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Ethical lapses that lead to malpractice claims

A look at the nexus of State Bar Rules and legal malpractice claims

The great 19th Century philosopher, Immanuel Kant, who tried to explain the relationship between reason and human experience, once declared: "In law, a man is guilty when he violates the rights of others. In ethics, he is guilty if he only thinks of doing so."

While the clients always demand perfect justice, ethics are less in demand, until expectations of how "perfect" the results of litigation should be are not achieved. What is expected from the lawyer from an ethical standpoint is set forth in the California Rules of Professional Conduct, and those rules are designed to protect the public at large, not just the client, from lawyers with questionable ethics.

While many clients who prevail on their claims have little concern about how their attorney got there, clients who have not had their expectations matched by the outcome are frequently quick to criticize both the lawyer, and his ethics. When the first objective is not achieved, the secondary concern becomes paramount. Ethical breaches are a certain way to give the client unhappy about the results achieved a measure not only of revenge, but recompense, in a legal malpractice claim.

Alan Dershowitz once observed, "Law is an imperfect profession in which success can rarely be achieved without some sacrifice of principle. Thus all practicing lawyers – and most others in the profession – will necessarily be imperfect, especially in the eyes of young idealists. There is no perfect justice, just as there is no absolute in ethics. But there is perfect injustice, and we know it when we see it."

An ethical lapse is not always malpractice, but there are certain breaches of ethics which easily beget the malpractice claim. This article will explore some of the inter-relationships between the most frequent ethical violations and malpractice lawsuits against attorneys.

Where State Bar Rules and malpractice claims intersect

Although there is no independent cause of action for a violation of the rules of ethics set forth in the State Bar Rules of Professional Conduct, (*Ross v. Creel Printing and Publishing* (2002) 100 Cal.App.4th 436) an inter-relationship between violations of State Bar Rules and legal malpractice claims against attorneys is often inherent.

At the same time, legal claims for damages against attorneys which are exclusively comprised of ethical violations or fee disputes are generally not covered by attorney errors and omissions insurance policies. However, there are many ways in which violations of the Rules of Professional Conduct ("RPC") are intertwined with covered claims which may make the attorney particularly vulnerable to a malpractice claim for

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events which occur in daily law practice, and are thus to be avoided. One begets the other.

A survey of legal malpractice insurance carriers and their panel law firms suggests that the five most common areas where ethical breaches lead to malpractice claims against offending attorneys are:

- Inadequate legal representation
- Lack of client communication
- Conflicts of interest
- Sexual relationships between attorney and client
- Billing and fee disputes.

In most instances, the interrelationship between the foundational ethical violation and a claim for malpractice are obvious. That is particularly true with the violation of California Rule of Professional Conduct (CRPC) Rule 3-110, violation of which easily translates into actionable "inadequate legal representation," which is covered by most legal malpractice policies.

California Rule of Professional Conduct Rule 3 -100 is entitled: "Failing to Act Competently;" Rule 3-110 (B) provides: "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." Failure to do so obviously may lead to both a legal malpractice action, and a disciplinary proceeding.

The rule applies to attorneys who "intentionally, recklessly, or repeatedly fail to perform legal services with competence." While ordinary negligence is not specifically referenced, the rule is so broadly stated that general negligence claims may become the basis of State Bar Disciplinary proceedings, particularly when they are frequent.

Business & Professions Code section 6002.1(a)(4), (5) and 6068(o) require a California attorney to make a written report to the State Bar's lawyer discipline system within 30 days following: (1) the filing of 3 or more lawsuits for malpractice in a 12-month period; (2) the entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence; (3) the imposition of litigation sanctions (except for discovery abuse sanctions) of more than $1,000; (4) the bringing of an indictment or information charging a felony; (5) the conviction of the attorney to a felony or misdemeanor committed in the course of the practice of law, or an attempt or conspiracy or solicitation of a felony; (6) reversal of a judgment or proceeding based in whole or in part upon attorney misconduct. The failure to report may be a separate basis of discipline by the Bar.

