Legal Malpractice And Ethics Violations

(MCLE Specialty Credit for Ethics)

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Notes:

LEGAL MALPRACTICE AND ETHICS VIOLATIONS

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There is a basic statement in the "Purpose and Function" subsection of Rule 1-100 of the California Rules of Professional Conduct ("Rules") that says, "These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty."[1] The Discussion following this rule adds a curious qualifier with the addition of the word "automatically" in the following sentence. "The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action."[2]

The undercurrent of this paper is about what to make of the word "automatically." Because while the Rules say that by themselves they do not create "new" causes of action or "any substantive legal duty," the Rules and an attorney's ethical conduct or lack of it inform and amplify the sound of a civil cause of action against an attorney. The ethical violations may give rise to a cause of action for negligence or breach of fiduciary duty in the course of an attorney-client relationship, but the conduct does not automatically give rise to a civil cause of action.

We are looking for the ethical violations in the malpractice cases.

Ethical violations are not present in every malpractice case. But they lurk in the background of all of them. If a lawyer breaches his duty more than once, which often is the case in malpractice, the lawyer will have "repeatedly" failed to perform legal services with competence, which violates Rule 3-110.

What distinguishes malpractice from ethical violations is the consequences. Malpractice requires injury or damage, some result leading to the client's prejudice. Ethical violations do not require anything more than noncompliant behavior. "The mere breach of a professional duty,

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[1] RULES PROF. CONDUCT, RULE 1-100(A).
[2] The Discussion cites *Noble v. Sears, Roebuck & Co.*, 33 Cal.App.3d 654 (1973) and *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal.App.3d 1324 (1986) for the following statement. "[T]he comments contained in the Discussions of the rules…are intended to provide guidance for interpreting the rules…." RULES PROF. CONDUCT, RULE 1-100(C).

causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence."[3] By comparison, the ethical competency rule is violated and disciplinary action may result even if a client has not suffered actual harm.[4]

To make this point, consider the recent verdict of more than $185,000,000 in favor of a single plaintiff in an employment discrimination case against AutoZone Stores in federal district court in San Diego.[5] The plaintiff's attorneys certainly did not commit an obvious act of malpractice on the face of that verdict. If they did, a malpractice case against them would fall on deaf ears. But Magistrate Judge William V. Gallo in a post-verdict order considered whether the plaintiff's attorneys committed violations of five California ethical rules: inducing a violation of the Rules (Rule 1-120); communicating directly or indirectly with any juror (Rule 5-320(B)); after discharge of a jury, asking questions or making comments to a member of that jury intended to harass or embarrass the juror (Rule 5-320(D)), conducting an out of court investigation of a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service (Rule 5-320(E)), and failing to reveal promptly to the court improper conduct by a person who is a juror, or by another toward a person who is a juror or a member of his or her family (Rule 5-320(G)). Although the court found violations of several rules and referred two of the plaintiff's attorneys to the State Bar of California, the verdict remained and the case was apparently settled and voluntarily dismissed.[6]

There are recent cases which illustrate the relationship between malpractice and ethical violations, and serve the purpose of making comparisons to circumstances that may interest attorneys in California who must operate in compliance with the Rules.

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[3] *Budd v. Nixen*, 6 Cal.3d 195, 200 (1971).
[4] *Reznik v. State Bar*, 1 Cal.3d 198, 203.
[5] *Rosario Juarez v. AutoZone Stores, Inc.*, United States District Court, Southern District of California, Case No. 08cv0417.
[6] *Rosario Juarez v. AutoZone Stores, Inc.*, United States District Court, Central District of California, Case No. 08cv0417 [Order Regarding Attorney Misconduct; Referral to the State Bar of California and the Standing Committee on Discipline for the Southern District of California filed July 24, 2015 (Document 341)].

Mylan, Inc., et al. v. Kirkland & Ellis LLP[7]

The Mylan Plaintiffs sued Kirkland & Ellis LLP, alleging that Kirkland & Ellis breached fiduciary obligations owed to Mylan by representing Mylan's competitor, Teva Pharmaceutical Industries, in a hostile takeover bid of Mylan's parent holding company. The matter was before the Magistrate Judge on Mylan's motion for a preliminary injunction to: prevent Kirkland & Ellis from representing or advising Teva in its efforts to acquire Mylan's parent; prohibit Kirkland & Ellis from using or disclosing any information it learned from representing Mylan in any representation of any other client; require Kirkland & Ellis to maintain the confidentiality of all non-public information it had learned in connection with its representation of Mylan; and require Kirkland & Ellis to retrieve all work product provided by Kirkland & Ellis to Teva in connection with its efforts to acquire Mylan's parent.

