The Wacky World of Legal Malpractice

By Howard A. Kapp

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While the "legal malpractice" bar itself is quite small, litigators think about — that is, fear — the specter of a legal malpractice case. This fear looms over all of us: the hopefully rare malpractice claim is one of the hazards of legal practice. This fear is increased because, with

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the economic conditions and high premium rates for Errors and Omissions (legal malpractice) insurance, many small firms are uninsured or "bare."

Most of the continuing educational resources available on "legal malpractice" focus on malpractice avoidance — a critical subject for any practicing attorney — yet few of us really understand the substantive law of legal malpractice.

> *'It is well established that a legal malpractice plaintiff must establish damages to a "legal certainty."* Shopoff & Cavalllo v. Hyon, *167 Cal. App. 4th 1489, 85 Cal. Rptr. 3d 268 (2008).'*

Legal malpractice is a subset of negligence law (*Flowers v. Torrance Memorial Medical Center*, 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685 (1994)); indeed, there is a long history of doctrine sharing between legal and medical malpractice cases (*Jeffer, Mangels & Butler v. Glickman*, 234 Cal. App. 3d 1432, 286 Cal. Rptr. 243 (1991)). However, many of the principles governing legal malpractice cases are unique and quite different from other types of negligence cases. Those differences, especially those that may be counter-intuitive to non-malpractice specialists, are the focus of this article. Most of these special rules favor the defendant (*i.e.*, the attorney), which may be, depending on your personal viewpoint, good or bad. Still, the practice offers many traps for the unwary; it is full of unexpected quirks.

This article is intended to give the uninitiated practitioner some inkling of this feared claim, to provide assurance to colleagues whose fears are ungrounded and finally, by educating those who might be asked to represent a party in such a case, a deeper understanding of this frequently counter-intuitive area of law, guiding you in making wiser choices.

The Case-Within-the-Case (aka the Trial-Within-the-Trial)

This is a well-established description for proof of the element of causation (*i.e.*, what would have happened if the defendant attorney had acted in compliance with the standard of practice).

In essence, a legal malpractice plaintiff is required to prove at least two cases in one, the "underlying case" and the legal malpractice case itself; in evaluating any potential legal malpractice case, you need to keep this in mind. This tends to add complexity to such cases, particularly in drafting jury instructions and the verdict form.

"The trial-within-a-trial method does not 'recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done.'" *Mattco Forge, Inc.*

v. Arthur Young & Co., 52 Cal. App. 4th 820, 840, 6 Cal. Rptr. 2d 780 (1997). Note, however, that this does not necessarily make the temperament or identity of the judge completely irrelevant because that information might be relevant to the standard of care. The textbook example would involve a decision which was, in part, motivated by the defendant attorney's knowledge of the judge's attitude about some discretionary matter — exemplified by the adage that "a good lawyer knows the law; a great lawyer knows the judge."

This rule is set forth, rather obliquely, in CACI 601: "To recover damages from [name of defendant], [name of plaintiff] must prove that [he/she/it] would have obtained a better result of [name of defendant] had acted as a reasonably careful attorney.

Interestingly, all issues in the trial-within-a-trial — including what a reasonable judge probably would have done — are factual issues to be resolved by the jury, not the judge in the legal malpractice case. *Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 969-970, 105 Cal. Rptr. 2d 88 (2001). This means, for example, that the lay jury — not the judge — gets to decide whether a reasonable judge would have granted a discretionary motion or allowed certain relief. The idea that a lay jury, lacking any background in the nuances of law practice or judicial practice, is empowered to decide such matters is surprising to many lawyers, but consistent with the guiding principle that juries decide questions of fact.

The Necessity to Prove Damages to a "Legal Certainty"

It is well established that a legal malpractice plaintiff must establish damages to a "legal certainty." *Shopoff & Cavallo v. Hyon*, 167 Cal. App. 4th 1489, 85 Cal. Rptr. 3d 268 (2008). "It is not enough for Barnard to simply claim, as he did at the trial of this malpractice action, that it was possible to obtain a better settlement or a better result at trial. The mere probability that a certain event would have happened will not furnish the foundation for malpractice damages. 'Damages to be subject to a proper award must be such as follows the act complained of as a legal certainty.'" *Barnard v. Langer*, 109 Cal. App. 4th 1453, 1461-1461-1462 (2003), 1 Cal. Rptr. 3d 175. This is quite different from the usual formulation of proof of causation in negligence cases, *i.e.*, more likely than not.

This rule is usually justified on the grounds

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that the plaintiff client's proof of causation could be speculative. This is understandable

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when the underlying issue involved an exercise of discretion by a judge (whether to grant a discovery motion, for example) or a jury (*e.g.*, whether to award punitive damages; see *Ferguson v. Lieff, Cabraser, et al.*, 30 Cal. 4th 1037, 135 Cal. Rptr. 2d 46 (2003)).

This doctrine seems to be intertwined with appellate courts' recognition that many legal malpractice cases are based on the former client's "seller's remorse," and/or that the results of litigation are so unpredictable and the possibility of speculative alternative outcomes so easy to argue, that a different standard must apply to protect the litigator from second guessing. This cannot be defended on doctrinal grounds — after all, the element of damages is identical in all varieties of negligence cases — but, as a practical matter, the rationale is obvious.

Notably, the "legal certainty" standard has not been incorporated into the relevant jury instruction, CACI 601.