The outcome of the matter at issue

While in the malpractice claim premised on negligence the plaintiff is obligated to prove every element of the cause of action, including damages caused by the negligent conduct, in the instance of State Bar disciplinary proceedings, the outcome of the matter in issue is not determinative. Conversely, in all claims for professional negligence or malfeasance seeking monetary recovery against the attorney, the rule of *Budd v. Nixen* (1971) 6 Cal.3d 195 prevails: the elements of a cause of action for professional negligence include the obligation to prove the proximate causal connection between the negligent conduct and the resulting injury, and the actual loss or damage resulting from the professional's negligence (i.e., negligence, causation, and damages).

Pursuant to the "case-within-a-case" doctrine of *Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, a plaintiff must establish that, but for the attorney's conduct, the loss would not have occurred, or, that the amount of the loss would have been less. (See also *Orrick Harrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052.) Where the alleged misconduct arose in a litigation context, the plaintiff must prove both that the attorney acted wrongfully and that the plaintiff would have obtained a better result in the underlying action had the attorney complied with the applicable standards of conduct. (*Harris v. Smith* (1984) 157 Cal.App.3d 100, and *Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740.)

This is equally true when the malpractice arises in the transactional setting. (See *Yanez v. Plummer* (2013) 221 Cal.App.4th 180) Similarly, if a plaintiff alleges there would have been a better result in the underlying action had counsel disclosed an alleged conflict of interest which the attorney failed to properly address, the plaintiff must prove that he or she would have obtained a better result. (See *Blecher & Collins P.C. v. Northwest Airlines, Inc.* (858 F. Supp. 1442.) In effect, under the "case within the case" rule, the plaintiff must retry the underlying action, although when doing so, the lawyer becomes the target for payment of damages in the eyes of the jury. When the claim includes an ethical violation, the lawyer becomes a juicy target.

While the connection between the foundational ethical violation and a claim for malpractice is frequently obvious, characterization of the unethical conduct which makes the claim collectible against a malpractice policy needs far less precision and focus.

Additionally, it is important to recognize that violations of the Rules of Professional Conduct have significant career consequences, regardless of how they are characterized, or recharacterized. And, while claims of incompetent representation typically produce lawsuits first, and only secondarily, end up as the basis for State Bar proceedings, improper sexual relations with a client which produce State Bar proceedings have a much larger impact on the attorney. It is of little consolation that improper sexual relations with a client typically only produce monetary recoveries against the attorney on theories other than legal malpractice.

Although the Rule of Professional Conduct barring sexual relations with clients is not one of absolute prohibition, the myriad of other social consequences seldom make the risk worth taking. Both the State Bar Act and the CRPC prohibit the attorney from having sexual relations with a client, under the following circumstances:

- The attorney shall not expressly or impliedly condition the performance of legal services for the prospective client on the client's willingness to engage in sexual relations with the attorney.

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• The attorney shall not employ coercion, intimidation or undue influence in entering into sexual relations with clients.

As if it needs to be explained, the very logical reason for existence of the Rule of Professional Conduct is that: "the attorney shall not continue to represent a client with whom counsel has sexual relations if the sexual relationship causes counsel to perform legal services incompetently in violation of CRPC 3-110, or if the sexual relationship would be likely to damage or prejudice the client's case." Under the Model ABA Rule (Rule 1.8), sexual relations with a client are absolutely prohibited, unless the consensual sexual relationship existed at the time the attorney-client relationship commenced. The obvious potential consequences of a soured sexual relationship with the client should make the rule of prohibition both intuitive and absolute.

While a breach of a fiduciary duty is tortious in nature (See *Brown v. Critchfield* (1980) 100 Cal.App.3d 858, 871), the tort of breach of fiduciary duty is different from the tort of legal malpractice. Liability for a breach of fiduciary duty claim typically arises under California Rule of Professional Conduct Rule 3-300 "Avoiding Interest Adverse to a Client".

Attorney negligence does not automatically give rise to a breach of fiduciary duty action against the attorney. (See *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070; see also *Buehler v. Sbardellati* (1995) 34 Cal.App.4th 1527; and *Yanez v. Plummer* (2013) 221 Cal.App.4th 180.) As indicated, a breach of fiduciary duty cause of action typically occurs when the attorney obtains an unfair advantage at his or her client's expense. Examples of such occurrences include *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139 [an attorney buying land sought by his client]; and, *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884). On the other hand, breach of the rules of ethics can frequently be cast in terms of claims which are actionable against the attorney seeking civil damages.

