Editor's Note:
This is one in a series of discussions about legal malpractice topics.

The Professional Discretion Defense

By Howard A. Kapp

All litigators worry about 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 the economic conditions and high premium rates for malpractice insurance, many small firms are "bare."

Most of the continuing education 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. That is the focus of this column.

Legal malpractice is a subset of negligence law (*Flowers v. Torrance Memorial Medical Center* (1994) 8 Cal.4th 992); and there is a long history of doctrine-sharing between legal and medical malpractice cases (*Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432). But many of the principles governing legal malpractice cases are unique and quite different from other types of negligence cases.

Those differences, especially those which may be counter-intuitive to non-malpractice specialists, are the focus of this column. Most of these special rules favor the defendant (i.e., the attorney), which may be, depending on your personal viewpoint, good or bad. Still, legal malpractice offers many traps for the unwary; it is full of unexpected quirks.

This column presents a few – but certainly not all – legal doctrines which uniquely apply to legal malpractice cases. It 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 these lawyers in making wiser choices.

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* (1974) 42 Cal.App.3d 604, 116 Cal.Rptr. 919.)[1]

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.

You can compare the relevant jury instruction, CACI 603 (legal malpractice) 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[2] to decide whether to undergo a particular procedure, the physician or surgeon rarely has more than a couple of acceptable alternative approaches to offer; indeed, it is medical dogma that a surgeon gets 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 which 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* (1972) 9 Cal.3d 229, at 242); 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* (1963) 216 Cal.App.2d 516, 519, 31 Cal.Rptr. 85.) "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* (1964) 227 Cal.2d 380, 391, 38 Cal.Rptr. 693.)

Thus, the scope of the lawyer's professional discretion defense is broader,[3] 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 someone hires a lawyer not to be perfect, but only to be better, or luckier, than the opponent's 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 Prof. Conduct § 3-500 [duty to "keep client reasonably informed about significant developments"], Bus. & Prof. Code § 6068(m) [same], § 3-510 [offers].) 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* (1995) 34 Cal.App.4th 1025, 1044, 40 Cal.Rptr.2d 744. In that case, a married man was accepted as a medical malpractice client by the defendant attorney. The court 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.[4] 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. It should be remembered 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.[5]

The attorney 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 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 who face a malpractice claim have no one to blame but themselves. Indeed, many expert attorneys would assert that appropriate written documentation is itself part of the standard of practice. ■

---

[1] 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* (1978) 21 Cal.3d 282, 146 Cal.Rptr. 218, 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.
>
> 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.
>
> Whether to put a witness on the stand to corroborate testimony has been characterized as a matter dependent on an attorney's judgment.

[2] See *Cobbs v. Grant* (1972) 9 Cal.3d 229, 104 Cal.Rptr. 505, the leading case on informed consent in a medical malpractice context.

[3] An attorney cannot simply assert that every mistake was the result of a tactical choice; for example, it would clearly be malpractice not to secure an expert whose testimony should have been known to be mandatory. As famously held in *Smith v. Lewis* (1975) 13 Cal.3d 349, 356, 118 Cal.Rptr. 621, "[t]here is nothing strategic or tactical about ignorance."

[4] "If [the defendant attorney] thought it 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 was to keep his evaluation entirely to himself, without warning the Meighans that the right existed and would be lost unless pursued. Had he done that, the Meighans 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."

[5] *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 19 Cal.Rptr.2d 601.

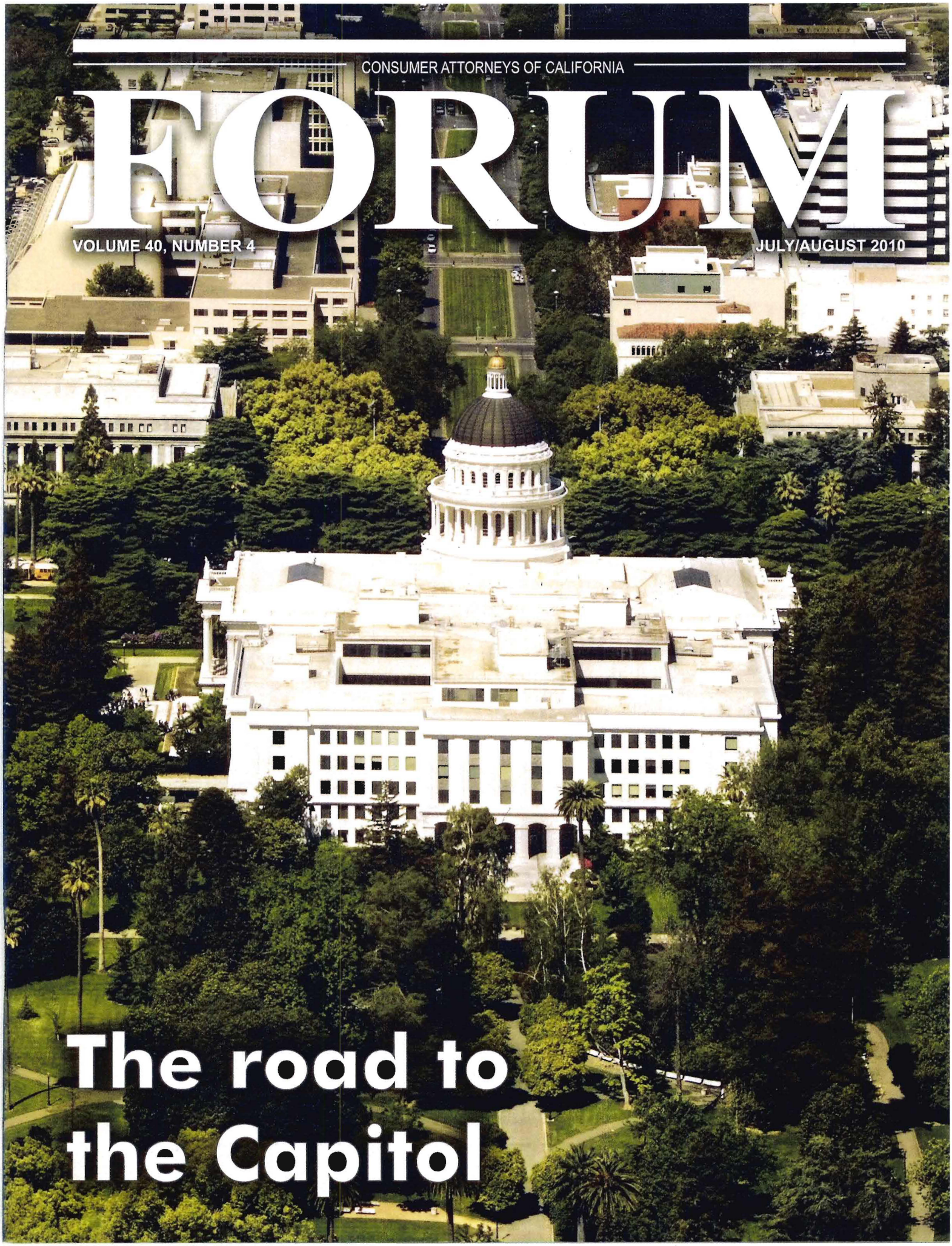
Howard A. Kapp specializes in legal and medical malpractice litigation. Mr. Kapp practices in Los Angeles. His website is www.kapplaw.com. He can be reached at hkapp@kapplaw.com.

CONSUMER ATTORNEYS OF CALIFORNIA

FORUM

VOLUME 40, NUMBER 4

JULY/AUGUST 2010



The road to the Capitol