into the trust until the 1970 audit. *Id.* at 409, 158 Cal. Rptr. at 717.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* Peckham cross-complained against McIntosh for indemnity in 1973. The jury found in favor of McIntosh. *Id.*

proximately caused by the attorney's negligence.¹⁷ The modern malpractice action evolved from that rationale.¹⁸

The elements of a legal malpractice action are fundamentally the same as those necessary to establish a prima facie case of ordinary, nonprofessional negligence: a breach of a duty to the plaintiff¹⁹ that is the proximate cause of the plaintiff's injury.²⁰

17. *Russell v. Palmer*, 2 Wils. K.B. 325, 95 Eng. Rep. 837 (K.B. 1767); *Pitt v. Yalden*, 4 Burr. 2060, 98 Eng. Rep. 74 (K.B. 1767). The development of legal malpractice in the United States began with the decision in *Stephens v. White*, 2 Va. (2 Wash.) 203 (1796). In rejecting defendant attorney's argument that he owed his client no duty, because the client had not compensated him for his services, the *Stephens* court stated: "[T]he appellee undertook to conduct the suit, and in his management of it, was guilty of such a neglect of his duty as to subject the plaintiff to a loss; after this, it is not competent to him to alledge a want of consideration." *Id.* at 210 (emphasis in original). For a detailed discussion of the genesis of legal malpractice, see Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959).

18. When a person adopts the legal profession, and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties; and if injury results to the client from a want of such a degree of reasonable care and skill, the attorney may be held to respond in damages to the extent of the injury sustained. Proof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the action; but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is that if he acts with a proper degree of skill, and with reasonable care and to the best of his knowledge, he will not be held responsible.

Savings Bank v. Ward, 100 U.S. 195, 198 (1879). See also *Student Symposium: Legal Malpractice*, 14 HAWAII B.J. 3, 4 (1978) [hereinafter cited as *Student Symposium*]; notes 19-26 and accompanying text *infra*.

19. The duty owed by an attorney usually arises from the attorney-client relationship. See *Berman v. Rubin*, 138 Ga. App. 849, 227 S.E.2d 802, 806 (1976). See also *Student Symposium*, *supra* note 18, at 8. Once an attorney assumes the responsibility to render professional services, a duty arises regardless of whether or not there exists a valid contract supported by consideration. See *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975); *Glenn v. Haynes*, 191 Va. 574, 66 S.E.2d 509 (1951). No duty arises, however, unless the attorney undertakes to render services in a professional capacity. Thus, an attorney giving free legal advice to a friend usually does not owe a duty. See *McGregor v. Wright*, 117 Cal. App. 186, 3 P.2d 624 (1931). But see *Grudberg v. Midvale Realty Co.*, 119 Misc. 558, 195 N.Y.S. 760 (App. Term 1922) (dictum).

Traditionally, an attorney has been obligated only to his client. See *Savings Bank v. Ward*, 100 U.S. 195, 199-200 (1879). In an effort to diminish the harshness of the privity requirement, the California Supreme Court in *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961), *cert. denied*, 368 U.S. 987 (1962), permitted the beneficiaries under a will to bring an action against the attorney who prepared it. "[T]he main purpose of the testator in making his agreement with the attorney is to benefit the persons named in his will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action. . . ." For a discussion of the holding in *Lucas v. Hamm*, see note 30 *infra*. See also *Lowall v. Groman*, 180 Pa. 532, 37 A. 98 (1897).

20. See, e.g., *Lysick v. Walcom*, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); *Collins v. Slocum*, 317 So. 2d 672 (La. App. 1975); *Thompson v. Erving's Hatcheries, Inc.*, 186 So. 2d 756 (Miss. 1966). In those situations involving only one causal factor, the courts have traditionally applied the "but for" rule. See *Hampel-Lawson Mercantile Co. v. Poe*, 169 Ark. 840, 277 S.W. 29 (1925) (mortgage filed in wrong county); *McCullough v. Sullivan*, 102 N.J.L. 381, 132 A. 102

Duty to Refer

The duty an attorney owes a client is expressed in terms of the applicable standard of care—the “minimum gauge” of an attorney’s actions.²¹ Traditionally, the standard of care has been based on the degree of knowledge, skill, and diligence exercised by lawyers of ordinary ability and prudence.²² Application of this standard generally results in liability for procedural errors,²³ fundamental errors of law,²⁴ and errors in preparing

(1926) (defective chattel mortgage). These situations present no problem in determining that the attorney’s negligent actions were the “sole cause” of the client’s loss when he unsuccessfully attempted to enforce the mortgages. The “but for” rule, however, proves inadequate when there is more than one causal factor. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 28 (4th ed. 1971). In those situations involving two concurrent causes, or one negligent act followed by a second negligent act, the courts have implemented (1) the “substantial factor” test (*Modica v. Crist*, 129 Cal. App. 2d 144, 146, 276 P.2d 614, 617 (1954) (“The defendant’s conduct is a cause of the event if it was a material element and a substantial factor in bringing it about.”) (quoting Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 378 (1950))); or (2) the “independent intervening cause” test (*Ward v. Arnold*, 52 Wn. 2d 581, 584, 328 P.2d 164, 166 (1958) (intervening event that could reasonably have been anticipated by the wrongdoer did not break the chain of causation)).

21. Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771, 772 (1968) [hereinafter cited as *Standard of Care*]. *See also* Houser, *Legal Malpractice—An Overview*, 55 N.D.L. REV. 185, 195 (1979).

22. Although there are a variety of articulations of the standard of care applicable in legal malpractice actions (*see Student Symposium, supra* note 18, at 5 n.18; Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1294–95 (1963) [hereinafter cited as *Attorney Malpractice*]), the formulation of the standard most often quoted is that found in *Hodges v. Carter*:

Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client’s cause.

239 N.C. 517, 80 S.E.2d 144, 145–46 (1954).

Some courts have held that liability for malpractice arises in contract, rather than in tort. *See In re Estate of Kruger*, 130 Cal. 621, 63 P. 31 (1900); *Lindner v. Eichel*, 34 Misc. 2d 840, 232 N.Y.S. 2d 240, *aff’d mem.*, 17 A.D.2d 735, 233 N.Y.S.2d 238 (1960). In applying this contractual theory of malpractice liability, some courts have found that by undertaking to render professional services, the attorney impliedly agrees to exercise a reasonable degree of care and diligence. *See Ventura County Humane Soc’y v. Holloway*, 40 Cal. App. 3d 897, 903, 115 Cal. Rptr. 464, 468 (1974). *See also* *Wade, supra* note 17, at 762–65. Characterization of the underlying theory as either contract or tort, however, does not alter the applicable standard of care. *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961), *cert. denied*, 368 U.S. 987 (1962).

The standard of care often takes “locality” into consideration. *E.g.*, *Smith v. Lewis*, 13 Cal. 3d 349, 355 n.3, 360, 530 P.2d 589, 592 n.3, 596, 118 Cal. Rptr. 621, 624 n.3, 628 (1975) (standard of attorney in same or similar locality); *Cook v. Irion*, 409 S.W.2d 475, 477 (Tex. Civ. App. 1966) (degree of care customarily exercised by attorneys in El Paso County, Texas); *Hansen v. Wightman*, 14 Wn. App. 78, 90, 538 P.2d 1238, 1247 (1975) (standard of reasonably prudent attorney in State of Washington).

23. *Williams v. Bashman*, 457 F. Supp. 322, 329 (E.D. Pa. 1978) (failure to file personal injury claim within statute of limitations); *Theobald v. Byers*, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864, 866–67 (1961) (failure to register or advise client to register chattel mortgage). *See also Student Symposium, supra* note 18, at 6–7; *Attorney Malpractice, supra* note 22, at 1294–95.

24. *Transamerica Ins. Co. v. Keown*, 451 F. Supp. 397, 402 (D.N.J. 1978) (“securities” er-

documents.²⁵ Attorneys are required to understand the elementary principles of law and to find those additional principles discoverable through "standard research techniques."²⁶ No liability, however, is ordinarily imposed for errors of judgment.²⁷

Expansion of the standard of care to include a duty, on the part of a general practitioner, to consult with or refer to a legal specialist was foreshadowed by the development of de facto specialization in the legal profession.²⁸ Imposition of the duty to refer was also presaged by indications that doctrines developed in medical malpractice actions may be equally applicable in the context of legal malpractice.²⁹

roneously interpreted to include real estate). See also *Student Symposium*, *supra* note 18, at 6-7; *Attorney Malpractice*, *supra* note 22, at 1298-300.

25. *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (failure to assert client's community interest in her husband's retirement fund in divorce decree); *McCullough v. Sullivan*, 102 N.J.L. 381, 132 A. 102, 103-04 (1926) (failing to state "true consideration" pursuant to chattel mortgage statute); *Schirmer v. Nethercutt*, 157 Wash. 172, 174, 288 P. 265, 268 (1930) (permitting legatee to witness will). See also *Student Symposium*, *supra* note 18, at 6-7; *Attorney Malpractice*, *supra* note 22, at 1296-98.

26. *Smith v. Lewis*, 13 Cal. 3d 349, 359, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 627 (1975). See *Berman v. Rubin*, 138 Ga. App. 839, 227 S.E.2d 802, 805 (1976). For an early judicial discussion of an attorney's duty to research, see *Citizens' Loan, Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 23 N.E. 1075, 1075-76 (1890).

27. *E.g.*, *Kirsch v. Duryea*, 21 Cal. 3d 303, 308, 578 P.2d 935, 938, 146 Cal. Rptr. 218, 222 (1978); *Cook v. Clausing*, 73 Wn. 2d 393, 394-95, 438 P.2d 865, 866 (1968). See also *Student Symposium*, *supra* note 18, at 6. *Cf. Smith v. Lewis*, 13 Cal. 3d 349, 359, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 627 (1975) ("[A]n attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys. . . .").