But at the heart of any claim is the threat such claims of ethical violations may lead to State Bar Disciplinary proceedings, particularly in view of the State Bar's zealous determination to protect the public from attorneys whose poor public persona the Bar's attitude seems to wholeheartedly embrace. For example, this year, the State Bar of California has put the following statement on all membership cards: "Protection of the Public Is the Highest Priority for the State Bar of California." Critics of the Bar have opined that the language implies that the bar intends to protect the public from its members, thus advancing the negative stereotype of attorneys.

Lack of Client Communication, a frequent source of malpractice claims, is the subject of Bar discipline, as set forth in CRPC 3-500, which states: "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." This dictum, alone, is so nebulous and overly broad as to not, by itself, be the exclusive basis for a legal malpractice claim. It is, however, a common problem at the root of the client's irritation about the legal services rendered, which then produces lawsuits for monetary damages. Continued failure to keep the client informed about significant developments in a case is often cited as part of the deterioration of the attorney-client relationship which leads to a malpractice claim, and a later State Bar claim that the attorney has failed to Act Competently – Rule 3-110.

Rule 3-500, 3-510: Communication

Poor communications get attorneys into trouble with their clients, particularly in instances where the client has unreasonable expectations – even those with no factual or legal basis. What commonly happens is that the less frequently the attorney responds, the more frequently the client calls, producing a vicious cycle of frustration for the client, and irritation for the attorney. To get the attorney's attention, the client begins to change their story, destroying their credibility in litigation, and making the litigation impossible to manage. When the case ultimately goes south, they blame the attorney. Because they are angry at having been ignored, they also sue.

The "failure to communicate" which becomes the most common basis for an action against the attorney for legal malpractice is the failure of the attorney to communicate settlement offers, not just in civil cases, but in criminal cases, particularly where the final result for the client is worse than the offer. In that regard, CRPC 3-510 forms the basis of the claim, and the subsequent disciplinary proceedings. It states: A) A member shall promptly communicate to the member's client: (1) All terms and conditions of any offer made to the client in a criminal matter; and (2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters. (B) As used in this rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

In the discussion of Rule 3-510 in the State Bar Rules of Professional Conduct, the Bar states: "Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused. Any oral offers of settlement made to the client in a civil matter should also be communicated if they are 'significant' for the purposes of Rule 3-500."

Any offer by opposing counsel on behalf of their clients which is effectively rejected, and which is not communicated in writing produces compelling proof of both the attorney's failure to comply with the standard of care, and the client's damages in the subsequent legal malpractice claim, even if the attorney had tried a case that would be the envy of the likes of Clarence Darrow and Abraham Lincoln. The best practice is to direct a letter to the client setting forth every

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material offer, with only general recommendations on how the offer should be responded to, described as such, but with a specific request that the client acknowledge receipt of the offer.

Rules 3-300; 3-310: Conflicts of interest/ Business transactions with clients

Attorney business transactions with their clients, and unrecognized conflicts of interest – some of which occur simultaneously – consistently produce the kinds of ethical violations which commonly result in lawsuits against the attorneys, and because that is so, they should be avoided. Some conflicts, which arise spontaneously and are innocently encountered, can only properly be dealt with directly and specifically, by obtaining a knowing and intelligent waiver of the conflict.

Several common fact patterns repeatedly arise in the context of attorney conflicts of interest. Most involve some type of adverse interest with the client.

An "adverse" interest which may produce a conflict is defined as one that is "hostile, opposed, antagonistic . . . detrimental, unfavorable to one's own interest." (*Ames v. State Bar* (1973) 8 Cal.3d 910.) Some State Bar opinions suggest that an adverse interest is one that "threatens the client with potential harm." Others simply suggest that an adverse interest is one that produces a different outcome for the lawyer than intended by the client by the retention. The latter kind points up the duty of loyalty which is owed to clients and even former clients.

