Attorney Malpractice: Problems Associated with Failure-to-Appeal Cases

Justin Stillwell White

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ATTORNEY MALPRACTICE: PROBLEMS ASSOCIATED WITH
FAILURE-TO-APPEAL CASES

INTRODUCTION

Legal malpractice, designated a cause of action in contract or tort, has taken on new dimensions as disappointed clients have attempted to hold their former attorneys responsible for an increasing variety of acts and omissions. Faced with the task of ad-


As an action in contract, the legal malpractice claim has several distinct elements: (i) attorney-client relationship, (ii) express or implied agreement that the client will pay a fee for services rendered, (iii) failure to achieve the contracted-for result, and (iv) damages. Implicit in any such “contract” is the condition that the attorney will exercise professional skill and diligence. See R. MALLEN & V. LEVIT, supra, at 104-07, wherein the authors discuss the amenability of contract analysis to tort theory.


Attorney malpractice as a tort action consists of four basic elements: (i) the duty to use such skill, prudence, and diligence as would the “reasonable attorney,” (ii) breach of duty of care, (iii) proximate cause between the negligent act or omission and harm to the plaintiff, and (iv) actual loss or harm to the plaintiff. For a discussion of these elements, see Wade, supra, at 757-72.


4. Several cases stand out as novel and unsuccessful attempts. In Banerian v. O'Malley, 42 Cal. App. 3d 604, 116 Cal. Rptr. 919 (1974), the court held that an attorney who defended
judicating such claims, courts have had to develop rules and legal doctrines designed to resolve the procedural and substantive issues presented. Typically, these decisions have emphasized the use of traditional tort theories, similar to the analysis used in medical

vendors in a suit by purchasers for recission owed no duty to inform the property insurer of an impending suit.

In Sherbak v. Doughty, 72 A.D.2d 548, 420 N.Y.S.2d 725 (2d Dep't 1979), that portion of a malpractice complaint seeking damages for emotional pain and suffering allegedly arising from the lawyer's mismanagement of the client's case was dismissed as a matter of law. Accord, Fox v. Issler, 77 A.D.2d 860, 431 N.Y.S.2d 69 (2d Dep't 1980).

Failure to do that which professional duty requires has also been the gravamen of unusual, and dismissed, complaints. For example, a California humane society brought an action against the attorneys of a decedent who had drawn a will under the latter's directions. While the will provided for bequests to societies for the protection of animals, plaintiffs were not beneficiaries. In alleging malpractice, they contended that the defendant lawyers had a duty to draft the will with such a degree of specificity so as to include them as legatees. Ventura County Humane Soc'y v. Holloway, 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974).

In Vitale v. Coyne Realty, Inc., 66 A.D.2d 562, 414 N.Y.S.2d 388 (4th Dep't 1979), the defendant attorney represented buyers in the sale of real property, after a contract of sale had been finalized. Plaintiffs claimed that the lawyer failed to advise them of the feasibility of their financial investment. The court said, "[a]n attorney has no duty to advise as to the feasibility of a financial investment after his client has contracted for the purchase." Id. at 567, 414 N.Y.S.2d at 392 (emphasis added).

5. With respect to determining the probable success or failure of any allegedly mishandled litigation, a relevant inquiry becomes: "what procedure should the malpractice trial court follow to conduct its 'suit within a suit'?" See Coggin, Attorney Negligence . . . A Suit Within A Suit, 60 W. Va. L. Rev. 225, 234 (1958).

Where the question is whether the attorney has breached an implied or express contract, or a duty not connected with the conduct of litigation per se, the admission of expert evidence as to the standard of care becomes a lively issue. See Breslin & McMonigle, The Use of Expert Testimony in Actions Against Attorneys, 43 Ins. Coun. J. 119 (1980).

6. Among the many substantive issues present in attorney malpractice, several stand out, such as whether deviation from any standard of professional conduct is a question of law or of fact (see Note, Standard of Care in Legal Malpractice, 43 Ind. L.J. 771, 776-81 (1968)) and whether specialization should be recognized as a basis for holding attorneys to a higher standard of care. See Schmidman, The Collateral Effects of Legal Specialization on the Applicable Standard of Care as it Relates to the Duty to Consult and to Advise, 6 Ohio N.U.L. Rev. 666 (1979).

7. Whether the action is characterized as one in tort or contract may have significant consequences with respect to the statute of limitations for malpractice claims. Generally, the period of limitation is shorter for an action in negligence than for one in contract. The New York malpractice statute of limitations, for example, is three years (see N.Y. Civ. Prac. Law § 214 (McKinney 1982)), whereas the time for filing contract complaints is six years. See N.Y. Civ. Prac. Law § 213 (McKinney 1982). See Central Trust Co. v. Goldman, 70 A.D.2d 767, 417 N.Y.S.2d 359 (4th Dep't 1979) (attorney malpractice action characterized as sounding in contract because harm was caused by fraud of attorney). But see Johnson v. Gold, 71 A.D.2d 1056, 420 N.Y.S.2d 816 (4th Dep't 1979) (malpractice action involving negligence came within the purview of malpractice statute of limitations). See also Cal. Civ. Proc.
malpractice actions. Legal malpractice litigation, however, has occasioned the growth of distinct hybrid legal concepts which attempt to deal with complex questions of negligence in the context of the legal profession.

One of the more difficult questions involved in a legal malpractice action concerns causation. After a plaintiff shows that a duty has been breached by the attorney, he must demonstrate that “but for” such negligence, he would have obtained a more favorable result. In cases where the negligence alleged involves the mishandling of a trial or a procedural misstep taken while performing routine legal services, the plaintiff’s burden of persuasion is relatively simple. The trial court hearing the malpractice claim merely retries, or tries for the first time, the plaintiff’s cause of action which he asserts was lost or compromised by his attorney’s negligence, and then decides whether the plaintiff would have fared substantially better “but for” such mishandling.


9. This Comment concerns civil legal malpractice as distinguished from criminal malpractice. While the latter raises significant and provocative issues (see, e.g., People v. Salquerro, 73 A.D.2d 56, 433 N.Y.S.2d 711 (1st Dep’t 1980) (discussion of attorney’s duty to make court record of client’s perjury committed against the former’s advice)), it is beyond the scope of this work. For a brief treatment of the subject, see Kaus & Mallen, The Misguiding Hand of Counsel — Reflections on “Criminal Malpractice”, 21 UCLA L. Rev. 1191 (1974).

10. For example, the lawyer’s duty to his or her client, the “reasonable attorney,” “legal incompetence,” “good faith judgment,” and “attorney malpractice.” They are derived, in part, from principles of tort law developed and applied in the context of medical malpractice. As the word “malpractice” suggests, negligence of lawyers has been termed a “dereliction from professional duty.” See Webster’s Seventh New Collegiate Dictionary 512 (1970). Concepts such as “reasonable attorney” may be viewed as simply the result of transforming the “reasonable man” of torts into a lawyer.

11. This principle was first enunciated 100 years ago in Spangler v. Sellers, 5 F. 882 (C.C.S.D. Ohio 1881). The court in Spangler stated, “[t]o entitle the plaintiff to recover for negligence he must not only show the negligence, but he must also show that damage resulted to him from such negligence. . . .” Id. at 894-95. See also Titsworth v. Mondo, 95 Misc. 2d 233, 243, 407 N.Y.S.2d 793, 798 (1978) (“[P]laintiff must establish . . . that he would have succeeded in the first action but for his attorney's malpractice.”).