28. "Specialization is significant only in the context of the standard of care." R. MALLEN & V. LEVIT, *supra* note 8, at 175. Recognition of specialization usually results in an alteration of the standard of care applicable to general practitioners as well as specialists. For example, medical practitioners have been found liable for malpractice if they fail to refer patients to specialists when a need for specialized treatment is apparent. *Seneris v. Hass*, 45 Cal. 2d 811, 291 P.2d 915 (1955); *Benson v. Dean*, 232 N.Y. 52, 133 N.E. 125 (1921). See *King v. Flamm*, 442 S.W.2d 679 (Tex. 1969) (reversing a summary judgment for defendant general practitioner). See generally *McCoid, The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 597 (1959); *Student Symposium*, *supra* note 18, at 20; Comment, *Specialization: The Resulting Standard of Care and Duty to Consult*, 30 BAYLOR L. REV. 729, 737 (1978) [hereinafter cited as *Resulting Standard of Care*]; *Attorney Malpractice*, *supra* note 22, at 1304.

29. Attorneys are very properly held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians and surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions. *Citizens' Loan, Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 23 N.E. 1075, 1075 (1890). *Accord*, *Theobald v. Byers*, 193 Cal. App. 147, 13 Cal. Rptr. 864, 866 (1961); *Slade v. Harris*, 105 Conn. 436, 135 A. 570, 572 (1927); *Olson v. North*, 276 Ill. App. 457 (1934); *Cook v. Irion*, 409 S.W.2d 475, 477 (Tex. Civ. App. 1966). See generally *Schnidman & Salzler, The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist?*, 45 U. CIN. L. REV. 541, 548 (1976); *Zelle & Stanhope, Lawyer Malpractice: The Boom-*

Duty to Refer

Prior to *Horne v. Peckham*, the courts were, nevertheless, reluctant to extend the duty to refer to attorneys.³⁰ This reluctance was, in part, attrib-

erang Principle, 13 TRIAL 16 (1977). For a case discussing the physician's duty to refer, see *King v. Flamm*, 442 S.W.2d 679 (Tex. 1969).

Although medical specialists are held to a higher standard of care than the general practitioner, the courts have not generally imposed a similar standard on legal specialists. Nevertheless, in *Wright v. Williams*, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975), the California Supreme Court indicated that an attorney who holds himself out as a specialist in maritime law may be held to a higher standard of care:

One who holds himself out as a legal specialist performs in similar circumstances to other specialists but not to general practitioners of the law. We thus conclude that a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field.

Id. at 810, 121 Cal. Rptr. at 199.

30. The only judicial statement prior to *Horne v. Peckham* suggesting that an attorney has a duty to refer or consult—in the malpractice context—was found in the intermediate appellate court's opinion in *Lucas v. Hamm*, 11 Cal. Rptr. 727, 731 (1961):

[T]he law today has its specialties, and even as the general practitioner in medicine must seek the aid of the specialist in his profession, so the general practitioner in law, when faced with a problem beyond his capabilities, must turn to the expert in his profession to the end that his client is properly served.

The California Supreme Court vacated on other grounds without discussing the duty to consult. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962). For a critical analysis of the California Supreme Court's decision in *Lucas v. Hamm*, see Note, 81 L.Q. REV. 478, 481 (1965) ("The standard of competence in California thus seems to be that it is not negligent for lawyers to draft wills knowing little or nothing of the rule against perpetuities, and without consulting anyone skilled in the rule. . . ."). As one commentator observed, "Notwithstanding their frequent statements that attorneys occupy a position with respect to those they serve similar if not identical to that of members of the medical profession, the courts have treated attorney malpractice suits as *sui generis*." *Attorney Malpractice*, *supra* note 22, at 1311-12.

In the context of professional discipline, as opposed to professional malpractice, attorneys have been held to a standard that specifically includes a duty to "associate." Disciplinary actions are governed by state-adopted rules, which are based on the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE] in every state but California. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 632 (1978); see ABA STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE 1 (1977). Disciplinary Rule 6-101(A)(1) of the current version of the Model Code provides: "A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." In *Florida Bar v. Gallagher*, 366 So. 2d 397 (Fla. 1978), the respondent attorney entered a conditional plea of guilty for admittedly violating, *inter alia*, DR 6-101(A)(1) of the Code of Professional Responsibility of the Florida Bar by accepting a maritime personal injury case with knowledge that he was not competent to handle the case. California recently adopted a rule that parallels ABA CODE DR 6-101(A)(1):

A member of the State Bar shall not wilfully or habitually

(1) Perform legal services for a client . . . if he knows . . . that he does not possess the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services . . . unless he associates or . . . consults another lawyer who he reasonably believes does possess the requisite learning and skill. . . .

CAL. BUS. & PROF. CODE § 6076 (West Supp. 1980) (Rule 6-101). See Flynn, Webster & Swartz, *Legal Ethics and Professional Responsibility in California*, 7 Sw. U.L. REV. 603 (1975). See also note 70 *infra*.

utable to underlying differences between the two professions and a general presumption that all lawyers are capable of handling all legal matters.³¹ The presumption that lawyers have the capacity for omniscience, however, is being eroded by the ever increasing complexity of the law.³²

Paralleling the growing complexity of the law are the demand for more competent professional services³³ and the resulting increase in malpractice litigation.³⁴ In view of these progressions, the expansion of the standard of care to include a specific duty to refer represents a significant development in the area of legal malpractice.