One form of conflict arises when a lawyer simultaneously represents two or more clients with adverse interests. Concurrent representation of clients with adverse interests, while not necessarily an ethical violation, is certainly an ethical dilemma and needs to be dealt with openly, directly and impartially. Such conflicts commonly arise because the interests of several clients in the same matter are rarely identical, and any variance in their positions regarding any matter in controversy in the transaction or litigation matter may create a potential conflict, if not an actual conflict.

A conflict of interest exists when a lawyer's duty on behalf of one client obligates the lawyer to take action prejudicial to the interests of another. That conflict occurs when, on behalf of one client, it is the attorney's duty to contend for that which his duty to another client requires him to oppose. (See *Flatt v. Superior Court* (*Daniel*) (1994) 9 Cal.4th 275.)

Conflicts from concurrent representation may arise innocently from circumstances including representation of several family members in a wrongful death case, particularly if the claim has a limited amount against which the clients can recover, such as a medical negligence, wrongful death case in which there is a ceiling under Civil Code section 3333.1 on the amounts that can be recovered. If representing all clients with the same level of skill and endeavor cannot be accomplished, the representation should not be continued.

Another source of conflict arises when an attorney's representation of a client's interests may be affected by the lawyer's personal or financial interests. Such circumstances include where an attorney enters into any business transaction with his client. While there is no statute, rule or ethical standard *prohibiting* attorneys from engaging in business or financial transactions with their clients, because of the attorney's fiduciary duty to the client, attorney-client transactions from which the attorney obtains a benefit are scrutinized for unfairness. Where the appearance of impropriety arises, the transaction can be set aside, and the attorney sued civilly for damages.

A business transaction with a client or other transaction by which an attorney knowingly acquires a financial interest adverse to the client is ethically permissible *only* if the following requirements are met:

> …the transaction and its terms are fair and reasonable to the client and are fully disclosed to the client in writing in a manner that can be reasonably understood by the client; and
>
> The client is advised in writing that he/she may seek the advice of an independent lawyer regarding the transaction, and is given a reasonable opportunity to seek that advice; and
>
> …the client consents in writing to the terms of the transaction.

As stated in *Sharp v. Next Entertainment, Inc*. (2008) 163 Cal.App.4th 410:

> A conflict of interest is present where the circumstances of a particular case present a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, or former client, or a third person.

Of course, the problem is not one which is solved simply by complete disclosure of the terms of the business transaction being described to the client in writing, as required. When a client does not get the bargain they expected, or they pay more, or earn less on a deal than they expect, the burden of proof of the "fairness" of the transaction is on the attorney, who has a fiduciary obligation to the client which, when breached, can result in a complete disgorgement of his fees or profits. (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518.)

The proper response to a client conflict is one which is universally presumed: if an impermissible conflict exists before representation is undertaken, representation should be declined; if a conflict arises afterwards, the lawyer should withdraw.

Frequently, in conflict of interest claims, several different Rules of Professional Conduct come into play to determinate the existence of a conflict, and several common fact patterns repeatedly arise in the context of attorney negligence claims arising out of the conflicts that occur.

The Rules of Professional Conduct which typically come into play in a breach of fiduciary duty claim against a lawyer are also typically cited in actionable conflict of interest claims. Those are: Rule 3-300: Avoiding Interests Adverse to the Client, and Rule 3-310: Avoiding the Representation of Adverse Interests. While they sound generally the same,

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they state very distinct duties owed by the attorney, the breach of which may give rise to liability under Business & Professions Code section 6002.
Rule 3-300 states:

> A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, *unless* each of the following requirements has been satisfied:
>
> (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and
>
> (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
>
> (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition;

The "Discussion" section of the statement of the Rule in the CRPC, states:

> Rule 3-300 is *not* intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.
>
> Rule 3-300 *is intended* to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees.

Thus, Rule 3-300 requires that the attorney avoid interests that are adverse to a client *unless* the terms of the transaction are *fair and reasonable* and *disclosed and transmitted* to the client *in writing*. Doing so may be found to be an acceptable conflict waiver, if it is a knowing waiver.

