Separate federal returns are not to be allowed if an election is made to file a joint state return.[304]

The amounts collected on behalf of the states will be "promptly transferred to the state on the basis of estimates" of the amount of tax actually due.[305] Withholding will be collected pursuant to the piggyback system, and any such amounts received by the federal government will be paid over to the state "not later than the close of the third business day after the amount is deposited in a Federal Reserve bank. In the case of amounts collected pursuant to a return, a declaration of estimated tax" or otherwise, the amount would be paid over not later than the close of the thirtieth day following receipt.[306]

Although the implementation of the Federal State Tax Collection Act of 1972 would undeniably be a further encroachment on state autonomy, the benefits of the system in the form of economy of time, reduced costs and increased efficiency would appear to make it worthwhile. In recognizing the principals of federalism, Congress has provided in the Act that the state, and not the federal government, will represent the interests of the state in proceedings involving the state constitution or in disputes between the United States and the individual state.[307]

The current system of income taxation by the State of Iowa is closely tied to the federal scheme of income taxation. Nonetheless, it is a separate system, and as such requires a substantial duplication of effort, repetitive calculations and bookkeeping, and a redundant filing of countless forms, all of which is burdensome to the taxpayer, perhaps unnecessarily so. In the interest of governmental economy, and to provide some relief to, at least, the non-corporate businessman and individual taxpayer, the federal piggybacking collection system might well be carefully considered by Iowa as an alternative to its present system of individual, trust and estate income taxation.

---

304. *Id.* § 6362(f)(5)(B).
305. *Id.* § 6361(c)(1).
306. *Id.*
307. *Id.* § 6361(b).

ETHICS AND MALPRACTICE

Lee Gaudineer†

I. INTRODUCTION

Canon 6 of the Iowa Code of Professional Responsibility for Lawyers (hereinafter Code of Professional Responsibility) provides that "*A Lawyer Should Represent a Client Competently.*"[1] The disciplinary rules for the Canon state in part:

> DR 6-101 Failing to Act Competently
>
> (A) 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.
>
> (2) Handle a legal matter without preparation adequate in the circumstances.
>
> (3) Neglect a legal matter entrusted to him.

This article addresses many of the questions raised by the adoption of DR 6-101 by the Supreme Court of Iowa, including the following: is legal malpractice now synonymous with a violation of DR 6-101(A); does the Code of Professional Responsibility only prescribe standards of personal behavior; what does behavior have to do with legal competence; what is legal competence; does a violation of DR 6-101(A) create a private cause of action in favor of an aggrieved person against the erring lawyer? All of these questions, and many more related ones, are being asked with increased frequency by lawyers, clients and members of the public.

Competence, the real substance of Canon 6, was not contained in the Canons of Professional Conduct propounded by the American Bar Association prior to 1969.[2] The potentially broad scope of Canon 6 has led to declarations

---

† Staff Counsel, Committee on Professional Ethics and Conduct of the Iowa State Bar Association. Partner, Austin, Myers, Peterson & Gaudineer, Des Moines, Iowa. B.A. 1957, Grinnell College; J.D. 1958, Drake University; LL.M. 1967, University of Missouri at Kansas City.—Ed.

1. IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS, Canon 6 (adopted by the Supreme Court of Iowa—IOWA SUP. CT. R. 119) [hereinafter CODE].

2. The American Bar Foundation's *Parallel Tables Between the ABA Canons of Professional Ethics and the ABA Code of Professional Responsibility* 15 (1969) correlates only Ethical Consideration (EC) 6-4 and Disciplinary Rule (DR) 6-101(A)(3) (client neglect) to old Canon 21 (duty to be punctual and concise, and direct in the disposition of causes). *Accord*, R. WISE, LEGAL ETHICS 83 (2d ed. 1970) ("But nowhere . . . was there a prohibition against acting incompetently or an injunction requiring the employment of additional counsel in such instances.").

that it is not a proper measure of conduct[3] and that it is placed within a framework that does not permit enforcement.[4] Canon 6 can perhaps best be analyzed in the context of the entire Code of Professional Responsibility. The key word is *responsibility*. Responsibility means more than simply conforming with set standards of norms of behavior. It is synonymous with *accountability*.[5] Lawyers are accountable, not only for their behavior, but for their legal knowledge and skill. This is also termed "conduct" as that word is used in the preamble, ethical considerations, and disciplinary rules of the Code of Professional Responsibility.

To be competent is to be capable.[6] It is not a vague term.[7] Furthermore, the ethical considerations state how competency in a particular area is met and thereafter maintained.[8] Although incompetency certainly embraces legal mal-

---

3. Performance and conduct must be distinguished. Performance is how skill is applied for the execution or completion of a task. It is devoid of any moral content or standards and assumes a standard of and thus some agreement about, measurement. Conduct, in contrast, relates to the behavior of lawyers. It assumes both community and professional standards; hence agreement about norms exists, whether they be criminal laws or professional ethics.

Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 ILL. L.F. 196.

4. *Id.* at 201.

It is equally clear that the Committee did not nurture the new point of departure by providing either a new environment, in the form of no-fault system for reviewing performance, or a proper parentage, in the form of professionally recognized performance criteria. DR 6-101 needs a system of recognized specialization and it needs as well an independent system of review and recertification tied in to that review. Unfortunately, it has neither. Accordingly, while DR 6-101 augurs well for the future, in the short run it fails to eliminate the discrepancy between performance issues and conduct issues in the disciplinary process.

Id.

5. WEBSTER'S NEW WORLD DICTIONARY 732 (1969).

6. *Id.* at 289.

7. *Cf. In re* Frerichs, 238 N.W.2d 764 (Iowa 1976) (DR 8-102(B), EC 8-6 and EC 7-36 held not vague).

Code, *supra* note 1, DR 1-102(A)(5) proscribes conduct that is prejudicial to the administration of justice. This disciplinary rule has been held not to be vague. *See* State v. Turner, 217 Kan. 574, —, 538 P.2d 966, 975 (1975); Disciplinary Counsel v. Campbell, 345 A.2d 616 (Pa. 1975). *See generally In re* D'Auria, 334 A.2d 332 (N.J. 1975). *See also* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952). In upholding an Interstate Commerce Commission regulation on a vagueness attack, the Court stated:

Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

. . . "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.

. . . The use of common experience as a glossary is necessary to meet the practical demands of legislation."

Id. at 340-41, *quoting* Sproles v. Binford, 286 U.S. 374, 393 (1932).

8. *E.g.*, CODE, *supra* note 1, EC 6-2 (directs participation in continuing legal education programs and keeping abreast of current legal literature); *id.* EC 6-3 (requires that if a lawyer accepts employment in an area in which he is not qualified, qualification must thereafter be had). *See also* IOWA SUP. CT. R. 123.1 which states:

Only by continuing their legal education throughout their period of the practice of law can attorneys fulfill their obligation competently to serve their clients. Failure to do so shall be grounds for disciplinary action by this court. This rule establishes minimum requirements for such continuing legal education and the means by which the requirements shall be enforced.

practice, the latter can be different, *i.e.*, not every case of legal malpractice constitutes incompetency.[9] The omission of the term malpractice in DR 6-101(A) and its specific inclusion in the separate DR 6-102(A) are evidence of the validity of this distinction.[10]

The questions of competence, adequate preparation, neglect and legal malpractice are prominent issues today. The courts have been defining their parameters and differences. The distinctions found significant by the court thus far depend upon the context in which the question is presented: disciplinary proceedings; legal malpractice actions; or dicta contained in other cases.

II. The Climate Today in Disciplinary Cases

A. *Procedure For Disciplinary Cases*

The Iowa Supreme Court has the inherent power to license, suspend, and disbar lawyers.[11] This exclusive power emanates from the separation of powers doctrine of the Iowa Constitution.[12] In Iowa, disciplinary cases are processed by the Committee on Professional Ethics and Conduct of the Iowa State Bar Association[13] and tried before the Grievance Commission of the Supreme Court of Iowa.[14] Trial is held before a division of five lawyers of the Grievance Commission of the Supreme Court of Iowa.[15] The division makes findings of fact, conclusions of law, and recommendations to the supreme court of what disciplinary action needs to be taken.[16] However, the case stands for final disposition in the supreme court.[17] Consideration and final disposition by the supreme court is de novo on the record made before the Grievance Commission.[18] This is true even if neither of the parties to the original action before the Grievance

---

9. *See* Division IV *infra*.

10. "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." Code, *supra* note 1, DR 6-102(A).

11. Committee on Professional Ethics & Conduct v. Bromwell, 221 N.W.2d 777 (Iowa 1974). State supreme courts have generally been held to have both licensing and disciplinary powers over attorneys. *See, e.g.*, Board of Comm'rs v. State *ex rel.* Baxley, 324 So. 2d 256, 258-61 (Ala. 1975); *In re* Farr, 340 N.E.2d 777, 780 (Ind. 1976); *In re* McCabe, 544 P.2d 825, 828 (Mont. 1975); *In re* Bannister, 86 Wash. 2d 176, —, 543 P.2d 237, 244 (1975).

12. *See generally* Committee on Professional Ethics & Conduct v. Bromwell, 221 N.W.2d 777 (Iowa 1974); State v. Ronek, 176 N.W.2d 153 (Iowa 1970), wherein the court stated:

> The separation of powers concept, as we understand it, has to do with the distribution of governmental functions as among the executive, legislative and judicial branches of the government, and recognizes the constitutional prohibition against one department's exercising another's powers, since all departments of government derive their authority from the same sources, they in equal degree represent the sovereignty, and each within its own sphere is supreme and independent, and the *several departments are not merely equal but are also exclusive.*

Id. at 155 (emphasis added).