Kirkland & Ellis began representing Mylan in 2013 in connection with numerous matters, including matters involving pharmaceutical products. The confidential information shared by Mylan with Kirkland & Ellis in those matters included proprietary and confidential pricing strategies, and confidential market and financial forecast information. Nonetheless, in 2015, Kirkland & Ellis undertook to represent Teva in its proposed acquisition of Mylan's parent. Kirkland & Ellis determined that it could concurrently represent the two clients in their matters and established an "ethical wall" between the lawyers that worked on the Teva proposed transaction and the lawyers working with Mylan. Kirkland also relied upon a general, prospective conflict waiver provision included in its engagement letter with Mylan.

The Court determined that it was substantially likely that Mylan would prevail on its breach of fiduciary duty claim against Kirkland & Ellis because the law firm's representation of Teva conflicted with Mylan's interests either directly or as an affiliated corporate entity of the Mylan parent company. The Court found that the very nature of a hostile takeover bid established an adversity of interests between Mylan and Teva, and also that Kirkland & Ellis provided advice to Mylan regarding substantial product and customer matters.

[7] United States District Court, Western District of Pennsylvania, Case No. 15cv00581 [Report and Recommendation on Plaintiff's Motion for Preliminary Injunction filed June 9, 2015 (Document 96)]. After the Magistrate Judge's recommendation, the motion became moot and the case was administratively closed, subject to dismissal with prejudice in six months. *Id.* [Stipulation and Order filed August 6, 2015 (Document 115)]. There is no published decision.

Although the direct and consequential damages caused by the conflicting representation and alleged fiduciary breach may not be apparent from the decision, there is usually a disgorgement remedy available to support a cause of action by a client against an attorney in conflicts cases. Kirkland & Ellis may face disgorgement of attorney's fees paid by Mylan (and Teva, too, if Teva sues). If fees are at issue or may be placed at issue, many ethical violations may give rise to a cause of action to recover them because there are cases holding that an attorney may not recover fees if services are rendered in violation of the requirements of professional responsibility.[8]

The ethical rules in California that would be implicated if the *Mylan* case were in our courts include:

Rule 3-100(A): "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule."

Rule 3-310(E): "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

Rule 3-600(A): "In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement."

In practices involving governmental entities, the most obvious, comparable example to *Mylan* is an attorney who represents a municipal governing body in a plenary fashion and seeks to represent private clients before that governmental entity's governing body or its subsidiary boards and agencies.[9] That conduct risks violation of each of the rules just cited. Similarly, an

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[8] *E.g., A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli*, 113 Cal.App.4th 1072, 1076 (2003), citing *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.*, 52 Cal.App.4th 1, 15-16 (1997) and *Goldstein v. Lees*, 46 Cal.App.3d 614, 618 (1975). If fees are at issue, the law provides standing for attorneys facing disqualification or disqualified attorneys to oppose the motion to disqualify or challenge the order disqualifying them even when their clients or former clients are not opposing disqualification. *A.I. Credit Corp., Inc.*, 113 Cal.App.4th at 1077.

[9] The comparable example is taken from IN RE SUP. CT. ADVISORY COMMITTEE ON PROF. ETHICS OP. NO. 697, 911 A.2d 51 (N.J. 2006).

attorney representing clients before a municipality's zoning and planning boards should not represent the municipality in land-use litigation, without all appropriate consents and waivers.[10]

The State Bar of California Standing Committee on Professional Responsibility and Conduct ("COPRAC") provided some guidance on governmental conflicts for city attorneys in a 2001 ethics opinion.[11] In its opinion, COPRAC analyzed the conflicts of a city attorney of a charter city in circumstances where the charter gave the attorney "the power to represent the city in litigation, subject to council direction, and to advise the council, other city bodies, and city officials (including the mayor) on legal questions." The city attorney advised the council about whether it would be lawful to adopt an ordinance to approve borrowing $100 million in earmarked funds. The council adopted the ordinance after consulting the attorney; the mayor also consulted the attorney and got the same legal advice. The mayor disagreed with the advice and accused the city attorney of a conflict of interest in advising both the council and the mayor. [12] COPRAC stated there was no conflict: "neither had the potential to become the city attorney's client against the other" and "the city attorney represents the municipal corporation as an indivisible unit."[13]

The difference between the conflicts addressed in the COPRAC opinion and the conflicts reflected in a representation comparable to the *Mylan* case is found in the identity of the client, and, to substantial effect, in the compensation of the attorney. A city attorney such as the one in focus in the COPRAC opinion, who has internal conflicts between his city council and the mayor of the city, has more concern for his ethics and the risk of being discharged, because he truly has only one client—the city, but the attorney with two clients, each of which is paying attorney's fees, has the additional risk of being sued for malpractice, breach of his duties of loyalty and confidentiality, and breach of fiduciary duty with a claim for disgorgement.

