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Andrea Hirsch

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THE IMPACT OF AUTOMATED LITIGATION SUPPORT SYSTEMS ON AN ATTORNEY'S STANDARD OF CARE

I. INTRODUCTION

No amount of wishful thinking can slow the rapid pace of technology or diminish its impact on every aspect of our daily lives. The use of computers is becoming commonplace in banking, manufacturing, medicine, government, education, and even in the home. The legal profession has not remained immune from this onslaught. Lawyers have discovered the beneficial aspects of computer use, ranging from increased office efficiency to use as an aid in legal research. Courts will now have to grapple with new problems such as the admissibility of computer generated evidence or the proprietary rights of computer software.

Given this technological explosion, it is foreseeable that at some point, failure to use a computer in a given industry or profession will serve as the basis for a negligence claim. The author of this comment suggests that it would be appropriate to impose a duty upon an attorney to use computerized litigation support where such use would enhance the attorney's performance. This duty should exist even though such use has not yet become standard practice throughout the legal profession. Trends in other areas of the law indicate that courts have been willing to impose liability for failure to use state of the art equipment even when such use is not customary.

In analyzing the imposition of this duty, this comment will first note the current use of computerized litigation support and its importance to the legal profession. Secondly, it will analyze the elements of a legal malpractice suit and dis-

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cuss how non-use of a computerized system could serve as the basis for such a suit. It will then examine those cases where a claim of negligence based on non-use of modern equipment has been successful and evaluate the factors that influence those decisions. Finally, the policy concerns of imposing professional liability upon attorneys to use computer support will be examined. In conclusion, this comment recommends that liability for non-use of computerized litigation support should be imposed in those cases where such support would enable an attorney to provide more effective representation in his client's behalf.

II. USE OF COMPUTERS IN LITIGATION MANAGEMENT

A. What is Automated Litigation Support?

Virtually all litigation, regardless of the size of the case, requires some overall scheme by which the attorney prepares for trial. The term "litigation support" refers to the design and execution of a plan for managing the full range of activities required in litigation. Automated litigation support is the addition of a computer to such a system.

The common objectives of an automated litigation support system are: (1) the establishment of a central collection of documents, (2) a means of providing access to a data base in order to support effective trial preparation, (3) the use of the data base as a primary source of input for drafting and editing of briefs and other documents, and (4) the establishment of a tool for the control of all aspects of the management of the case. There are two methods by which these objectives can be obtained. First, the computer can be used for full text recording. This involves transferring the entire text of a document into the computer and directing the computer to prepare its own index. Thus, when the attorney types

2. "Litigation support is a system of combining the activities of people with machines and methods and associated resources for the acquisition, condensation, manipulation, presentation and disposition in support of the practice of law." E.U. Kinney, LITIGATION SUPPORT SYSTEMS: AN ATTORNEY'S GUIDE 13 (1980).

3. There are numerous sources that describe automated litigation support systems. For a discussion of such systems see S.L. Haynes, COMPUTERS AND LITIGATION SUPPORT (1981); COMPUTERS IN LITIGATION SUPPORT (W. Cwiklo ed. 1979); J.H. Young, M.E. Kris & H.C. Trainor, USE OF COMPUTERS IN LITIGATION (1979).

a word or words into the computer, the computer retrieves all the documents that contain the desired word or words.

Document indexing is the second method of automated litigation support. This requires that all the evidentiary materials of a case be manually reviewed and indexed in some manner so that they can be instantly retrieved by the computer. An attorney’s choice between full text recording or document indexing will depend upon the characteristics of the particular case. An automated system, however, will never replace the experience and judgment of a trial lawyer.

The first litigation stage where automated litigation support becomes particularly useful is discovery. With regard to production of documents, a computer can perform special searches and group documents according to theories underlying the litigation. Also, in determining whether additional discovery is required, the computer can provide instant retrieval of relevant documents for the attorney. When interrogatories need to be answered, a computer can provide invaluable assistance in locating pertinent information. Automated litigation support can also be helpful when depositions are being taken. For example, a computer can locate those documents authored by, or received from, the individual to be deposed and subsequently verify statements made at the deposition by comparing those statements with those the person has previously made. In addition, it can facilitate searching deposition transcripts through use of the indexing system.

5. The primary advantage of full text recording is that when certain words are critical to a case, they will not escape the computer’s attention. However, in a case with a large number of documents, an inquiry as to a certain word may produce too many documents for an attorney to perform an effective search. In addition, because of the use of slang or ambiguous phrases, an important document may be overlooked. It also is more expensive to input all the data into the computer.

The document indexing approach has several distinct advantages. It promotes an early organization of the case due to the required initial manual review. It eliminates the dependence on words since human judgment is required for the process of data input. Also, less material need be entered into the computer, thus lowering the cost. See Rust & Rome, The Combination of a Manual and an Automated Approach to Trial Preparation, in USE OF COMPUTERS IN LITIGATION 107, 109-11 (1979).