13. Iowa Sup. Ct. R. 118.2.

14. Iowa Sup. Ct. R. 118.1.

15. Iowa Sup. Ct. R. 118.7.

16. Iowa Sup. Ct. R. 118.9.

17. Iowa Sup. Ct. R. 118.10.

18. Iowa State Bar Ass'n v. Kraschel, 260 Iowa 187, 194, 148 N.W.2d 621, 625 (1967).

Commission appeals the Commission's findings or recommendation to the supreme court.[19] Therefore, violations will result in meaningful disciplinary action, as determined by the supreme court, even if a lesser penalty is recommended and no appeal is taken. Recently, upon its own volition, the Iowa Supreme Court has increased the disciplinary action recommended by the Grievance Commission.[20]

B. *The Effect of the Code of Professional Responsibility on the Evaluation of Lawyer Conduct*

The Supreme Court of Iowa has consistently demanded strict adherence to the Canons by Iowa lawyers. The court has not been reluctant to point out instances of violations of the Code of Professional Responsibility when the unethical conduct of a lawyer comes to the court's attention in appeals not related to discipline or malpractice. *State v. Vickroy*[21] involved an appeal alleging error based upon prosecutorial misconduct. The court not only found conduct present which necessitated a reversal based upon prevailing case law, but it went further and pointed out that the conduct also violated DR 7-106(C)(4) (asserting personal opinion as to guilt of the defendant).[22] In *Rowen v. LeMars Mutual Insurance Co.*,[23] a motion was filed with the supreme court contending that having two corporate defendants represented by the same counsel was such a conflict that the lawyers should be removed. The supreme court, citing its inherent authority to supervise lawyers as evidenced by its adoption of the Client Security Fund and the Code of Professional Responsibility, found

19. Committee on Professional Ethics & Conduct v. Galvin, 223 N.W.2d 162 (Iowa 1974).

20. Committee on Professional Ethics & Conduct v. Lemon, 237 N.W.2d 824, 826 (Iowa 1976) (recommendation was approximately 14 months suspension and suspension decreed was 18 months); Committee on Professional Ethics & Conduct v. Toomey, 236 N.W.2d 39 (Iowa 1975) (suspension decreed was two years; the author notes that the recommendation was one year suspension); Committee on Professional Ethics & Conduct v. Golden, 228 N.W.2d 113 (Iowa 1975) (recommendation was three months suspension and suspension decreed was indefinite with right to apply for reinstatement after six months); Committee on Professional Ethics & Conduct v. Strack, 225 N.W.2d 905 (Iowa 1975) (recommendation was 36 months and suspension decreed was indefinite with right to apply for reinstatement after the expiration of 36 months); Committee on Professional Ethics & Conduct v. Galvin, 223 N.W.2d 162 (Iowa 1974) (recommendation was nine months suspension and suspension decreed was indefinite with right to apply for reinstatement after the expiration of 12 months); Committee on Professional Ethics & Conduct v. Sylvester, 221 N.W.2d 803, 805 (Iowa 1974) (suspension decreed was nine months; the author notes that the recommendation was three months suspension with one-third waived); Committee on Professional Ethics & Conduct v. Cray, 245 N.W.2d 298 (Iowa 1976) (recommendation was a reprimand and the court decreed disbarment); Committee on Professional Ethics & Conduct v. Hanson, 244 N.W.2d 822 (Iowa 1976) (recommendation was a suspension between one and two years and the court decreed disbarment); and Committee on Professional Ethics & Conduct v. Roberts, 246 N.W.2d 259 (Iowa 1976) (recommendation was disbarment and the court decreed an eighteen month suspension). In Committee on Professional Ethics & Conduct v. Rowe, 225 N.W.2d 103 (Iowa 1975), the recommendation was a six months suspension; the Committee appealed and the lawyer was disbarred.

21. 205 N.W.2d 748 (Iowa 1973).

22. State v. Vickroy, 205 N.W.2d 748, 750-51 (Iowa 1973).

23. 230 N.W.2d 905 (Iowa 1975).

a potential (not real) conflict and not only removed the lawyers but directed the trial court to appoint new independent counsel for the two corporations and one group of stockholders.[24] *Koppie v. Allied Mutual Insurance Co.*[25] involved a claim of liability for a judgment in excess of the insured's policy limits because the lawyer retained by the insurance company failed to inform the insured that the case could be settled within the policy limits before trial. The Iowa Supreme Court held that such lack of communication, standing alone, was insufficient to generate the jury issue of bad faith.[26] However, the court sounded an onerous warning to defense lawyers:

> Our affirmance in this case is not to be construed as any indication of the communication responsibility of the lawyer retained by the insurer to represent the insured. Careful study should be given to the Iowa Code of Professional Responsibility for Lawyers, EC 5-14 through EC 5-19, p. 16; DR 5-105, p. 18; and EC 7-8, p. 21. Where there is a settlement available within policy limits and the insured is otherwise unrepresented, *such a lawyer walks a narrow and dangerous path.* See . . ., where counsel's potential liability for the excess judgment was recognized.[27]

A recent fee dispute case resulted in the court chastising the lawyers involved, calling attention to EC 2-19 and EC 2-23 and assessing the costs to the lawyers.[28] Similar references to the Code of Professional Responsibility have been

---

24. Rowen v. LeMars Mut. Ins. Co., 230 N.W.2d 905, 913-16 (Iowa 1975). *See also* United States Gen., Inc. v. Schroeder, 400 F. Supp. 713, 718 (E.D. Wis. 1975) (citing EC 7-4 and DR 7-102); Cannon v. United States Accoustics Corp., 398 F. Supp. 209, 216, 222 (N.D. Ill. 1975) (citing EC 5-15, EC 5-18 and EC 4-4); American-Canadian Oil & Drilling Corp. v. Aldridge & Stroud, Inc., 237 Ark. 407, —, 373 S.W.2d 148, 151 (1963) (citing old Canon 6 of the ABA Canons of Professional Ethics); Schulte v. Mauer, 219 N.W.2d 496, 501 (Iowa 1974) (citing EC 4-5, 5-1, 5-3 and 5-7, and DR 4-101(B)(2), 5-101(A), 5-104(A) and 5-105(A)); Rolfstad, Winkjer, Suess, McKennett & Kaiser, P.C. v. Hanson, 221 N.W.2d 734, 737 (N.D. 1974) (citing EC 5-15 and EC 5-16); *In re* Estate of Trench, 76 Misc. 2d 180, 349 N.Y.S.2d 265, 269 (Sup. Ct. 1973), *rev'd*, 47 App. Div. 2d 627, 363 N.Y.S.2d 836 (App. Div. 1975) (citing Canon 5, EC 5-14 and EC 5-15 in the former case, and DR 5-105 in the subsequent reversal); Schroeder v. Schaefer, 477 P.2d 720, 723 (Ore. 1970) (citing old Canon 6 of the ABA Canons of Professional Ethics).

25. 210 N.W.2d 844 (Iowa 1973).

26. Koppie v. Allied Mut. Ins. Co., 210 N.W.2d 844, 848 (Iowa 1973).

27. *Id.* at 849 (emphasis added and citations omitted). *Compare id. with* Peterson v. Farmers Cas. Co., 226 N.W.2d 226, 231 (Iowa 1975) holding that a defense lawyer, hired by the insurance company under a policy provision giving the company that right, is not the agent of the insured-defendant. However, the court expressly stated that in so holding, it was not expressing an opinion on the potential vicarious liability of the insurance company to the insured for the negligence, if any, of the lawyer it retained.

28. Carmichael v. Iowa State Highway Comm'n, 219 N.W.2d 658, 665 (Iowa 1974). EC 2-19 provides as follows:

> As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC 2-23 provides as follows:

> A lawyer should be zealous in his efforts to avoid controversies over fees

noted in decisions from other jurisdictions.[29]

The Iowa Supreme Court has, by court order, adopted and promulgated the Code of Professional Responsibility.[30] The preliminary statement to the Code of Professional Responsibility states that the ethical considerations "are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations."[31] However, even in light of this preliminary statement, the Iowa Supreme Court has cited violations of the ethical considerations as grounds for disciplinary action.[32] The courts of several other states have done likewise.[33] Recently, the Iowa Supreme Court clearly held that the ethical considerations were not simply aspirational as stated in the preliminary statement, but were binding principles:

> The Ethical Considerations of our Iowa Code of Professional Responsibility for Lawyers . . . describe our common experience and prescribe the objectives for professional conduct. They constitute a body of principles upon which the lawyer can rely for guidance in many situations, including the one before us.[34]
>
> . . . .
>
> The Code of Professional Responsibility for Lawyers was developed, not by judges, but by lawyers so as to mark the proper path for any attorney who senses a conflict between various duties. . . .
>
> The Iowa Code of Professional Responsibility for Lawyers, binding by our order on all lawyers practicing before this court, is derived from the ABA Code of Professional Responsibility.
>
> All lawyers practicing before this court are bound by the canons

---

with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

29. *See* cases cited note 24 *supra*. *See also In re* Corace, 390 Mich. 419, —, 213 N.W.2d 124, 130, 132 (1973); G.A.C. Commercial Corp. v. Mahoney Typographers, Inc., 66 Mich. App. 186, —, 238 N.W.2d 575, 577 (Ct. App. 1976) (citing Canons 4 and 9 and DR 4-101 and DR 9-101 as grounds for removing plaintiff's counsel); *In re* Estate of Evans, 238 N.W.2d 677, 679 (N.D. 1976) (citing DR 5-101(B) and DR 5-102 as grounds for striking the testimony of a lawyer who testified for his client); State v. Dean, 67 Wis. 2d 513, —, 227 N.W.2d 712, 722 (1975).

30. Iowa Supreme Court Order, Oct. 4, 1971, *revised*, Nov. 1, 1973. The Iowa Code of Professional Responsibility for Lawyers is referred to as Iowa Supreme Court Rule 119. However, as printed under Iowa Supreme Court Rule 119 and published in the Iowa Code it contains only the canons and the disciplinary rules. The Supreme Court Order adopts and promulgates the ethical considerations as well. Their omission from rule 119 in the Iowa Code is by action of the code editor and not the supreme court. The ethical considerations are part and parcel of the Iowa Code of Professional Responsibility for Lawyers and binding upon lawyers in Iowa in the same manner as are the canons and disciplinary rules.

31. Code, *supra* note 1, Preliminary Statement.

32. *See In re* Frerichs, 238 N.W.2d 764, 767, 770 (Iowa 1976) (citing EC 7-36, 8-6 and 9-6); Committee on Professional Ethics & Conduct v. Lemon, 237 N.W.2d 824, 826 (Iowa 1976) (citing the ethical considerations); Committee on Professional Ethics & Conduct v. Bromwell, 221 N.W.2d 777, 778, 780 (Iowa 1974) (citing EC 1-5).

33. *In re* Farr, 340 N.E.2d 777, 786 (Ind. 1976) (citing EC 7-8); People v. Gomberg, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975) (citing EC 5-16); Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (Ct. App. 1975) (citing EC 2-32).

34. *In re* Frerichs, 238 N.W.2d 764, 766 (Iowa 1976).

and the provisions of the Iowa Code above set out. *They are not free to view them merely as aspirational.*[35]

It is now clear that although the Code of Professional Responsibility was drafted by lawyers, it will be interpreted and applied in Iowa by the supreme court. It is equally clear that the ethical considerations, as well as the disciplinary rules, will be used as the measure against which the lawyer's conduct will be judged. Questions that remain unanswered are: is this to be true only in disciplinary cases or will these standards be extended to cases of legal malpractice; if they are extended to cases of legal malpractice, does a violation create a private cause of action; if a private cause of action is created, in whose favor does it lie, only the client's or also a third party's? The opposite question is equally important to the lawyer: does every case of malpractice require disciplinary action?