St. Croix v. Superior Court, 228 Cal.App.4th 434 (2014)

This recent case demonstrates the fact that the court will focus on the language of a charter city's charter in determining whether a city attorney's client is the city itself, not

[10] *See* R.I. OP. 2003-6 (Sept. 11, 2003).
[11] FORMAL OP. NO. 2001-156. The ethics opinions are available on the website of the State Bar of California at *http://ethics.calbar.ca.gov*.
[12] FORMAL OP. NO. 2001-156 at p. 1.
[13] *Id*. at p. 4.

individual officials, whose representation may present a conflict. The *St. Croix* case involved a city resident's effort to use a provision of a city ordinance to cause the production of 24 documents withheld by the executive director of the San Francisco Ethics Commission on the grounds that they were protected by the attorney-client privilege. The 24 documents were requests from the commission's staff to the city attorney's office for legal advice about the commission's proposed regulations and responses by the city attorney's office to the ethics commission's staff, providing advice about the proposed regulations. The city opposed disclosure, contending that the city charter creates the office of the city attorney, specifies the attorney's duties, and thus incorporates the attorney-client privilege. The city argued that the ordinance relied on by the resident as requiring production of the 24 documents could not validly modify the charter by barring the city from asserting the privilege.[14]

Putting aside the court's discussion of whether the specific charter controls the ordinance, which was also at issue in the case, the court in *St. Croix* stated that "'the same principles of construction applicable to statutes apply to the interpretation of municipal charters. [Citations.] The courts must always look first to the express language of the statute to ascertain its meaning.'"[15] After taking judicial notice of two relevant sections of the City Charter, including "[s]ignificantly [that] … the city attorney must, '[u]pon request, provide advice or written opinion to any officer, department head, or board, commission or other unit of government of' the City," the court concluded:

"The above charter provisions, by establishing the office and responsibilities of the city attorney, establish an attorney-client relationship between the city attorney on the one hand, and City and its officers and agencies (including the Ethics Commission) on the other."[16]

In the context of the decision, the court's conclusion obviously assumes that the relationship between the city attorney and the City, and its officers and agencies, must involve the interest of the City. Although the court's decision does not make clear that there is only one client involved—the city—even if the attorney-client privilege for the city may extend to its officers and agencies, that is the import of the language. With only one client, there could not be a conflict in the city attorney's work or the potential for unprivileged communications. There is

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[14] *St. Croix v. Superior Court*, 228 Cal.App.4th at 440.
[15] *St. Croix v. Superior Court*, 228 Cal.App.4th at 442, quoting *United Assn. of Journeymen v. City and County of San Francisco* (1995) 32 Cal.App.4th 751, 760.
[16] *St. Croix v. Superior Court*, 228 Cal.App.4th at 443.

never a mention or an implication in the decision that any separate interest of John St. Croix, the head of the Ethics Commission, or of the Commission, was involved.[17]

Martinez v. CalTrans, 238 Cal.App.4th 559 (2015)

A different type of malpractice and ethics violation may be found in misconduct of an attorney when the misconduct wipes out a favorable result at trial.

The Court of Appeal in this case reminded lawyers and clients alike that serious attorney misconduct during a trial results in a reversal of a favorable verdict. (It did not happen in the AutoZone Stores litigation discussed above, but it did in this case.) The lawsuit involved a motorcyclist that had been injured when he hit a raised divider while riding his motorcycle on the 57 freeway. He sued CalTrans alleging a dangerous condition on public property.

The jury returned a defense verdict in CalTrans' favor, but the Court of Appeal reversed the verdict based solely on the misconduct of CalTrans' in-house counsel who tried the case. (And, yes, in-house counsel may be sued for malpractice, which is why single, in-house attorney malpractice policies exist.) The court noted numerous instances of trial counsel's violation of pre-trial *in limine* orders, improper references to CalTrans' inability to pay any judgment, and improper introduction of character evidence. As one example, CalTrans' attorney sought to associate the plaintiff with Nazism through reference to a logo on his motorcycle that resembled a World War II era German military helmet. The court had already ruled that any reference to the logo or to the plaintiff's membership in a motorcycle gang was inadmissible, but the defense attorney persisted. During questioning of the plaintiff's wife, the attorney sought to introduce a picture of the plaintiff's motorcycle that showed the helmet logo. The trial judge deferred ruling on the admission of the photo until he could decide how to deal with the photo. Instead of waiting for the court's ruling on the evidence, the attorney asked the witness: "At the time of the accident, the motorcycle that your husband was riding had a skull picture on it wearing a Nazi helmet; right?" Even worse, the attorney admitted that the testimony was sought to besmirch the