— The "Element" of Collectability —

Courts frequently speak of "collectability" as a separate element of legal malpractice cases. *DiPalma v. Seldman*, 27 Cal. App. 4th 499, 33 Cal. Rptr. 2d 219 (1994); *Campbell v. Magana*, 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32 (1960). This is, in fact, a misnomer: collectability is not doctrinally a separate or special element of legal malpractice case, but simply a necessary part of proof both of breach of duty and causation. This element was explicitly stated in BAJI 6.37.5 but is only implicit in CACI 601.

Collectability affects the element of causation directly: a plaintiff who proves that his case was "worth" millions of dollars has lost nothing if the original tortfeasor could not have paid the judgment. The law is clear: There is no legal malpractice for failing to pursue, or obtain, an uncollectible paper judgment.

The courts have strictly enforced this element. For example, in *Garretson v. Miller*,

99 Cal. App. 4th 563, 121 Cal. Rptr. 2d 317 (2002), plaintiff's counsel presented evidence that the underlying defendant was the owner of an established business with 25 employees; this was found to be insufficient to establish collectability.

This is not necessarily a black or white question: an otherwise successful legal malpractice plaintiff who proves that a judgment would have been collectible to some degree is entitled to judgment to the extent that the judgment would have been collectible.

While collectability may not be an actual "new" element, it is just as necessary to establish. Collectability is generally something that can be proven simply, *i.e.*, by showing the limits of the original defendant's insurance coverage or that defendant's wealth. You must prepare to address this issue at trial.

In certain cases, the plaintiff may not be able to establish either the existence of insurance or the available limitations of coverage. This may be the case, for example, where the attorney negligently allowed the statute of limitations to lapse. Under such circumstances, collectability may be shown by direct evidence of the defendant's wealth — although, as O.J. Simpson demonstrated for everybody, wealth itself does not guarantee collectability — or by subpoenaing the insurance company (if known) or the original defendant. If these alternatives are not possible and plaintiff's inability to establish collectability was caused by the defendant attorney's conduct, the burden of proof on this issue should be shifted to the negligent attorney. *Thomas v. Lusk*, 27 Cal. App. 4th 1709, 34 Cal. Rptr. 2d 265 (1994).

The courts have recognized the unique burden that proof of collectability may impose on plaintiffs: Legal malpractice parties are permitted the unique opportunity to subpoena financial records from, or presumably about, the former defendant — a non-party to the legal malpractice case. *Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court*, 137 Cal. App. 4th 579, 593, 40 Cal. Rptr. 3d 446 (2006). Presumably, this authority would extend to subpoenas to the

'…if an attorney had to weigh his or her own personal interests against those of the client…the attorney would hesitate to confess to possibly excusable mistakes which, until and unless the court excused the mistake, could potentially be used as evidence in a later malpractice suit.'

former defendant's insurance company; indeed, this would be far less invasive than attempting to reconstruct the original defendant's personal ability to pay a judgment.

Collectability and the Standard of Care

Although the law is well developed that collectability is an element of causation, you must remember that collectability may also be relevant to the attorney's standard of care. For example, a plaintiff who claims a "million dollar injury" cannot expect the same level of activity when the tortfeasor is impecunious, uninsured or judgment-proof. Every attorney recognizes that that "million dollar case" will be handled differently if the defendant is a well-insured and solvent Fortune 500 company than if that defendant is patently insolvent.

This is, of course, why lawyers have long ordered asset checks: Lawyers treat cases differently based on the anticipated ability of the defendant to pay a judgment; thus, collectability can be a component of the variety of factors that determine the standard of care.

The Misuse of Experts in Legal Malpractice Cases

It is apparently an occupational hazard for attorneys in these cases to assume a large scope of testimony for the attorney acting as a legal malpractice expert. This is a trap.

First, it is well established that the attorney-expert cannot testify to *the law* itself: the attorney can only testify to *legal practice*. There are various reasons for this, *e.g.*, "there is a knowledgeable gentleman in a robe whose exclusive province it is to instruct the jury on the law" (*Summers v. A. L. Gilbert Co.*, 69 Cal. App. 4th 1155, 1181, 82 Cal. Rptr. 2d 162 (1999)) and such testimony is not helpful to the jury. *Summers* at 1182-1183. It is clear that "[t]he manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion." *Summers* at 1179. This has been established in many cases and in many contexts. See, *e.g., Towns v. Davidson*, 147 Cal. App. 4th 461, 473, 56 Cal. Rptr. 3d 568 (2007); *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 884, 254 Cal. Rptr. 336 (1989) ("It is thoroughly established that experts may not give opinions on matters which are essentially within the

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province of the court to decide."); *Klein v. Oakland Raiders, Ltd.,* 211 Cal. App. 3d 67, 82, 259 Cal. Rptr. 149 (1989) (same); and *Com. Satellite Corp. v. Franchise Tax Board*, 156 Cal. App. 3d 726, 747, 203 Cal. Rptr. 779 (1984) ("An expert witness may not properly testify on questions of law or the interpretation of a statute.").

'The professional discretion defense is similar to the medical malpractice defense of "alternative schools of thought." This analogy misses the point: the lawyer's immunity for professional decisions is considerably broader than that for doctors simply because the lawyer's scope of decisions is far broader than the doctor's.'

There is a different procedure for the law of foreign countries, however. Evidence Code § 454(b).

Thus, the correct approach for informing the jury about the law necessary for its decision is not expert testimony, but preparation of proper jury instructions, supported by appropriate legal briefs. Since the legal issues are bound to be contentious, you should be ready with alternative instructions "just in case" there is a colorable flaw in the preferred instruction.