6. Vovakis, supra note 4, at 142.


8. Id.

The next stage of litigation, preparation for trial, can also benefit from the utilization of an automated litigation support system. The system can be used to develop sets of potential trial exhibits, track documents as to their exhibit history,\textsuperscript{10} index legal memoranda and briefs by reference to the particular points of law that they address,\textsuperscript{11} and assist in preparation of witnesses and experts.\textsuperscript{12}

Automated litigation support also provides valuable assistance during the trial itself. To begin with, it can index the daily trial transcripts.\textsuperscript{13} It also can furnish a means for tracking trial exhibits and searching for specific documents mentioned by witnesses at trial. Furthermore, automated litigation support can extract relevant document summaries and work product summaries, as well as other pieces of data to be used in narrative statements, trial briefs, and arguments.\textsuperscript{14} Finally, an automated litigation support system will preserve the document file for appeal.\textsuperscript{15}

The benefits of automated litigation support systems are numerous. Efficiency is the most obvious benefit. The system can provide a reliable method of systematically handling any significant volume of information. In complex cases\textsuperscript{16} manual

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\textsuperscript{10} Tracking documents as to their exhibit history refers to the ability of a computerized system to record all evidence offered as exhibits at depositions and hearings and maintain a record as to their status, i.e., when the exhibit was offered, with what witness, whether it was objected to, and its possible use for trial. See Haynes, supra note 3, at 589.

\textsuperscript{11} DuBowe, supra note 9, at 1121.

\textsuperscript{12} Vovakis, supra note 4, at 143-44.

\textsuperscript{13} A full trial transcript can be of enormous use in correlating evidence, recalling statements made and evidence offered, referencing precise terminology used by the court, and researching matters related to cross-examination or rebuttal. See S.L. Haynes, supra note 3, at 598.

\textsuperscript{14} Vovakis, supra note 4, at 143-44. See also Legal Automation News, Dec. 1982, at 7, col. 2, for a description of how one law firm utilized automated legal support at three different trials.

\textsuperscript{15} Halverson, Use of the Computer for Manipulating Information, in Use of Computers in Litigation 83, 93 (1979).

\textsuperscript{16} The term complex cases refers to "[o]ne case or two or more related cases which present unusual problems, and which require extraordinary treatment." West's Manual for Complex Litigation § 0.10 (1973). Some examples are: antitrust, common disaster cases, patent, trademark and copyright cases, products liability cases, multiple or multidistrict litigation, and class actions. Sherman & Kinnard, The Development, Discovery and Use of Computer Support Systems in Achieving Efficiency in Litigation, 79 Colum. L. Rev. 267, 268 (1979) [hereinafter cited as Sherman].
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handling of information is impossible. The ability of the computer to instantly retrieve documents provides protection against unanticipated developments. Moreover, if the case is to extend over a long period of time, automated litigation support helps assure continuity.

B. How to Decide if Automated Litigation Support is Necessary

The legal profession has been slow in adopting computers for use in litigation support. In today's complex cases, however, it is no longer feasible to use manual methods of handling information. It is generally accepted that any litigation involving over 10,000 documents will require some sort of automated litigation support system. Many commentators even prefer to use the figure of 5,000 documents as the cut-off point. However, the number of documents in a given case is not necessarily determinative of whether automated litigation support should be utilized or not.

Automated litigation support may be desirable for much smaller litigation. The following factors should be considered:

1) The character of the litigation and the number and complexity of the issues. If the issues are complex, the computer can ascertain patterns among the documents produced.

2) The number of parties. If there are multiple plaintiffs or defendants for which it is necessary to track class members or compare interrogatory and deposition responses, a computer can simplify this process.

3) The time involved in the litigation. On the one hand, if the documents must be processed in a very short time, computer use may be desirable. Or, if the litigation

18. DuBowe, supra note 9, at 1119.
is expected to stretch out over a long period of time, it can be expected that more documents will be generated and the computer can aid in dealing with the influx of those new documents. In addition, it can facilitate the situation of attorneys leaving the case and new attorneys coming onto the case.

4) The amount at stake. The amount in controversy may justify the expense of being better organized and more in control.

5) The importance of the case to the attorney and the client.

6) What the other side is doing. If the other side is using a computer, the attorney that continues to pursue litigation by manual methods may find himself at a severe disadvantage.?

No one factor is necessarily more important than another in any given case. An attorney handling a small case is most likely to be concerned with cost and therefore must carefully analyze the importance of the case, both to himself and to his client, to determine if the added expense of computerization is justified and/or necessary.

C. Predictions for Increased Use

Five years ago, a trial lawyer would not have considered using automated litigation support, unless it was a case of massive proportions. Today, the use of automated litigation support is a more viable concept. This is due in part to the growth of litigation. Attorneys are faced with more cases and often a greater volume of relevant documents in a case. In addition the number of vendors of litigation support systems has increased in recent years. As these vendors gain experience, standardization of systems may result, thus providing attorneys with a greater predictability of cost of an automated system. Furthermore, as lawyers become more familiar with computers, they may be encouraged to establish an in-house computer and litigation support system which would lead to

25. Id.
26. Id.
more routine use of automated litigation support.\(^27\)

III. **Non-Use of Automated Litigation Support as a Basis for a Malpractice Suit**

A. *Elements of the Legal Malpractice Claim*\(^28\)

The elements of a legal malpractice claim are identical to those that constitute the prima facie case for ordinary negligence: a duty of care owed to plaintiff by defendant, a breach of that duty, and an actual injury or loss sustained by plaintiff which was proximately caused by the breach.\(^29\)

1. *Standard of Care.*

The difference between legal malpractice and ordinary negligence is the standard by which an attorney's conduct is judged. In ordinary negligence cases, the defendant must show that he conformed to the standard of care expected of a "reasonable man."\(^30\) In a legal malpractice action, the standard of care is generally "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonably careful and prudent lawyer in the practice of law . . . ."\(^31\)

In determining whether an attorney conformed with the standard of care required of him, a court will look to: (1) whether the necessary skill and knowledge was exercised, (2) whether the local considerations and customs were followed or exceeded, and (3) whether the attorney has held himself out as a specialist.\(^32\)

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27. *Id.* at 182.