III. Canon 6 As a Basis For Disciplinary Proceedings

Competency, as used in Canon 6 (*"A Lawyer Should Represent a Client Competently"*), embraces: (1) being qualified in an area of the law wherein representation has been undertaken;[36] (2) adequate preparation under the circumstances;[37] and (3) reasonable and proper attention to the client's case.[38] What the lawyer needs to show to establish competency, adequate preparation, and due diligence (absence of neglect) remains unsettled at the present time. It is extremely easy for the layman to jump to the conclusion that since the case was lost or the matter did not turn out as favorably as was initially contemplated, the lawyer was incompetent, ill prepared, or neglectful. Likewise, an opposing party, who receives a favorable verdict, can jump to the conclusion that a competent lawyer or one who had properly investigated and researched the case would have seen the folly of his client's way and consequently would not have filed a lawsuit in the first instance. Both the client and the opposing party can point to the Canons as proof of their respective assertions. Similarly, the dismissal of a suit once filed should not give rise to a presumption that it was based upon a negligent investigation. In many cases, *e.g.*, products liability, anti-trust, securities, fraud, critical evidence is under the control of the defendant and can only be found, if present, by deposition or other discovery procedures available only after suit is commenced. The supreme court needs now to be doubly careful in its description or characterization of the conduct of lawyers in the handling of legal matters so as not to mislead the public. This must be the case regardless of the context in which the matter is brought to the court's attention: as an ancillary matter involved in an appeal on other grounds; a disciplinary action; or legal malpractice case.

---

35. *Id.* at 769 (emphasis added).
36. Code, *supra* note 1, DR 6-101(A)(1).
37. *Id.*, DR 6-101(A)(2).
38. *Id.*, DR 6-101(A)(3).

Competency is not an all-inclusive term. In fact, the six ethical considerations to Canon 6 specifically explain how the lawyer can accomplish the competency demanded.[39] Furthermore, Canon 6 must be interpreted according to the rules of statutory construction.[40] Thus, if only certain criteria are included, then criteria not included are omitted under the doctrine of *expressio unius est exclusio alterius*.[41] Therefore, competency, as now limited by Canon 6, should not be added to by judicial interpretation as opposed to actual, before the fact, amendment by court rule.[42]

---

39. The ethical considerations for Canon 6 are as follows:
EC 6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.
EC 6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.
EC 6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, 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. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.
EC 6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.
EC 6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.
EC 6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

40. Committee on Professional Ethics & Conduct v. Shaffer, 230 N.W.2d 1, 2 (Iowa 1975) holding that Iowa Supreme Court Rule 118 is to be interpreted according to the rules of statutory construction. The same would obviously apply to rule 119 (the Iowa Code of Professional Responsibility for Lawyers).

41. Archer v. Board of Educ., 251 Iowa 1077, 1084, 104 N.W.2d 621, 626 (1960).

42. *See* Dingman v. Council Bluffs, 249 Iowa 1121, 90 N.W.2d 742 (1958); Rural Independent School Dist. v. McCracken, 212 Iowa 1114, 1126, 233 N.W. 147, 153 (1930).

Failing to act competently, under Canon 6, is separated into three separate categories in DR 6-101(A): (1) incompetency; (2) lack of adequate preparation; and (3) neglect. Incompetency so defined must be distinguished from negligence, for while either incompetency or negligence may form a basis for a legal malpractice action, only incompetence, lack of adequate preparation, or neglect within the purview of DR 6-101(A)(1), (2) or (3) should form the basis for disciplinary action. Prior to the adoption of the new Code of Professional Responsibility and its Canon 6, the term "negligence" was generally given a very broad meaning in disciplinary matters.[43] "Negligence" meant neglect, indifference, incompetence, inattention, carelessness and/or malfeasance on the part of the lawyer.[44] However, with the language and terminology now contained in Canon 6, "negligence" can no longer be so broadly and loosely defined.[45] Negligence presupposes an absence of intent. Generally, it is a simple act of commission or omission; it is inadvertence or oversight. A Canon 6 violation implies the element of intent by either a conscious disregard of the established standards or a failure to understand these standards as shown by the lawyer's conduct in several instances. Furthermore, other terms, such as "honest mistake" and "error of judgment," should be eliminated from court opinions[46] because the public believes that conduct so characterized creates, at the very least, civil liability for malpractice as a matter of law. Such conduct should certainly not be the basis for a disciplinary action.

1. *Incompetence*

Competence, in the sense that an individual has attained the requisite degree of legal learning, generally has not been deemed a subject of inquiry in a disciplinary matter.[47] "There is nothing in the State Bar Act conferring authority upon the board of governors to commence discipline for lack of legal learning, as a general charge."[48] The same position would seem to be valid

43. Annot., 96 A.L.R.2d 823 (1964).
44. *Id.*
45. The definition of "negligence" should be the same whether the action is disciplinary, malpractice or otherwise.
46. The Iowa Supreme Court in Baker v. Beal, 225 N.W.2d 106, 112 (Iowa 1975), stated that a lawyer is not liable for an error of judgment made in good faith as long as the lawyer "exercises a reasonable degree of care, skill and diligence." In Committee on Professional Ethics & Conduct v. Wright, 178 N.W.2d 749, 752 (Iowa 1970), the court noted that an "[h]onest mistake does not ordinarily afford a basis for disciplinary action. If it did, the practice of law would indeed be a hazardous profession."
The Nebraska Supreme Court has characterized an honest mistake as neglect. State *ex rel.* Nebraska State Bar Ass'n v. Pinkett, 157 Neb. 509, —, 60 N.W.2d 641, 643 (1953).
47. Some states seem to take a different view. *See* Florida Bar v. Reed, 299 So. 2d 583, 584 (Fla. 1974), wherein the court stated:
> When the Supreme Court issues a license to practice to a new lawyer, it is a representation to the public at large that the individual in question is competent to handle the legal affairs of any citizen. When the Supreme Court learns that it has erred in its evaluation and has an opportunity to correct its error, it owes it to the public to do so.

48. Friday v. State Bar, 23 Cal. 2d 501, 504, 144 P.2d 564, 567 (1943).

today under the Code of Professional Responsibility.[49] After all, the lawyer does have a law degree from an accredited school[50] and has passed the bar examination.[51] Prior to the adoption of the present Code of Professional Responsibility by the American Bar Association, several other states also held that ignorance of the law was not grounds for discipline. The California Supreme Court once stated:

> Nor does the Board have power to recommend the discipline of an attorney for a deficiency in legal knowledge when such deficiency is the gravamen of the charge of specific misconduct with relation to a client. . . . In other words, he must perform his duties to the best of his individual ability, not the standard of ability required of lawyers generally in the community. Mere ignorance of the law in conducting the affairs of his client in good faith is not a cause for discipline.[52]

Likewise, various state courts have found that a case for disciplinary action was not presented when a lawyer honestly did not know what the applicable law was,[53] mishandled cases because of inexperience,[54] or otherwise exhibited no culpability or moral turpitude.[55]

The adoption of Canon 6 was not meant to now permit inquiry into whether a lawyer still possesses the requisite degree of legal learning needed to continue in the practice by means of a disciplinary action. However, it was meant to change the rule that ignorance of the law was not grounds for disciplinary action. A lawyer is permitted to take a case in an area in which he is not, at that time, qualified.[56] However, if this occurs, the lawyer must undertake the necessary study and research to become qualified.[57] This not only includes the applicable law, but also any technical data and other information relative to the subject matter of the case.[58] In the alternative, with the consent of his client, a lawyer so qualified may become associated with the case.[59] It follows from these requirements that neither good faith ignorance of the law[60]

---

49. A reading of Canon 6 together with its ethical considerations establishes that it is only speaking to being "qualified" (*i.e.*, competent) in a certain area of the law, *e.g.*, products liability, workmen's compensation, labor, estate planning, corporations, securities. *See also* CODE, *supra* note 1, EC 6-3 which states in part that "the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar . . . ."

50. IOWA CODE § 610.2 (1975) requires that an applicant for admission to the bar have a law degree from a "reputable law school." Iowa Supreme Court Rule 106 defines a "reputable law school" as one accredited by the ABA or the Supreme Court of Iowa.

51. *See* IOWA CODE § 610.4 (1975).

52. Friday v. State Bar, 23 Cal. 2d 501, 504, 144 P.2d 564, 567 (1943).

53. Call v. State Bar, 45 Cal. 2d 104, 287 P.2d 761 (1955).

54. People *ex rel.* Chicago Bar Ass'n v. Charone, 288 Ill. 220, 123 N.E. 291 (1919).

55. *In re* Gelzer, 31 N.J. 542, 158 A.2d 331 (1960).

56. CODE, *supra* note 1, EC 6-3.

57. *Id.*

58. "Proper preparation and representation may require the association by the lawyer of professionals in other disciplines." *Id.* This means the retaining of experts, for example, medical doctors in a personal injury case, technical experts in a products liability case, etc.

59. *Id.*

60. Obviously, this must mean statutory law or legal principles clearly announced by the supreme court.

nor youth and inexperience should now excuse a lawyer from disciplinary action.[61]

DR 6-101(A)(1) carries with it more than the requirement to become qualified in a particular area of the law.[62] The knowledge of the case (legal, technical, and factual) must be applied for the benefit of the client in a professional manner. One could be highly qualified within the meaning of EC 6-3, but, unless the knowledge is applied properly, nothing will be gained for the client. Conduct which evidences indifference, irresponsibility, or a failure to do the best possible service for one's client will be a violation of this disciplinary rule. For example, the following establish incompetence cognizable under DR 6-101(A)(1): failure to file briefs with the supreme court when specifically ordered to do so;[63] lack of basic knowledge of substantive and procedural law which is essential to the appellate process;[64] failure to effectively represent the interest of one's clients;[65] and advice to a client in conscious disregard of the truth or falsity of the facts upon which one's advice is predicated.[66]

2. *Adequate Preparation*

Closely related to being knowledgeable and properly applying one's knowledge is being prepared. One can be knowledgeable and skillful in applying that knowledge, but, unless the lawyer is prepared in a given case, the client will suffer. Proper preparation or attention to the details of the matter, both to the law and facts, is mandatory.[67] Disciplinary cases under this rule have been few. Proper preparation, as competency in general, ordinarily was not a basis for disciplinary action prior to the adoption of the Code of Professional Responsibility.[68] However, the changing view was well expressed by the Nebraska Supreme Court:

---

61. *Compare* State v. Larmond, 244 N.W.2d 233, 237 (Iowa 1976) *with* Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (rule against perpetuities poses such complex and difficult problems that lawyers will not be held to always applying it correctly) *and* Mills v. Shoppers Charge Plan, Inc., 231 N.W.2d 165 (N.D. 1975) (holding that the bankruptcy laws present the same kind of problem for "the general practitioner and State judges").