Furthermore, a "legal expert" may not opine on what the "settlement value" of a case would have been under different circumstances. The calculation of a case's "settlement value" has been universally condemned as "speculative." See, *Campbell v. Magana*, 194 Cal. App. 2d 751, 8 Cal. Rptr. 32 (1960) ("leading case"); see also, *Mattco Forge, Inc. v. Arthur Young & Co.*, 52 Cal. App. 4th 820, 60 Cal. Rptr. 2d 780 (1997); *Thompson v. Halvonik*, 43 Cal. Rptr. 2d 142, 36 Cal. App. 4th 657 (1995). Indeed, most legal malpractice experts would agree that a case based on an allegedly inadequate settlement would be virtually impossible to prove, except where the attorney had negligently failed to obtain some highly critical information needed for an intelligent evaluation of the claim, that the plaintiff was not informed of an offer, or that the plaintiff was not informed of information which would have been objectively pertinent to the decision to settle.

Likewise, a legal expert — or any expert in a legal malpractice case — is categorically prohibited from testifying as to what the outcome of the underlying case "should have been." *Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 105 Cal. Rptr. 2d 88 (2001).

While the reasons for this rule vary somewhat from the rule barring testimony as to "settlement value," both rules are well grounded in reason and authority.

— The Misuse of Advocacy Arguments —

It is common practice for attorneys to seek relief regarding some sort of error or mistake pursuant to *Code of Civil Procedure* § 473 or other fundamentally similar provisions throughout the law. In order to do so, the attorney has to admit to some error or mistake. Depending on the circumstances, the court may accept the *mea culpa*; in other cases, the court will deny relief, which may lead to a claim for legal malpractice.

It is a common perception, applying otherwise well-established evidentiary concepts, that the attorney's "admissions" in the relief motion can be used as party admissions (*Evidence Code* § 1220) to prove legal malpractice. Since such "admissions" frequently are commonly documented in a pleading (*e.g.*, a trial brief or list of claimed damages), declaration or transcribed argument, the attorney can hardly deny what was said.

The prospect of a client's using such "admissions" against counsel in a subsequent legal malpractice case should be frightening to any litigator. However, the Supreme Court has held such admissions to be inadmissible as a matter of law. *Smith v. Lewis*, 13 Cal. 3d 349, 364-365, 118 Cal. Rptr. 621 (1975). The rationale of *Smith* is a textbook example of the sometimes-unexpected application of otherwise familiar legal concerns in the odd world of legal malpractice.

In *Smith*, an attorney applied for relief from an admitted mistake pursuant to *Code of Civil Procedure* § 473. The attorney submitted his own declaration in which he explicitly laid out his mistake and asked for relief. The court denied the motion for relief. Later the client sued the lawyer for legal malpractice and used, over objections, the attorney's own declaration as admissions of malpractice.

The Supreme Court reversed, holding that the sworn declaration was inadmissible and irrelevant as a matter of law. The court noted that one of an attorney's core ethical duties was "zealous representation" and that, if such statements were admissible in a legal malpractice context, there would be a tension between the core duty of zealous representation and the attorney's natural instinct of self-protection.

In other words, if an attorney had to weigh his or her own personal interests against those of the client — something which is inconsistent with the fiduciary nature of the attorney-client relationship and the mandate of zealous representation — the attorney

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would hesitate to confess to possibly excusable mistakes which, until and unless the court excused the mistake, could potentially be used as evidence in a later malpractice suit.

This would obviously not be in the interests of either lawyers or their clients, all of whom presumably would be benefitted by the attorney's attempt to avoid the negative consequence of the error by a *mea culpa*. The court thus declared the sworn declaration inadmissible as a matter of public policy.

The *Smith* case comports with the realities of legal practice: the legal system anticipates that attorneys, as fallible human beings, will make mistakes and sometimes need to seek relief. Further — and this was not explicitly addressed by the court — attorneys, exercising prudent judgment, will frequently "fall on the sword" for mistakes or errors of the client or others; whether this acceptance of responsibility is based on the true state of affairs or even whether the attorney, in accepting fault, is being truthful is beside the point: *The attorney is engaging in zealous advocacy within an adversarial system*. If the attorney elects to "fall on the sword" to cover up for a client, the client is in no position to complain.

A similar result was reached in *Loube v. Loube*, 64 Cal. App. 4th 421, 74 Cal. Rptr. 2d 906 (1998), where the court held that the defendant attorney was not barred by the doctrine of judicial estoppel from asserting an argument contrary to that presented when the defendant attorney represented the client who is now suing for legal malpractice.

Likewise, the defendant attorney is not necessarily bound by a decision of the original tribunal and may, under certain circumstances, seek to relitigate the correctness of the bad result resulting from the alleged malpractice. *Church v. Jamison*, 143 Cal. App. 4th 1568, 50 Cal. Rptr. 3d 166 (2006). In effect, this gives the defendant the opportunity to, in some cases, attempt to deflect blame from the lawyer to the original judge, the client (*e.g.*, client refuses reasonable advice to appeal) or subsequent counsel. Note, however, that this is only a defense, and does not provide an opportunity for the defendant lawyer to seek indemni-

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ty or contribution from a subsequent lawyer. *Holland v. Thacher*, 189 Cal. App. 3d 924, 245 Cal. Rptr. 247 (1988).