12. See generally Coggin, supra note 5.

13. See, e.g., Cline v. Watkins, 66 Cal. App. 3d 174, 135 Cal. Rptr. 838 (1977); Carpen-
In cases involving an attorney's alleged failure to perfect an appeal, however, the burden of proving causation can be far more difficult. The main inquiry becomes whether the frustrated client would have been successful on appeal, "but for" his or her attorney's negligence. Thus, not only must the court determine what should have happened at trial, but, in addition, how a higher court would have ruled on appeal.

This Comment examines legal malpractice law in failure-to-appeal cases. Such cases are significant because of the novel issues of fact and law presented as well as the conflicting results reached by the various courts. The main emphasis involves a discussion of the plaintiff's burden of proof. Special effort has been made to analyze the types of evidence and methods of proof courts have considered in determining whether a disappointed client would have fared substantially better on appeal. In addition, a critique of several solutions advanced in response to the "attorney malpractice dilemma" will be made, together with a proposal for a more rational and workable standard to be employed by courts in adjudicating such claims.

I. THE PLAINTIFF'S BURDEN OF PROOF

A. Elements of Attorney Malpractice Tort

A typical failure-to-appeal case involves inadvertent error; for example, where a lawyer neglects to take an appeal within the pe-

14. See, e.g., Pusey v. Reed, 258 A.2d 460 (Del. Super. Ct. 1969) where the court remarked, "[i]n accordance with this general rule [that the plaintiff must prove negligence resulted in harm], where the negligence relied upon is a failure to take an appeal, it must be shown that, if an appeal had been taken, a more favorable result would have been reached." Id. at 461.

15. In the context of attorney malpractice litigation, the concept of causation is usually defined as "strict" proximate cause, i.e., the "but for" variety which requires judge and jury to single out the lawyer's negligence as the sole basis for the client's loss. See, e.g., Reynolds v. Picciano, 29 A.D.2d 1012, 1012, 289 N.Y.S.2d 436, 437 (3d Dep't 1969) (plaintiff must prove at trial that "but for the negligence of the attorney, the plaintiff's claim would or could have been collected"). See also Commercial Standard Title Co. v. Superior Court, 92 Cal. App. 3d 934, 943, 155 Cal. Rptr. 393, 399 (1979) ("[b]efore a client can recover for alleged negligence . . . he must establish that any loss suffered was caused solely by the negligence of the attorney"). But see Modica v. Crist, 129 Cal. App. 2d 144, 276 P.2d 614 (1954); Comment, Legal Malpractice, 27 Ark. L. Rev. 452, 462 (1973) (it would be inequitable to require a plaintiff to prove that an attorney's negligence was the sole cause of his loss).
period prescribed by statute. In *Pete v. Henderson,* the plaintiff sued his father's former attorney for failing to file a timely notice of appeal, thus losing the opportunity to have an adverse judgment reversed. The malpractice case was dismissed on the basis that no cause of action had been stated. On appeal, the California District Court of Appeal reversed, stating:

In the present case, the attorney was negligent in failing to file the notice of appeal. That is admitted. The question is, what damages were proximately caused by that negligence? Obviously, the $150 fee paid to the attorney to take the appeal was a proper item of damage. This was allowed and is not in question on this appeal. But that is not the only item of damage that appellant may have suffered. If the judgment against him for $1600 was erroneous, to the extent it would have been reversed on appeal under circumstances that would not require him to pay it, he has suffered serious damage indeed. That damage was directly and proximately caused by the negligence of the attorney. If proof of the required state of facts can be made, appellant should be able to recover the damages so suffered.

In cases such as *Pete* the facts generally reveal the existence of an attorney-client relationship and a breach of the lawyer's duty of care. It is the latter two elements of the attorney malpractice

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18. In *Pete*, the trial court ruled "not only that there was a failure of proof, but that, as a matter of law, no other damages than the attorney's fees could be recovered." *Id.* at 488, 269 P.2d at 79.
19. *Id.* at 488-89, 269 P.2d at 79.
20. A threshold question in this context is whether an attorney's agreement to represent a client includes the implied agreement to proffer an appeal from any adverse judgment. If a lawyer explicitly agrees to represent the client in the event an appeal becomes necessary, then such a contract would undoubtedly provide the basis for recovery. "[T]he terms of the retainer agreement would govern the procedure that an attorney should follow." D. MEISELMAN, supra note 1, at 253. See also *Franke v. Zimmerman*, 526 S.W.2d 257, 258 (Tex. Civ. App. 1975) (contract of employment between attorney and client normally terminates upon rendering of final judgment).
21. Insofar as any implied warranty to appeal is concerned, it has been held that an attorney is not obliged to proffer an appeal absent an express agreement to do so. See, e.g., *Lundberg v. Backman*, 11 Utah 2d 330, 358 P.2d 987 (1961); *Hey v. Simon*, 29 Ky. 315, 93 S.W. 50 (1906). But see *Young v. Bridwell*, 20 Utah 2d 332, 437 P.2d 686 (1968) (trial counsel must inform client of right to appeal).
22. A relevant issue concerning the attorney's duty in appellate practice is the standard of care applicable to such duty. Is the appellate litigation attorney a "specialist" who must be held to a higher standard of care than the "average attorney?" Or, does the widespread reluctance to recognize specialties insulate lawyers who "specialize" in appellate practice? See, e.g., Note, supra note 6, at 785-86 ("the courts have been unwilling to recognize the legal specialist").

One could argue that any standard of care applied to lawyers is more the result of im-
tort, proximate cause and damages, which present complex issues for courts to decide. While these two elements may present no great challenge when the question before the court is whether the contracted-for result was achieved or whether the property of the plaintiff was lost, the failure-to-appeal case is unique by virtue of the demands it makes upon a court to determine what would have happened if the attorney had acted diligently.

Cases involving contracts to perform non-litigation duties do not require the malpractice trial court to speculate about what would have occurred at trial, so the court can often rely either upon the agreement between the parties or upon the settled law of the jurisdiction. Even in cases where the alleged negligence concerns the failure to commence or pursue litigation, the court merely commences a suit within a suit to determine what the outcome of litigation would have been. In the failure-to-appeal cases, however, the court hearing the malpractice claim must in addition determine what decision would have been reached by an appellate

plied warranties than of specialization. In other words, an attorney's agreement to undertake work for his or her client (in this context, proffer an appeal) necessarily implies that he or she possesses the requisite skill to do so. At the very least, such an agreement assumes that the counselor knows what the procedure is or will ascertain what it is. Insofar as some degree of specialization is called for in all types of legal services, every attorney is a de facto specialist. See Childs v. Comstock, 69 A.D. 160, 74 N.Y.S. 643 (1902) (New York court recognized customs brokerage lawyer as de facto specialist).


24. For example, in the oft-cited case of Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 987 (1962), the malpractice trial court was asked to decide whether the lawyer's failure to properly employ the Rule Against Perpetuities constituted negligence, and if so, whether the would-be beneficiaries suffered any actual loss. The Supreme Court of California ruled that although the plaintiffs were in privity with the testator and his lawyer, their suit for malpractice could not succeed because "[a]n attorney of ordinary skill acting under the same circumstances might have fallen into the net which the Rule spreads for the unwary." Id. at 593, 364 P.2d at 690, 15 Cal. Rptr. at 826 (citations omitted). This result has been severely criticized. See Note, Attorney's Violation of Future Interests Statute Held Not Actionable, 14 STAN. L. REV. 580 (1962).