28. In discussing the failure to use automated litigation support as the basis of a malpractice claim, it is first necessary to realize that there is a recognition problem. A client may not even be aware that his attorney's failure to use a computer could serve as the basis of a valid malpractice suit. The increased use of computers may serve to mitigate any recognition problem. The client himself may use computers in his trade or business and expect that his attorney is also utilizing the modern tools of the trade. In addition, if the other side uses a computer, the client may thus be aware of computer use by providing a distinct advantage.


No single factor listed above is conclusive as to liability. For the purpose of a legal malpractice claim, however, the second factor is particularly important. Consideration of local rules, practices or customs may help determine the propriety of the attorney's conduct. In many instances computer use will not be the custom of the legal profession in a particular locality. Therefore, a defendant attorney might depend on that absence of custom as a defense to the malpractice action. However, while evidence of local practices or customs may be relevant, courts generally assert that such evidence cannot be used to reduce the standard of care and thus shield an attorney from liability. Custom may in fact be found to be improper, as was the case in Gleason v. Title Insurance Co. In Gleason, the defendant attorney had been hired to examine title to property. Instead of personally examining the public records, he relied on information received over the telephone. When the information that he relayed to the plaintiff was discovered to be erroneous, the attorney claimed that he could not be held liable for negligence since he had performed in the customary manner. Rejecting this contention, the court stated

33. Courts in general have not applied a specialist standard of care to legal malpractice. A litigation attorney is not held to the standard of care as exemplified by litigation attorneys but just that of a general practitioner. There is a minority line of cases, however, that support the proposition that a lawyer who holds himself out as a specialist subjects himself to the standard of care exercised by other lawyers practicing in the same specialty. See Childs v. Comstock, 74 N.Y.S. 643 (1902); Wright v. Williams, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975).

As official recognition of specialization in certain areas of the law increases, it is likely that a stricter standard of the care expected of specialists will evolve. It has been suggested that certification standards for trial advocates be adopted which would have the effect of classifying litigation attorneys as specialists. Koskoff, Specialization: Certification Standards for Trial Advocates, 13 Trial June 1977, at 36. Should that occur, a client who hired an attorney for litigation purposes could reasonably expect that attorney to possess a higher degree of knowledge and skill than a general practitioner of law. Such a development might affect a litigation attorney's duty to utilize computer support. See generally Friend & Hartzler, New Developments in Legal Malpractice, 26 A.M. U.L. Rev. 408, 414 (1976-77); Peters & Robinson, supra note 29, at 57-58; Schnidman & Salzler, The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Beyond the Reach of the Specialist, 45 Cin. L. Rev. 541, 547-50 (1976).

34. Local practices or custom may be used to determine the minimum standard of care required of an attorney; for example, an attorney should be familiar with local statutes and ordinances. See Cook v. Irion, 409 S.W.2d 475, 478 (Civ. App. 1966). However, these local practices and customs are only relevant with regard to the knowledge required, not to the degree of skill and prudence required, which should be uniform. See R.E. Mallen & V.B. Levit, supra note 32, at 332-39 (1981).

35. 300 F.2d 813 (5th Cir. 1962).
that "[w]hile custom provides an important indication of what constitutes reasonable care and what is negligent, it is not dispositive of the question at issue." 36

2. Breach

Once plaintiff has established the standard of care required, he must show that the defendant attorney breached that standard. The type of litigation error that is most likely to provide a successful basis for a suit based on an attorney's failure to use automated litigation support is one where the attorney's mistake does not involve an error in judgment. Failure to win a case does not indicate that the attorney did not possess the requisite skill and knowledge. 37 Attorneys will not be held liable for judgments made in good faith 38 or for the utilization of trial strategies that differ from those of another attorney. 39 For example, plaintiffs have not been successful when they allege negligence on the basis of the attorney's failure to introduce certain evidence or witnesses in the course of a trial. 40

If the plaintiff can show, however, that the attorney's error was not based on a tactical decision, the court may be willing to find the attorney liable for negligence. 41 In a suit based