'It is common for legal malpractice claims to be joined with a claim for breach of fiduciary duty. However, not all legal malpractice claims involve a breach of fiduciary duty; moreover, the cases are not particularly helpful in clarifying which cases actually involve fiduciary duty issues.'

— Interplay of Malpractice and Ethics —

Smith v. Lewis presents a fairly rare application of ethical considerations that favor the legal malpractice defendant. In fact, the rules of ethics are more commonly used to provide a basis for liability.

The conjunction of the lawyer's rules of ethics, especially those formalized in the Rules of Professional Conduct (which are mandatory), has long been recognized and is beyond dispute. *Mirabito v. Liccardo*, 4 Cal. App. 4th 41, 46, 5 Cal. Rptr. 2d 571 (1992); *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 41 Cal. Rptr. 2d 768 (1995). After all, it would be difficult to imagine unethical conduct that is within the applicable standard of care!

Discussion of the impact of legal ethics on legal malpractice claims would greatly expand this article. While every lawyer is supposed to know and follow these rules, most lawyers rarely read the considerable ongoing literature or cases on legal ethics; the ethical mandates can be so complex that there are lawyers in California who specialize solely in representing other lawyers before the State Bar.

This specialty practice requires a considerable set of skills that rarely, if ever, overlaps with legal malpractice practice; these people, however, may provide special consultation or expert testimony, although their proper role as trial experts is rarely fully understood.

__ The Professional __ Discretion Defense

The courts have recognized that "in view of the complexity of the law and the circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy or other procedural step." *Banerian v. O'Malley*, 42 Cal. App. 3d 604, 116 Cal. Rptr. 919 (1974).

The leading legal malpractice treatise, Mallen & Smith, *Legal Malpractice 4d*

(West 1996, with current supplement), § 17.14, page 526, the authors, citing, *inter alia, Kirsch v. Duryea*, 21 Cal. 3d 282, 146 Cal. Rptr. 218 (1978), provides an emphatic summary of this point:

> "Because an advocate must consider a multitude of factual circumstances and because of the uncertainty of what will persuade at a particular moment, the advocate's judgment decisions are appropriately described as 'tactical.' Only recently, however, have the courts analytically addressed the issue of whether a lawyer, as an advocate, should be liable for an erroneous tactical decision. This issue has been examined in litigation, the most common and extreme form of advocacy. The courts have acknowledged the need for an advocate's immunity from liability for judgmental errors.
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> "The ability of a client to use an error in tactical judgment as a basis for legal malpractice is often hampered by problems in proving proximate cause. Because of the innumerable variables and subjective considerations, an action based on a tactical error almost invariably will fail because of the inability of the plaintiff to prove what should have happened had the attorney acted otherwise.
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> "Whether to put a witness on the stand to corroborate testimony has been characterized as a matter dependent on an attorney's judgment."

This is a very common defense in legal malpractice litigation; its alleged scope in immunizing every unfortunate decision as a mere tactical misstep is the stuff of urban legend. The defense is real and viable; however, it is frequently misunderstood and misused.

The professional discretion defense is similar to the medical malpractice defense of "alternative schools of thought." This analogy misses the point: the lawyer's immunity for professional decisions is considerably broader than that for doctors simply because the lawyer's scope of decisions is far broader than the doctor's. In both cases, however, the rule is based on the same appreciation of the allocation of responsibilities between professional and consumer, and the fiduciary relationships.

Compare, for example, the relevant jury instruction, CACI 603 (legal malpractice)

'Conflict of interest cases represent a quintessential breach of fiduciary duty and, frankly, ought to be obvious to any practicing attorney. It hardly takes a rule of professional conduct to alert a lawyer to the fact that a true conflict of interest can lead to serious legal and professional complications.'

and CACI 506 (medical malpractice). The doctor's discretion-related defense is limited by two factors. First, the doctor's discretion is limited to "medically accepted method[s] of treatment or diagnosis" (which are generally few in number); secondly, the doctor's treatment options are limited by a well-established informed consent doctrine. CACI 532 *et seq*.

The doctor does not have an infinite set of options: the options are limited to those which are "medically accepted." While the patient has the fundamental human right to decide whether to undergo a particular procedure (*Cobbs v. Grant*, 9 Cal. 3d 229, 104 Cal. Rptr. 505 (1972)), the physician or surgeon rarely has more than a couple of acceptable alternative approaches to offer; indeed, it is medical dogma that surgeons get better with practice doing the same procedure in essentially the identical way. Medical practice is governed by well-established norms (protocols); after all, how many ways are there to remove a gall bladder?

On the other hand, the lawyer is entitled — indeed, expected — to make, without any client input, innumerable significant tactical decisions, only limited by decisions which go to settlement or may determine the outcome of the case. Otherwise, the attorney's practice would be a constant battle to seek the client's approval for trivial matters which the client should legitimately expect the lawyer to decide.

The difference is qualitative — relating to the breath and number of choices — but, in theory, largely the same. In both cases, the professional has an established fiduciary duty to inform the client/patient of material information and allow the client/patient to make the big decisions. In one case, "a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment" (*Cobbs v. Grant*, 9 Cal. 3d 229, at 242 (1972)); in the other, the client retains ultimate control over the case: "An attorney may not surrender any substantial right of his client contrary to his instructions or declared desires." *Kohr v. Kohr*, 216

> *'It is now well-established that, except in rare cases, an attorney is not liable for emotional distress arising from legal malpractice.... This is based on the dubious notion that "a reasonable person, normally constituted, ought to be able to cope with the mental stress of loss of hoped-for tort damages without serious mental distress"* Merenda, *at 10.'*

Cal. App. 2d 516, 519, 31 Cal. Rptr. 85 (1963) ("An attorney's authority to bind his client does not permit him to impair or destroy the client's cause of action."); *Daley v. Butte County*, 227 Cal. 2d 380, 391, 38 Cal. Rptr. 693 (1964).