62. State v. Thompson, 208 N.W.2d 926, 927 (Iowa 1973) (citing EC 6-1 and DR 6-101(A)(1), (2) and (3) for removing an attorney in a criminal appeal); State v. Bruno, 196 N.W.2d 539 (Iowa 1972).

63. State v. Thompson, 208 N.W.2d 926, 927 (Iowa 1973); State v. Bruno, 196 N.W.2d 539, 540 (Iowa 1972).

64. *In re* Budzinski, 322 So. 2d 511, 512 (Fla. 1975).

65. Florida Bar v. Abagis, 318 So. 2d 395, 397 (Fla. 1975).

66. Committee on Professional Ethics & Conduct v. Wright, 178 N.W.2d 749, 752 (Iowa 1970).

EC 6-3 speaks in terms of being "qualified" and competent. In Degen v. Steinbrink, 236 N.Y. 668, 142 N.E. 328 (1923), an action brought by a client against her attorney claiming negligence, the court spoke in terms of being competent to skillfully and properly perform the work.

It is clear from a reading of the ethical considerations and the cases cited in notes 48-67, *supra*, that a lawyer must apply his knowledge for the benefit of his client in a "skillful" or "professional" manner to be competent within the meaning of DR 6-101(A)(1).

67. CODE, *supra* note 1, EC 6-4, DR 6-101(A)(2).

68. *E.g.*, Friday v. State Bar, 23 Cal. 2d 501, 144 P.2d 564 (1943).

> We have repeatedly recognized the ancient maxim that ignorance of the law is no excuse. . . . Of all classes and professions the lawyer is most sacredly bound to understand and uphold the law. Respondent was guilty of extreme negligence in his failure to familiarize himself with Section 77-1918, R.R.S. 1943, as amended. The fact that he was extremely busy with criminal prosecutions does not absolve him of his responsibility. It would have taken comparatively little time to have read the statute as amended.[69]
>
> Respondent was not charged, as he should have been, with . . . lack of proper preparation. It would have been more appropriate to have included DR 6-101(A)(2), which reads as follows: "A lawyer shall not: . . . (2) Handle a legal matter without preparation adequate in the circumstances." It is more in line with respondent's irresponsible conduct. Respondent clearly would have been in violation of this provision of the Code. He admits that he did not know the law. He knew the statute had been amended and made no attempt to ascertain its provision. *It is inexcusable for an attorney to attempt a legal procedure without endeavoring to ascertain the law governing that procedure.*[70]

It is clear that lack of preparation will be no longer condoned. It does not matter whether the preparation was needed in order to become qualified as required by DR 6-101(A)(1) or in order for a qualified lawyer to update his knowledge as required by DR 6-101(A)(2).[71]

3. *Neglect*

Neglect is the third enumerated instance of "Failing to Act Competently,"[72] although it is not used in the ethical considerations to Canon 6.[73] Neglect should not be construed to embrace those matters within DR 6-101(A)(1) and (2); nor should it be construed to include those matters heretofore labeled as an "honest mistake" or an "error of judgment."[74] Neglect should not be given such an extremely broad meaning.

Neglect, as previously used as a basis for disciplinary action, was: (1) conduct that demonstrated indifference to the client's cause; (2) conduct that was tantamount to abandonment of the client at his hour of need; or (3) a pattern of conduct which established conscious carelessness or habitual dilatoriness in the handling of a client's affairs. It is more than a single act of negli-

---

69. State *ex rel.* Nebraska State Bar Ass'n v. Holscher, 193 Neb. 729, —, 230 N.W.2d 75, 80 (1975).

70. *Id.* at 80-81 (emphasis added).

71. ABA COMM. ON ETHICS & PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 335 (1974) states good guidelines for the securities lawyer to follow as to inquiries or preparation he should make before rendering an opinion and whom the lawyer should expect to rely on that opinion.

72. CODE, *supra* note 1, DR 6-101(A)(3).

73. A possible reference is contained in EC 6-4 which states: "Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client . . . ."

74. The terms "honest mistake" and "error of judgment" should be eliminated because of the confusion they generate in the malpractice area. *See* text accompanying note 47 *supra.*

gence, whether the negligent act is one of commission or one of omission.[75] It should not now have a broader definition under DR 6-101(A)(3). For instance, the Florida Supreme Court observed that:

> Respondent's failure to follow mandatory appellate procedures in the two misdemeanor cases here involved, in and of itself, is not a mortal sin. Many lawyers of average competence and diligence will stub their toes on appellate time strictures at least once in their careers.[76]

Proper examples of neglect are failure to appear and defend or prosecute at trial;[77] accepting a retainer fee and, after repeated demands, failing to institute the action;[78] accepting a case and, after repeated requests, failing to

---

75. ABA COMM. ON ETHICS & PROFESSIONAL RESPONSIBILITY, INFORMAL OPINIONS, No. 1273 (1973) defined "neglect" as follows:

> Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.

Unfortunately, this definition is not all that clear. It really does not provide a workable guide for the discipline enforcing agencies of the several states. In the same opinion, the ABA Committee also bypassed an opportunity to give meaningful guidance to DR 6-101(A)(1) and (2). The text of the opinion read:

> Your Committee poses the following questions:
>
> 1. A lawyer is retained to seek redress for losses sustained by his client. A year elapses and his file reveals that he has taken little, if any, affirmative action in the matter. Has the lawyer violated DR 6-101?
>
> 2. Assume the lawyer engaged in necessary investigation and adequately prepares the claim, but he fails to file a suit within the applicable statute of limitations. Has the lawyer violated DR 6-101? Is it relevant whether the omission by the lawyer was inadvertent?
>
> 3. Assume a lawyer has not neglected the matter entrusted to him, is his ordinary negligence involving an affirmative act or omission grounds for disciplinary action?
>
> 4. Assume the lawyer for the plaintiff does in fact file the suit but not within the applicable statute of limitations. Defense counsel, however, fails to plead the affirmative defense of the statute of limitations, and the suit goes to trial, [sic] Has defense counsel violated DR 6-101?
>
> 5. A lawyer, a member of the bar for two years, is retained to defend a client charged with a criminal offense for which the maximum sentence that could be imposed is twenty years. The lawyer has some limited experience in minor criminal matters but has not previously handled a case of equivalent seriousness. The lawyer does not associate himself with experienced counsel and represents the defendant at trial. Has the lawyer violated DR 6-101?
>
> We are not able to answer questions 1, 2, 4 and 5 because each of the four fact situations could be supplemented by additional facts, not inconsistent with the facts given by you, from which neglect might or might not be shown depending on all other relevant factors.

76. Florida Bar v. Reed, 299 So. 2d 583, 584-85 (Fla. 1974) (a one year suspension was imposed because other factors were present over and above the simple failure to comply with the appellate procedures).

77. *In re* Fellows, 57 Ariz. 224, —, 112 P.2d 864, 866 (1941) ("We can conceive of no act by an attorney more reprehensible than to desert, at the very hour set for his trial, a poor fellow charged with a felonious crime."); *In re* Grubbs, 396 Mich. 275, 240 N.W.2d 233 (1976) (failure to appear at sentencing which resulted in arrest of client violated DR 6-101(A)(3)).

78. Norris v. Alexander, 246 S.C. 14, —, 142 S.E.2d 214, 217 (1965) wherein the court stated:

> An attorney, who contracts to prosecute an action on behalf of his client, impliedly represents that he possesses the requisite degree of learning, skill and ability, which is necessary to the practice of his profession; that he will exert

communicate with the client or take other appropriate action;[79] and inexcusable delay and carelessness in several instances (*e.g.*, being habitually dilatory or consciously careless).[80]

IV. MALPRACTICE

Legal malpractice cases have increased dramatically in recent years. Some of the most important unanswered questions in regard to this area are: with the adoption of Canon 6, are all malpractice cases automatically disciplinary cases; if not, where is the line drawn; does a violation of DR 6-101(A) create a private cause of action;[81] does a jury verdict in a civil action for or against a lawyer preclude a redetermination of his conduct in a subsequent disciplinary action?[82]

---

his best judgment in the prosecution of the litigation entrusted to him; and that he will exercise reasonable and ordinary care and diligence in the use of his skill and the application of his knowledge to the cause of his client. This requires that an attorney should with reasonable diligence and dispatch prosecute his client's cause.

See also In re Albert, 390 Mich. 234, 212 N.W.2d 17 (1973); *In re* Williams, 249 Minn. 600, 83 N.W.2d 115 (1957); *In re* Lanza, 24 N.J. 191, 131 A.2d 497 (1957).

79. Committee on Professional Ethics & Conduct v. Wilson, 235 N.W.2d 117 (Iowa 1975); *In re* Posler, 390 Mich. 581, 213 N.W.2d 133 (1973); State v. Weber, 55 Wis. 2d 548, 200 N.W.2d 577 (1972).

80. State v. Bonisz, 231 Wis. 157, —, 285 N.W. 386, 391 (1939) wherein the court, *quoting* State v. Soderberg, 215 Wis. 571, 255 N.W. 906 (1934), stated:

> The client is just as much entitled to protection against carelessness or incompetence as he is to protection against dishonesty. The lawyer who is habitually negligent in handling matters intrusted to him has as little place at the bar as the dishonest lawyer, unless he can offer convincing evidence that he can and will change his ways.

See also Grove v. State Bar, 66 Cal. 2d 680, 427 P.2d 164, 58 Cal. Rptr. 564 (1967); Cleveland Bar Ass'n v. McGinty, 18 Ohio St. 2d 71, 247 N.E.2d 459 (1969).

These problems also pose a potential violation of DR 7-101(A)(1)—failing to seek the lawful objectives of the client—and DR 7-101(A)(2)—failing to carry out a contract of employment entered into with a client for professional services.

81. The Preliminary Statement to the Code of Professional Responsibility provides: "nor does it [the Code] undertake to define standards for civil liability of lawyers for professional conduct." *See In re* Krozman, 335 N.E.2d 210 (Ind. 1975) holding that the Canons are not statutes or case law but evidence proper standards of conduct for the legal profession; *In re* Estate of Trench, 76 Misc. 2d 180, —, 349 N.Y.S.2d 265, 268 (Sup. Ct. 1973) wherein the court stated that "[w]hile the Canons contained in the Code do not possess the force and effect of statute they have come to be recognized by Bench and Bar as establishing standards and rules of professional conduct . . . . They therefore constitute a safe guide in ascertaining whether professional misconduct exists."; Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975) wherein the court stated: "The portion of the instruction submitted by the plaintiffs, which was taken directly from DR 2-107(A), *correctly stated the law* . . . ." (emphasis added); *cf.* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (section 10(b) of the Securities Exchange Act of 1934 created no private cause of action in the absence of an allegation of scienter); Piper, Jaffray & Hopwood Inc. v. Ladin, 399 F. Supp. 292 (S.D. Iowa 1975) (deals with the Code of Ethics of the National Association of Security Dealers).

