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Legal Malpractice: Improper Representation of Conflicting Interests

*Marshall J. Nachbar**

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.[1]

WHEN AN ATTORNEY, for whatever reason—sloth, over zealous conduct, or personal greed—represents a client without being completely loyal to the client's interests there are several things that may occur. The attorney may be subject to disciplinary or disbarment proceedings.[2] He may be disqualified from further representing his client.[3] If the attorney's actions have resulted in damage to his client the attorney may find himself the defendant in a malpractice action.[4] If the cause of the damage is alleged to be the result of an attorney representing dual interests or improperly representing adverse interests then the cause of action will be for representing conflicting interests.[5]

Before proceeding to discuss the elements of a malpractice action for representing conflicting interests and before describing some actions by attorneys that may be considered as the improper representation of adverse interests, there are some general facts about the problem that should be mentioned. There are instances where an attorney may legally and ethically represent adverse or conflicting interests.[6] An attorney, once he has made a full disclosure of all the facts concerning the dual representation to the parties involved and has obtained their permission to continue the representation of both of them, may do so.[7] In fact it has been held that the "general rule that an attorney may not at the same time represent parties whose interests conflict is subject to an exception, where he so acts with

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1 ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC5-1 (1970).

2 Broderick's Case, 104 N.H. 175, 181 A.2d 647 (1962); Toledo Bar Ass'n. v. Miller, 22 Ohio St. 2d 7, 257 N.E. 2d 376 (1970); Columbus Bar Ass'n. v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968).

3 Consolidated Theatres, Inc. v. Warner Bros. Cir. Mgt. Corp., 216 F.2d 920 (2d Cir 1954); Wucthumna Water Co. v. Bailey, 216 Cal. 564, 15 P.2d 505 (1932); Wilson v. Wahl, 182 Kan. 532, 322 P.2d 804 (1958); Brasseaux v. Girouard, 214 So.2d 401 (La. Ct. App. 1968).

4 Theobald v. Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961.

5 Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Olitkowski v. St. Casimir's Sav. & Loan Ass'n., 302 Mich. 303, 4 N.W.2d 664 (1942); Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897).

6 McClenden v. Eubanks, 249 Ala. 170, 30 So.2d 261 (1947); Todd v. Rhodes, 108 Kan. 64, 193 P. 894 (1920).

7 *Id.*

the full knowledge and consent of both".[8] Thus the key phrases are full disclosure and permission of the parties.

Violation of Legal Ethics

The attorney should strictly adhere to all nine canons of the *Code of Professional Responsibility*.[9] To be more specific, it appears that by representing conflicting interests without full disclosure and permission from the involved parties the attorney will violate or at least be very close to violating Canons Four, Five, and Six of the Code.[10] Canon Four states that "a lawyer should preserve the confidences and secrets of a client."[11] This is the lawyer-client privilege. In cases where an attorney is representing adverse interests the opportunity to break the attorney-client privilege and to use confidential information obtained from one client for the benefit of the other is greater than in an ordinary case, where the opposing parties have their own attorneys and is directly opposed to the disciplinary rules of Canon Four.[12] Under these rules an attorney shall not "use a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure."[13]

Canon Five deals in depth with problems caused by lawyers representing conflicting interests.[14] Under this canon's ethical considerations, EC5-14 stands out as a general statement that crystallizes the ethical problems of an attorney who has become involved in a dual representation. It says:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, diverse or otherwise discordant.[15]

While this statement very nearly speaks for itself, it is not difficult to see how an attorney who is representing adverse interests may find himself hamstrung to the point where everything he does concerning that representation will be colored by how it will affect his other client.[16] The attorney in the middle will find strings pulling him both ways at the same time and may have the strings of self interest pulling him in a third direction away from the interests and

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[8] Todd v. Rhodes, 108 Kan. 64, 65, 193 P. 894, 895 (1920).

[9] *Supra* note 1, at Preamble.

[10] *Id.*, Canons 4, 5 & 6.

[11] *Id.*, Canon 4.

[12] *Id.*, DR4-101.

[13] *Id.*, DR4-101 (B) (3).

[14] *Id.*, Canon 5.

[15] *Id.*, EC5-14.

[16] Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Ishmael v. Millington 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

loyalties owed to the two clients. Because of these conflicting interests the lawyer may violate Canon Six, A Lawyer Should Represent a Client Competently.[17] It becomes impossible to represent one client competently when a lawyer is subject to pressures from the other client or is pursuing his own interests. It is at this point that a lawyer may find himself facing a malpractice action stemming from his improper representation of adverse interests.