27. See Coggin, supra note 5.
court. This added variable makes the plaintiff’s burden of proving proximate cause and damages much more difficult than in the simple attorney malpractice suit.

B. Additional Elements Required For Failure-to-Appeal Cases

The fact that the malpractice court in a failure-to-appeal case must determine how an appellate court would have decided the underlying action requires the plaintiff to prove certain elements in order to show proximate cause. Specifically, the plaintiff must show that an appellate court would have had jurisdiction to hear the appeal, that the appellate court would have granted review when review is discretionary, and that the trial court’s judgment would have been modified on review. Although damages must be pleaded in any attorney malpractice suit, this section discusses the problems of proving damages in failure-to-appeal cases.

1. Jurisdiction. The plaintiff must prove that an appellate court had jurisdiction to hear the appeal. The very foundation of the failure-to-appeal cases rests upon the theory that there was in fact a court to which the attorney could have proffered an appeal. Whether an appellate court would have had jurisdiction depends upon the statutes defining jurisdiction and the applicable federal or state court procedures.

2. Appellate court would have granted review. In some cases the underlying action would have been justiciable only if the ap-

28. While this allegation is an essential element of the malpractice complaint, a subtle question remains as to whether the malpractice plaintiff must plead (i) that appeals to other tribunals are altogether barred (e.g., both state and federal courts are presently inaccessible to the plaintiff who would have appealed an adverse administrative decision to either court); or (ii) that the plaintiff applied for and was denied leave to appeal under a statute which permitted late appeals, such as Mass. Ann. Laws ch. 214, § 28 (Michie/Law. Co-op. 1960), cited in Note, Attorney’s Negligence: The Belated Appeal, 2 Val. U.L. Rev. 141, 153 n.78 (1967) [hereinafter cited as The Belated Appeal].

Although the first proposition might be “apparent on the face” of the lower court’s record, it is not clear that requesting remission from the tolling of a statute of limitations plays a critical role in the assessment of the plaintiff’s cause of action. Should the plaintiff be required to exhaust such remedies before proceeding against his or her attorney? This commentator suggests that he or she should be required to take such steps, where permitted, and if successful in lifting the procedural impediment, thereafter hold the former attorney liable for expenses incidental to procuring such a remedy.

29. This Comment concerns lost appeals, as distinguished from motions for a retrial, petitions for rehearing, etc., which although similar in effect, fall outside the scope of lost appeals cases.
The appellate court in its discretion granted review. The plaintiff then has the burden of proving the appeals court would have entertained his request for review. In Better Homes, Inc. v. Rogers, the plaintiff company brought a malpractice action against its former attorney for negligence in connection with the filing of an appeal. Better Homes alleged that Rogers had represented the company in an action for damages, and after losing in the trial court, agreed to proffer an appeal. Because an application for a writ of error was not made within the prescribed time period, however, and because the appellate brief Rogers filed contained no memorandum of law, the petition for review was dismissed. In alleging malpractice, Better Homes pleaded that but for this negligent handling of the case, the adverse judgment of the trial court would have been reversed by the West Virginia Supreme Court of Appeals, and Better Homes would have been relieved of the obligation of paying the original judgment entered against it.

The defendants argued that the appellate court to which Better Homes — through its attorney Rogers — would have proffered its appeal had denied over two-thirds of all applications for appeals and writs of error. Thus, while the defendants did not question the fact that the appellate court had jurisdiction to hear the appeal, they did contend that the chances of that particular court granting review to the Better Homes’ appeal were no better than one-in-three and, therefore, the judge hearing the malpractice claim should dismiss the complaint as a matter of law. They argued “[t]hat, since appellate review in West Virginia is not a matter of right, [the plaintiffs would have to prove that] the Supreme Court of Appeals would have included the Hill v. Better Homes case among the minority of cases in which review was granted.”

In deciding the Better Homes case, the trial court questioned the propriety of sitting “in lieu of the Supreme Court of Appeals of West Virginia, to pass upon . . . the ruling of the trial court, whose

30. A good example of discretionary review is the United States Supreme Court’s procedure of granting or denying writs of certiorari. See Procedure in Connection with Petitions for Certiorari, in R. Stern & E. Gressman, Supreme Court Practice 160-223 (4th ed. 1969).
32. Better Homes was found liable for approximately $13,500. Id.
33. Id. at 94.
34. Id.
judicial powers are at least coordinate with mine."  

However, the trial court was also concerned that "no lawyer [should] be held financially responsible for admitted negligence in failing to perfect an appeal" if the case would have been dismissed. Therefore, the judge undertook the "repugnant" task of deciding whether the "judgment against [Better Homes] would have been reversed under circumstances which would have required a directed verdict in its favor upon retrial or the entry of judgment in its favor as a matter of law."

In agreeing to decide the malpractice case and to speculate upon the probability of exercise of jurisdiction by the appeals court, the trial judge clearly refused to accept the defendants' contention that the case would not have been reviewed. This decision was in the nature of a concession to the plaintiff by the trial court, which recognized that it was determining that "the case was of sufficient public importance or that the possibility of error was sufficiently apparent to make appellate review imperative." The basis for this ruling was in part the existence of the "repugnant alternative" of making lawyers judgment-proof from such negligence claims and the court's decision "that the 'speculative nature' of the damages is no defense to a negligent lawyer whose client has lost the opportunity to have his claim adjudicated by a court and jury. . . ."

3. Lower court judgment would have been modified on review. Once the plaintiff in the malpractice action has shown that an appellate court would have entertained an appeal from the lower court decision, then the plaintiff must prove that the adverse

35. Id. at 95. A singular difficulty in this respect pertains to the possibility of a rehearing of the underlying action, in the context of the malpractice claim, by the same judge who tried it in the first instance. Undoubtedly, such a judge would decline to try the malpractice claim and would request that the case be reassigned.

The same reticence to perform the appellate court's role can be found in Pete v. Henderson, 124 Cal. App. 2d 487, 269 P.2d 78 (1954). In reversing the trial judge's decision not to weigh the merits of a negligently-handled appeal, the court in Pete found strong policy reasons for deciding the reviewability and likelihood of success on appeal. See also Cornelissen v. Ort, 132 Mich. 294, 93 N.W. 617 (1903). But see Laux v. Woodworth, 195 Wash. 550, 81 P.2d 531 (1938); Armstrong v. Adams, 102 Cal. App. 677, 283 P. 871 (1929); Childs v. Comstock, 69 A.D. 160, 74 N.Y.S. 643 (1st Dep't 1902).


37. Id. at 97.

38. Id. at 95.

39. Id. at 96.
judgment would have been reversed or remanded back for further proceedings. In *Better Homes* the court framed the issue in these terms:

That, on submission of the case on review, the court would have reversed the judgment of the lower court and remanded the case for a new trial; . . . and [t]hat, upon a new trial, the verdict and judgment would have been reversed and entered for the defendant [Better Homes] upon substantially the same evidence on which the first jury unanimously found for the plaintiff.40

While not all cases would warrant or permit retrial of the underlying action,41 the allegation that the adverse judgment would have been modified on review is crucial to the failure-to-appeal malpractice complaint.42 Without it, a cause of action in appeal malpractice may be dismissed. In *Laux v. Woodworth*,43 the court dismissed that portion of the complaint which alleged that "by reason of the negligence of the respondent [attorney], she [the plaintiff] was prevented from having the merits of the litigation reviewed," stating:

There is no charge that, had a statement of facts been filed in time and been available for consideration by this court, the appellant could, or would, have obtained a result on that appeal more favorable to her than she did, which was affirmance of the judgment. Without such an allegation, the second cause of action was defective, and the demurrer was properly sustained.44

In *Pete v. Henderson*,45 however, the court ruled that the plaintiff’s failure to "plead and prove that the appeal, had it been taken, would have resulted in reversal," was not fatal to his cause of action. The court based its determination on the grounds that the malpractice plaintiff appeared pro se (having failed to find an attorney willing to bring suit against a fellow member of the bar) and the lower court, in refusing to point to defects in the plaintiff’s self-prepared pleadings, overlooked the purpose of a motion for a

40. *Id.* at 94.