In light of the Iowa Supreme Court's holding with respect to the binding aspect of the ethical considerations, it would not be surprising if full legal effect would be given the Code of Professional Responsibility in private litigation. *See* note 35 *supra* and accompanying text.

82. *See* Committee on Professional Ethics & Conduct v. Wright, 178 N.W.2d 749, 750 (Iowa 1970) holding that the transcripts are admissible but the conclusions reached are not binding or conclusive on the issues in a disciplinary action.

A. *Criminal Matters*

Criminal law is perhaps the area giving rise to the most troublesome legal malpractice cases. The legal principle that a defendant's rights must be scrupulously protected presents a host of difficult decisions for the criminal defense lawyer. For example, should the defendant be advised to testify or not testify; what defenses should be raised; what pretrial motions should logically be filed; how in-depth must the investigation be; how forceful should the cross-examination of the chief prosecution witnesses be; should plea bargaining be attempted? The trial of a criminal case is like the trial of any other case; tactics and strategy must be devised. If the case is subsequently lost, that does not mean the lawyer erred, that his judgment was erroneous, or that he was negligent.[83] The fact that a trial plan did not result in an acquittal is not any evidence that another plan would have fared better.

The general incompetency of the defense lawyer (ineffective assistance of counsel) in the handling of a criminal case is an issue that is frequently raised on appeal. If the record establishes that the representation by the lawyer was so inadequate as to turn the trial into a sham or mockery of justice, the defendant's right to due process of law was violated and therefore, the decision of the trial court is vacated.[84] An unsuccessful defense does not mean that the defense lawyer was incompetent or that the defendant was deprived of effective assistance of counsel.[85] Effective assistance of counsel means that the defendant is entitled to conscientious meaningful representation wherein he "is advised of his rights and honest, learned and able counsel is given a reasonable opportunity to perform the task assigned to him."[86]

The defendant's right to have competent counsel obligates an attorney to prepare the client's defense.[87] However, the amount of time needed for preparation and research will vary with the counsel's familiarity with the applicable law, relevant facts, issues presented and the availability of material witnesses.[88] The total record must be examined and the totality of the circumstances evaluated. For the defendant to prevail on this issue, an affirmative factual basis demonstrating defense counsel's inadequacy must appear in the record.[89] Moreover, "the decision on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province

---

83. Olson v. North, 276 Ill. App. 457 (1934) (such language was used to characterize the advice of the lawyer). *See also* Pineda v. Craven, 424 F.2d 369, 372 (9th Cir. 1970) ("There is nothing strategic or tactical about ignorance. . . .").
84. State v. Kendall, 167 N.W.2d 909 (Iowa 1969).
85. Wycoff v. State, 226 N.W.2d 29, 32 (Iowa 1975).
86. Scalf v. Bennett, 260 Iowa 393, 399, 147 N.W.2d 860, 864 (1967).
87. Orcutt v. State, 173 N.W.2d 66, 69-72 (Iowa 1969).
88. Wycoff v. State, 226 N.W.2d 29, 32 (Iowa 1975).
89. State v. Massey, 207 N.W.2d 777 (Iowa 1973). A lawyer who did not receive a copy of the indictment and minutes until the day of the trial and conducted no investigation for the seven weeks preceding trial was held to have served the defendant competently. *Id.* at 779.

of the lawyer after consultation with his client.[90]

In *Birk v. Bennett*,[91] the defendant entered a plea of guilty and was sentenced to 25 years in the penitentiary after being told by his first attorney that if he did not so plead the county attorney was going to prosecute him as a habitual criminal for which he would receive 40 years in prison. The county attorney was not going to prosecute the defendant as a habitual criminal. The first attorney was discharged and a second was retained. The second attorney, after learning the facts, failed to correct the statements of the first attorney. The court held that the first attorney had mislead the defendant and since the second attorney knew this and did not advise differently, the second attorney's representation was perfunctory and the defendant did not have effective assistance of counsel.[92] In *State v. Karston*,[93] the same attorney represented both defendants to a charge of first degree murder arising out of an armed robbery. Both defendants pleaded guilty. At the sentencing, the lawyer maintained that one defendant was more culpable than the other; thus, the sentences should be different. Since the only two penalties available, at that time, were life imprisonment or death, one defendant was left "before the court with his own counsel having said, in substantial effect, that hanging might be what he deserved."[94] This was held to be ineffective assistance of counsel.[95]

Ineffective assistance of counsel has also been found if the defense lawyer fails to properly investigate published contradictory statements of the prosecuting witness or call witnesses that could "cast doubt" upon the happening of the crime;[96] fails to make a meaningful presentation of an appeal;[97] fails to timely file an appeal in a criminal matter when instructed to do so by the defendant;[98] fails to file obvious motions to suppress illegally seized evidence;[99] or fails to adequately communicate with the defendant prior to trial.[100]

---

90. State v. McCray, 231 N.W.2d 579, 580 (Iowa 1975), *quoting* ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.2(b) (Approved Draft 1971).

91. 258 Iowa 1016, 141 N.W.2d 576 (1966).

92. Birk v. Bennett, 258 Iowa 1016, 141 N.W.2d 576 (1966).

93. 247 Iowa 32, 72 N.W.2d 463 (1955).

94. State v. Karston, 247 Iowa 32, 37, 72 N.W.2d 463, 466 (1955).

95. *Id.*

96. Garza v. Wolff, 528 F.2d 208, 213 (8th Cir. 1975).

97. Commonwealth v. Davis, 307 N.E.2d 6 (Mass. 1974).

> We take this occasion to remind the bar that lawyers owe their clients obligations of competence, diligence and zeal, and that those obligations may comprehend, upon appeal, both the presentation of the law and the marshalling of the facts. . . . Canons 6 and 7 . . . Only in unusual situations should a murder appeal be submitted without oral argument.

Id. at 6-7.

98. Blanchard v. Brewer, 429 F.2d 89, 91 (8th Cir. 1970); *accord*, Glouser v. United States, 318 F. Supp. 175 (S.D. Iowa 1970).

99. Pineda v. Craven, 424 F.2d 369 (9th Cir. 1970).

100. Orcutt v. State, 173 N.W.2d 66 (Iowa 1969); *accord*, Turner v. Maryland, 318 F.2d 852 (4th Cir. 1963).

> A sense of professional responsibility should have suggested to the lawyer that the omission to communicate with his client during the two weeks available before trial not only constituted a deplorable disregard of the client's feelings, but involved the risk of overlooking significant information which the client might

It certainly seems that reversals today for ineffective assistance of counsel would also constitute incompetency in violation of DR 6-101(A). The converse does not, however, appear to be true. Lawyers, whose representations of defendants have been held competent or the conviction has not been reversed and a new trial ordered because of incompetent counsel on either direct appeal or post-trial relief, are subject to malpractice claims. Although some state court litigation has been noted, as yet, the number has not been great.[101]

At the start, the lawyer is entitled to the presumption that he did discharge his duty until the contrary is shown.[102] No presumption of negligence arises merely because the defendant was found guilty.[103] The alleged negligent act may be a legal one or one of fact.[104] Malpractice concerning legal questions should be decided by the court while those involving factual matters should be left to the jury if properly generated by expert testimony.[105]

---

have in his possession or be able to point to. Normally, in the absence of clear proof that no prejudice resulted, we should be obligated to treat the lawyer's representation as inadequate.

Id. at 853-54.

101. What the damages would be in a malpractice action arising out of a criminal case could be an interesting development in the law. Generally in malpractice cases, the client deserves to be made whole. "An attorney's liability as in other negligence cases is for all damages directly and proximately caused by his negligence." Smith v. Lewis, 13 Cal. 3d 55, 530 P.2d 589, 118 Cal. Rptr. 621 (1975). Since the action is predicated upon the theory that but for the lawyer's incompetence, the defendant would have been acquitted, proof of incompetent counsel must be followed by additional proof that the defendant was innocent, *i.e.*, would have prevailed in the underlying case. Baker v. Beal, 225 N.W.2d 106 (Iowa 1975). However, assuming that the defendant is guilty but had ineffective assistance of counsel, what then are the damages? Any attorney's fees paid to the erring lawyer would obviously be recovered. Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 269 So. 2d 239 (1972) (fees paid to the lawyer guilty of malpractice as well as the fees necessary to rectify the matter). However, no court has held that such a defendant is entitled to money damages because the lawyer's conduct deprived him of his right to a speedy trial or a determination of guilt based upon an adequate presentation of his case.

See also Annot., 53 A.L.R.3d 731 (1973).

102. *See* note 83 *supra.*

103. *Id. See also* Annot., 53 A.L.R.3d 731 (1973).

104. Martin v. Hall, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (Ct. App. 1971).

105. *Id.* at 420, 97 Cal. Rptr. at 733-34.

The trial court, in the instant case, therefore should have ruled how the court in the criminal case would have resolved these legal questions. If, after the establishment of the basic facts, it became evident that, as a matter of law, a particular defense could not have prevailed, any evidence on whether or not defendant committed malpractice in not raising it became academic. At the very least it was the court's duty to instruct the jury that such malpractice caused the defendant no harm. Conversely, if in its view a particular defense would have prevailed, the trial court should have so advised the jury, leaving to that body only the issues of negligence and damages.

Id. (citations omitted). The defenses that the plaintiff/client claimed should have been interposed were double jeopardy and multiple punishment, generally legal defenses. A defense of fact, *e.g.*, insanity, would be a jury question under appropriate instructions. *Compare with* Petersen v. Farmers Casualty, 226 N.W.2d 226 (Iowa 1975), a malpractice action for failing to timely pursue an appeal. The Iowa Supreme Court seemed to hold that all that was necessary to be established was a showing of "grounds for appeal". This would be an abandonment of the lawsuit within a lawsuit concept adopted in Baker v. Beal, 225 N.W.2d 106 (Iowa 1975). The court also seemed to approve the reception of expert testimony upon "the probability of reversal" (without stating the necessary qualifications of this expert) for the jury's consideration.

