



By Peter M. Kunstler

Breakdowns of the attorney-client relationship: Pleading (and avoiding) the breach of fiduciary duty claim

This article will explore the pleading of a breach of fiduciary duty claim to accompany a cause of action for legal malpractice. Although very often pleaded with almost identical allegations to those supporting the professional negligence claim, breach of fiduciary duty should be recognized as a separate tort, and alleged accordingly. Identifying the principal constituents of this type of claim should not only assist legal malpractice counsel, but should also help all practitioners avoid the conduct likely to lead to the wrong end of lawsuit.

The essentials of maintaining a good attorney-client relationship should seem obvious to all of us, long-term and recently admitted practitioners alike. Yet attorneys that represent plaintiffs in legal malpractice cases frequently discover that breakdowns of that relationship constitute the motivating factor for the former client seeking to sue his or her attorney.

It has become a truism that clients whose lawyers do not discuss their cases with them, or attempt to foist a settlement on them, or do not work up their cases, or continually demand fees in excess of the retainer agreement, will most often attribute the loss of the case or a smaller than expected award of damages to their attorney's malpractice. Fee disputes arising from abusive billing or unclear bills also often result in malpractice cases.

While breakdowns in lawyers' relationship with their clients often consist primarily of a failure to communicate, a number of other shortcomings, real or occasionally imagined, contribute to the client's dissatisfaction. These issues can include the attorney's neglecting to obtain the client's permission for significant actions in the case; the attorney's failure to obtain the client's consent to a settlement; inadequate explanation of the terms and consequences of a settlement; withholding client funds from the client; and, in particular, overbilling and murky

billing practices. Certainly, undisclosed and undealt-with conflicts of interest, when they inevitably emerge, provide a rich source of allegations of breach of fiduciary duty.

Many lawyers bringing legal malpractice actions automatically tack on what they believe to be a *required* breach of fiduciary duty claim. They explain to their clients that the claim may afford access to punitive damages. However, many attorneys do not adequately differentiate between the two claims, sometimes bringing them in garden variety malpractice claims where they do not belong; at other times omitting the additional allegations necessary to support the claims.

Where the facts make it appear that the client has an actionable claim for breach of fiduciary duty, it makes sense to add the cause of action to the complaint. An attorney's violation of his fiduciary responsibilities to the client adds weight to the client's claim that his lawyer was negligent, may increase the settlement value of the case and, yes, may even be sufficiently egregious to justify those elusive punitive damages.

Consult the Rules of Professional Conduct for standards

While not the exclusive source of standards to determine whether an attorney's conduct violated his or her fiduciary duties to the client, the California Rules of Professional Conduct for Attorneys (Rules) embody virtually all the significant issues that arise between lawyers and the parties they represent. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339].) As held in *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 45 [5 Cal.Rptr.2d 571], the Rules "help define the duty component of the fiduciary duty which an attorney owes to his client." Statutes and principles governing fiduciary relationships in general also apply.

Understand the differences from the malpractice claim

"[A] breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence." (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr. 768].) The dealings between an attorney and his client frame a fiduciary relationship "of the very highest character." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837].) It follows that an attorney seeking damages on behalf of his client for breach of fiduciary duty beyond those incurred from the former counsel's negligence needs to plead additional facts.

For example, Rule 3-110(A) provides that "[a] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." This rule raises the issue of whether the defendant attorney accepted the representation knowing that he or she lacked the knowledge, resources or experience to handle the underlying case. However, Rule 3-110 is not violated by an attorney's "mere" negligence. Thus, simply realleging the facts evidencing the defendant's failure to meet the standards of due care will not support the breach of fiduciary duty claim. An inadequate pleading of this cause of action may, indeed, waste the attorney's – and the client's – time and resources, by eliciting a demurrer and a motion to strike.

On the other hand, if malpractice counsel can demonstrate that the defendant's negligence was compounded, for instance, by repeated failures to communicate with the client, rudeness, disrespect, mishandling of client funds or a botched termination of the employment, he or she will have added to the value of the case in a couple of significant ways.