Elements of the Malpractice Action

An action for legal malpractice is comprised of the same four basic elements that make up other damage actions based on negligence. These elements are: (1) a duty owed, (2) a breach of that duty, (3) being the proximate cause, (4) of the damage sustained.[18] More specifically, the elements of the action break down as follows: an attorney-client relationship satisfies the first element of a duty owed[19]. Next is the breach of duty which is the improper representation of an adverse interest. It is not difficult to see that an attorney who is representing adverse interests will have trouble in maintaining the degree of care owed to his client when he has another client involved in the same matter to worry about.[20] The third element, proximate cause, corresponds to the legal advice given by the lawyer which, when accepted and relied upon by the client, leads to and causes his damage.[21] It is at this point, after the client has sustained damages, that he has a viable action for malpractice against the attorney.[22]

Cases of Conflict of Interest

At this point it becomes necessary to review and analyze some of the reported cases dealing with malpractice for the improper representation of adverse interests. It is necessary to do this in order to see how the four general elements of a malpractice suit[23] break down into the more narrow, specific questions that must be answered. Those questions are: (a) Did an attorney-client relationship exist?[24]

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[17] *Supra* note 1, Canon 6.

[18] Chavez v. Carter, 256 Cal. App. 2d 577, 64 Cal. Rptr. 350 (1967); Ishmael v. Millington 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Modica v. Crist, 129 Cal. App. 2d 146, 276 P.2d 614 (1955).

[19] McGregor v. Wright, 117 Cal. App. 186, 3 P.2d 624 (1931); Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897).

[20] Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Theobald v. Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 592 (1961); Babbitt v. Bumpers, 73 Mich. 331, 41 N.W. 417 (1889); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954); Ward v. Arnold, 52 Wash.2d 581, 328 P.2d 164 (1958).

[21] Ishmael v. Millington, 241 Cal. App.2d 520, 50 Cal. Rptr. 592 (1966); McGregor v. Wright, 117 Cal. App. 186, 3 P.2d 624 (1931).

[22] *Id.*; W. PROSSER, LAW OF TORTS 146 (3d ed. 1964).

[23] McGregor v. Wright, 117 Cal. App. 186, 3 P.2d 624 (1931); Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897).

[24] Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 P. 57 (1900); Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897).

(b) What is necessary for an attorney-client relationship to exist?[25] (c) What is the nature of the duty the attorney owes to the client?[26] (d) What is the degree of care owed by the attorney to the client once the attorney agrees to render legal services?[27] (e) Must the negligence charged be based upon a specific action?[28] (f) Was the alleged damage sustained as a result of the client's reliance upon the attorney's legal advice or services?[29] (g) What damages is the attorney liable for?[30]

There have been few cases reported involving clients suing lawyers for damages stemming from the lawyers improperly representing conflicting interests. There have been many more reported instances of attorneys being disciplined for improper representation of adverse interests. There have also been more reported instances of attorneys being disqualified from representing one or both parties in order to prevent the improper representation of conflicting interests.[31]

In *Ishmael v. Millington*[32] an action stemming from a divorce case, the defendant attorney had been the husband's lawyer. The parties to the divorce agreed upon the divorce and the property settlement. The defendant attorney agreed to the husband's request to act as the lawyer for the plaintiff wife. The divorce was granted and the prior property agreement was incorporated into the decree. The wife received $8,800 as part of her settlement and surrendered her rights to community assets of $82,500. She claims this came about as a result of the defendant attorney's negligence in that when the husband told the attorney that his wife's share was what she was entitled to under community property laws the attorney took him at his word and negligently failed to inquire into the true value of the community property.

The court in this case found that the attorney by accepting the employment as the wife's lawyer had impliedly agreed to use that degree of skill, prudence and diligence that lawyers of ordinary skill

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[25] *Id.*

[26] Grievance Comm. v. Rottner, 152 Conn. 59, 203 A.2d 82 (1964); Smoot v. Lund, 13 Utah 2d 168, 369 P.2d 933 (1962).

[27] Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Theobald v. Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961); Olitkowski v. St. Casimir's Sav. & Loan Ass'n., 302 Mich. 303, 4 N.W.2d 664 (1942); National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S.W. 561 (1909); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954); Ward v. Arnold, 52 Wash.2d 581, 328 P.2d 164 (1958); Leavitt, *The Attorney as Defendant,* 13 HASTINGS L.J. 1 at 23 (1961).

[28] Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

[29] *Id.*

[30] *Id.;* Lawall v. Groman, 180 Pa. 532, A. 98 (1897).

[31] Author's Note: The reasons for the scarcity of reported cases of legal malpractice stemming from the improper representation of conflicting interests can only be speculated about. It is this author's opinion that many malpractice cases are settled out of court as part of a deal by which the former client agrees not to make a complaint to the courts or local bar association.