The Civil Rights Act[106] has presented a fertile field for spawning malpractice charges against criminal defense lawyers by their convicted clients. The basis for the claim that the "color of state law" requirement is satisfied is that lawyers are officers of the court.[107] However, in the criminal area, the courts generally hold that lawyers are privately retained (even if court appointed for an indigent) and as such do not act under color of state law.[108] Furthermore, conspiracy to violate someone's civil rights requires two or more people and generally this cannot be proved.[109] Such actions sound in malpractice and simply are not cognizable under the Civil Rights Act.[110] The same result is reached even if the plea is that the lawyer permitted trial without a valid indictment;[111] or that the lawyer did not adequately prepare, failed to interview witnesses, and permitted the defendant to receive an excessive sentence;[112] or that the defendant's constitutional rights guaranteed by the fifth and fourteenth amendments to the United States Constitution were violated.[113] However, state court action could still be taken.[114]

---

106. 42 U.S.C. section 1983 (1970) provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. section 1985(3) (1970) provides:
If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

107. Steward v. Meeker, 459 F.2d 669 (3d Cir. 1972).
108. *Id.*
109. *Id.*
110. Smith v. Clapp, 436 F.2d 590 (3d Cir. 1970).
111. *Id.*
112. Fletcher v. Hook, 446 F.2d 14 (3d Cir. 1971).
113. Christman v. Pennsylvania, 275 F. Supp. 434 (W.D. Pa. 1967).
114. Steward v. Meeker, 459 F.2d 669 (3d Cir. 1972); Smith v. Clapp, 436 F.2d 590 (3d Cir. 1970).

Trial judges are reversed, not the lawyer on the losing side. However, the lawyer makes objections and otherwise has the duty to see that the record is properly made. The lawyer may also file trial briefs and requested instructions. As such, the lawyer certainly may be as responsible for a reversal as the trial judge. A reversal, whether in a criminal case or civil case, should create no presumption of incompetence or lack of adequate trial preparation. It should not be the basis for a malpractice or disciplinary action. It is suggested that any time a position or proposal of a lawyer has been adopted

Prosecutors, no matter how flagrant or fraudulent their conduct, are immune from a third party suit by the defendant under the Civil Rights Act.[115] The same result is reached if the prosecutor illegally seized evidence.[116] However, a different result may be reached if the prosecutor was acting as an investigator and not a prosecutor.[117] In any event, the prosecutor is still amenable to disciplinary action[118] and, perhaps, a third party action in state court under state law.

The possibility of a malpractice suit presents obvious problems for a criminal defense lawyer, especially for those that are court appointed. The exercise of his independent judgment[119] on behalf of his client cannot help but be compromised by looking over his shoulder at a possible subsequent malpractice action. The cases have not yet made it clear whether failure to reverse a criminal case or grant post-conviction relief on the grounds of ineffective assistance of counsel precludes the issue of defense counsel's liability in a subsequent malpractice action. The defense lawyer's independent judgment and freedom, whether privately retained or court appointed, should not be further compromised by the fear of disciplinary action for a violation of DR 6-101(A), absent a reversal on the grounds of ineffective assistance of counsel or other compelling reasons to the contrary.[120] Defense lawyers should do everything reasonable and necessary, within their sound judgment, to provide their client with a good defense. However, they should not be required to do unnecessary research, investigation, or motion filing simply to have affirmative evidence of their competency preserved for use in a subsequent disciplinary action in the event their client is convicted and claims thereby that his lawyer was incompetent.[121]

---

by a judge or an objection sustained or overruled and such action by the trial judge was the basis for a reversal, no cause of action for malpractice (or disciplinary action) should lie, absent an affirmative showing that the lawyer acted fraudulently or intentionally misinformed the trial court.

115. Imbler v. Pachtman, 424 U.S. 409 (1976). *Compare with* Spring v. Constantio, 362 A.2d 871 (Conn. 1976) holding a public defender liable to his client for malpractice.

116. *Cf.* Wilhelm v. Turner, 431 F.2d 177 (8th Cir. 1970) (the court here added the requirement of good faith).

117. *Id.*; Barnes v. Dorsey, 480 F.2d 1057, 1060 (8th Cir. 1970).

118. Imbler v. Pachtman, 424 U.S. 409 (1976). This should be a question of state policy for the individual states to answer.

119. *See* EC 5-1 requiring that the professional judgment of a lawyer should be exercised "for the benefit of his client and free of compromising influences"; EC 5-2 requiring a lawyer to reject representation if "there is a reasonable probability" his personal interests will adversely affect the advice to be given; DR 5-101(A) requiring representation be declined if the lawyer's professional judgment will be reasonably affected by his own personal interests.

120. *See* CODE, *supra* note 1, EC 5-1, EC 5-2, DR 5-101(A). Canon 7 further requires a lawyer to represent his client zealously. However, DR 7-102(A)(1) specifically states that zealous advocacy does not include doing things when the lawyer knows "that such action would serve merely to harass or maliciously injure another."

See also State v. Hansen, 215 N.W.2d 249 (Iowa 1974) (censuring defense counsel for profuse filings as dilatory, obstructive and harassing); First Am. Bank & Trust Co. v. George, 239 N.W.2d 284, 288-89 (N.D. 1976) ("[C]ounsel owes to the courts . . . a duty to exercise an informed and professional restraint in raising and litigating issues which are either without merit or barely arguable and without prospect of success.").

121. *See* note 120 *supra*. *See also* State v. Kendall, 167 N.W.2d 909, 910 (Iowa 1969) wherein the court stated: "Improvident strategy, bad tactics, mistaken carelessness or inexperience do not necessarily amount to ineffective assistance of counsel."

B. *Civil Matters*

Legal malpractice claims arising out of civil matters are on the increase.[122] Crucial questions yet to be decided in this area include: is every case of legal malpractice also a violation of Canon 6 and does a Canon 6 violation create a private cause of action in favor of any person damaged by the legal malpractice of a lawyer? With the adoption of Canon 6, it is now necessary to precisely define the terms employed to characterize lawyer conduct. In this way, one may more easily make a valid judgment as to whether legal malpractice was committed and, if committed, whether it further constituted incompetence, lack of reasonable preparation, or client neglect in violation of DR 6-101(A). Although the following two sections do not present an exhaustive analysis of the numerous legal malpractice cases decided in recent years, they do present an overview of those malpractice cases that could also form the basis for disciplinary action under DR 6-101(A) and illustrate the possible extent of a lawyer's liability to third parties. A sampling of such cases makes apparent the dilemma facing the lawyer of today.

1. *The Overlap Between Legal Malpractice and Canon 6*

First and foremost, the term "negligence" should be reserved solely for malpractice actions and should no longer be used in disciplinary cases.[123] A lawyer who agrees to represent a client 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;
> (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.[124]

A lawyer who fails to exercise that degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer is guilty of malpractice.[125] The standard is the same throughout the state and does not differ in various communities.[126] It matters not if the ter-

---

122. Rates for malpractice insurance for Iowa lawyers increased, effective August 1, 1976, to $292 per lawyer for coverage of $100,000/$300,000. Concentration in a particular area such as securities brings a much higher premium. Just eight years ago the premium was $43.50 per lawyer with no deductible. Rates in Missouri have risen from $72 to $225 in 1976 with another increase still anticipated. Rates in Michigan are $456; Ohio $440; Connecticut $495; and Arizona and Florida $589. Most major metropolitan areas average from $500 to $600. Iowa State Bar Ass'n, News Bull. 10 (June-July 1976).

123. Negligence is applicable to single instances of malpractice. A proper disciplinary case may still be based upon several independent acts of malpractice showing a pattern of conduct that amounts to client indifference or conscious carelessness.

124. Hodges v. Carter, 239 N.C. 517, —, 80 S.E.2d 144, 145-46, 45 A.L.R.2d 1, 3 (1954).

125. Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 438 P.2d 865 (1968).

126. *Id.*

minology used is negligence or malpractice.[127]

Proof of negligence may be so clear and obvious that the court can rule as a matter of law whether the applicable standards were met.[128] Other cases may present facts such that malpractice may be recognized or inferred from the common knowledge or experience of laymen.[129] In other cases, especially those involving the judgment of the lawyer, expert testimony is needed to establish that the lawyer's judgment was so lacking as to constitute negligence.[130]

Malpractice actions based upon the contention that the lawyer was not qualified in a particular area of the law have been few.[131] If a general lack of qualification is present, usually there are also specific acts of negligence present. Furthermore, a case alleging specific acts of negligence is much easier to prove than one generally alleging incompetency. Thus, the majority of malpractice cases that come within the ambient of DR 6-101(A) will involve DR 6-101(A)(2).

Preparation, adequate in the circumstances, encompasses knowledge of the current law on the subject, ascertainment of the facts from the client, independent investigation, and employment of necessary discovery proceedings after a suit is started. A lawyer is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.[132] The lawyer must educate himself on the applicable principles of law so that he may exercise informed judgment and advise the client accordingly in regard to the client's rights.[133] The court will take notice of those research tools available

127. Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966).

128. Central Cab Co. v. Clarke, 259 Md. 542, 270 A.2d 662 (1970) (failure of attorney to notify client of termination of his representation); Walters v. Hastings, 84 N.M. 101, 500 P.2d 186 (1972) (dictum). The Iowa Supreme Court recognized this rule in Baker v. Beal, 225 N.W.2d 106 (Iowa 1975). This case brought forth another interesting pronouncement that is not a subject of this article, namely, that once a lawyer files a suit he will not be heard to claim the action was without merit in a later malpractice action.

129. Baker v. Beal, 225 N.W.2d 106 (Iowa 1975) (dictum); Central Cab Co. v. Clarke, 259 Md. 542, 270 A.2d 662 (1970) (dictum); Walters v. Hastings, 84 N.M. 101, 500 P.2d 186 (1972) (dictum).

130. Walters v. Hastings, 84 N.M. 101, 500 P.2d 186 (1972) (proof of justification for discharge of attorney; not a malpractice action).

131. *See* Annot., 96 A.L.R.2d 823 (1964); Annot., 45 A.L.R.2d 5 (1956). *See generally* RESTATEMENT (SECOND) OF TORTS § 299(A) (1965) (discussion of the standards by which professionals are judged).

132. Smith v. Lewis, 13 Cal. 3d 315, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (experienced domestic relations attorney failed to claim state and federal retirement benefits as community property, asserting that the state of the law at the time in question was unsettled); Ramp v. St. Paul Fire & Marine Ins. Co., 254 So. 2d 79, 83 (La. App. 1971); *In re* Woods, 158 Tenn. 383, —, 13 S.W.2d 800, 803 (1929) wherein the court stated:

> For loss to clients resulting from a want of proper knowledge of matters of law in common use, or of such plain and obvious principles as every lawyer is presumed to know, an attorney is liable, and he is usually held to be liable for the consequences of his ignorance or nonobservance of the rules of the courts in which he practices, or for his ignorance of the statutes and published decisions of his own state.