III. THE *HORNE* COURT'S REASONING

Defendant Peckham contended that an attorney who is a general practitioner has no duty to refer a client to a specialist.³⁵ Peckham alleged that it was therefore reversible error for the trial court to have given the jury an instruction imposing a duty to refer.³⁶ The allegedly erroneous instruction, ordinarily given in medical malpractice cases,³⁷ stated that a general

31. See *Schnidman & Salzler*, *supra* note 29, at 548:

The reluctance of courts to extend the duty to consult to the legal profession stems from a belief that all attorneys are competent to handle *all* legal matters. Today, this presumption, coupled with the complexity of the law, is highly tenuous. It is obvious, for example, that the general practitioner does not possess detailed knowledge of the intricacies and exceptions of federal taxation law, securities regulation, or antitrust law. When presented with such problems, it therefore would seem incumbent upon the general practitioner to refer his clients to attorneys possessing the requisite knowledge.

32. See Cheatham, *The Growing Need for Specialized Legal Services*, 16 VAND. L. REV. 197 (1963); *Resulting Standard of Care*, *supra* note 28, at 737.

33. See *Schnidman & Salzler*, *supra* note 29, at 541: "The relatively secure domain of the professional in our society recently has been jeopardized by increased attacks upon his competence. His once favored position gradually is being undermined by unyielding public demand for unparalleled competency and efficiency."

It has been suggested that "[m]ore competent clients are demanding more competent legal assistance." Petrey, *Professional Competence and Legal Specialization*, 50 ST. JOHNS L. REV. 561, 561 (1976).

Lawyers are facing a new phenomenon: more competent clients. American citizens are becoming better educated consumers and are demanding more information about the services they buy. They also are recognizing, more than ever before, the growing need for effective legal advice and representation in a complicated society where redemption of legal rights and benefits is a regular event for nearly everyone, rich and poor alike.
Id. See Gillen, *Legal Malpractice*, 12 WASHBURN L.J. 281 (1973).

34. See R. MALLIN & V. LEVIT, *supra* note 6, at § 6 (including graphs depicting the relative frequency of legal malpractice actions in the United States from 1799 to 1979 and the relative frequency of malpractice actions by state during 1900-1976 and during 1960-1976).

35. 97 Cal. App. 3d at 414, 158 Cal. Rptr. at 720.

36. *Id.*

37. *Id.*

practitioner has a duty to refer a client to a specialist, or to recommend a specialist's assistance, if a reasonably prudent attorney would have done so under similar circumstances.³⁸ The applicability of the instruction to legal malpractice presented "an issue of first impression."³⁹

In approving the jury instruction, the *Horne* court rejected Peckham's contention that, since California did not officially recognize specialists until 1973, an attorney could not have had a duty to refer in 1967.⁴⁰ Despite the absence of official recognition, the court concluded that legal specialists did exist in 1967.⁴¹ To support this conclusion, the court cited a 1968 California survey, revealing that two-thirds of all California attorneys had "limited their practice to a very few areas, frequently to one only."⁴²

Furthermore, the court reasoned, taxation was one of the first areas to be recognized as a legal specialty in California⁴³ and elsewhere.⁴⁴ The court noted that defendant Peckham himself admitted that tax specialists existed in 1967 when he advised his client that he was not a tax expert.⁴⁵ Acknowledging that the existence of a specialty does not require referral to a specialist in every case, the *Horne* court remarked: "Many tax matters are so generally known that they can well be handled by general practitioners."⁴⁶

Having thus reasoned that tax specialists did exist in 1967 and that Peckham himself recognized his need for expert assistance, the *Horne*

38. The instruction given to the jury stated:

It is the duty of an attorney who is a general practitioner to refer his client to a specialist or recommend the assistance of a specialist if under the circumstances a reasonably careful and skillful practitioner would do so.

If he fails to perform that duty and undertakes to perform professional services without the aid of a specialist, it is his further duty to have the knowledge and skill ordinarily possessed, and exercise the care and skill ordinarily used by specialists in good standing in the same or similar locality and under the same circumstances.

A failure to perform any such duty is negligence.

Id. at 414, 158 Cal. Rptr. at 720.

39. *Id.* at 415, 158 Cal. Rptr. at 720.

40. *Id.* at 414–15, 158 Cal. Rptr. at 720.

41. *Id.*

42. *Id.* at 414, 158 Cal. Rptr. at 720, citing Committee on Specialization, *Results of Survey on Certification of Specialists*, 44 J. ST. B. CAL. 140, 143 (1969).

43. 97 Cal. App. 3d at 415, 158 Cal. Rptr. at 720 (taxation one of first three recognized specialties in California) (citing Casey, *Annual Report of the Board of Governors*, 51 CAL. ST. B.J. 549, 555 (1976)).

44. 97 Cal. App. 3d at 414–15, 158 Cal. Rptr. at 720, citing R. MALLEN & V. LEVIT, *supra* note 8, at 368.

45. 97 Cal. App. 3d at 415, 158 Cal. Rptr. at 720.