41. Whether a retrial would be necessary would depend upon the discretion of the appellate court and the procedural posture of the case. If the case had been dismissed below, then the question of retrial would not arise.

42. *See, e.g.*, Chicago Red Top Cab Ass’n *v. Gaines*, 49 Ill. App. 3d 332, 333, 364 N.E.2d 328, 329 (1977) ("[B]urden is on the plaintiff to establish that it would have been successful in the prosecution of the appeal to the circuit court."); *Pusey v. Reed*, 258 A.2d 460 (Del. Super. Ct. 1969) ("[I]t must be shown that, if an appeal were taken, a more favorable result would have been reached.").

43. 195 Wash. 550, 81 P.2d 531 (1938).

44. *Id.* at 552, 81 P.2d at 532.

nonsuit.\(^{46}\)

Similarly, the plaintiff's failure to show that the underlying action would have been reversed was excused by the Fifth Circuit in *Smoot v. State Farm Mutual Insurance Co.*\(^{47}\) Reversing summary judgment entered by the district court, the court of appeals held for the plaintiff. Its decision was based on the facts that the allegation of failure-to-appeal was made to substantiate substandard performance and bad faith representation by an insurance company appointed counsel and that the appeal in fact would not have been made, but the threat to do so would have been employed to encourage a post-judgment settlement.\(^{48}\) From both *Pete* and *Smoot*, it is clear that the pleadings in failure-to-appeal cases should contain an allegation that the underlying action would have been modified by an appeals court, because not doing so will be excused only under unusual circumstances.

The burden of proving that the plaintiff would have fared substantially better on appeal is sometimes onerous. For example, when the area of law affecting the client's case is unsettled, the claim that an appellate court would have interpreted the law in a given fashion becomes tenuous. In *Collins v. Wanner*,\(^{49}\) the Supreme Court of Oklahoma was called upon to decide whether the defendant attorney failed to proffer a meritorious appeal. In describing the nature of the underlying action, the court said, "[m]oreover, the issue presented in *Wanner v. Wanner* [the underlying action] has never been directly passed upon by this court and the answer thereto was in fact highly controversial."\(^{50}\) The Oklahoma court refused to hold the lawyer liable, justifying its decision by declaring that "[a]n attorney who acts in good faith. . . is not answerable for a mere error of judgment or for a mistake in point of law which has not been settled by a court of last resort in this state. . . ."\(^{51}\) While the underlying action in *Collins* did not involve issues which were of first impression in the strictest sense,\(^{52}\) the case illustrates the difficulties such a circumstance

\(^{46}\) *Id.* at 491, 269 P.2d at 80.

\(^{47}\) 299 F.2d 525 (5th Cir. 1962).

\(^{48}\) *Id.* at 532-33.

\(^{49}\) 382 P.2d 105 (Okla. 1963).

\(^{50}\) *Id.* at 108.

\(^{51}\) *Id.* at 109.

\(^{52}\) The law affecting the underlying action was in a state of transition, having been recently modified by decisional law. *See id.* at 107.
would create and suggests a possible preview of the manner in which courts will deal with them.

The disposition of a failure-to-appeal case at the trial level may also create nearly insurmountable barriers to success in proving that the plaintiff would have prevailed on appeal. One example is where the trial court hearing the malpractice claim dismisses the complaint as a matter of law. In *General Accident Fire & Life Assurance Corp. v. Cosgrove*, the plaintiff sought to prove in the trial court that its attorney negligently failed to file an appeal. After reviewing the complex facts which constituted the underlying action, the court dismissed the suit and the plaintiff appealed. At that stage of the proceedings, with the justiciability of the underlying action unresolved, the plaintiff would have to convince an appellate tribunal that no less than three courts, *i.e.*, the original trial court, the appellate court which was not reached due to the alleged negligence, and the malpractice trial court, should have decided the issue differently. As the Supreme Court of Wisconsin remarked, "[t]his appears to place a heavy burden on the plaintiff in this case."

4. Damages. In addition to pleading that the original suit would have been won if appealed, the plaintiff must assert that he or she suffered actual damages:

Universally it has been held that the mere fact that the plaintiff would have recovered a judgment in the first action is not sufficient, in and of itself, to hold the attorney liable. In addition to proof that a judgment would have been rendered against the former defendant, it is necessary to allege and prove that he would have been able to respond in damages.

Thus, if the original defendants were judgment-proof or if the malpractice plaintiff does not specifically plead that damages flowed from the counselor's misfeasance, no recovery will result. In *Chicago Red Top Cab Association, Inc. v. Gaines*, the court said:

A malpractice action by a client against his attorney is an action for damages and has no basis unless the client has sustained a monetary loss as the result

53. 257 Wis. 25, 42 N.W.2d 155 (1950).
54. The underlying action in *General Accident* involved an automobile collision and liability arising therefrom. The court was required to retry complex facts involving, *inter alia*, contributory negligence. *Id.* at 28, 42 N.W.2d at 156.
55. *Id.*
of some negligent act on the part of the lawyer. . . . In other words, negligence even if proved is not actionable without resulting damage.58

If the plaintiff relies solely upon the lost opportunity to appeal as the basis for an award of damages, his cause of action may likewise be dismissed. In C/M of Baton Rouge, Inc. v. Wood,59 the plaintiff contended that such damages were recoverable:

In effect, plaintiff urges that it is entitled to damages because of disappointment sustained by the loss of its right to appeal. This suit for malpractice was submitted without testimony and . . . no testimony or other evidence supporting this alleged element of damages appears in the record. Therefore . . . we can make no such award.60

Moreover, even if the plaintiff sues for return of the fees which he advanced to his lawyer, that prayer may go unanswered because the court could find that a "reasonable lawyer" would not have appealed.61

II. EVIDENTIARY AND RELATED PROBLEMS IN FAILURE-TO-APPEAL CASES

A. Disposition on Appeal: Question of Fact or Law?

Several questions arise concerning the nature of proof required to establish that the underlying action would have been reversed. Chief among them is whether the hypothetical decision of the appellate court is an issue of fact or an issue of law. The answer to this question determines whether a judge or a jury will decide the issue of how the appellate court would have decided the case.

In reference to Better Homes it has been argued that "[t]he judge determined the client's likelihood of success upon a new trial as a matter of law."62 This analysis of the Better Homes decision fails to acknowledge the significance of the fact the judge hearing the malpractice case was sitting without a jury; the court was compelled to decide itself whether prejudicial error was present "be-

58. Id. at 333, 364 N.E.2d at 329.
60. Id. at 1183.
62. See The Belated Appeal, supra note 28, at 142.
low," and the absence of a jury precluded the question of disposition on appeal from becoming one of fact for the jury. Therefore additional authority must be referred to in discussing this issue.