'It is not the purpose of this article to discuss the 1-year legal malpractice statute of limitations…; suffice it to say that this raises some very complex — and frankly still unresolved — issues of accrual. Moreover, transactional malpractice claims may be resolved differently from litigation malpractice.'

Thus, the scope of the lawyer's professional discretion defense is broader, consistent with the courts' understanding of the infinitely broader variety of tactical decisions, the far more subjective, and strategically expansive, scope of legal practice, and, of course, the reality that attorneys rarely have the ability to predict, with any scientific certainty, the reaction of a judge or jury to some tactic. Every client recognizes that one hires a lawyer not to be perfect, but only to be better, or luckier, than the opposing lawyer.

The formally-established rules of legal ethics mandate reporting to clients, a rough analogy to informed consent in a medical context. See *Rule of Professional Conduct* § 3-500 (duty to "keep client reasonably informed about significant developments"), *Business and Professions Code* § 6068(m) (same), § 3-510 (offers). Please note that these are ripe areas for potential legal malpractice claims (especially failure to advise of offers), easily avoidable and that, while the former is limited to "informing" the client, the client's approval should be sought whenever the case may turn on such a decision. It is no excuse that the client "would have consented" and that the "lawyer knows best" — as held in *Cobbs* (the leading medical malpractice informed consent case), at 242, "[i]n many instances, to the [lawyer], whose training and experience enable a self-satisfying evaluation, the particular [decision] which should be undertaken may seem evident, but it is the prerogative of the [client], not the [lawyer], to determine for himself the direction in which he believes his interests lie."

The attorney does not have the right to "play God" with the client's case and must present alternatives on important matters. A case which presented these issues well is

Meighan v. Shore, 34 Cal. App. 4th 1025, 1044, 40 Cal. Rptr. 2d 744 (1995). In that case, a married man was accepted as a medical malpractice client by the defendant attorney. The court, as noted below, found that the attorney had a duty to the client's wife to inform her of her right to pursue a loss of consortium claim. The attorney further defended the case on the grounds that "his decision not to pursue an action on her behalf was based on a reasonable and good faith exercise of discretion, and hence was not actionable." This argument was rejected both on evidentiary grounds and on the merits: the attorney simply did not have the authority to make that decision unilaterally. As the appellate court noted, if the defendant attorney "thought [the loss of consortium claims] was without merit, or that pressing it would weaken Dr. Meighan's case, or if he simply did not want to handle it, he was perfectly free to act on those conclusions." "What he was not free to do," the court confirmed, "was to keep his evaluation entirely to himself, without warning the Meighans that the right existed and would be lost unless pursued." Had he disclosed that information, his clients "could have made their own decision about whether they wished to pursue the action, and, if they did, whether they wanted to find other counsel who would represent both the malpractice and consortium causes of action."

The case also demonstrates how such self-serving assertions — which may or may be supported by contemporaneous documents — raise serious credibility issues.

Any competent lawyer should err on the side of caution in seeking client approval of "important" decisions. This serves two purposes: (1) the client is informed about the progress of the case, which is inherently good for a number of reasons, and (2) the attorney's own self-protection. Remember that "importance" is not defined by the scope of the retainer, but by the scope of the information needed, and reasonably expected, by the client to make decisions. *Nichols v. Keller*, 15 Cal. App. 4th 1672, 19 Cal. Rptr. 2d 601 (1993).