46. *Id.*

court held that it was not reversible error for this trial court to have given the "medical malpractice" instruction.⁴⁷

IV. ANALYSIS OF THE COURT'S REASONING

A. *Recognition of De Facto Specialization*

The court's first step in approving the jury instruction ordinarily given only in medical malpractice cases was recognition of de facto specialization.⁴⁸ Peckham asserted that he owed no duty because his conduct should be judged according to the law as it existed in 1967—before specialists were officially recognized in California.⁴⁹ Although Peckham's assertion was correct,⁵⁰ he incorrectly assumed that the lack of official recognition was conclusive in determining whether or not there were specialists to whom he could have referred his client. The court accurately characterized the debate over whether specialists existed as "academic" because many lawyers did in fact specialize.⁵¹ The existence of specialists in 1967, however, did not ipso facto create a corresponding duty to refer.⁵²

B. *Analogy to Medical Profession*

The second step in the court's reasoning should have been a critical evaluation of the similarities and differences between the medical and legal professions. Instead, the court concluded, without explaining its rationale, that the attorney's standard of care with respect to referral is identical to that of the physician.⁵³

Prior to *Horne v. Peckham*, courts were reluctant to apply the stricter standards of care developed in medical malpractice to legal malpractice

47. *Id.*

48. See notes 40–42 and accompanying text *supra*.

49. 97 Cal. App. 3d at 414, 158 Cal. Rptr. at 720.

50. See *Smith v. Lewis*, 13 Cal. App. 3d 349, 356, 530 P.2d 589, 593, 118 Cal. Rptr. 621, 625 (1975) ("We cannot, however, evaluate the quality of defendant's professional services on the basis of the law as it appears today.").

51. 97 Cal. App. 3d at 414, 158 Cal. Rptr. at 720 (citing *R. MALLEN & V. LEVIT*, *supra* note 8, at 172 ("The reality is that many attorneys have become specialists")). See *Resulting Standard of Care*, *supra* note 28, at 729 ("Whether recognized officially or unofficially by a state bar, specialization has always existed within the legal profession and is certain to become the public's primary means of assessing the qualifications of a legal representative.") (footnote omitted).

52. See 97 Cal. App. 3d at 415, 158 Cal. Rptr. at 720; note 68 and accompanying text *infra*.

53. The court's conclusion that attorneys and physicians owe the same duty to refer was implicit in the court's approval of the jury instruction ordinarily given only in medical malpractice cases. 97 Cal. App. 3d at 414–15, 158 Cal. Rptr. at 720. See notes 37 & 38 and accompanying text *supra*.

actions.⁵⁴ This reluctance was attributable, at least in part, to differences between the two professions.⁵⁵ First, attorneys are rarely confronted with life and death situations, such as physicians often encounter.⁵⁶ Second, attorneys have not generally undergone additional training, as have medical specialists.⁵⁷ Finally, and most significantly to *Horne v. Peckham*, attorneys traditionally have not been certified to practice in specialized areas.⁵⁸

As a result of medicine's highly developed board certification programs,⁵⁹ a physician who recognizes a need to refer to a specialist is better able to select a qualified specialist with a particular expertise.⁶⁰ Because board certification in medicine is widespread and well-established,⁶¹ medical specialists are known to their colleagues by their certified area of expertise.⁶²

In most states,⁶³ general practitioners in law, recognizing a similar

54. See note 30 and accompanying text *supra*.

55. See *Resulting Standard of Care*, *supra* note 28, at 735–36; *Standard of Care*, *supra* note 21, at 786.

56. Nonetheless, as one commentator observed, “an attorney can not only considerably affect the economic quality of life, but a criminal specialist is quite often involved in life or death decisions.” *Resulting Standard of Care*, *supra* note 28, at 736.

57. See generally Stall & Baer, *Legal Versus Medical Training, or Are Lawyers and Their Clients Missing Out?*, 49 N.Y. St. B.J. 568 (1977).

58. See R. MALLEEN & V. LEVIT, *supra* note 8, at 33–36.

59. Medicine with its highly developed system of certification is a striking analogy. In 1959 it had examining and certifying boards in nineteen specialties, which over the preceding eighteen years had granted 77,447 certificates of proficiency. There was no hasty growth of certification. The first board was created in 1915, the second nine years later in 1924, and most originated in the 1930's. So the system, growing slowly at first, developed only after its usefulness was proven. There are criticisms of the operation of the system and warnings lest the specialist become a mere narrow technician. There is no thought, however, of abolishing specialties and of returning to a system under which all physicians would be general practitioners. While medicine is a striking analogy, it may not be a close one. Medicine and law differ greatly in the development and precision of the underlying sciences, in the facilities for post-graduate work under supervision, and in the methods of practice. It would be impossible to transfer the system of medical certification to law, and law must work out its own system.

Cheatham, *supra* note 32, at 502 (footnotes omitted).

60. For example, a physician general practitioner could consult the Directory of Medical Specialists to locate a board certified specialist (with a particular expertise). See AMERICAN BOARD OF MEDICAL SPECIALTIES, *DIRECTORY OF MEDICAL SPECIALISTS* (1979–1980). Additionally, a general practitioner in medicine may consult this directory to verify the certification of a specialist whose name was given to him by a colleague. No such directory is available to attorneys. *But see* note 64 *infra*.