[17] The *St. Croix* court states no less than three times that its conclusion is that an attorney-client relationship exists between the city attorney "and City agencies" (twice at 228 Cal.App.4th at 444 fn 6 and at 444 in the text) and "the commission" (228 Cal.App.4th at 445).

plaintiff's character and to rebut prior testimony about the plaintiff's studies to become a clergyman.[18]

In addition to the reversal of the judgment, the Court of Appeal notified the State Bar that it reversed the judgment in CalTrans' favor based on its attorney's misconduct.

Prakashpalan v. Engstrom, Lipscomb & Lack, et al., 223 Cal.App.4th 1105 (2014) and *Angela Britton, et al. v. Thomas Girardi, et al*., 235 Cal.App.4th 721 (2015)

And then there is one of the primary reasons for the Rules: the money.

The factual background of these two cases overlap to some extent concerning lawsuits against the former lawyers who represented the plaintiffs in cases against an insurance company arising out of the 1994 Northridge earthquake. That case resulted in a payment of $100 million by the defendant insurance company. The plaintiffs in these cases alleged that they learned, many years later, that their attorneys failed to account for at least $22 million of the settlement funds. Their discovery of the alleged misappropriation of funds was delayed, according to the plaintiffs, because retired judges determined the allocations of the settlement funds among the various plaintiffs, which allocations were not revealed to the plaintiffs. The plaintiffs also contended that they did not give their informed consent to the underlying settlement because they were never provided with a complete copy of the settlement agreement, nor did they receive a complete accounting of the settlement proceeds.

The Court of Appeal affirmed the trial court's decision that the malpractice and breach of fiduciary claims were untimely. However, the court in the *Prakashpalan* case gave the plaintiffs an opportunity to amend their fraud claims to demonstrate delayed discovery. The court observed that lawyers are required to supply their clients with an accounting of the client's trust account and, thus, the tolling provisions of California Probate Code section 16460 apply to the fraud claims if there has been no accounting. The *Britton* case was different on this point and the plaintiffs lost because there it was apparent that the plaintiffs were on inquiry notice of the alleged fraud they claimed. It is very important to consider whether the plaintiffs, if successful at the final resolution of this litigation, will ever see the money so many years after the settlement.

[18] The admitted effort to besmirch character violated a statute: "It is the duty of an attorney…[t]o advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged." BUS. & PROF. CODE, SEC. 6068(F).

The ethical rules implicated include:

Rule 3-310(D): "A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client."

Rule 3-500: "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."

Rule 4-100(B):

"A member shall:

"(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

"(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

"(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

"(4) Promptly 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."

Clark v. Superior Court, 196 Cal.App.4th 37 (2011)

The trial court determined, on disputed facts, that the plaintiff's attorney had received from his client privileged and confidential documents that the client obtained during the client's employment with the defendant. The trial court further found that the plaintiff's attorney had excessively reviewed the privileged documents when he had an obligation under *Rico v. Mitsubishi Motors Corp.*, 42 Cal.4th 807 (2007) and *State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal.App.4th 644 (1999) to notify the defendant's attorney that he possessed privileged documents. The Court of Appeal ruled that substantial evidence supported the trial court's findings and upheld the trial court's decision to disqualify the plaintiff's counsel from

representing the plaintiff in the action. Again in this case, the primary effect of the malpractice will be on the attorney's fees. To the extent that an evidentiary sanction is imposed on the plaintiff because of the ethical misconduct, and the sanction adversely causes an effect on the client's case, there will be additional malpractice damages.

The ethical rules implicated include:

Rule 3-110(A): "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

Rule 3-110(B): "For purposes of this rule, 'competence' in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service."

There is really no end to the cases that illustrate the relationship between malpractice and an attorney's ethical obligations. Strict compliance with the Rules eliminates many chances for malpractice to occur. No one can avoid the chances of error entirely, but the cases show that knowing who your client is, excellent conflicts systems, avoidance of purposeful misconduct, civility, prompt communications, appropriate handling of money and property, and overall ethical conduct, will help keep an attorney out of the malpractice loop.