First, the "fiduciary relationship" alluded to in *Neel v. Magana, supra*,
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embodies three basic principles: honesty, fairness and respect. Where the facts show that an attorney has disregarded even one of these principles in dealings with the client, they can also support the notion that the attorney was equally careless in carrying out the representation. Solid proof of a breach of fiduciary duty will thus increase the value of the case in the eyes of the trier of fact or settlement officer.

Second, additional damages will likely have arisen from the breach of fiduciary duty that were not caused by the attorney's negligence alone. Examples, discussed in more detail below, include the attorney's misuse of client funds, failure to account for settlement proceeds, conflicts of interest that result in additional disputes or litigation, or abandonment of the client without the means of finding alternate counsel.

Some of these violations, particularly those involving money, will justify punitive damages, not available for negligence. Since Civil Code section 3294 requires a showing of "oppression, fraud, or malice" by "clear and convincing evidence," malpractice counsel should ensure that he or she can allege conduct by defendant that is egregious enough to meet this standard. Otherwise, counsel will very likely have to oppose a motion to strike, possibly exposing some weakness in an otherwise valid breach of fiduciary duty claim. It is often wiser to bring the claim without the added element of punitive damages.

Conduct likely to support a breach of fiduciary duty claim

While the discipline reports published by the State Bar reveal almost unlimited creativity on the part of dishonest attorneys in violating the standards of conduct, for the most part, breaches of fiduciary duty appear in a few sets of recurrent circumstances. Those circumstances have in common a disregard for the basic principles of good attorney-client relationships: honesty, fairness and respect.

When the attorney does not communicate with the client

All too often, clients will perceive in their lawyer's failure to answer phone calls, to send copies of important docu-

ments, or to advise the client about the progress of the case as evasive action because the attorney has forgotten about the case, has made a mistake or simply has no respect for the client. All too often, the client is correct on this score.

Bearing in mind that appropriate communication of "significant developments" concerning the representation is *required* by Rule 3-500, and includes providing the client with requested documents and information, violation of this rule can constitute and should be alleged as a breach of fiduciary duty. This occurs especially in matters where the defendant has concealed, for example, the failure to timely file the underlying action; or a dismissal for lack of prosecution. Often, therefore, negligent attorneys, afraid to confront the issue with the client, increase the client's damages because of the delay.

Lack of communication can also mislead the client into believing that the attorney continues to represent him or her. This will have the effect, in certain instances, of extending the statute of limitations — thereby enabling malpractice counsel to defeat this defense. (*Gonzalez v. Kalu* (2006) 140 Cal.App.4th 21, 31 [43 Cal.Rptr.3d 866].)

Refusing to take a client's calls or not responding to questions also shows a lack of respect. Some attorneys may attempt to justify such conduct because the client is "annoying" or "pestering." However, all clients, even "annoying" ones, deserve their attorney's compliance with the Rules of Professional Conduct, as well as their counsel's respect. In this regard, again altogether too frequently, malpractice counsel will hear minority clients complain that their attorneys appeared to assume them less capable of understanding their cases, and consequently withheld information and treated them condescendingly. Where such conduct results in a lack of informed consent to actions affecting the representation, it becomes actionable as a breach of fiduciary duty.

Unfair billing practices and overbilling

As far as the financial relationships between the attorney and client are con-

cerned, violations of Rule 4-200, which defines "unconscionable" fees, often anger a client sufficiently to bring an action for malpractice, and should be explored to determine if they support a breach of fiduciary duty claim. Improper billing constitutes, in any event, another means of showing disrespect for the client, often breaches the retainer agreement, and may accompany other forms of breach, such as aiding in coercing a settlement.

Malpractice counsel should take very seriously a client's complaints about former counsel's billing practices. Investigation will often reveal that a defendant dishonest in one aspect of the representation will be dishonest in others. Moreover, improper billing can constitute damages, where the client has paid for more services than the attorney has provided, has made payments not required by the attorney's retainer agreement, or received a smaller portion of a settlement or award than that to which he or she was entitled.