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36. Id. at 814.
39. See Lynn v. Lynn, 4 Wash. App. 171, 480 P.2d 789 (1971) where the court held that the test is: "[a]fter considering the entire record, was the complaining party afforded a fair trial?" Id. at 175, 480 P.2d at 792. See also Stricklen v. Koella, 546 S.W.2d 810, 813 (Tenn. Ct. App. 1976).
In other cases plaintiffs have been unsuccessful because it has been shown that in fact the attorney's decision was correct. See Johnson v. Amer. Life Ins. Co., 237 Ala. 70, 185 So. 409 (Ala. 1938) where the court found that plaintiff's allegation with regard to defendant having excused an important witness was not supported by the evidence. See also Case v. Ricketts, 41 A.2d 304-05 (D.C. 1945) (the court found the evidence "would probably have had a damaging effect" to plaintiff's case).
41. See Lewis v. Collins, 260 So. 2d 357 (La. Ct. App. 1972). The court found defendant attorney negligent for failing to obtain and present records which he knew were available and necessary to present plaintiff's case favorably. The case was re-
on the failure to use automated litigation support, the plaintiff must first show that the attorney committed a litigation error. Examples of such litigation errors include claims that an attorney failed to find key documents, overlooked an impeaching statement made by a witness, or produced confidential documents during discovery.

After showing the litigation error, the plaintiff then must establish that the attorney's error was negligent, thus constituting a breach of the duty of care. To establish this element, plaintiff may need expert witnesses to testify as to the proper course of action; for example, whether omitted evidence was admissible, or that the inadvertently produced documents were in fact confidential. The expert witness would also testify as to whether it would have been reasonable or tactically sound for an attorney to have acted in the manner of the defendant attorney.\textsuperscript{42}

3. Causation

In a legal malpractice claim, the plaintiff must next demonstrate that a causal connection existed between the alleged breach and his injury. This causation requirement is the most difficult element in a legal malpractice claim to substantiate. It is said that a plaintiff must prove "a suit within a suit," or two separate lawsuits.\textsuperscript{43} By examining this "suit within a suit" burden, the causation requirements for litigation involving automated litigation support are better understood.

In the first phase of the suit, the plaintiff must show a causal connection between the attorney's failure to use automated litigation support and the injury. The majority rule is that plaintiff must establish that the defendant's negligence was \textit{the} proximate cause of loss.\textsuperscript{44} There is evidence of a

\footnotesize{manded because the court was unable to rule whether presentation of the evidence would have ensured a successful result to the plaintiff. \textit{Id.} at 360.

\textsuperscript{42} See Sanders v. Smith, 83 N.M. 706, 496 P.2d 1102 (1972). Defendant attorney obtained the affidavits of three other attorneys attesting that he had not been negligent. Plaintiff failed to present any expert witnesses of his own to support his allegations of negligence. The court found that there was no question of fact as to the attorney's negligence. \textit{Id.} at 708, 496 P.2d at 1104.

\textsuperscript{43} See generally D.J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE (1980); Friend & Hartzler, \textit{supra} note 33, at 433-34; Peters & Robinson, \textit{supra} note 29, at 60-61.

\textsuperscript{44} See Maryland Casualty Co. v. Price, 231 F. 397, 401 (4th Cir. 1916); Christy}
recent trend, however, that requires only that plaintiff show that the attorney's act or omission was a proximate cause of the injury. Thus, the plaintiff would only have to prove that the alleged litigation error was a substantial factor in the unfavorable judgment and that proper use of automated litigation support would have ensured that the mistake would not have occurred.

The plaintiff may have to introduce evidence that the number of documents alone prevented the attorney from effectually being able to do a thorough manual review, thus necessitating computer use. Or, plaintiff may contend that due to the complexity of issues involved, the attorney could not perform analyses that were critical to a thorough understanding of the case without the aid of a computer. It may be persuasive simply to show that the winning side did use automated litigation support.

In the second phase of the suit, the plaintiff must prove that his underlying claim was valid. Plaintiff must establish the validity of his claim by showing that a favorable judgment would have resulted "but for" the attorney's negligent conduct. For example, where plaintiff has alleged that the attorney's non-use of automated litigation support caused certain evidence to be overlooked, or improperly disclosed, he must also prove that but for that act or omission he would have obtained a favorable result in the original action.

The law is unsettled regarding the burden of proof required to prove causation. In some jurisdictions, the court will
require that the plaintiff establish with certainty, that had it not been for the attorney's failure to use automated litigation support, a different and more favorable result would have been achieved. 49 Recently, however, courts have acknowledged that the certainty requirement places too great a burden upon a plaintiff. The requirement has been viewed as an almost impossible barrier for plaintiff to overcome, thus insulating attorneys from liability. These courts have been willing to adopt a more lenient test.

In Lysick v. Walcom 50 the court held that the plaintiff need only establish "a reasonable basis for the conclusion that it was more likely than not, that the conduct of the defendant was a substantial factor in the result." 51 Similarly, in Smith v. Lewis 52 the court found that plaintiff's negligence claim against his attorney was valid even though it was not certain that plaintiff would have obtained a favorable result in the original action. The test adopted by the court was whether defendant's action caused the plaintiff to suffer a loss of opportunity. 53

It can be argued that Smith places too great a burden on the attorney and that the plaintiff should have to show a loss of a substantial opportunity. This was the test adopted by the court in Hicks v. United States 54 Hicks is a medical malpractice case but it has been suggested that the courts adopt this new medical standard test in legal malpractice cases because the "certainty" test is too harsh. 55