[32] Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

and capacity generally have and exercise in rendering their services. The court held that the negligence charged by the plaintiff did correctly consist of a negligent failure to act, in that the average attorney would have checked the actual value of the community property and would not have relied on the word of an adversely interested party. The court found that the lawyer's actions came as a result of his representing the husband and his interests. This follows from the fact that the attorney did not make an inquiry into the husband's finances, or if he did, then he did not make a full disclosure to the wife so as to enable her to protect herself. The court said:

> . . . an attorney representing two parties with divergent interests must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation.[33]

The court continued to emphasize the duty a lawyer owes his client. It stated:

> A lawyer owes undivided loyalty to his client. Minimum standards of professonal ethics usually permit him to represent dual interests where full consent and full disclosure occur. The loyalty he owes one client cannot consume that owed to the other.[34]

Surely in *Ishmael v. Millington* [35] the reason the court awarded damages to the plaintiff was that the defendant attorney's loyalty to the husband consumed that which he owed to the wife.

In *Lawall v. Groman*[36] the defendant attorney was charged with negligently overlooking a prior lien on property upon which the plaintiff had taken a mortgage. The defendant answered that there was no improper representation of conflicting interests because there was no attorney-client relationship established between himself and the plaintiff. The defendant was acting for the borrower in this transaction and it was from him that he received his compensation. Thus, there was an attorney-client relationship established on one side. On the other side was the plaintiff, the lender. After the plaintiff had paid the money to the borrower, the defendant kept the mortgage, which was the plaintiff's property, and agreed to put it on record. The plaintiff told the defendant lawyer to search the title before recording the mortgage and the attorney agreed to do so. It was at this point that an attorney client relationship came into being and at the same time the defendant began to represent adverse interests. He claimed that because he was not to receive compensation from the lender, but rather from the borrower, there was no attorney-client relationship established and, therefore, he did not owe the plaintiff any duty of care and could not be liable for any

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[33] *Id.* at 528, 50 Cal. Rptr. at 597.
[34] Ishmael v. Millington, 241 Cal. App. 2d 520, 526, 50 Cal. Rptr. 592, 595-6 (1966).
[35] Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).
[36] Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897).

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damages the plaintiff had sustained. The court took a dim view of the attorney's reasoning. It held that if the defendant undertook to act for the plaintiff in his professional capacity as an attorney, with the knowledge that the plaintiff was relying on him to adequately search title, then the attorney was bound to act with the ordinary and reasonable care and skill of his profession. The court further held that it did not matter that he was not to be paid by the plaintiff for "one who undertakes to do, even without reward, is responsible for misfeasance."[37] The court continued to discuss the establishment of the attorney-client relationship. It held that while the fee is the most usual and important item in considering whether or not an attorney-client relationship has been established it is not indispensable. The essential feature of the professional relationship is the act of employment to do something in the client's behalf.[38] The court recognized that adverse interests could be properly represented by one lawyer but "the cases in which this can be done are exceptional and never entirely free from danger of conflicting duties."[39]

In *Lysick v. Walcom*,[40] the plaintiffs were the survivors of the deceased victim of an automobile accident caused by the testator, one Rardin. The attorney, defendant in this action, represented the estate of the testator in the wrongful death action by way of an insurance policy. He also represented the insurance company. The conflict of interests that was alleged was a result of the lawyer representing the insurer and the insured, the testator's estate in this case.[41]

The plaintiffs were assigned any cause of action which the estate of Rardin might have against the insurance company and the defendant attorney as a result of the judgment entered against the estate. Originally the Lysicks brought an action against Rardin's insurer for $10,000 in death damages. The insurance company offered $9,500. This was rejected and claims totalling $450,000 were set forth against the estate coupled with an offer to settle for $12,500. At that point the estate was willing and able to contribute $2,500 if the insurance company would contribute the additional $10,000. The insurance company now employed the defendant attorney to defend the estate as per the insurance policy. However, neither the insurance company nor the attorney told the estate of this arrangement. At the same time as he was named to defend the estate the attorney was authorized by the insurance company to offer the $10,000 originally demanded, but to do so only at a propitious moment, and then to offer it with the $2,500 that the estate had agreed to contribute.

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37 *Id.* at 533, 37 A. at 99.

38 *Id.*

39 Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897).