133. Smith v. Lewis, 13 Cal. 3d 315, 530 P.2d 589, 118 Cal. Rptr. 621 (1975);

to and commonly used by the lawyer.[134]

The attorney must also make an adequate investigation of the facts, both as they are favorable and unfavorable to the client.[135] However, a lawyer may rely upon the facts related by the client.[136] Investigation as to the truth or falsity of the facts related need not be made,[137] but, if critical facts are not related, it is the duty of the lawyer to ascertain such facts.[138] The lawyer may also have the duty to investigate and report to the client.[139] If the client does not know what facts are material, it is the duty of the lawyer to inquire of the client in respect to such facts.[140] If the client assumes the responsibility of ascertaining the facts, the lawyer need not.[141] In all cases the lawyer's conduct is to be appraised in light of the surrounding circumstances existing prior to and during the course of such litigation and not solely according to the omniscience of hindsight gained after the litigation has been completed.[142]

Reasonable investigation in order to permit the lawyer to properly advise or represent his clients in legal matters other than litigation also is required. For example, it has been held that a lawyer has a duty to investigate and advise his client concerning recording requirements to perfect a lien;[143] to ascertain and enter of record damages the client has sustained;[144] to certify title to real estate;[145] to advise on all material facts so that the client can make an informed decision;[146] and to question a legal description in a title opinion that

---

Ramp v. St. Paul Fire & Marine Ins. Co., 254 So. 2d 79 (La. App. 1971); *In re* Woods, 158 Tenn. 383, 13 S.W.2d 800 (1929). *See also In re* Farr, 340 N.E.2d 777 (Ind. 1976) to the effect that it is not malpractice to fail to discuss all possible theories of recovery with the client.

134. Smith v. Lewis, 13 Cal. 3d 315, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Ramp v. St. Paul Fire & Marine Ins. Co., 254 So. 2d 79 (La. App. 1971); *In re* Woods, 158 Tenn. 383, 13 S.W.2d 800 (1929).

135. Watkins v. Sheppard, 278 So. 2d 890 (La. App. 1973); Passanante v. Yormark, 138 N.J. Super. 233, —, 350 A.2d 497, 500 (Super. Ct. App. Div. 1975).

136. Watkins v. Sheppard, 278 So. 2d 890, 892 (La. App. 1973); Boley v. Boley, 506 S.W.2d 934, 941 (Tex. Civ. App. 1974) (attorney may assume wife in divorce action is fully aware and familiar with assets owned by her and her husband); *see* Ishmael v. Millingan, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (Dist. Ct. App. 1966) holding that where the attorney represents both parties, it is his duty to ascertain and disclose all assets.

137. Milliner v. Elmer Fox & Co., 529 P.2d 806, 808 (Utah 1974). *Compare id. with* Grigsby v. Liles, 147 So. 2d 836 (Ala. Ct. App. 1961), *rev'd*, 147 So. 2d 846 (Ala. 1962), which requires a lawyer to see and talk with witnesses. Obviously, proper trial preparation (depending on the case's value to the client) dictates that the lawyer interview prospective witnesses and not rely upon what the client relates a witness will say. A lawyer should not put a witness on the stand and ask questions without knowing what the answers will be.

138. *See* cases cited note 136 *supra*.

139. Burien Motors, Inc. v. Balch, 9 Wash. App. 573, 513 P.2d 582 (Ct. App. 1973). *See* Passanante v. Yormark, 138 N.J. Super. 233, 350 A.2d 497 (Super. Ct. App. Div. 1975), which requires the lawyer to inform the client of any new information.

140. Bank of Anacortes v. Cook, 10 Wash. App. 391, 517 P.2d 633 (Ct. App. 1974).

141. Rochester v. Katalan, 320 A.2d 704 (Del. 1974).

142. Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370, 373 (1959).

143. Feil v. Wishek, 193 N.W.2d 218 (N.D. 1972).

144. Armstrong v. Adams, 102 Cal. App. 677, 283 P. 871 (Dist. Ct. App. 1929).

145. Gleason v. Title Guar. Co., 300 F.2d 813 (5th Cir. 1962).

146. Spector v. Mermelstein, 361 F. Supp. 30 (S.D.N.Y. 1972).

a lawyer should reasonably know was defective even if the same opinion is made subject to anything that would be revealed by a survey.[147]

DR 6-101(A) does impose duties upon the lawyer that require affirmative action. If the required affirmative action is not taken, this disciplinary rule is violated. Again, an element of intent should be found either through the lawyer's conscious disregard of the standard or because his conduct in a series of cases establishes that he fails to appreciate the standard. A single act of negligence does not establish this element of intent.

2. *Liability to Third Parties*

Generally, a lawyer owes no duty to a party who is not a client and therefore has no liability to such a third party even if a third party is damaged by the lawyer's negligence. The lawyer is not a party in interest in the litigation.[148] The frequency of these suits are increasing and thereby this doctrine of nonliability is becoming eroded.[149] The Civil Rights Act is not available in civil matters for the same reason it is not available in criminal cases.[150] However, if damage to the opposing party is occasioned by use of a known unconstitutional state law as opposed to the state simply providing a forum, liability may be imposed upon the client.[151] However, if the lawyer proceeds upon his own volition, without the authority or knowledge of the client, and

147. Owen v. Neely, 471 S.W.2d 705, 708 (Ky. 1971). *See also* Annot., 62 A.L.R.3d 252 (1975) (sale of securities); Annot., 55 A.L.R.3d 977 (1974) (estate, will or succession matters); Annot., 59 A.L.R.3d 1176 (1974) (investigation/certification of real estate title); Annot., 55 A.L.R.3d 930 (1974) (timely notice of tort claim against government); Annot., 47 A.L.R.3d 1286 (1973) (preparation of income tax return); Annot., 47 A.L.R.3d 507 (1973) (estate tax law violations); Annot., 17 A.L.R.3d 1442 (1968) (admissability of expert evidence as to standards of practice); Annot., 45 A.L.R.2d 5 (1956) (litigation); Annot., 45 A.L.R.2d 62 (1956) (measure of damages).

148. Jones v. Jones, 410 F.2d 365 (7th Cir. 1969); Tunheim v. Bowman, 366 F. Supp. 1395 (D. Nev. 1973).

149. *E.g.*, United States Gen., Inc. v. Schroeder, 400 F. Supp. 713 (E.D. Wis. 1975); Victor v. Goldman, 74 Misc. 685, 344 N.Y.S.2d 672 (Sup. Ct. 1973). Some states hold that the bringing of a suit without reasonable cause, such as for a claim barred by the doctrine of res judicata, imposes third party liability on the lawyer. Manchester Ins. & Indem. Co. v. Strom, 122 Ill. App. 2d 183, 258 N.E.2d 150 (App. Ct. 1970); Ready v. Ready, 33 Ill. App. 2d 145, 178 N.E.2d 650 (App. Ct. 1961). *See also* Tormo v. Yormark, 398 F. Supp. 1159 (D.C.N.J. 1975) (third party immunity bars only suit brought by client for contributions); Tool Research & Eng'r Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (Ct. App. 1975) (a lawyer is not an insurer to the client's adversary that the client will be right); Lucas v. Ludwig, 313 So. 2d 12 (La. Ct. App. 1975) (a lawyer *licensed for two months* who persuaded the police to go to a landlord's house to recover property of a tenant held under an alleged landlord's lien was guilty of invading the landlord's right of privacy and assessed damages of $500.00); Schnabel v. Taft Broadcasting Co., 525 S.W.2d 819 (Mo. Ct. App. 1975); Goerke v. Vojvodich, 67 Wis. 2d 102, 226 N.W.2d 211 (1975). *See generally* Annot., 45 A.L.R.3d 1181 (1972); 7 C.J.S. *Attorney & Client* § 52(b), at 834 (1937) stating that there is no liability to a third party unless the lawyer is guilty of fraud or collusion, or of malicious or tortious acts.

150. Dotlich v. Kane, 497 F.2d 390 (8th Cir. 1974); Glasspoole v. Albertson, 491 F.2d 1090 (8th Cir. 1974); Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974); Skolnick v. Martin, 317 F.2d 855 (7th Cir. 1963).

151. Tunheim v. Bowman, 366 F. Supp. 1395 (D. Nev. 1973).

with knowledge, actual or constructive, of the unconstitutionality of the statute used, liability may be found.[152]

If privity is found between the lawyer and the third party, such as a beneficiary of a will, an action will lie.[153] In general, an action will now lie in any case where the transaction was intended to affect the third party; the harm was foreseeable; a close connection is present between the lawyer's conduct and the damage suffered; the moral blame is the lawyer's; and it is the policy of the state to prevent future harm of a similar nature.[154]

Canon 6 does not require that the lawyer be civilly liable before he has violated any of its disciplinary rules. In Iowa, the client has historically been immune from liability if he acted upon the advice of counsel after a full and fair disclosure of the facts.[155] The adoption of Canon 6, which at the very least sets a minimum standard for the lawyer to meet, now raises the question of the possible vicarious liability of the client for the negligence of the lawyer-agent. Such a case may exist where the client does not know all the facts, thereby placing the duty upon the lawyer to discover same, and the lawyer wrongly advises the client without undertaking the necessary investigation. Even though the damaged third party could not reach the lawyer directly in a third party suit because of lack of privity, the lawyer might be reached by suing the client directly and the client thereafter impleading the lawyer as a third party defendant on the theory of indemnity over.[156]

Abuse of process presents an even more onerous problem for the lawyer. The gravamen of this action is not the lack of probable cause,[157] but the misuse of the process, once obtained, for any purpose other than that for which it was designed to accomplish.[158] Obviously, the use of legal process, once obtained, rests with the lawyer and not the client. If it is misused because of the lawyer's failure to comply with DR 6-101(A), the wrongdoing can only lie with the lawyer.

A finding of privity between the lawyer and any party is not necessary before the lawyer can be found in violation of DR 6-101(A). Disciplinary action may lie even though a civil malpractice action will not.

---

152. United States Gen., Inc. v. Schroeder, 400 F. Supp. 713 (E.D. Wis. 1975).

153. Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Licata v. Spector, 26 Conn. Supp. 378, —, 225 A.2d 28, 29 (Ct. C.P. 1966); McDonald v. Stewart, 289 Minn. 35, 182 N.W.2d 437 (1970); Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930). *See also* Cameron v. Montgomery, 225 N.W.2d 154 (Iowa 1975) holding a lawyer liable for malpractice in failing to take advantage of alternative valuation dates for federal estate taxes.