61. See note 59 *supra*.

62. See note 60 and accompanying text *supra*.

63. By June 1980, only ten states (Alaska, Arizona, California, Michigan, Missouri, Nevada, New York, South Carolina, Texas, and Washington) had adopted and implemented board certification programs. ABA STANDING COMM. ON SPECIALIZATION, *INFORMATION BULLETIN* NO. 7, at 36–42 (1980). For a description of board certification in California, see note 66 *infra*. Nine states (Alabama, Arkansas, Connecticut, Florida, Georgia, Iowa, Louisiana, Nebraska, and New Mexico) had adopted

need to refer to a specialist, would have to rely primarily on rumored reputation to select a qualified attorney with a particular expertise.⁶⁴

One can criticize Peckham for creating a Clifford trust when he admittedly doubted his own competence to do so.⁶⁵ Nonetheless, one can also appreciate the difficulty he would have encountered if he had tried to refer his client to a competent tax expert in 1967.⁶⁶ In the absence of any certification program, there was no guarantee that an attorney who had a reputation as a tax attorney was actually competent in that field.

If attorneys are held to a standard of care that includes a duty to refer, then the legal profession must develop and control specialization in order that competent legal specialists can be identified by the general practitioners.⁶⁷

“designation” or “identification” (self-designation) programs. *Id.* For a description of Florida’s designation plan and New Mexico’s identification plan, see note 67 *infra*. Three states (Kentucky, Ohio, and Oklahoma) had adopted “combination” (certification and designation) plans. Additionally, two states (Indiana and Tennessee) had implemented specialization programs based on the ABA Model Plan.

Even in those states that have implemented designation or identification plans, there is little assurance that the attorneys who have designated or identified the areas in which they practice are actually competent in those areas. See note 67 *infra*.

64. An attorney in a state without officially recognized specialization could consult the American Bar Association (ABA) Directory to find the names of individuals in leadership positions in the ABA’s taxation section. See AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION 1980/81 DIRECTORY E-127-34 (1980). Participation in the taxation section, however, is based on payment of dues, political considerations, and mutual interests. Participation is not based on certification and qualification.

65. See generally note 6 and accompanying text *supra*.

66. California did not implement its board certification program for lawyers until 1973. *Standards for Specification Announced*, 48 CAL. ST. B.J. 80, 80 (1973). The requirements for qualifying as a specialist under the certification program include: required period of law practice, substantial involvement in the specialty area, examination, peer rating, and continuing legal education. See Kovacs, *New Standards Set for Certification and Recertification of Legal Specialists*, 50 CAL. ST. B.J. 309 (1975); *Rules and Regulations of the California Board of Legal Specialization January 1974*, 49 CAL. ST. B.J. 170 (1974).

67. The American Bar Association began studying specialization in 1952, and in 1953 the Committee on Continuing Specialized Legal Education “acknowledged the necessity for regulating voluntary specialization. Because of vigorous opposition, the subject was dropped.” Fromson, *Let’s Be Realistic About Specialization*, 63 A.B.A.J. 74, 75 (1977).

A new committee, the Special Committee on Recognition and Certification of Specialization in Law Practice, was formed but, following opposition to the Committee’s proposal for basic criteria, their proposal was “shelved.” *Id.* In 1967 the Committee concluded that “recognition and regulation of specialization . . . will measurably improve the availability of legal services. . . .” *Id.* Although the ABA’s House of Delegates did not support this conclusion, another committee was created by the Board of Governors to develop a specialization plan. This Committee on Specialization encouraged states to develop pilot programs in 1969, but in 1974 the Committee reversed itself and urged states to refrain from implementing pilot programs until the Committee had evaluated the existing programs. *Id.*

Three representative pilot programs include: California’s “certification” program (see note 66 *supra*); Florida’s “designation” plan; and New Mexico’s “identification” program.

C. *Differentiation between "Specialist" and "Generalist" Cases*

The third step in the court's analysis should have been a discussion of how to distinguish a case that should be referred to a specialist from one that can be handled by a general practitioner. Although the court acknowledged that not every tax case must be referred to a specialist,⁶⁸ no attempt was made to establish guidelines for distinguishing specialist cases from generalist cases.⁶⁹

The starting point for establishing guidelines could have been an examination of the alternatives available to an attorney who recognizes a lack of competence to handle a particular matter. In addition to being able to refer the client to a specialist, the attorney may, with the client's consent, associate or consult an attorney who does possess the requisite ex-

Under Florida's "designation" plan, which was implemented in 1976, an attorney may designate the areas of law in which he practices. As originally adopted, there was "little policing by the bar and few meaningful requirements other than the . . . requisite of ten hours of continuing legal education per year after the attorney self-designates." Wells, *Certification in Texas: Increasing Lawyer Competence and Aiding the Public in Lawyer Selecting*, 30 BAYLOR L. REV. 689, 689 (1978). See INTEGRATION RULE OF THE FLORIDA BAR art. XXI, reprinted in 50 FLA. B.J. 11, 41 (September 1976); By-Laws Under the Integration Rule art. XVII, reprinted in 50 FLA. B.J. 42, 53-56 (September 1976). The plan was subsequently amended to require stricter entry requirements (e.g., continuing legal education requirement prior to applying for designation). Bylaws Under the Integration Rule art. XVII, reprinted in 53 FLA. B.J. 51, 60-63 (September 1979). The Florida Bar also has a certification plan pending in the Florida Supreme Court. ABA STANDING COMM. ON SPECIALIZATION, INFORMATION BULLETIN No. 7, at 37 (1980).

A lawyer in Florida may designate the areas in which she practices on her letterheads and professional cards and in telephone directories and legal lists. Fromson, *supra*, at 76.

