After Attorney Error: What is the Duty to Assist the Former Client in Mitigating Consequences?

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After Attorney Error: What is the Duty to Assist the Former Client in Mitigating Consequences?

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AUTHORS' NOTE: As a threshold matter, of course, in the absence of attorney negligence or other misconduct, there would be no duty to mitigate under any circumstance. The focus of this article is where undisputed attorney negligence or other misconduct has occurred or the attorney is sufficiently concerned that he or she is considering assisting the former client in the hopes that it will moot any such claim.

Lawyers held liable for malpractice know the maxim that we live with our mistakes. Consider scenarios in which a lawyer's error has injured a former client who, shouldering the arguable duty to mitigate, now seeks remedial assistance from the lawyer. In such situations, what are the former lawyer's duties? Often, the one-time client needs the attorney's testimony by deposition or declaration (a *mea culpa*, for example) to obtain relief from a default judgment or court order under Code of Civil Procedure Section 473. Sometimes, the former client needs attorney work product of a kind that the lawyer previously had withheld on the arguably correct theory that releasing it was not required. Other times, the ex-client seeks remedial legal services. In each instance -- to avoid a malpractice claim -- it may be in the lawyer's best interest to assist, but the question addressed here is whether there is a *legal duty* to do so.

Three independent bases support the contention that the lawyer has a duty to assist the former client in mitigating damages: (1) the ethical duty of loyalty, (2) the standard of care, and (3) the principle of reciprocity.

Duty of Loyalty

Beyond the requirement to preserve client confidences, the duty of loyalty sometimes requires lawyers to cooperate with the client and successor counsel. One formal opinion of the State Bar Standing Committee on Professional Responsibility and Conduct is instructive. In *Opinion No. 1992-127*, COPRAC addressed a criminal defense lawyer's obligations to cooperate with appellate counsel.

The committee opened its analysis with California's Rules of Professional Conduct. Under Rule 3-700(A), "a member shall not withdraw from employment until the member has taken reasonable steps to avoid prejudice to the rights of the client." Also, pursuant to Rule 3-700(D)(1), an attorney whose employment has terminated must promptly

respond to a client's request to release all "client papers and property" defined as "correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation." COPRAC interpreted the latter phrase to include "work product reasonably necessary to the client's defense."

Noting that under the statutory work product rule there is no work-product privilege against one's former client in any action alleging a breach of the attorney's duty to the client, COPRAC said, "The ethical responsibilities of the attorney, however, go beyond the evidentiary issues of . . . section 2018." *Opn. No. 1992-127, n. 4.*

Regarding work product not reduced to writing, COPRAC said, "The attorney's obligation to the client remains to avoid prejudice to the rights of the client. Where the information is of such import that ignorance of it might result in such prejudice, the attorney must volunteer the information."[1]

Although COPRAC's conclusions arose in the criminal context,[2] the reasoning seems equally applicable in the civil arena in cases where the former client has a duty to mitigate damages arising from the lawyer's wrongdoing. As the committee said, "counsel's refusal to cooperate may harm the client, and by harming the client, counsel is violating the ethical duty she owes her client."

COPRAC concluded that former counsel had a duty to fully and candidly discuss with successor counsel matters relating to the prior representation, even if doing so would reveal that former counsel failed to provide effective assistance. Based on that reasoning, even beyond the criminal arena, attorneys who learn of damages arising from their prior services arguably may have an ethical duty to cooperate in mitigating those damages.[3]

Standard of Care

The duty of care may also require cooperation. A lawyer has a duty to use such skill, prudence, and diligence that other members of the profession commonly possess and exercise. *Budd v. Nixen* (1971) 6 Cal.3d 195, 200. Thus, if the trier-of-fact concluded that the prevailing practice in the legal community is that an attorney assist a client's remedial efforts, the conclusion would establish a separate and independent basis for requiring cooperation.

Tortfeasor's Duty to Mitigate

Courts generally require an injured party to use reasonable care to minimize the loss. Traditionally known as the "duty to mitigate" damages, others use a more descriptive phrase, such as the doctrine of avoidable consequences. *See Green v. Smith* (1968) 261 Cal. App. 2d 392, 396.