51. Id. at 153, 65 Cal. Rptr. at 418.
52. 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), rev'd, 15 Cal. 3d 851 (1976) (case was reversed on a different issue than that addressed in this comment).
53. In Smith the plaintiff had alleged that defendant had been negligent in failing to assert her community interests in certain of her husband's retirement benefits in her divorce proceedings. The court found that the defendant had been negligent in failing to sufficiently research the issue although it was far from certain that he would have prevailed. Id. at 360, 530 P.2d at 596, 118 Cal. Rptr. at 628.
54. 368 F.2d 626 (4th Cir. 1966). Plaintiff alleged death of decedent due to the doctor's negligence. The court held that "If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass." Id. at 632.
55. Jensen, The Standard of Proof of Causation in Legal Malpractice Cases, 63
Therefore, if the court is willing to adopt a lesser standard of proof, plaintiff's task will be eased considerably. Plaintiff will have to meet a two prong test: proof that the attorney's failure to present favorable or essential evidence was due in part to the non-use of automated litigation support and then that such evidence indicates that he had a substantial (although not necessarily unflawed) claim in the underlying action. Where plaintiff can meet that test and show damages, the case is strong for imposing liability for failure to use automated litigation support.

B. Duty to Use Automated Litigation Support

1. T.J. Hooper and Liability for Non-Use of Modern Technology

The question then arises as to whether a court will be willing to impose a duty on an attorney to use such recent technology as automated litigation support when such use is not accepted as standard practice in the legal profession. Automated litigation support may in fact be standard practice in complex litigation cases which generate a tremendous number of documents. However, the issue is unlikely to arise in such cases because undoubtedly both sides are already utilizing computer support. Complex litigation usually involves large corporate interests, institutions, and the government which have adequate wealth to support the expense of computerized support.

There is precedent, however, for liability to be imposed even where computer use is not customary. This precedent can be found in other professional malpractice and negligence cases.


56. In order to be successful in a legal malpractice action, plaintiff must be able to show actual damages sustained. Campbell v. Magana, 184 Cal. App. 2d at 754, 8 Cal. Rptr. at 33; Capital Bank and Trust Co. v. Core, 343 So. 2d 284, 288 (La. Ct. App. 1977). Thus, without actual injury caused by an attorney's failure to use automated litigation support, there would be no recovery for a plaintiff.

The general rule is that plaintiff may recover damages which are a direct result of the attorney's negligence. Pete v. Henderson, 124 Cal. App. 2d 487, 489, 269 P.2d 78, 79 (1954); Hodges v. Carter, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954). The value of the lost claim, that is, the amount that would have been recovered but for the attorney's negligence, is the accepted measure of damages. Williams v. Bashman, 457 F. Supp. 322, 329 (E.D. Pa. 1978); Freeman v. Rubin, 318 So. 2d 540, 543 (Fla. Ct. App. 1975).

cases where courts have been willing to impose a duty to use state of the art technology even though it is not yet general custom to do so.

The leading case with regard to this issue is *T.J. Hooper*. In that case several tugs were towing barges that subsequently were damaged when they were lost in a storm. The *Hooper* court addressed the issue of whether the tugs' owners had a duty to have working radio receiving sets aboard by which they could have gotten warning of the change in weather and sought shelter. Although it was not general custom among the carriers to have radio sets, the court held the tug owners liable for failing to so equip their tugs. The court reasoned that:

There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence . . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests . . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission . . . .

In deciding to impose liability on the tug owners, the court considered the availability and reliability of radio, the minimization of risk due to the use of radio, and the reasonableness of the cost compared to the benefit received. *T.J. Hooper* establishes that an individual can be found negligent for failing to utilize available technology despite the fact that such use is not standard industry practice.

The development of radar posed a similar problem for the courts. In *Northwest Airlines v. Glenn L. Martin Co.* the plaintiff had purchased planes that were manufactured by the defendant. When one of the planes was involved in a crash, plaintiff alleged that there was a defect in the plane. Defendant then alleged contributory negligence on the ground that plaintiff had failed to equip the plane with proper radar

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58. 60 F.2d 737 (2d Cir. 1932).
59. The court made a factual finding that the coastal carriers did not equip their vessels with radio. *Id.* at 739.
60. *Id.* at 740 (emphasis added).
61. *Id* at 739-40.
62. 224 F.2d 120 (6th Cir. 1955).
equipment. The court found that at the time of the crash, no American airline had airborne radar in operational use and thus did not find plaintiff liable for contributory negligence. The court emphasized, however, that it was the lack of availability of radar and not what was the customary practice of other airlines which determined plaintiff's liability. Had radar been available at a reasonable cost, it seems likely that liability for failure to use radar would have resulted regardless of the fact that such use was not yet customary practice.

The issue arose again in *Afran Transport Co. v. The Bergechief* which also involved a plane collision. In this case, both aircraft involved were equipped with radar. The plaintiff alleged that the captain of The Bergechief plane failed to properly use his radar. In addition to ruling that the captain had been negligent, the court noted that the duty of the owner of a vessel to equip such vessel with radar was still an unsettled question. The court expressed its opinion, however, that a rule requiring radar would soon be formulated.