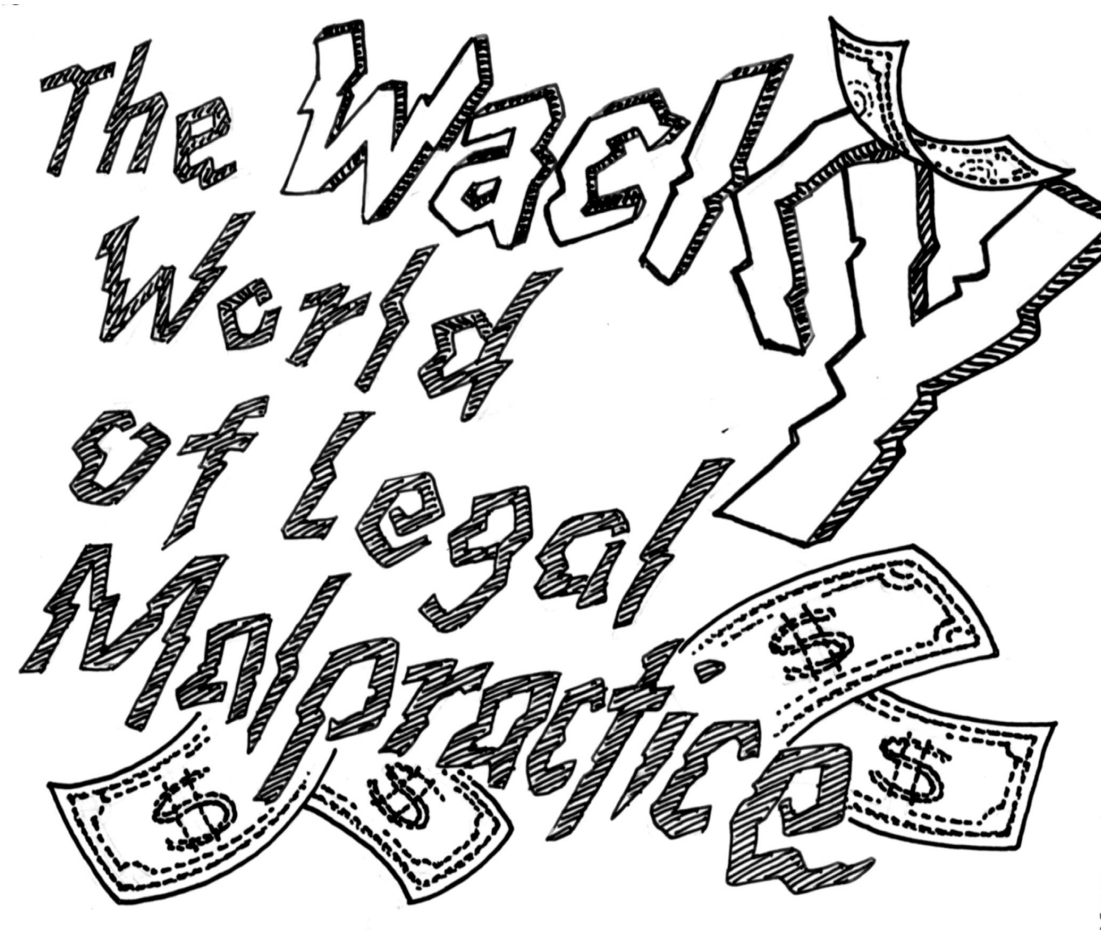
You should always obtain indisputable documentary proof that the client received the necessary advice and agreed. This can be confirmed by E-mail, fax (with a fax-generated proof), a "sign and return letter," certified mail, etc. This should be done whenever advice is given in person, by telephone or would otherwise be undocumented; copies of these proofs should be created, and maintained, separately from the file to protect the attorney (and the truth) in case that the file is later destroyed or given to another attorney. Such preventatives should be considered part of any legal practice: Lawyers who fail to indisputably document such matters and face a malpractice claim has no one to blame but themselves. Indeed, many expert attorneys would assert that appropriate written documentation is itself part of the standard of practice.

— Limited Legal Duty —

The scope of the legal duty, both to clients and non-clients, is itself a major topic beyond the scope of this article. Legal malpractice cases frequently have very specific and unique duty issues. You should rarely assume, without appropriate legal research, that the attorney has the legal duty to do anything other than the items specified in the retainer, the bills or the matters actually undertaken by the attorney.

The duty questions usually involve either a non-client or an established client who is suing from inaction (or lack of advice) on some matter arguably peripheral to the retention. Most of the duty cases involve non-clients; it is vital, in such cases, to carefully determine the state of the law.

For example, in *Meighan v. Shore*, 34 Cal. App. 4th 1025, 40 Cal. Rptr. 2d 744 (1995) , the court determined that a personal injury lawyer had a duty to inform the client's spouse, who attended meetings with her husband, of her right to pursue a separate, but ancillary, claim for loss of consortium. In *Hall v. Superior Court*, 108 Cal. App. 4th 706, 133 Cal. Rptr. 2d 806 (2003), the same district, citing *Meighan* and acknowledging that there was, by law, a single claim for wrongful death essentially mandating joinder (see, *e.g., Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801, 62 Cal. Rptr. 2d 78 (1997)), found that there was no similar duty when the wife, who was still living with (and pregnant by) her husband, privately approached a lawyer about suing



her mother-in-law for the alleged wrongful death of the couple's child. Such duty decisions can be very narrow, policy-driven and difficult to predict. You should carefully consider the issue of duty in any potential legal malpractice case where the relationship between the plaintiff and the lawyer was not explicitly created.

On the other hand, the courts generally will find a duty for an incumbent lawyer to advise an incumbent client about matters which are colorably related to the scope of the retention. A good example is *Nichols v. Keller*, 15 Cal. App. 4th 1672, 19 Cal. Rptr. 2d 601 (1993). In that case, the attorney was hired solely to pursue a worker's compensation claim and was later sued for allegedly failing to advise the plaintiff to pursue a related third party claim. The attorney was found to have such a duty, even though it was beyond the scope of the retainer.

Even more perplexing, there is case law holding that the duty does not apply to matters within the attorney's explicit undertaking. For example, in *Bolton v. Trope*, 75 Cal. App. 4th 1021, 89 Cal. Rptr. 2d 637 (1999), the attorney was accused of negligence when he failed to recognize that his client had a closed-head injury which required expert evaluation. The court, finding that none of the plaintiff's treating doctors had affirmatively recommended consultation with a neuropsychologist, held that the attorney had no legal duty to consult with such a specialist. *Bolton*, which cited only a New York case (which it distinguished), has not been cited in any case in the intervening 10 years, although it continues to be cited by defense attorneys as stating a broad principle of law.

Thus, the existence, or non-existence, of a legal duty should rarely be presumed except in the clearest case. The interests of all concerned require that any attorney involved, or potentially involved, in a legal malpractice case thoroughly research the duty question at the outset of the representation.