Attorneys sometimes try to confuse the issue, inducing their clients to sign successive retainer agreements with different fee arrangement — and then trying to collect under both. The result will be a vast, unwarranted increase in attorneys' fees. Counsel should determine whether, for example, the attorney has tried to collect hourly *and* contingent fees where the agreement provided for one *or* the other. Another improper practice consists of providing the client with a retainer agreement for a contingent fee, then demanding a substantial cash deposit from the client just before trial as a condition to proceeding with the case.

Where the attorney's bills appear suspect — for example, where excessive amounts are charged for relatively simple service, the attorney then blaming opposing counsel for the problem — malpractice counsel may want to hire an auditor, usually an attorney with experience in the same area of practice as the defendant or who has developed auditing skills with regard to a variety of practice areas. In the complaint, counsel should allege the overbilling or unfair billing practices as having damaged the client by depleting his or her resources,

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making it difficult to continue the case or find alternate counsel, and unjustly enriching the attorney.

An attorney may not maintain sums in the client trust account which are not in dispute

Rule 4-100(B)(4) provides that the lawyer must “[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.” The attorney may not hold sums that do not belong to him or her to force the client into an unfavorable resolution of the fee dispute.

Rule 4-100(A)(2) provides that only the *disputed* portion of proceeds obtained in the representation may be withheld until the fee issues between lawyer and the client are resolved.

Lying to the client, or intentionally concealing facts material to the representation

“The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests.” The obligation is affirmative, that is, requires disclosure, rather than merely refraining from making active misrepresentations. (*Neel v. Magana, supra*, 6 Cal.3d at 189.)

Outright lies and intentional concealment of facts about the case commonly serve as a means to delay a client’s discovery of malpractice, or to convince the client that factors other than negligence caused the loss of the client’s case. This conduct should be alleged. “[T]he fact that a client lacks awareness of a practitioner’s malpractice implies, in many cases, a second breach of duty by the fiduciary, namely, a failure to disclose material facts to his client.” (*ibid.*)

Damages arise from such conduct where the client may have lost the opportunity to find alternative representation, or the attorney may have squandered the opportunity to work with the client to fix the problem. Lying and intentional concealment also constitute fraud — and will provide malpractice

counsel with a basis upon which to allege punitive damages.

Communications regarding settlement, or the lack of them

Breaches in this category usually fall into one or more of three types of conduct, not mutually exclusive, all of which are described in Rule 3-510. First, an attorney *must* communicate settlement offers to the client. Second, the attorney needs to explain the client’s rights and obligations under the settlement agreement accurately and thoroughly, and in a manner that the client understands. Finally, the attorney may not coerce the client into a settlement, especially not in reliance on false or misleading statements. Settlement authority belongs exclusively to the client.

Proving that a client agreed to a settlement because “the attorney made me do it” or “the attorney didn’t explain it right” can be difficult, however. The defendant will contend that the problem was not one involving a breach of fiduciary duty, but rather “settler’s remorse,” and that the settlement was perfectly adequate, or the best that could be achieved under the circumstances. Consequently, malpractice counsel will have to seek evidence that shows that the settlement was clearly insufficient, that the attorney urged or even forced the client to accept it, rather than the other way around, and if possible, that the attorney pushed the settlement out of self-interest instead of the interests of the client.

Evidence to support a claim based on a coerced settlement can include, for example, documents from the file showing that the attorney was unprepared for trial, and needed (perhaps desperately) to resolve the case before his or her unpreparedness was exposed. Some lawyers make it their practice to avoid trial — aware that their skills are not up to the task. Note that settlement of cases for below their value in this context also violates Rule 3-110. Some attorneys, in an area such as toxic torts, where they have a great many clients with identical or similar claims, may settle certain cases to the

detriment of others in the name of efficiency or fostering good relations with opposing counsel. Whatever the motivations, such conduct amounts to a breach of fiduciary duty towards the client at the losing end of the bargain.