These cases provide a strong argument for imposing liability for non-use of available technology regardless of industry custom. Of course the analogy between the use of radar and use of automated litigation support may seem somewhat tenuous. The use of radio or radar provides a benefit that humans cannot duplicate. A computer merely allows humans to operate more efficiently. Nonetheless, these cases evidence a willingness on the part of the judicial system to acknowledge new technology and change the standard of care in accordance with such new technology.

2. Medical Malpractice and Non-Use of Modern Technology

Another key area where technological change has forced the courts to re-evaluate the appropriate standard of care is in medical malpractice cases. Physicians and attorneys are sub-

63. *Id.* at 129.

64. *Id.* "The fact that Northwest conformed to the practice of other airlines in failing to equip No. 44 with radar did not establish its exercise of ordinary care as a matter of law. Customary practice is not ordinary care; it is but evidence of ordinary care." *Id.*

65. 274 F.2d 469 (2d Cir. 1960).

66. "Though the question is not before us . . . the question arises in limine as to the duty of a vessel to carry radar . . . . Lurking in the background is *T.J. Hooper . . . . We think this case shows the way the wind blows . . . ." *Id.* at 474.
ject to a similar standard of professional care; physicians must observe the same degree of care as would "an average, competent practitioner acting in the same or similar circumstances." Since the practice of medicine is constantly being enhanced by new technology, the standard of care for physicians is constantly evolving.

The effect of T.J. Hooper can be seen in those medical malpractice cases where the court has looked beyond what is customary practice to impose liability upon a physician. The leading case in this area is *Helling v. Carey* where the court acknowledged the Hooper holding as a controlling principle. In *Helling* the plaintiff alleged that her physician was negligent for failure to administer a glaucoma test. This alleged negligence resulted in permanent visual damage to plaintiff. Her physician contended that it was not standard practice among ophthalmologists to administer glaucoma tests to persons like plaintiff. Relying on T.J. Hooper, the court found the physician negligent. The court reasoned that the precaution of giving a glaucoma test, regardless of the plaintiff's age, was "so imperative that irrespective of its disregard by the standards of the ophthalmology profession" liability must exist.

*Helling* represents a major departure from the traditional approach to medical malpractice. If *Helling* is followed, it raises the possibility that doctors and hospitals could be found negligent for the failure to purchase or use computers, even when such computer use is not standard practice.

The impact of the *Helling/Hooper* analysis can be seen in

69. See Freed, *Legal Aspects of Computer Use in Medicine*, 32 Law Contemp. Probs. 674, 681 (1967). A physician has an obligation to keep abreast of advances made in the profession and to utilize the latest methods and practice.
70. 83 Wash. 2d 514, 519 P.2d 981 (1974).
71. Id. at 515, 519 P.2d at 981.
72. Id.
73. Id. at 516, 519 P.2d at 983.
74. Traditionally, if a doctor does what other competent doctors in the locality do in similar situations, he will not be liable for malpractice. Petras, *Computers, Medical Malpractice and the Ghost of the T.J. Hooper*, 5 Rutgers J. Comp. & L. 15, 16 (1975).
75. Id. at 17.
several recent cases involving the duty of a physician to inform his patient about the diagnostic technique of amniocentesis.\textsuperscript{76}

In \textit{Johnson v. Yeshiva University},\textsuperscript{77} the court refused to impose liability upon the physician for failure to perform amniocentesis on grounds that his conduct was "a permissible exercise of medical judgment and not a departure from then accepted medical practice."\textsuperscript{78} That court was apparently content to accept custom as a determinative factor. In \textit{Karlson v. Guerinot}\textsuperscript{79} however, the court imposed liability upon a physician for failure to perform amniocentesis. In that case the fact that the mother's history indicated the birth of a previously deformed child provided an imperative need for the test to be performed. Finally, in \textit{Call v. Kezarian}\textsuperscript{80} the court held that "an attending physician is under a duty when treating a middle-aged woman to test for Down's Syndrome."\textsuperscript{81} In this case, defendant maintained that at the time of the pregnancy, amniocentesis was not a common routine procedure, but rather "at the frontiers of medical knowledge."\textsuperscript{82}

Despite disagreement as to customary practice in regard to the performance of amniocentesis, these cases illustrate that some courts felt that the medical necessities of the procedure outweighed any arguments that non-use was standard procedure.

When analogizing medical malpractice cases to the issue of computer use in the legal profession, one must realize that technology plays a different role in medical diagnoses and

\textsuperscript{76} Amniocentesis is a method of genetic screening that is generally recommended by physicians for pregnancies where the patient is older or there is a family history of Down's Syndrome (mongolism). It was developed in the 1930's, but was not commonly accepted until 1970. There still appear to be problems with the accuracy of test results however, in part due to the overburdening of laboratory services. Haley, \textit{Amniocentesis and the Apotheosis of Human Quality Control}, 2 J. OF LEGAL MED. 348, 352 (1981).

\textsuperscript{77} 42 N.Y.2d 818, 364 N.E.2d 1340 (1977).

\textsuperscript{78} Id. at 818, 364 N.E.2d at 1340.

\textsuperscript{79} 394 N.Y.S.2d 933 (Sup. Ct. 1977). In \textit{Karlson} the court imposed liability upon the defendant doctor who failed to inform the plaintiffs of the use of amniocentesis to diagnose their child's condition. \textit{See also} Berman v. Allen, 80 N.J. 421, 404 A.2d 8, 11 (1979) (failure to inform of amniocentesis procedure constituted departure from acceptable medical practice).