— Breach of Fiduciary Duty —

It is common for legal malpractice claims to be joined with a claim for breach of fiduciary duty. However, not all legal malpractice claims involve a breach of fiduciary duty; moreover, the cases are not particularly helpful in clarifying which cases actually involve fiduciary duty issues. The issue can be important because of the availability of damages for emotional distress and even punitive damages in the breach of fiduciary duty context.

An attorney handling a breach of fiduciary duty claim may wish to engage a "legal ethics" expert in addition to, or instead of, an expert on the subject matter of the alleged legal malpractice (*e.g.*, family law, personal injury, etc.).

A lead case here is *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 41 Cal. Rptr. 2d 768 (1995). In that case, the defendant family law attorney was negotiating with her opposing counsel to become law partners concurrent with their negotiations on the plaintiff's divorce, which negotiations allegedly led to the plaintiff's claimed loss.

The plaintiff presented expert testimony from a law professor that the defendant violated *Rule of Professional Conduct* § 5-102 (conflict of interest) (an aspect of the duty of undivided loyalty) by her representation in the face of her ongoing partnership negotiations. Amazingly, the trial court, finding that the partnership had not yet been created, granted a non-suit, which was easily reversed. *Stanley* was an easy case to decide: The defendant had engaged in conduct explicitly prohibited by a textual reading of a Rule of Professional Conduct and, although it was not legally necessary (*Stanley*, at 1087), plaintiff even provided an expert on the subject.

Conflict of interest cases represent a quintessential breach of fiduciary duty and, frankly, ought to be obvious to any practicing attorney. It hardly takes a rule of professional conduct to alert a lawyer to the fact that a true conflict of interest can lead to serious legal and professional complications. A lawyer who acts in the face of a real life conflict will find every decision and act subjected to intense scrutiny and soon be without friends, credibility, or defenses.

The scope of this distinct cause of action (CACI 4106), however, remains murky and undefined by the cases. It is clear that merely negligent conduct does not constitute a breach of fiduciary duty, but what if that negligence is the result of the attorney's knowingly accepting a case without the relevant knowledge, experience or subject matter expertise (a potential violation of *Rule of Professional Conduct* § 3-110)? What if that knowledge was highly esoteric or unexpected? What if the misbehavior is merely a failure to inform the client of a development which a jury later determines was "significant" within the meaning of Rule 3-500? Is every act of ignorance-associated negligence by definition a breach of fiduciary duty?

Likewise, the cases have not addressed the situation where, in a more general (non-rule) sense, the conduct was arrogant or more generally in violation of the fiduciary relationship. Consider, for example, a case where the attorney, having accepted a case with a significant personal injury claim, contemplates but rejects an ancillary claim, such as a claim for loss of consortium without informing the client. Compare *Meighan v. Shore, supra*. What about the attorney who accepts a medical malpractice case and after consultation with a single dubiously-qualified and/or conflicted expert decides not to oppose a summary judgment motion without informing the client of the decision to rely on the opinion of the single expert. Is that lawyer entitled to claim that he or she was exercising "professional judgment" by electing not to pursue the case and clutter the courts with unmeritorious cases (compare *Kirsch v. Duryea*, 21 Cal. 3d 282, 146 Cal. Rptr. 218 (1978) with *In re Hickey*, 50 Cal. 3d 571, 580, 268 Cal. Rptr. 170 (1990)) or was that attorney simply negligent by failing to engage another expert (*e.g., Kirsch v. Duryea*, 21 Cal. 3d 282, 311, 146 Cal. Rptr. 218 (1978)) and/or by deferring the decision to the client. Is that attorney a hero for stopping a "frivolous" lawsuit or simply using these public concerns as a fig leaf for negligence-caused abandonment of the client?

Likewise, an attorney who has sexual relations with a client should assume that any legal malpractice claim will invariably be filed with a breach of fiduciary claim. See *Rule of Professional Conduct* § 3-120.

At present, it appears that the rule can be summarized, as in *Stanley*, as a violation of either a breach of a Rule of Professional Conduct or "statutes and general principles relating to other fiduciary relationships." It does not appear, as the drafters of CACI 4106 apparently agree, that the breach of fiduciary duty cause of action necessarily requires any specific intent. This, potentially, provides a significant opening for claiming emotional distress damages.

Moreover, by explicitly opening the door for "legal ethics" experts, this cause of action may provide legal malpractice litigants with a broader potential scope of experts and a more objectively focused trial presentation.

— Special Immunities —

The Supreme Court has prohibited legal malpractice cases against criminal lawyers unless the plaintiff client can establish his "actual innocence" of the crime involved. *Wiley v. County of San Diego*, 19 Cal. 4th 532, 79 Cal. Rptr. 2d 672 (1998). This has been limited to the criminal aspects of the

representation. See, *e.g., Brooks v. Shermaria*, 144 Cal. App. 4th 434, 50 Cal. Rptr. 3d 430 (2006).

In *Ferguson v. Lieff, Cabraser, et al.*, 30 Cal. 4th 1037, 135 Cal. Rptr. 2d 46 (2003), the Supreme Court, citing public policy, has barred a client from claiming the loss of a punitive damages claim as damages in a legal malpractice case.

It is, at this point unknowable whether *Wiley* or *Ferguson* are the beginning of a trend of immunity-granting authorities or merely — and thus *sui generis* — examples of the Supreme Court's barring legal malpractice cases on the extreme fringe. Nonetheless, future practitioners for either side should consider — and, of course, update — these cases in making decisions about their own legal malpractice cases.