New Mexico adopted an "identification" program in 1973. "[A]n attorney becomes entitled to listing in the . . . telephone directory, on letterheads and business cards, and in recognized law lists as a specialist on his assurance to the New Mexico Board that he has spent at least 60 percent of his time in that field [during the five immediately preceding years]." *Id.* Additionally, an attorney who does not qualify under the identification requirements may advertise in telephone directories and legal lists that his "practice is limited to [field]." *Id.* (brackets in original).

The New Mexico Bar, as well as the Florida Bar, "indicates to the public that it is not seeking to measure competence by specialty designations." *Id.*

The ABA House of Delegates adopted the "Model Plan for Specialization" in 1979, which outlines the recommended minimum criteria for states desiring to implement specialization programs. By April 1980, ten states had proposed adoption of the Model Plan with revisions. (Interview with George Stephens, Chairman, ABA Standing Committee on Specialization, by telephone, April 17, 1980).

See generally Petrey, *Professional Competence and Legal Specialization*, 50 ST. JOHN'S L. REV. 561 (1976); Fromson, *The Challenge of Specialization: Professionalism at the Crossroads*, N.Y. ST. B.J. 540 (1976); Bucklin, *Change Is Always a Shock: Is There Some Other Reason You Resist Controlling Specialization?*, 50 N.D.L. REV. 169 (1973).

68. 97 Cal. App. 3d at 415, 158 Cal. Rptr. at 720 ("Of course, the fact that the specialty exists does not mean that every tax case must be referred to a specialist. Many tax matters are so generally known that they can well be handled by general practitioners.").

69. The court merely concluded that Peckham should have referred this case, because he "himself acknowledged his need for expert assistance throughout his testimony. . . ." *Id.*

pertise.⁷⁰ Another alternative is to conduct the research necessary to handle the client's case proficiently.⁷¹

1. The Need for Self-Appraisal in Determining Whether to Refer

Determining which alternative is appropriate requires an honest self-appraisal in light of the complexity of the client's legal problem.⁷² For attorneys, appraisal of their own competence is often difficult because of an ingrained assumption of a capacity for omnicompetence.⁷³ Lawyers often assume that given enough time they can resolve any legal matter.⁷⁴ Although this assumption is being eroded by the increasing complexity of

70. See note 30 *supra* (ABA CODE DR 6-101(A)(1) and CAL. BUS. & PROF. CODE § 6076 (West Supp. 1980) (Rule 6-101) reproduced). Although the Disciplinary Rules of the Code of Professional Responsibility apply to disciplinary rather than to malpractice actions, "any lawyer representing a client in a malpractice action in a jurisdiction adopting this Code who does not contend that the Code in fact sets a standard to be applied in malpractice cases will himself probably be demonstrating a lack of competence." Thode, *Canons 6 and 7: The Lawyer-Client Relationship*, 48 TEX. L. REV. 367, 377 (1970). See generally Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281 (1979).

71. However, the attorney should not so educate herself if such preparation would result in unreasonable delay or expense to her client. Ethical Consideration 6-3 of the Code of Professional Responsibility provides in pertinent part:

[A] lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client.

ABA CODE EC 6-3.

72. See Wilkins, *Malpractice and the Under-Informed Lawyer or What You Don't Know May Really Hurt You After All*, 44 INS. COUNSEL J. 333 (1977).

73. Ingrained assumptions of the omnicompetence of the lawyer may at first make [the need for legal specialists] difficult for clients to grasp. In medicine the patient who is told by the general practitioner that he needs the services of a specialist too, will accept this as a mark of the care of his physician. In law the client given this advice may take it as proof of the incompetence of his lawyer. The same assumptions of omnicompetence, by lawyers themselves, may for a time make generalists resent a plan that seems to reflect on their ability to handle their clients' cases.

Cheatham, *supra* note 32, at 504. See Houser, *supra* note 21, at 210 ("The old adage, 'a jack-of-all-trades but a master of none,' is more applicable to the legal profession, perhaps, than to any other. The failure of the attorney to recognize his own limitations has been the cause of much fruitful litigation.").

74. Lawyers . . . continue to muddle through and insist that given enough time they can do every job well. Would you be willing to pay a doctor to muddle through specialist's jobs as a part of a general practice, or pay the doctor for "reading up" instead of referring you to a specialist?

Bucklin, *Change Is Always a Shock: Is There Some Other Reason You Resist Controlling Specialization?*, 50 N.D.L. REV. 169, 170 (1973). See also ABA CODE EC 6-3 (reproduced in part in note 71 *supra*).

Duty to Refer

the law,⁷⁵ it still persists,⁷⁶ and when an attorney performs services beyond his competence, the client pays either for the lawyer's learning time⁷⁷ or for the lawyer's mistakes.

Once an attorney has honestly appraised her competence, she should balance the benefits and risks of continued representation.⁷⁸ If a lawyer assesses her own competence and believes that she can competently perform the requisite services without undue delay, expense, or risk to the client, she should continue to represent the client. If she determines that the client's problem is beyond her capacity, but that she could perform the services with assistance, with the client's approval she should "associate" or consult another lawyer who possesses the necessary skill and learning. If the lawyer discovers that continued representation would result in undue expense or increased risk, she should refer the client to an attorney whom she reasonably believes can competently resolve the client's problem.⁷⁹

2. *The Need for Expert Testimony in Establishing Liability for Failure to Refer*

Although self-appraisal will better enable the attorney to determine whether or not to refer a client to a specialist, it will not aid the judge or jury in determining whether the attorney's actions fell below the requisite standard of care.