40 Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

41 *Id.*

At a pre-trial conference a member of the defendant's firm represented that only $9,500 would be forthcoming from the insurance company when in reality they were authorized to offer the full $10,000. At this point the estate was made aware of the fact that the defendant attorney was representing them, as called for in the insurance policy. Soon after the pre-trial conference, the estate's administrator died and the estate became unwilling and unable to contribute the $2,500 originally offered. Thus, the last hope of settlement for $2,500 died with the estate's administrator. The action proceeded to trial and resulted in a judgment for $225,000 for the Lysicks. The assignment which made this action possible was then made. This suit was commenced alleging a bad faith and negligent representation by the attorney Walcom due to a conflict of interests.

The court, in deciding this case against the attorney, held that he owed both of his clients, the insured and the insurer, a high duty of care. It further held that he owed that duty to the insured just as if the insured had retained him personally. The defendant violated professional standards of care by not making a full disclosure to the estate concerning the fact that he was authorized to offer $10,000. In fact, he represented exactly the opposite as he tried to save the insurer $500. The court held the attorney liable to the party who was injured by his lack of disclosure. In this case that party was the estate and by way of the assignment the Lysicks were able to recover.[42]

Guidelines

In summary, it will be useful to review the seven questions that should be answered in a legal malpractice action stemming from an alleged conflict of interests and to present answers to those questions. Question (a) Did an attorney-client relationship exist?[43] An attorney-client relationship must exist in order for claims of improperly representing adverse interests to be substantiated.[44] Question (b) What is necessary for an attorney-client relationship to exist?[45] It is necessary that the attorney agree to perform professionally for the client. A fee is not necessary for an attorney-client relationship to exist.[46] Question (c) What is the nature of the duty the attorney owes to the client?[47] It has been said that the attorney-client relationship "carries with it a continuing obligation of fidelity and loyalty which disqualifies the attorney from rendering professional services in the same cause to his client's opponent or from taking

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[42] *Id.*

[43] Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 P.57 (1900); Lawall v. Groman, 180 Pa. 532, 37 A.98 (1897).

[44] *Id.*; Lysick v. Walcom 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

[45] Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 P.57 (1900); Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897).

[46] Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897).

[47] Grievance Comm. v. Rottner, 152 Conn. 59, 203, A.2d 82 (1964); Smoot v. Lund, 13 Utah 2d 168, 369 P.2d 933 (1962).

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a position hostile to his original client and inimical to the very interest he originally guarded."[48] Question (d) What is the degree of care owed by the attorney to the client once the attorney agrees to render legal services?[49] The attorney impliedly agrees to use such skill, diligence and care as lawyers of ordinary skill, diligence and care generally possess.[50] Question (e) Must the negligence charged be based upon a specific negligent act?[51] It is not necessary for the negligence charged to be predicated upon a specific act. A failure to act may result in actionable negligence.[52] Question (f) Was the alleged damage sustained as a result of the client's reliance upon the attorney's legal advice or services?[53] The damage must be the proximate result of the lawyer's action or inaction.[44] Question (g) What damages is the attorney liable for?[55] The lawyer is liable for the loss caused by his failure to properly discharge some duty which was within the purview of his employment.[56]

Conclusion

It is extremely desirable for the legal profession to eliminate instances of malpractice. The practicing attorney should be aware of the fact that instances where he may properly represent adverse interests are rare and never entirely free of the dangers inherent in such situations. The attorney must decide whether or not to risk a lawsuit for malpractice or disciplinary proceedings for misconduct whenever he is confronted with a potential conflict of interest situation. In view of the risks involved, it seems foolhardy to even attempt representation in such a situation.

Unfortunately, it is impossible to look into every lawyer's dealings and to advise him so that he may avoid being trapped in a conflict of interests situation. However, it is not impossible to start at the beginning, that is with the law school, and to acquaint the student with situations that he may find once he is a practicing attorney. This can be done through legal practice clinics and by putting new emphasis on attorney-client relations. Hopefully this practical experience will help to eliminate not only malpractice due to representing conflicting interests but all forms of legal malpractice.

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[48] Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Theobald v. Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961); Olitkowski v. St. Casimir's Sav. & Loan Ass'n., 302 Mich. 303, 4 N.W.2d 664 (1942); National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S.W. 561 (1909); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954); Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958); Leavitt, *The Attorney as Defendant,* 13 HASTINGS L.J. 1 (1961).

[49] *Id.*

[50] Lucas v. Hamm, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961); Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958).

[51] Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

[52] *Id.*

[53] *Id.*

[54] *Id.*; Home Fed. Sav. & Loan Ass'n. v. Spence, 259 Md. 515, 270 A.2d 820 (1970).

[55] Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897).

[56] Home Fed. Sav. & Loan Ass'n. v. Spence, 259 Md. 515, 272 A.2d 820 (1970); Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897).