The California Court of Appeal, in Croce v. Sanchez, held that the question of success upon appeal was one of law. In affirming the trial judge's decision that no liability attached to the counselor's failure to perfect an appeal, the court said, "[a]fter . . . reading the reporter's transcript of the proceedings in Croce v. Ryan [the underlying action], the trial judge determined as a matter of law that plaintiff's appeal, if perfected, would not have resulted in a reversal of the judgment." According to the parties' stipulation in Bryant v. Seagraves, what the appellate court would have done with an appeal of the underlying action "[was] a matter of law to be determined by the court and . . . the court in determination thereof may review the trial court file. . . ." In General Accident Fire & Life Assurance, the court stated that "[t]his [the fact that the plaintiff suffered damages as a result of a lost appeal] is obviously a question of law properly disposed of on a motion for summary judgment." According to Mallen and Levit, "[t]he initial determination, reserved solely for the court, is whether the attorney erred. For example, only a judge can decide whether an affidavit required for appeal was defective or if the appeal would have been successful."

One of the most thoroughly reasoned decisions to address the question of fact versus law is Chocktoot v. Smith. Discussing this issue in the context of alleged failure-to-appeal, the Supreme

63. Although the presence or absence of a jury in a malpractice suit would not be determinative of whether the question was a matter of fact or law, the threshold question of submission to a jury cannot be answered here. In Chocktoot v. Smith, 280 Or. 567, 571 P.2d 1255 (1977), the Supreme Court of Oregon, en banc, stated: "[w]e conclude, in short, that in determining the probable consequences of an attorney's earlier negligence . . . the line dividing the responsibility of judge and jury runs between questions of law and questions of fact." Id. at 574, 571 P.2d at 1259.

64. 256 Cal. App. 2d 680, 64 Cal. Rptr. 448 (1967).
65. Id. at 683, 64 Cal. Rptr. at 450 (emphasis added).
67. Id. at 18, 526 P.2d at 1028.
68. 257 Wis. at 26, 42 N.W.2d at 159.
69. R. MALLEN & V. LEVIT, supra note 1.
70. Id. at 345.
72. Chocktoot also involved the issue of negligent trial preparation. This fact is significant for the holding that disposition on appeal was a question of fact.
Court of Oregon held, *inter alia*, that "[t]he legal consequences of an attorney's failure . . . to take an appeal are matters for argument, not proof," implying that such a determination was one of law, not fact. The court ruled, however, that the disposition of an underlying case on review was a matter of fact:

In the present case, the trial court, placing itself in the position of Judge Sisemore in the earlier proceeding, concluded that proper presentation of all . . . evidence would have led to a decision in favor of [the plaintiff], either at trial or . . . [upon] *de novo review on appeal*. That conclusion is one of fact . . . and should have been left to the jury, unless [the evidence] called for a directed verdict. . . .

In reversing the lower court's decision, the Supreme Court held it error for the malpractice trial judge to determine as a matter of law what would have taken place with respect to the underlying action on appeal. Since this holding is in apparent contradiction with those cited above, a closer analysis of the *Chocktoot* decision is necessary.

In *Chocktoot*, allegations of negligence included failure to present certain evidence to the original trial court. The plaintiff argued that the introduction of that evidence would have brought about a different result either at trial or on appeal. The court hearing the malpractice claim ruled that it was within the province of the jury (in the malpractice case) to determine what *should* have taken place if such evidence had been introduced, pointing out that the effect of evidence upon a jury could be construed as an issue of fact.

To reconcile *Chocktoot* with earlier cases which held that dis-

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73. 280 Or. at 573, 571 P.2d at 1258.
74. Indeed, the court made this explicit by stating that "[t]he same view [that the issue was 'a matter of law to be decided by the court'] has been taken with respect to the probable success of an appeal." *Id.* at 574 n.4, 571 P.2d at 1258 n.4.
75. *Id.* at 575-76, 571 P.2d at 1259 (emphasis added).
76. The original action in *Chocktoot* was a will contest. In the malpractice suit, the plaintiff maintained that if proof of his relationship to the testator had been submitted to that surrogate's court, a portion of the estate would have been awarded to him. *Id.* at 569-70, 571 P.2d at 1256.
77. A good portion of the rationale in *Chocktoot* involved drawing a distinction between what *would* have happened as distinguished from what *should* have happened. The court held that the former approach called for retroactive prediction of the probable behavior of the trial court and was an unwieldy and speculative procedure. Instead, the court recommended use of the "should" method, i.e., what *should* the lower court have done if the lawyer performed like a reasonable attorney. *See id.* at 573, 571 P.2d at 1258.
position on appeal was an issue of law,\textsuperscript{78} it is essential to note first, that although failure-to-appeal was a \textit{facet} of the plaintiff's complaint, it was by no means the actual gravamen.\textsuperscript{79} Secondly, the argument that the underlying action would have been reversed upon \textit{"de novo review on appeal"} was relevant in particular to the proceedings which constituted the underlying action in \textit{Chocktoot} (\textit{i.e.}, probate proceedings, the outcome of which depended upon questions of fact).\textsuperscript{80} In addition, the court stated that \textit{"no jury can reach its own judgment on the proper outcome of an earlier case that hinged on an issue of law."}\textsuperscript{781}

Hence the \textit{Chocktoot} decision, understood in light of its own facts, fortifies the conclusion that when the probable outcome of a lower court's decision rests upon an issue of law, the prediction of that outcome in a malpractice action is itself a question of law to be decided by the judge. While cases such as \textit{Better Homes} had assumed that issues on appeal would involve questions of law (since appellate courts rarely decide or review issues of fact\textsuperscript{82}), the


\textsuperscript{79} \textquotedblleft[P]laintiff brought . . . malpractice action . . . alleging that they negligently had failed to discover and present material evidence and to appeal the adverse decision in the earlier case." \textit{Chocktoot}, 280 Or. at 569, 571 P.2d at 1256. Saying this, the court then treated the basis of the action as negligent trial litigation, suggesting that it was the non-submission of evidence which constituted defendant's main breach of duty. \textit{Id.} at 570, 571 P.2d at 1257.

\textsuperscript{80} Appeal from the lower court's decision would have provided the plaintiff in this case an opportunity to raise certain issues of fact not presented before the trial court. See \textit{id.} at 570-71, 571 P.2d at 1256-57.

\textsuperscript{81} \textit{Id.} at 572-73, 571 P.2d at 1258.

\textsuperscript{82} Although it may be generally true that appellate courts rarely decide or review questions of fact (see 4 \textit{AM. JUR. 2D Appeal and Error} § 76 (1962)), it is not strictly true and hence this assertion requires some qualification. In New York, for example, the Appellate Division courts are empowered to review both questions of law and questions of fact (see \textit{N.Y. CIV. PRAC. LAW} § 5501 (5)(c) (McKinney 1982)). The New York Court of Appeals reviews questions of law only (\textit{N.Y. CIV. PRAC. LAW} § 5501 (5)(b) (McKinney 1982)) with the exception that if an Appellate Division finds new facts and enters judgment thereon, the court of appeals may review those facts (\textit{N.Y. CIV. PRAC. LAW} § 5501 (5)(b) (McKinney 1982)).

Moreover, cases such as Better Homes v. Rogers, 195 F. Supp. 93 (D.W. Va. 1961) (reversal of jury verdict as a matter of law), Collins v. Wanner, 382 P.2d 105 (Okla. 1963) (application of legal principle enunciated in decisional law to the facts of the case), and Childs v. Comstock, 69 A.D. 160, 74 N.Y.S. 643 (1902) (construction of customs statute) all involved legal issues which the malpractice plaintiff asserted would have been decided differently by a court of appeal. That these were legal issues to be decided by judges and not juries, the court in \textit{Chocktoot} would hardly disagree. \textit{See infra} text accompanying note 93.
rationale in Chocktoot concerns the role of the jury in the malpractice case: if the outcome on appeal hinged upon an issue of fact, then the jury must first decide what the outcome of that issue would have been, before the judge can decide issues of law which may have been presented on appeal. Maintaining this distinction between the functions of judge and jury is important, for while one may countenance the assumption of the appellate court's role by a trial judge, any decision by a jury on an issue of law becomes more repugnant by virtue of its de facto substitution as an appellate court.