\textsuperscript{80} 135 Cal. App. 3d 189, 185 Cal. Rptr. 103 (1982).

\textsuperscript{81} Id. at 193, 185 Cal. Rptr. at 105.

treatment than in litigation. Technological development in medicine enables a physician to make diagnoses that he could not previously make and to treat illnesses in a new and more effective manner. Medicine is an objective, scientific profession and non-use of modern technology can have a clear cut detrimental result. In contrast, use of automated litigation support will not necessarily guarantee a favorable outcome in litigation. Automated litigation support merely provides a more efficient system to prepare for trial; it is not meant to act as a replacement for the attorney's judgment or experience.

But the analogy should not be dismissed solely because the use of automated litigation support may not be as critical to the result of litigation. Both the legal and medical professions stress the importance of a high standard of care. The medical malpractice cases indicate that the standard of medical care is adapting to changes in technology. Surely it is just as important for the legal profession to accept a change in the standard of care in response to changes in technology.

IV. CONSIDERATIONS FOR IMPOSING LIABILITY FOR NON-USE OF AUTOMATED LITIGATION SUPPORT

The likelihood exists that in certain circumstances an attorney could be found liable for failure to use automated litigation support. If the court determines the appropriate standard of care by looking to the skills and care of a prudent attorney in similar circumstances, then liability is likely to be imposed only in those very complex cases that involve a massive document file. In smaller cases, however, automated litigation support is unlikely to be general custom; thus, unless a court is willing to accept the Hooper/Helling analysis, there will be no liability for the attorney involved. This comment suggests that the Hooper/Helling analysis should be adopted as a rationale for finding an attorney liable for failure to utilize computer support when such use is deemed appropriate and/or necessary.

83. Freed, supra note 69, at 681; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6, EC-2 (1980).
A. Evaluation of Factors Supporting Liability for Non-Use

Future decisions to impose liability for non-use of computers in litigation support will be made on a case by case basis, yet certain factors can be singled out for the court's evaluation of the need or desire to impose liability.

In *T.J. Hooper* the court asserted specific factors for imposing liability on the tug owners. Those considerations can be applied to the question of when it is reasonable to impose a duty to use automated litigation support that is not as yet generally accepted as standard practice by the legal profession. The factors include: (1) whether automated litigation support systems are available, (2) whether automated litigation support is available at a reasonable cost, (3) whether automated litigation support is being used to minimize or reduce an extraordinary risk, and (4) whether the absence of automated litigation support was a direct cause of the injury.

1. Availability

There is no question that automated litigation support systems are generally available to any attorney who wishes to utilize them. One survey indicates that 83% of the law firms surveyed had used electronic data processing in litigation. Another survey states that "a good share of all the lawyers engaged in litigation in the U.S. have taken advantage of some form of computer assisted litigation support." Numerous articles and books instruct attorneys as to the use of automated litigation support systems and where to obtain them. It is not even necessary that an attorney have a working knowledge of computers because there are vendors of computerized litigation support systems that will design and install the system. Automated litigation support is far from being a device that is in the experimental stage; it is available and can be successfully used by any attorney that desires to do so.

2. Cost

Automated litigation support is fairly costly to utilize.
However, the use of computers for litigation support is due to a need for increased information and efficiency and not necessarily for lowering costs. The principle cost involved is the preparation needed to put data into the computer system. Initially it may take longer and cost more to input data than it would take for an attorney or support staff to manually review documents. But that expense may be worthwhile at some later point when the computer performs a document search in a fraction of the time that manual retrieval would require.

Furthermore, as systems use becomes more widespread, the cost is likely to decrease. One author has made the prediction that within the decade, law firms will find it cost effective to automate cases involving as few as one thousand documents. Also, as use increases, there may be greater standardization of systems, thus lowering the cost to the user.

3. Minimization of Extraordinary Risk

So far the factors discussed are valid considerations when applied in the context of computer use in litigation. Given the difference, however, between a legal malpractice action and a negligence or medical malpractice case, an extraordinary risk will generally not be involved in a legal malpractice claim. As already discussed, radio and radar have the capability to actually prevent an accident. New advances in medicine allow for greater accuracy in diagnosis and treatment. Law, at least in civil litigation, does not involve that type of potential life or death situation.

Perhaps because computer use in litigation does not involve minimization of an extraordinary risk, courts will feel that the Hooper/Helling analysis should not apply. Yet, litigation, like medical diagnosis or treatment is result oriented; although life is not at stake, winning is. Thus, to a client who has invested time and money, winning may seem as critical as a life or death situation.

89. Olson & Goodrich, supra note 24, at 170-71.
Moreover, automated litigation support does reduce or minimize a risk. If a case involves large numbers of documents or parties, or very complex issues, computer use may make it more likely that the attorney’s analysis can be more thorough and efficient. Computer use can be viewed as imperative because non-use makes the risk of losing greater. Thus, automated litigation support does reduce or minimize a risk.