— Some Other Special Rules —

It is now well-established that, except in rare cases, an attorney is not liable for emotional distress arising from legal malpractice. See, *e.g., Merenda v. Superior Court*, 3 Cal. App. 4th 1, 4 Cal. Rptr. 2d 87 (1992). This is based on the dubious notion that "a reasonable person, normally constituted, ought to be able to cope with the mental stress of loss of hoped for tort damages without serious mental distress" *Merenda*, at 10. Perhaps reasonable people are "able to cope" with such a negligently-caused loss, but why should they have to? It appears unseemly that this rule applies specifically to protect negligent *lawyers*, the very people hired, in part, to lessen the client's stress. Few lay clients would agree that there was a significant element of choice in their decision to seek a remedy; the finding of legal malpractice implies that the plaintiff is a two-time victim who has to endue more years of litigation.

However, a client may recover emotional distress damages where the damages were incurred by a breach of fiduciary duty. *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1097, 41 Cal. Rptr. 2d 768 (1995).

It is not uncommon for a legal malpractice defendant to blame a subsequent attorney for the latter's failure to take some action to either eliminate or mitigate against the alleged result of asserted malpractice. While this may offer a defense on the merits, the courts have categorically barred the filing of cross-complaints for equitable indemnity or contribution against subsequent lawyers. *Holland v. Thacher*, 189 Cal. App. 3d 924, 245 Cal. Rptr. 247 (1988). In this context, a lawyer who is removed from a case in the context of a potential legal malpractice situation should promptly make a clear record — such as a detailed letter laying out potential cures for the problem. This letter should, at the very least, be provided to the replacement lawyer by certified mail or E-mail or in some other provable way. Since the fired attorney may be instructed by new counsel to not communicate with the client, it may be unethical to send that post-replacement letter to the client.

While such communication will not establish a case against the replacement lawyer, it may demonstrate that the client's unilateral decision to fire the attorney was unwise or premature, as well as laying out a defense which the jury can evaluate in the context of the lawyer's ongoing concern for the client's welfare, as well as demonstrating the then-available means of unraveling the asserted malpractice. Such correspondence should make clear that the fired attorney is willing, without any expectation of compensation, to assist in the process, even the drafting of motions for relief or signing of necessary declarations.

If the subsequent lawyer fails to adopt the presumably aggressive proposed remedy, this may serve as a defense; moreover, the existence of such a letter may well convince

a legal malpractice specialist that the case is weak or should not be pursued.

Consistent with their *sui generis* habitual approach to legal malpractice, the courts have held that malpractice which leads to "mere delay" in collecting will not support a claim of legal malpractice. *Thompson v. Halvonik*, 36 Cal. App. 4th 657, 43 Cal. Rptr. 2d 147 (1995).

In *Landmark Screens, LLC v. Morgan, Lewis & Bockius*, 183 Cal. App. 4th 238, 107 Cal. Rptr. 2d 373 (2010), the court, while acknowledging that legal malpractice is a matter of state law, held that a legal malpractice case arising from handling of a patent matter is a matter for exclusive federal jurisdiction.

In *Porter v. Wyner*, 183 Cal. App. 4th 949, 107 Cal. Rptr. 2d 653 (2010), the court held that, in a legal malpractice case, communications between client and lawyer were admissible despite mediation confidentiality. The Supreme Court's recent decision in *Cassel v. Superior Court*, 2011 WL 102710 (2011), however, has at least implicitly overruled *Porter*. [*Ed. Note: See the article by Paul Dubow in this issue regarding the* Cassel *case*.]

— Statute of Limitations —

It is not the purpose of this article to discuss the 1-year legal malpractice statute of limitations (*Code of Civil Procedure* § 340.5); suffice it to say that this raises some very complex — and frankly still unresolved — issues of accrual. Moreover, transactional malpractice claims may be resolved differently from litigation malpractice. No legal malpractice litigator should assume that the "usual rules" apply to these issues; one is best served by carefully researching the statute.

Most non-specialist litigators have long recognized that any substantial medical malpractice case should be handled by a qualified medical malpractice lawyer. It is intuitively understood that medical malpractice involves a heightened understanding of medical practices and issues than that generally available to the general injury lawyer; the textbook example of that is the almost certain inability of the non-specialist to fully appreciate, and thus anticipate, the complexity of causation in medical malpractice cases. Still, the *laws* which apply specially only to medical malpractice cases are quite finite.

The problem with legal malpractice cases is essentially the opposite: virtually any non-specialist litigator, having attended law school and interfaced with other attorneys, properly has a decent understanding of the realities of legal practice. In fact, if the potential defendant lawyer (or if the litigator is representing himself) practices in the same substantive area of law, that lawyer may have an excellent grasp of the relevant factual context.

The problem, though, is not that the non-malpractice specialist does not understand the factual context, but rather that much of legal malpractice law is frankly counter-intuitive and based on a method of reasoning — based on decades of law — that that non-specialist is intellectually adrift, without the instinctive ability to know the issues which are unique to this area.

Finally — and this can be tragic — many non-specialist lawyers, especially those that are in small or uninsured practices, elect, for obvious financial reasons, to represent themselves, or to "hire a friend," in such cases. The adage that such lawyers have a "fool for a client" does, sadly, apply to legal malpractice cases. At the very least, the uninsured defendant attorney who elects to proceed in *pro per* should seriously consider engaging a legal malpractice and/or ethics (or "bar") lawyer to consult on the case.