B. Expert Testimony

The distinction between questions of law and questions of fact is also significant because it determines the admissibility of certain types of evidence:

The question of whether an attorney's malpractice is an issue of law or fact has had a large impact on the admissibility of evidence establishing the standard of care. As noted earlier, if the court's interpretation of the question of want of skill of an attorney is to be one of law, then expert witnesses could not be used to testify that certain conduct of the attorney did or did not meet the standard of prudence or diligence as established by the legal profession.83

In the context of failure-to-appeal cases, however, it is not the attorney's negligence per se which has been designated a question of law, but rather the decision which the appellate court would have reached upon review of the underlying action. It follows logically then that expert testimony in support or opposition to a determination of how the appellate court would have decided a case is inadmissible. Indeed, this is the position adopted by Breslin and McMonigle: "[p]revailing on appeal is a legal question for the court to decide. Thus, expert testimony is inadmissible on this issue."84 Criticizing Collins v. Wanner,85 the authors concluded that admission of expert testimony on the issue of the settled state of law affecting the underlying action was "improper."86

In Chocktoot v. Smith the issue of expert testimony arose in the context of distinguishing matters of fact from matters of law.

83. Breslin & McMonigle, supra note 5, at 127.
84. Id. at 126.
85. 382 P.2d 105 (Okla. 1963).
86. Breslin & McMonigle, supra note 5, at 127.
Suggesting that expert testimony would be inadmissible in regard to questions of law,87 the court said that what would have happened in an earlier suit was one of "those consequences [which] does not call for testimony by the judge . . . whose hypothetical rulings are to be retroactively 'predicted,' subject to cross-examination and confrontation with various precedents, nor does it call for a battle of expert witnesses. . . ."88 While this statement is in apparent consonance with the view expressed by Breslin and McMonigle, the court in Chocktoot went on to say, "[o]f course the parties may offer the court the views of experts on a legal issue if it wishes them."89 Although the admission of such evidence was held reversible error in another case,90 this statement has been interpreted to mean that attorneys for either side could submit memoranda on the legal issues affecting the underlying action.91

The rule that expert testimony is inadmissible for the purposes of showing that an original action would have been modified on appeal is defensible for several reasons. First of all, to allow experts an opportunity to assert contradictory opinions about the outcome of an appeal would unnecessarily duplicate the expertise and arguments of the attorneys trying the malpractice case. With each side foreseeably bringing forth its own witnesses to testify as to what would have happened on appeal, the net probative value of such evidence would be negligible.92 There is also the problem of deciding who is a "specialist" qualified to predict the probable behavior of appellate courts. Would attorneys be qualified to render such opinions? What of active or retired appellate justices? Attempting to distinguish the experts would fruitlessly embroil the trial court in a debate over qualifications, as was pointed out in Chocktoot v. Smith.93 Finally, the purpose to which experts are usually put, clarifying matters not within the court's everyday experience, is not served in such circumstances because the judge is

87. "[T]he jury cannot decide a disputed issue of law on the testimony of lawyers." Chocktoot v. Smith, 280 Or. at 573, 571 P.2d at 1256.
88. Id. at 574, 571 P.2d at 1259 (emphasis added).
89. Id.
91. D. Meiselman, supra note 1, at 257.
92. See Breslin & McMonigle, supra note 5, at 121, where the authors discuss "the conclusiveness of expert testimony" remarking "[a]s long as there is a conflict in the experts' assumed facts, the jury has apparent discretion to reject all testimony."
93. 280 Or. at 573, 571 P.2d at 1256.
arguably an "expert" himself who can answer questions of law without such assistance; and the jury, whose limited role is to predict how another jury should have decided a case, could easily be prejudiced by "experts" who in fact would be recommending to them how to decide the case.

C. Admissibility of New Evidence in Failure-to-Appeal Cases

The question remains as to what type of evidence a court hearing a malpractice claim of this type ought to allow to determine what would have occurred upon review. In C/M of Baton Rouge, Inc. v. Wood, "the only evidence offered ... was the transcript of the original case. No testimony or other evidence supporting this alleged element of damages [loss of appeal] appears in the record. Therefore ... we can make no such award." In Better Homes, Inc. v. Rogers, "the record and transcript" of the underlying action were submitted by stipulation, and in Bryant v. Seagraves, the court permitted review of all transcripts, exhibits, and memoranda submitted between the parties in the underlying action. Indeed, a pattern appears among failure-to-appeal cases which suggests that the only type of evidence which is admissible constitutes that which was a part of the earlier adjudication.

When evidence other than the record or transcript of the underlying action is required or permitted, there is a divergence of opinion as to what form such evidence should take. In Childs v. Comstock, the court permitted the plaintiff to cite appellate precedents in support of his contention that the adverse judgment entered below would have been reversed; it did not allow the defendant to prove by way of actual administrative practice, not in the record below, that the decision of the lower court would have been affirmed.

According to one writer, the plaintiff in a malpractice suit alleging failure-to-appeal should be permitted to introduce new evidence affecting the underlying action because such "a change in
evidence is permitted in a retrial.\textsuperscript{99} This statement uncritically assumes that the jury in a malpractice case engages in an actual retrial of the underlying action and that admission of new evidence would prejudice neither party. In fact, both these assumptions are false.\textsuperscript{100}

In short, if a court hearing a malpractice claim is going to determine what would have taken place on appeal, to be fair to the defendant attorney it ought to do so on the basis of what the appellate court would have received and no more. Since the plaintiff's contention is that the underlying case, as decided by the original trial court, would have been reversed, it follows \textit{a fortiori} that other issues of fact or law should not be retroactively introduced. Only when allegations of negligence include substandard trial technique should the question of "new" evidence or undecided issues arise.\textsuperscript{101}

D. Failure-to-Appeal: The Difficult Cases

Problems surrounding failure-to-appeal litigation do not end with resolution of the fact versus law controversy. Because proving success on appeal has been so unsuccessful,\textsuperscript{102} and because both the substantive and procedural impediments to recovery are substantial, it can be argued that even the most straightforward of cases\textsuperscript{103} defy a predictable outcome. If this is so, what then of more complex cases where the issues in the underlying action can be characterized as strictly "first impression?" How is a court to decide, for example, a case in which an appeal was not proffered to the court of last resort within a jurisdiction, although a court of intermediate appeal had reviewed the case and handed down an opinion? In such a circumstance, questions of fact and law concerning the alleged negligence remain unchanged, but the added

\begin{itemize}
\item \textsuperscript{99} See The Belated Appeal, supra note 28, at 144.
\item \textsuperscript{100} First, the trial within a trial which the malpractice court conducts is a fiction, devoid of the formalities of a separate and distinct trial (e.g., opening statement, placement on the trial calendar, jury charge, etc.). Second, the introduction of "fresh" evidence would obviously be prejudicial to the defendant. It is in respect to the record below that the attorney is held liable. Unless new evidence is excluded the attorney would be exposed to all manner of claims based upon hindsight. See Coggin, supra note 5, at 232-37.
\item \textsuperscript{101} For example, see Chocktoot v. Smith, 280 Or. 567, 571 P.2d 1255 (1977).
\item \textsuperscript{103} E.g., Better Homes v. Rogers, 195 F. Supp. 93 (D.W. Va. 1961).
\end{itemize}
variable of a second judgment on the merits of the case is present. A relevant inquiry becomes: should the second judgment cast a heavier burden upon the malpractice plaintiff to show causation, or upon the trial court to justify its review of what would then be a higher court ruling?