4. Injury Caused by Non-Use

The final factor to be evaluated is whether non-use of automated litigation support caused the injury. As already discussed, this is an element that is necessary to prove the prima facie case for legal malpractice. If the plaintiff cannot show that the attorney’s failure to use a computer was a proximate cause of his injury, then he cannot win.

B. Policy Consideration

Whether or not liability should be imposed for failure to use automated litigation support where it is not the general practice is an issue that has important public policy considerations as well as legal considerations.

Because automated litigation support is initially expensive to install, there is a problem of equal accessibility of such systems to all attorneys. Courts may be reluctant to impose the duty of using computer support when the cost appears too great for the attorney to bear. There are, however, suggestions as to how to reduce the cost problem. One suggestion is that the courts establish facilities for the computerization of cases to be tried in their jurisdiction, at cost to the parties involved. Although the initial cost to the courts would be high, this would ensure that both parties to a lawsuit had equal access to a computer. Another idea for making automated litigation support available to smaller firms is that of sharing a computer system with the other side in the lawsuit; or, if that is not feasible, several smaller firms might join together in sharing a system. A small firm could also explore the possibility of utilizing the computer system of a larger firm that

91. See supra text accompanying notes 43-56.
92. Rosen, supra note 23, at 322.
has an in-house system. Yet another suggestion is that of trying to recover the expenses of systems support under a statute that authorizes the recovery of attorney's fees.

Notwithstanding the expense involved, there are several important policy considerations that support imposing liability. First and foremost, technological development should be encouraged, not stifled. Judicial support of computer use is essential to help combat inertia and resistance to change. The courts have already been faced with a need to re-evaluate the present law as to its validity in this new computer age. One example of this involves the admissibility of computer evidence. It was argued that when business records were entered into and printed out by a computer, those computer print-outs were not original records as required by the rules of discovery. The courts have made it clear that computer print-outs are admissible as business records. Federal Rule of Civil Procedure 34 was amended in 1970 so that "data compilations" are now included in the listing of discoverable materials.

Courts have also acknowledged the extensive use of computers in such specific industries as banking. In Digitrex v. J. Howard Johnson Co., the court invalidated a New York banking law that required restraining orders to be served on the particular bank where a depositor's account was maintained. It reasoned that due to the use of computers, a bank could monitor checking accounts from its main office and each branch bank need no longer be considered a separate business entity. The court took judicial notice of the fact that all major commercial banks now are computerized.

A second policy consideration is that as sophistication of

95. Lewis, Closing Remarks and Questions, in COMPUTERS IN LITIGATION SUPPORT 77 (W. Cwiklo ed. 1979).
97. The rules of evidence governing the admission of business records are of common law origin and have evolved case by case, and the Court should apply these rules consistent with the realities of current business methods. "The law always ... adjusts its rules to accommodate itself to the advancements of the age which it serves ..." 222 So. 2d 393 at 397. See also Adams, 15 Fed. R. Serv. 2d (Callaghan) at 1276.
100. Id. at 68.
systems develops, considerations as to cost, capability and performance will cease to be as limiting as they are presently perceived to be.\textsuperscript{101} Furthermore, computers can vastly increase the power of attorneys to manage litigation more thoroughly, and therefore, provide a benefit to all concerned. Considering the increase in litigation in the past few years, any method of making it more manageable should be viewed favorably. Finally, there is the practical consideration that business records are increasingly being maintained in computerized form and discovery will consist of retrieving information from the other side's computer and not from its warehouse. If the attorney also has a computer system available, the information is more readily processable.\textsuperscript{102}

It is also useful to consider the possible results of non-use of a computer in litigation support. These include the possibility that some work will not get done due to the manual tasks consuming all available time; or, perhaps the attorney will be less motivated to explore the additional or alternate efforts that could have been employed through the computer's ability to perform special searches or data analyses.\textsuperscript{103}

V. CONCLUSION

The question of imposing liability for non-use of computers is one that will arise in many different contexts in the near future. Liability for non-use of automated litigation support systems is merely one facet of the larger question: when should the courts recognize a need to change the accepted duty of care to conform to changes in technology.

The courts have readily accepted the increasingly important role that computers play in society today. Recent cases suggest a willingness on their part to find non-use of technology to be evidence of negligence even when such non-use is the accepted custom. The considerations that dictated a finding of negligence in \textit{Hooper} and \textit{Helling} are equally applicable to a finding of liability when an attorney neglects to use automated litigation support in litigation where such use would be valuable.

The technology is available for lawyers to improve the

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\textsuperscript{101} Lewis, \textit{supra} note 95, at 4, 5.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} E.U. Kinney, \textit{supra} note 2, at 26.
\end{flushleft}
services that they render their clients in litigation. Once lawyers become accustomed to the idea of using computers for litigation support, use will increase dramatically. Hopefully, attorneys will discover the immense advantages of using automated litigation support systems without the necessity of a court ruling that such is an attorney's duty. However, if it is necessary for a court to rule on the matter, the time is ripe.

Automated litigation support is commercially available to all those desiring to use it. The initial cost may be well worth subsequent savings in time, labor and efficiency. Automated litigation support increases an attorney's competence and level of performance, thus benefitting both the attorney and his client. All of the necessary elements are present for a finding that an attorney has a duty to employ a computer in litigation support.

Andrea Hirsch