An attorney’s lack of funds to operate his or her practice can also lead to forced or inadequately explained settlements. Similarly, attorneys may seek to put a “stop-loss” on their expenditure of time or money on a case, by giving their clients an ultimatum: Settle, or come up with a large sum of money — often an additional deposit not contemplated in the retainer agreement — to prevent the lawyer from withdrawing from the case, typically on the eve of trial. Such conduct has all the attributes of a breach of fiduciary duty: it is dishonest, unfair and disrespectful.

A lawyer that knowingly allows a foreseeable conflict of interest to develop or persist, without seeking the client’s informed written consent

Rule 3-310 requires attorneys to “avoid the representation of adverse interests,” and sets standards of informed written consent. The law regarding conflicts of interest may be somewhat complex, but the instances set forth in Rule 3-310 are reasonably clear.

American Airlines v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal.App.4th 1017 [117 Cal.Rptr.2d 685], provides a valuable analysis of the law of conflicts of interest as it relates to an attorney’s or in this instance, a law firm’s, breach of its fiduciary duty. The court noted, first, that the relationship with the “other party” to the conflict need not be as counsel. (*Id.* at 1034-35; Rule 3-310(B).)

Moreover, even a promise to maintain the confidentiality of one client when representing a client whose interests are adverse does not alleviate the conflict.

It is anathema to the State Bar Rules of Professional Conduct to suggest that an attorney can place himself in a situation in which he undertakes adverse representation of a third party, and the client cannot object because the attorney has promised not to disclose the

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client's confidential information even though the information may be decidedly helpful to the new client. It is precisely this compromised situation, when the burden of deciding which client to favor is placed solely on the attorney's shoulders and within the attorney's sole power to decide, that Rule 3-310 is designed to avoid. (*Id.* at 1039.)

The American Airlines court concluded that where an attorney owes a duty of confidentiality and loyalty to a client, that the attorney does not fulfill, the client has incurred actionable damages. The "absence of loyalty" in and of itself may suffice to support a breach of fiduciary duty claim. (*Id.* at 1044.)

Attorneys must end the relationship with their clients in accordance with Rule 3-700

Attorneys most often violate this Rule in two ways, again, unfortunately, not mutually exclusive. First, faced with their own unpreparedness to proceed with the case, perhaps antipathy for the client, or desire for a prompt settlement

to realize fees, yet unable to obtain relief from the court due to the proximity of trial, defendants will pressure their clients into signing a substitution of attorneys that severely prejudices the client's interest. This pressure is often accompanied by misrepresentations of the attorney's right to withdraw.

Second, the attorney, perhaps in the realization that the file will reveal his malpractice, may refuse to return the client's original documents or forward them to new counsel at the client's instruction, obviously to the client's serious detriment. Rule 3-700(D) mandates the return of the client's papers and property, that is, all "items reasonably necessary to the client's representation, whether the client has paid for them or not." No formal substitution of attorneys is needed to trigger this obligation. (*In the Matter of Phillips* (2001) 4 Cal. State Bar Ct. Rptr. 315.)

Conclusion

Breaches of fiduciary duty by attorneys constitute an intentional tort distinguishable from legal malpractice based

upon negligence. Those attorneys that occasionally or even regularly bring legal malpractice actions should keep the differences in mind, and ensure that they allege all their clients' various sources of damages.

At the same time, the subject of an attorney's fiduciary duties to his or her clients provides a cautionary tale for all practitioners. We may not always be able to avoid making mistakes, sometimes very costly mistakes. On the other hand, there is no excuse for deliberately violating our duties of honesty, fairness and respect to our clients.

Peter M. Kunstler has been involved in the litigation of legal malpractice/breach of fiduciary duty cases as an associate with the West Los Angeles law firm of Makarem & Associates and its predecessors since 1994.