Assume that the plaintiff in an underlying action sued the defendant for breach of contract. The defendant brought a motion to dismiss the complaint for failure to state a claim, which was denied by the trial court. The defendant then appealed the denial of his motion to an appellate court of competent jurisdiction which reversed the trial court and ordered dismissal. The plaintiff requested his lawyer to appeal this decision to a higher appellate court. Plaintiff's attorney negligently allowed the appeal to become time-barred. What result?

In this example the plaintiff in a malpractice suit against his lawyer could conceivably confront the defenses of res judicata,\textsuperscript{104} collateral estoppel,\textsuperscript{105} and stare decisis.\textsuperscript{106} In other words, the attorney could argue that since an appellate court had determined that the plaintiff had no cause of action, any appeal would have been fruitless. He or she might also assert that the trial court in

\textsuperscript{104} See Montrose v. Baggott, 161 A.D. 494, 146 N.Y.S. 649 (2d Dep't), appeal dismissed, 220 N.Y. 686, 116 N.E. 1062 (1914). In Montrose, the plaintiff asserted that the judgment of the lower court was res judicata as between himself and the lawyer who represented him. The court said, "[w]e do not agree with the plaintiffs that the defendants are bound under the doctrine of res adjudicata [sic]. . . . Persons neither parties nor privies to an action — and these defendants bore neither relation to the other actions — are not estopped by a judgment." Id. at 501, 146 N.Y.S. at 654.

Indeed, one requirement of res judicata is being a party in interest to the earlier adjudication and this requirement could not be satisfied by an attorney who, although interested in the outcome for the sake of his client, can neither be held liable for an adverse judgment, nor demand the benefit of a favorable judgment from the court. See 9 N.Y. CARMODY WAITE 2d § 63:233 (R. Hursh ed. 1966):

The strict rule that a judgment is operative, under the doctrine of res judicata, only in regard to parties and privies is sometimes expanded to include as parties or privies a person who is not technically a party to a judgment, or in privity with a party, but who is, nevertheless, connected with it through his interest in the prior litigation and by his right to participate therein.

\textit{Id.} at 248 (emphasis added).

\textsuperscript{105} Collateral estoppel presupposes both the requirements of res judicata, e.g., mutuality of parties and identity of issues. See Blonder-Tongue Laboratory, Inc. v. University of Ill. Found., 402 U.S. 313 (1971).

\textsuperscript{106} "The rule of stare decisis is controlling when the court of last resort has laid down a principle of law applicable to a certain state of fact[s]. . . ." Montrose v. Baggott, 161 A.D. at 501, 146 N.Y.S. at 654 (emphasis added).
the malpractice suit is in no position to sit as arbiter of an appellate court's decision. If the underlying action has been reviewed by a higher court, the law of the case would apparently preclude any judgment from being entered by the malpractice court other than that affirmed or reversed on appeal.\textsuperscript{107}

While the answers to these issues must await litigation,\textsuperscript{109} they certainly emphasize the difficulties inherent in this area of professional liability litigation. On one hand it is difficult to disagree with Judge Paul in Better Homes\textsuperscript{109} that attorneys should not enjoy a privileged immunity from tort claims in connection with their work. However, the court's position in Collins v. Wanner,\textsuperscript{110} that an attorney should not be responsible for errors of judgment when the law he or she is dealing with is unsettled, is also plausible. Because the nature of the failure-to-appeal case is — to a large extent — predicated upon speculation, a certain amount of restraint is appropriate. At the same time, when the attorney's failure to appeal is the result of gross or admitted negligence, then the question arises whether any substantive barriers should bar recovery.

III. **Some Solutions to the Attorney Malpractice Dilemma in Failure-to-Appeal Cases**

A. *Leave to Appeal*

One proposal which attempts to alleviate some of the problems of proof confronting the failure-to-appeal plaintiff is that the moving party be permitted to appeal even though review is barred by the statute of limitations.\textsuperscript{111} According to this view, if the plaintiff can show that the only reason procedural requirements were not met was due to his attorney's negligence then any bar to appeal should be lifted. Not willing to accept the theory that negligence of the attorney is negligence of the client, the author suggests that the agency analogy is unjust, because it fails to take into account the fact that the attorney is an officer of the

\textsuperscript{107} Of course, the main issue is whether the attorney was negligent in failing to perfect an appeal. To the extent that this issue has not been determined by any court, the effort to employ the doctrine of *stare decisis* to bar adjudication must fail.


\textsuperscript{109} 195 F. Supp. at 96.

\textsuperscript{110} 382 P.2d at 109.

\textsuperscript{111} See The Belated Appeal, supra note 28, at 145.
court.\textsuperscript{112}

While this solution to the failure-to-appeal dilemma necessarily eliminates the need to relitigate the underlying action or to proceed against the erring attorney, it is for the most part unworkable. It suggests that the procedural and legal requirements connected with bringing a suit can be dispensed with when extenuating circumstances are present.\textsuperscript{113} This leads to the question: if an attorney fails to commence a suit within the statute of limitations, should the client be allowed to bring a suit against the defendant anyway, under the theory that the lawyer was at fault, and not the client? A policy of this sort would create a host of problems, including proliferation of litigation, exposure of would-be defendants to aged claims, and collusive agreements between attorneys and their clients who face procedural impediments.

\textbf{B. Insurance}

Another possible remedy for the failure-to-appeal victim is the "client security fund."\textsuperscript{114} Discussed in the context of attorney misfeasance in general, and actually operative in many states,\textsuperscript{115} these funds are meant to compensate those whose rights and property are injured by the acts of their attorneys. Such a fund has been justified in the following way:

The basic argument in favor of the establishment of a clients' security fund is premised upon the bar's moral duty to the public as honorable, learned, and skilled; when this trust is betrayed, the profession as a whole has a duty to rectify the wrong committed against a client. The client has relied upon the profession's collective representation. Consequently, the profession has an interest in every breach of that representation.\textsuperscript{116}

However, client security funds will not normally recompense the victims of failure-to-appeal malpractice.\textsuperscript{117} Their purpose is to reimburse clients whose attorneys have fraudulently converted or

\textsuperscript{112} \textit{Id.} at 156.
\textsuperscript{113} \textit{See} \textit{The Belated Appeal,} supra note 28, at 152 n.67, where the authors cite various relief statutes where remission from appellate deadlines can be granted — in rare instances. \textit{See, e.g., In re Loewenbach's Will,} 210 Wis. 253, 246 N.W. 332 (1933).
\textsuperscript{115} \textit{Id.} The Note mentions 28 states, including New York and Illinois.
\textsuperscript{116} \textit{Id.} at 384-85 (emphasis added).
\textsuperscript{117} "Malpractice or disputes over fees are not within the purview of clients' security fund." \textit{Id.} at 392.
misappropriated funds.

Another type of fund, known as the "Professional Liability Fund," would serve to compensate clients of lawyers who breach their professional duties by negligent acts and omissions. In discussing this type of fund it has been noted that:

A professional liability fund would not only protect the thousands of clients who now, practically speaking, have no present remedy against execution-proof lawyers for their injury, but it would also benefit the profession. It has been estimated that such a plan would provide savings of thirty-five to fifty percent over comparative private insurance.