In medical malpractice actions, the plaintiff must introduce expert testimony to establish the standards of practice.⁸⁰ The majority rule in legal

75. See *Resulting Standard of Care*, *supra* note 28, at 737. See generally Schnidman & Salzler, *supra* note 29, at 548; Bucklin, *supra* note 74, at 169. One legal scholar has stated:

All of the immense and continuing developments in other fields of knowledge may be of importance and find reflection in law. They have made law so diverse in subject and so developed in detail that no lawyer can have an adequate working or even beginning knowledge of the law on all the matters that may naturally come into the office of the general practitioner.

Cheatham, *supra* note 32, at 498.

76. See *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979).

77. A lawyer today cannot "acquire an adequate working knowledge of the law on all [diverse subjects] in a length of time that will make practicable fees which are fair both to the client and to the lawyer." Cheatham, *supra* note 32, at 498. See generally ABA CODE EC 6-3 (reproduced in part in note 71 *supra*).

78. Cf. Hirsh, *Duty to Consult and Refer*, 1977 LEGAL MEDICINE ANNUAL 249, 249-50 (guidelines for physicians).

79. See ABA CODE EC 6-3 (reproduced in part in note 71 *supra*).

80. The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by particular circumstances is within the common knowledge of the layman.

Sinz v. Owens, 33 Cal. 2d 749, 205 P.2d 3, 5 (1949) (citations omitted). See *Canterbury v. Spence*,

malpractice actions, however, is to admit, but not require, expert testimony by other attorneys on the applicable standard of care in order to establish a prima facie case.⁸¹

Without the aid of expert testimony, it is unclear how a jury of laymen can determine whether a reasonably prudent legal general practitioner would have referred the matter to a specialist under similar circumstances.⁸² Moreover, even if the jury is able to determine that the attorney failed to perform her duty to refer, it is not discernible how the jury is to determine whether the attorney exercised the skill and diligence ordinarily displayed by specialists in that area.⁸³

Thus, a plaintiff in a legal malpractice action based on negligent failure to refer should be required first to introduce expert testimony by general practitioners to establish that the reasonably prudent generalist would have referred the matter to a specialist. Then the plaintiff should be required to produce expert testimony by a legal specialist to establish the standard of care of the reasonably prudent specialist.

Under this approach, the lawyer would be found liable only if the jury determined (1) that she had failed to fulfill a duty to refer and (2) that in undertaking to perform the specialist services she failed to exercise the care and skill ordinarily displayed by specialists.⁸⁴

464 F.2d 772, 791-92 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *Cobbs v. Grant*, 8 Cal. 3d 229, 236, 502 P.2d 1, 5, 104 Cal. Rptr. 505, 509 (1972); *Douglas v. Bussabarger*, 73 Wn. 2d 476, 478, 438 P.2d 829, 831 (1968).

81. See, e.g., *Rhine v. Haley*, 238 Ark. 72, 378 S.W.2d 655, 661-62 (1964); *Starr v. Mooslin*, 14 Cal. App. 3d 988, 997-99, 92 Cal. Rptr. 583, 587-88 (1971) (*overruling* *Gambert v. Hart*, 44 Cal. 542 (1872)); *Cochrane v. Little*, 71 Md. 323, 18 A. 698, 701 (1889). See generally *Standard of Care*, *supra* note 21, at 779; *Student Symposium*, *supra* note 18, at 15-16 ("In cases where no expert evidence need be introduced, judges apparently rely on their own expertise to establish the standard of care and to advise the jury on the amount of deviation needed to incur liability. The court's own knowledge is considered as sufficient as expert testimony." *Id.* at 16). *But see* *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966) (applying Illinois law); *Wright v. Williams*, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194, 200 (1975) (expert testimony required to define standard of care of maritime specialist); *Hughes v. Malone*, 146 Ga. App. 341, 237 S.E.2d 107, 111 (1978); *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 313 N.E.2d 180, 182 (1974); *Baker v. Beal*, 225 N.W.2d 106, 112-13 (Iowa 1975); *Walters v. Hastings*, 84 N.M. 101, 500 P.2d 186, 192 (1972) (contract case, not malpractice; expert testimony still required).

82. See *Standard of Care*, *supra* note 21, at 780:

It is not discernible how a jury of laymen, without the aid of such testimony, could determine whether an attorney had exercised the care of the average member of his profession. In view of the complexity of law and of legal practice, the confusion would be great in many cases . . . if the jury were permitted to rely solely upon its own knowledge and experiences.

83. See note 38 and accompanying text *supra* (allegedly erroneous jury instructions).

84. *Id.*

V. CONCLUSION

The significance of *Horne v. Peckham* lies not in the malpractice liability of one attorney for failing to refer his client to a tax specialist. Rather, it is significant in view of its implications for the entire legal profession. If attorneys are to be held to a standard of care that includes a specific duty to refer, the profession must meet its obligation by developing and controlling specialization so that general practitioners can identify competent legal specialists.

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