Attorneys are not prohibited from engaging in business or financial transactions with a client. However, any transaction or acquisition where it is reasonably foreseeable that the lawyer's interest may be detrimental to the client is considered "adverse." (*Hawk v. State Bar* (1988) 45 Cal.3d 589.) Specific rules apply to attorney-client business transactions, and where counsel knowingly acquires a pecuniary interest adverse to the client, he is certain to face both litigation, and State Bar disciplinary action.
Rule 3-310 states:

> A member shall not accept or continue representation of a client without providing written disclosure to the client where:
> (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
> (2) The member knows or reasonably should know that:
>
> (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
>
> (b) the previous relationship would substantially affect the member's representation; or
>
> (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
> (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.
>
> (c) A member shall not, without the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
>
> (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Although CRPC 3-310(B)(4) requires lawyers to disclose their own legal, business, financial or professional interests in the "subject matter" of the client's representation, the rule does not specifically reference the lawyer's *personal interests*. (In fact, the CRPC do not directly address situations where a lawyer's personal interests conflict with those of the client.) However, the California Supreme Court has concluded that CRPC 3–310(B), when read as a whole, requires a lawyer to disclose any personal relationship or personal interest that the lawyer knows or reasonably should know could substantially affect the exercise of the lawyer's professional judgment. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822.)

Plaintiff attorney conflicts

Frequent circumstances encountered by contingency fee tort lawyers which seemingly violate the rule include the representation of both the driver and the passengers in an automobile collision, or the simultaneous representation of two or more clients injured in the same incident for which there are aggregate insurance policy limits which are insufficient for the damages suffered by each client. Representing both the driver and passenger in an auto accident case against a third party may produce conflicting responsibilities for the lawyer to each, competing causes of action, and different damage claims.

If Client A is the vehicle driver, for example, and his conduct is challenged, or may be potentially challenged by the adverse vehicle driver as comparatively negligent, a clear conflict of interest occurs with Client A's attorney representation of the passenger(s) in Client A's vehicle. There, the representation of the fault-free passenger will necessarily require the assertion of a claim against the driver, and thus: "a claim against a client represented by the lawyer in the same litigation or other proceeding

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before a tribunal," prohibited by both the California RPC and the ABA Model Rules.

Less obvious is the circumstance where there are serious injuries to multiple plaintiffs for which there is a limited policy of insurance available which is insufficient to adequately indemnify any single defendant for the potential damage award of each separate plaintiff. If, for example, Defendant Jones, the driver of the adverse vehicle, has a policy of automobile liability insurance with minimal limits of only $15,000 per person, and an aggregate policy limit of $30,000, accepting representation of both the fault-free driver and passenger of the other vehicle may be "materially limited by the lawyer's responsibilities to another client," thus resulting in a conflict of interests by definition.

What is "disclosure?"

While Rule 3-310 also specifically defines the terms: "informed consent" and "written" in clear and unambiguous terms as they are used in the Rule, the term: "Disclosure" is defined quite broadly to mean: " . . . [I]nforming the client or former client of the *relevant circumstances* and of the *actual and reasonably foreseeable adverse* consequences to the client or former client." What are relevant circumstances is open to interpretation. Actual and reasonably foreseeable adverse consequences are subject to change. As they change upon review, there may be an additional duty to inform the client of the change of circumstance and the further consequences, but having done so, the attorney may be allowed to continue representation, so long as other rules are not violated.

Of course, what is an "adverse interest" to that of the existing client is one that is "hostile, opposed, antagonistic ... detrimental, unfavorable" to one's own interests, – one which threatens the client with potential injury. (*Ames v. State Bar*, *supra*). When one existing client becomes antagonistic to the interests of another existing client, the attorney may be obligated to withdraw, unless the lawyer has no part in the creation of the conflict. Where the conflict between existing clients is "thrust upon" the attorney, several jurisdictions have allowed the lawyer, upon discovery of the conflict, to withdraw from concurrent adverse representation which occurs by "mere happenstance."