The professional liability fund would act much like a private insurance carrier in that it would defend the attorney in the malpractice action and pay claims in the form of court-mandated judgments. The major difference would be that contribution to the professional liability fund would be mandatory. In short, a liability fund of this type would amount to compulsory malpractice insurance carried by the state or district bar association.

Although the establishment of such a fund would undoubtedly increase goodwill between the public and the legal profession, and might result in monetary savings for participating lawyers, it is not clear how effectively it would prevent the often harsh results of failure-to-appeal malpractice. In order for a client to recover from such a fund, his attorney would first have to be found liable by a court. Hence, the client’s burden of proof is in no way lightened, and there is no suggestion that the fund would adopt a "charitable" view of the frustrated client who could not establish liability through bringing a malpractice action. Indeed, viewed from the perspective of the malpractice victim, the fund would defend the negligent lawyer in the malpractice suit, and would be a real bene-


119. Id. at 840.

120. "These pooled funds would be administered much like a claims-made liability insurance plan. The administrators of this public corporation would defend the attorney accused of malpractice and pay an adverse judgment up to specified limits." Id. at 835-36.

121. See id. at 839, where the authors discuss the insurance industry's reluctance to participate in such schemes and successful challenges to compelled participation. See also id. at 845, where failure by attorneys to avoid mandatory participation programs is discussed.

122. The one real advantage of the client security fund lies in the fact that a successful plaintiff would be protected from a defendant attorney who could not satisfy the judgment without insurance coverage.
fit only in those rare cases where liability was established but the lawyer was judgment-proof.

C. _Res Ipsa Loquitor_

The doctrine of _res ipsa loquitor_ has also been mentioned in reference to legal malpractice, and must be considered as a possible solution to the problems connected with proving success on appeal where the attorney's negligence is admitted. In these cases the doctrine of _res ipsa loquitor_ could help reduce the plaintiff's burden of proof.

Plaintiffs have attempted to utilize the doctrine of _res ipsa loquitor_ to prove a prima facie case of legal malpractice. The doctrine of _res ipsa loquitor_ affects the burden of producing evidence. It requires the plaintiff to prove that the injury (1) must be of a kind which ordinarily does not occur in the absence of someone's negligence, and (2) must be caused by an agent or instrumentality in the control of the defendant.

While the failure-to-appeal malpractice complaint could conform to the above-stated requirements of the _res ipsa_ doctrine, it is unlikely that the main hurdle in such cases (i.e., proving an appeal would have been successful) would be eliminated or even reduced by applying the doctrine. Although it might improve a plaintiff's chances of establishing negligence per se, the question of causation would still loom over the litigation. Even in cases where the trial court was clear in its decision concerning the underlying action (suggesting that the only impediment to reversal on appeal was non-conformance with procedural rules), it would be difficult for any court to apply _res ipsa loquitor_ in light of the presumption

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123. See Breslin & McMonigle, _supra_ note 5, at 121.
125. Breslin & McMonigle, _supra_ note 5, at 121.
126. It has been argued that the plaintiff in an appeal dismissed for being untimely was contributorily negligent. _See_ Franke v. Zimmerman, 526 S.W.2d 257 (Tex. Civ. App. 1975) (attorneys alleged that their client failed to pay for the printing of the record on appeal). When appellate pleadings are at the printers (as they were in _Franke_) and represent the last step in perfecting an appeal, does the attorney have a duty to subsidize their completion? It is submitted that if the costs do not amount to a great expense and if the client has not expressly asked that an appeal be dropped, then the lawyer has a duty to preserve the right to appeal. Since legal strategy and its effectuation are entrusted to the lawyers, the second element of _res ipsa loquitor_ would point to liability of the lawyer.
D. Punitive Damages

Another possible answer to the difficulties associated with failure-to-appeal malpractice lies in awarding punitive damages to aggrieved clients. By finding the attorney liable for judgment in the amount of the legal fees advanced to proffer the appeal, the award of punitive damages would serve to compensate the plaintiff who could not prove that an appeal would have been successful. Such an award would also encourage maintenance of a high level of professionalism within the legal community because of its deterrent effect.

A practical difficulty with this approach lies in determining the amount of damages. What is a lost appeal worth? If courts are unwilling to award damages for psychological pain and suffering, the "harm" of disappointment over losing an opportunity to appeal will not be compensated in such cases. Therefore, the grounds for awarding punitive damages must be based upon other authority.

E. Shifting the Burden of Persuasion

Perhaps the most reasoned approach to the problems of proof and damages in failure-to-appeal cases is to adopt a decidedly liberal attitude towards the degree of proof required to show that the client has been substantially harmed as a result of the attorney's negligence. Such a relaxation of the standards of pleading and proof has occurred in some instances. In cases where the under-
Failure-to-appeal malpractice is one of first impression, or where the questions presented to the court are highly controversial, the law should be changed to create a presumption in favor of the disappointed client.

In effect the court would assume that the plaintiff would have prevailed on appeal, absent clear and convincing proof to the contrary. The burden of persuasion would then shift to the defendant. To meet this burden of proof in the context of unsettled case law or in a case of first impression would be virtually impossible. In circumstances such as those found in Collins v. Wanner the malpractice plaintiff would prevail because there would be no basis for the lawyer to assert that the trial judgment would have been affirmed.

Shifting the burden of persuasion to the defendant-attorney would result in no real hardship or injustice, because unlike imposition of a strict liability rule, the opportunity to discharge the burden would not be denied. Moreover, such a procedure would preclude any lawyer, who had impliedly or expressly warranted that an appellate adjudication of the underlying action would have been favorable, from later maintaining that the appeal was without merit. On estoppel grounds alone a shift towards greater liability would be justified. And, unable to avail themselves of the "fruitless appeal" defense, members of the legal profession would be encouraged to adopt habits, procedures, and safeguards which would eliminate or at least decrease the incidence of negligence in connection with the successful filing and perfecting of an appeal.

Conclusion

Despite the evident difficulties involved in failure-to-appeal malpractice cases, there is no suggestion that they defy a reasoned outcome. By employing the so-called "Winter Doctrine" and drawing authority from decided cases, a trial court deciding an appeal malpractice case should display little hesitancy in making its

(partial text continued)
rulings.

Outside the courtroom context, however, questions concerning this area of the law remain unanswered. These include whether there exists an implied duty on the part of an attorney to make the client’s case ready for appeal, even at his own expense, whether a lawyer can be held liable for not fully understanding a highly unsettled area of law, and whether an attorney’s judgment concerning the wisdom of taking an appeal ought to be second-guessed.

While these and a host of other inquiries must await intelligent review, a caveat regarding the latter issue is appropriate. Not all lawyers share the same training and experience, and clients must be aware that the selection process in finding an attorney often results in a seasoned and experienced advocate being pitted against one not so skilled. So long as the latter possesses the minimum qualifications to practice law, however, losing one lawsuit should not be the impetus for starting another. Especially in the area of appeals practice, where the lawyer’s judgment plays a large role, caution is advisable. While one may never excuse missing an appeal’s filing deadline, the adversarial system of law and adjudication in appellate practice necessarily results in a loss for one of the parties. With clients and their attorneys aware of these facts, the kind of full disclosure and alternative decision making they should generate will serve to reduce the incidence of malpractice of all kinds.

Justin Stillwell White