154. Donald v. Garry, 19 Cal. App. 3d 769, 771-72, 97 Cal. Rptr. 191, — (1971).

155. Vander Linden v. Crews, 231 N.W.2d 904 (Iowa 1974); Liberty Loan Corp. v. Williams, 201 N.W.2d 462 (Iowa 1972); Annot., 27 A.L.R.3d 1113 (1969).

156. Estate of Zalaznick, 84 Misc. 2d 715, 375 N.Y.S.2d 522 (Sur. Ct. 1975) (action in an estate wherein the client did implead the lawyer alleging that the lawyer's negligence, if any, was the moving cause).

157. Sarvold v. Dodson, 237 N.W.2d 447, 448 (Iowa 1976).

158. Estate of Zalaznick, 84 Misc. 2d 715, 375 N.Y.S.2d 522 (Sur. Ct. 1975).

3. *Lack of Success At Trial—Negligence and Incompetency*

There should be no reluctance to recognize a valid malpractice claim.[159] The same is true of a case that warrants disciplinary action.[160] However, lack of success at trial does not mean that negligence or a violation of the Code of Professional Responsibility is present.[161] In order to guard against a future claim of a violation of DR 6-101(A) in either a malpractice or disciplinary action, the lawyer should not have to do things he believes will not be of benefit to the client.

Unquestionably, lawyers should still be careful and thorough in the handling of their client's affairs. The extent of the services rendered in this regard should still depend upon the "value of the case to the client." A case with a value of $100 cannot justify $500 worth of preparation. Nor is preparation or research justified that the lawyer believes will not reasonably benefit the client. This is what preparation "adequate in the circumstances" has to mean under DR 6-101(A)(2).

The terminology used in characterizing lawyer conduct contributes to this problem. For example, prior to the adoption of DR 6-101(A), the courts had pronounced that a lawyer was not chargeable for an "honest mistake" nor an "error of judgment" in either a malpractice or disciplinary action. However, employment of these terms certainly conveys to the layman the conclusion that the lawyer did or failed to do something for the client that the lawyer should have done. The client does not care if the lawyer's failure was honest or otherwise; the client only knows that he lost and the court's language leads the client to believe that he should not have. Actually the decision of the court often turns on the fact that it has not been established that absent the "honest mistake" or "error of judgment" the client's case would have turned out more favorably. It can be equally true that at the time the lawyer either acted or failed to act, what he did or did not do was neither a "mistake" nor an "error." It could just as well have been done or not done in furtherance of the lawyer's analysis or evaluation of what action would benefit the client and what action would bring little or no benefit. Certainly, this is neither a "mistake" nor an "error of judgment" in any sense of those words. If proper analysis and evaluation does not turn out as favorably as the client desires, it does not mean that, at the time made, it was bad; the lawyer does not guarantee his advice.[162]

Many examples come quickly to mind. Leading questions are often permitted until testimony on the critical issues is reached and objections may not be made because, at the time, no benefit would accrue to the client. Like-

159. Hammond v. Weiss, 46 Mich. App. 717, 208 N.W.2d 578 (Ct. App. 1973).

160. *See* CODE, *supra* note 1, DR 1-103(A), (B).

161. O'Kelly v. Skinner, Wilson & Beals, 132 Ga. App. 792, 209 S.E.2d 242 (Ct. App. 1974). *See also* Underwood v. Woods, 406 F.2d 910 (8th Cir. 1969); Nause v. Goldman, 321 So. 2d 304 (Miss. 1975) (a lawyer is not an insurer).

162. Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966); Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963); Eadon v. Reuler, 146 Colo. 307, 361 P.2d 445 (1961).

wise, the lawyer may ask that the case be submitted on one theory and not another because he thinks the evidence on that theory is stronger or more advantageous to the client. If the trial turns out adversely to the lawyer's client, it does not mean that the lawyer's judgment or strategy was bad or that "mistakes" or "errors" were made even though these omitted points cannot now be raised on appeal.[163] More preparation or thought would not have changed the strategy or tactics. Furthermore, it is extremely speculative to say that the case would have had a different result if the lawyer had conducted the trial differently.[164]

The use of the terms "honest mistake" and "error of judgment" should be discontinued in order to eliminate any possible confusion in the mind of the public. It has already been noted that such conduct should not fall within the parameters of DR 6-101(A) because the element of intent is lacking.

V. Conclusion

The requirement to be or become qualified in a matter undertaken places a duty upon the lawyer to affirmatively demonstrate this fact. If the lawyer has been acting in the legal area for several years, with some success, that should be good evidence of qualification or competency within DR 6-101(A)(1). If Iowa were to adopt specialities and the lawyer was included therein, this should establish his qualification or competency as a matter of law. The burden rests most heavily upon the recent graduate or young lawyer who has no association with a firm that has older or more experienced lawyers. Such a lawyer must affirmatively establish that even though the matter is his first venture into the area, the course of study undertaken has made the lawyer competent. This is not to say that lawyers should be penalized for their attempts to develop new legal theories. If the attempt to establish a new theory or extend an existing one fails, that fact does not establish that the lawyer is incompetent.[165]

It will be more difficult to develop meaningful criteria with which to judge

163. For an example of a case where omitted issues were not considered on appeal see Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532, 535 (Iowa 1973).

164. *Id.* The same result should be reached if the objection made by the attorney is considered by the supreme court not to be the right one or not specific enough; the appeal issue was not presented to the lower court; or the theory of the appeal is different in the supreme court than it was in the trial court. Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532 (Iowa 1973) (appeal issue not presented); Linge v. Iowa State Highway Comm'n, 260 Iowa 1226, 150 N.W.2d 642 (1967) (deficient objection); Ferris v. Riley, 251 Iowa 400, 101 N.W.2d 176 (1960) (deficient objection); *In re* Searbaugh's Estate, 231 Iowa 320, 1 N.W.2d 105 (1942) (theory of appeal different). Actual prejudice to the case of the client should be required to the extent that such prejudice should have been apparent to the lawyer at the time he acted or failed to act. Hindsight should not be permitted. *Compare* Pete v. Henderson, 124 Cal. App. 2d 487, 296 P.2d 78 (Dist. Ct. App. 1954) *with* Annot., 45 A.L.R.2d 62 (1956).

165. *In re* Corace, 390 Mich. 419, 213 N.W.2d 124, 132 (1973). "We agree . . . that our adversary system 'intends, and expects, lawyers to probe the outer limits of the bounds of the law, ever searching for a more efficacious remedy or a more successful defense.'"

whether a lawyer was adequately prepared[166] under the circumstances. There will be numerous occasions when a lawyer will have to decide if pursuit of additional avenues of preparation will cost the client more than the potential benefit it will bring, or, because of the particular strategy chosen, whether the additional preparation is necessary. The lawyer should always be mindful of the value of the undertaking to the client in relation to the cost of rendering the legal services requested. DR 6-101(A)(2) should not require the lawyer to make the actual cost of the undertaking out of proportion to its value to the client. Within this framework, the lawyer must undertake reasonable legal research to ascertain the law and reasonable investigation to ascertain the facts so that the client may be properly advised or that an informed decision as to a course of action based upon an intelligent assessment of the problem can be made.

A lawyer must be attentive to the client's cause and perform the necessary legal services with due diligence.[167] "Indifference,"[168] rather than "neglect," probably better describes the proscribed conduct. Inadvertence,[169] even though causing the client damage and constituting negligence and malpractice, is not within the proscribed conduct of DR 6-101(A)(3). There must be an element of intent attributable to the lawyer, either directly or by his conduct.[170]

It does appear that the Iowa Supreme Court may soon accept the principle that violations of the Code of Professional Responsibility will create a private cause of action in favor of, at least, the aggrieved client. If the court does adopt this position and a subsequent malpractice action based upon a violation of the Code of Professional Responsibility is successful, it should not mean that disciplinary action will also be taken. The degree of proof is different.[171] In the past the Committee on Professional Ethics and Conduct of the Iowa State Bar Association has maintained that a violation of the Code of Professional

---

166. *See* CODE, *supra* note 1, DR 6-101(A)(2).

167. *Id.* DR 6-101(A)(3).

168. *Webster's Seventh New Collegiate Dictionary* defines "indifference" as "unconcerned"; "disinterested"; "doesn't matter one way or the other." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 427 (1969). Indifference is the exact opposite of being a zealous advocate.

169. *Webster's Seventh New Collegiate Dictionary* defines "inadvertence" as an "oversight." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 421 (1969). Examples include a misnomer in the original notice, stating the wrong county in the original notice, misreading a legal description or omitting a critical word in a contract. It is something that is done or not done and which had not been called to the attention of the lawyer. It is something that occurs within a very short span of time and cannot be corrected after discovery. There is no element of intent present, directly or by inference.

170. *See* note 75 *supra.* The conduct referred to is often characterized as conscious disregard. This is more than a momentary slip in the review of a document. It is a failure to act after demand (indifference); a long period of time having transpired without action (dilatory); failure to appear at trial after notice (abandonment); etc.

171. Committee on Professional Ethics & Conduct v. Kraschel, 260 Iowa 187, 194, 148 N.W.2d 621, 625 (1967) holding that the degree of proof in a disciplinary proceeding is "a convincing preponderance of the evidence. Obviously, this requirement is something less than required in a criminal prosecution, and is something more than is required in a civil proceeding." A malpractice action being a civil suit, the burden is a preponderance of the evidence.

Responsibility implied that a showing of intent, either directly or by conduct, must be established; inadvertence was insufficient.

What the future law will be in respect to malpractice actions in light of the Code of Professional Responsibility is unsettled at this time. Fear of such actions will undoubtedly impair the zeaolusness and independent judgment of the lawyer. It should not be further impaired by permitting malpractice actions to broaden the scope of disciplinary actions.[172]

There certainly are valid reasons why a lawyer will choose one course of action over another in the handling of a client's affairs. The lawyer must communicate to the client, *in language the client understands*, what the various available courses of action are and why the particular course of action was chosen over the others, before the action is taken. If this is not done and the matter does not turn out as the client anticipated, the client believes the alternative courses were not considered or the lawyer did not know they even existed. If told after the fact, the client will think the lawyer is attempting to excuse what the client now believes was the incompetent manner in which his legal matter was handled. Over half of the complaints received by the Committee on Professional Ethics and Conduct of the Iowa State Bar Association are filed because the lawyer failed to *properly* communicate with the client. Today, in light of Canon 6, it is especially important that the lawyer takes the time to adequately communicate with the client during all phases of the handling of the client's legal affairs.

---

172. Of course, the lawyer must comply with DR 6-101(A)(1) and (2). This imposes an affirmative duty on the lawyer. The failure to comply with this affirmative duty will imply the requisite intent needed for a disciplinary action.

SURVEY OF IOWA CRIMINAL LAW

Mark E. Schantz†

TABLE OF CONTENTS