Under this standard, as described by the Orange County Bar Association in its local Formal Opinion 2012-01, the attorney may continue to represent the other client if he or she has not received confidential information from the now-former client substantially related to the current matter. In such situations, the duty of confidentiality, rather than the duty of loyalty, is primarily at stake (See, *Flatt v. Sup Ct.* (*Daniel*), *supra*.) Disqualification is typically only required when the attorney obtains confidential information from the former client material to the current employment, or a substantial relationship exists between the former and current representation.

Violation of the conflict of interest rules will not automatically lead to attorney discipline. An attorney must be found to have willfully violated an ethical rule relating to disclosure before discipline can be imposed. On the other hand, an attorney need not be guilty of a willful violation to be disqualified from representation of the party with whom he has a conflict. Disqualification derives from a court's inherent power or right to regulate its own proceedings. So too, where the court disqualifies an attorney for a conflict of interest, the disqualification does not result in a determination that the conduct is unethical. However, in California, an attorney who has a conflict of interest may be barred from collecting fees earned in the representation, even though forfeiture of fees is not automatic, and depends on the egregiousness of the conflict.

As stated previously, the CRPC are disciplinary rules. However, attorneys who fail to disclose and resolve conflicts of interest may face potential malpractice exposure if the client is harmed. (See *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 901; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520). Again, the test of *Budd v. Nixen*, *supra*, applies, and the plaintiff must still demonstrate that the conduct of the attorney was a substantial factor in causing them harm.

RULE 2-200: Referral Fees

One of the CRPC Rules relating to improper attorney conduct is Rule 2-200 entitled "Financial Arrangements Among Lawyers" and is one of the Rules of Professional Conduct purportedly promulgated to protect the public from unscrupulous attorneys and to promote respect and confidence in the legal profession. (See *Chambers v. Kay* (2002) 29 Cal.4th 142; and *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453.) The rule prohibits a member of the Bar from sharing a fee with another lawyer who is not a partner, associate or shareholder with a member, *without prior written consent of the client*. Unfortunately, as the law has been developed by appellate decisions, the application of the rule has simply spawned unseemly ways in which lawyers can avoid honoring referral fee agreements with the referring attorneys, casting personal-injury lawyers in a bad light.

Take *Olsen v. Harbison* (2010) 191 Cal.App.4th 325, for example. It involves a dispute between two attorneys over the division of fees arising from a personal-injury action in which a plaintiff's attorney brought in a second attorney to assist in the prosecution of the claim on behalf of the original tort victim. When the second attorney allegedly induced the personal-injury client to fire the first attorney, that first attorney sued the second attorney for breach of contract, fraud and deceit, and constructive trust for the work done on the claim during the early stages of the lawsuit.

The Court of Appeal affirmed various orders of the trial court dismissing all the claims against the second attorney, and essentially directing that the original attorney's only remedy was to sue the client for quantum meruit. Although the court concluded that quantum meruit provides a means of recouping attorney fees when an action for breach of contract is untenable, such as when a Rule 2-200 agreement had not been signed by the client, in this case a Rule 2-200 agreement had been signed. Thus, the attorney's only remedy was against the former client, not the attorney who had concluded the case.

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Suing the client for fees, even when properly earned and deserved, is a sure path to antagonizing the client. The antagonized client will almost certainly question the competence and ethics of the lawyer, producing both State Bar issues and exposure to civil litigation.

Just as often, attorneys are accused of fraud in having billed for services not performed, or for reimbursement of costs not incurred. California Code of Civil Procedure section 338 provides a three-year statute of limitations for such claims. (*Shafer v. Berger Kahn Shafton Moss Stigler Simon and Gladstone* (2003) 1007 Cal.App.4th 54.) The disciplinary exposure period is limitless.

William Newkirk founded the Law Offices of William Newkirk, *specializing in medical negligence, professional negligence and personal injury. He is a member of the American Board of Trial Advocates and the Consumer Attorneys Association of Los Angeles Board of Governors (Emeritus). Mr. Newkirk has received Recognition of Experience Certificates in Medical Negligence and Trial Practice. He is an author and lecturer on medical negligence and personal injury litigation, and is an occasional legislative witness in medical negligence issues. He received his B.A. from UCLA in 1970 and his J.D. from Southwestern University in 1974.*