In legal malpractice cases, damages can be reduced by what the client could and should have recovered by mitigational efforts. *Lewis v. Super. Ct.* (1978) 77 Cal. App. 3d. 844. Consistent with tort law generally, however, the client is not required to take

measures that are impractical or involve expense disproportionate to the loss. *Horne v. Peckham* (1979) 97 Cal. App. 3d 404, 418.

Given that the law imposes a duty on the former client to mitigate damages caused by former counsel, the tortfeasor-lawyer may have a reciprocal duty to cooperate in mitigating those damages. Though this appears to be an issue of first impression in California, logic and moral force strongly suggest that the tortfeasor owes as much a remedial duty as the victim of the tort. Assuming it does, the question is how a practicing lawyer can best fulfill the obligation.

Typically, the issue arises when the former client asks the lawyer to give *mea culpa* testimony or make a declaration to that effect under Section 473.[4] That kind of request can pose a serious dilemma since, successful or not, such a declaration can be used to establish probable cause for a subsequent legal malpractice case. Also, it can be an arguable basis for tolling the statute of limitations based on a continuing (resumed) relationship under Code of Civil Procedure Section 340.6(a)(2).[5]

One should resist the instinct to bargain for a release in exchange for cooperation, as any step that may be regarded as the performance of additional legal services in response to the client's plea may well trigger a violation of Rule 3-400(A) of the Rules of Professional Conduct.[6]

The California Supreme Court's decision in *Smith v. Lewis* (1975) 13 Cal. 3d 349, inspires a better approach. In that case, the court reviewed a judgment against an attorney for legal malpractice arising from divorce proceedings in which the lawyer had failed to assert the client's community interest in her husband's pension benefits. The Supreme Court affirmed the judgment but said that the lower court had erred in admitting into evidence the attorney's inculpatory declaration filed in the underlying action to obtain Section 473 relief. The court reasoned as follows:

"Were we to sanction the admissibility of such evidence, tension might develop between the attorney's duty to zealously represent his client . . . and his instinct of self-protection. As a result, the attorney could become reluctant to seek an amended judgment under . . . section 473, and the quality of legal representation in the state might suffer accordingly. In short, an attorney should be able to admit a mistake without subjecting himself to a malpractice suit." 13 Cal. 3d at 364-365.

While *Smith* is instructive, the troubled lawyer cannot rely on its dictum to protect against the use of inculpatory testimony in a future malpractice action.

One approach to minimizing fallout from doing what ethics arguably require is to ask the client for limited contractual protection, a kind of "use immunity." Basically, the lawyer and client can enter into an agreement limiting use of the lawyer's testimony in a later legal malpractice action. Such an agreement would provide some limited protection for the lawyer trying to do the right thing and would advance client relations -- to everyone's benefit.[7]

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[1] The committee noted that if such assistance would require extensive effort from former counsel, the attorney may properly seek compensation for it.

[2] It must be noted that COPRAC limited its opinion as follows: "This conclusion is based on the specific scenario presented to the Committee -- a criminal case where appellate counsel is seeking information in the possession of trial counsel. This situation is qualitatively different from other attorney-client relationships, because the client possesses the Constitutional right to the effective assistance of counsel."

[3] Conversely, one might argue that the statutory work product rule limits any duty to assist the client's mitigational efforts to the extent the attorney is called upon to surrender such materials or disclose private "mental impressions." One appellate court addressed the apparent clash between the work product statute and the final clause of Rule 3-700(D)(1). In *MGM v. Superior Court* (1994) 25 Cal. App. 4th 242, involving a dispute between corporation and shareholders over a merger transaction, one faction of shareholders subpoenaed the former corporate counsel's work product created in the course of the transaction. The court chose not to resolve the issue, instead deciding on waiver grounds that since one faction already had obtained the materials, the other faction should likewise have access. In doing so, the court noted that bar association ethics committees have issued somewhat conflicting opinions regarding uncommunicated work product, but all agree that it is ethically desirable for an attorney to provide it.

[4] Due to space limitations, this article does not address all possible mitigating actions, but the lawyer should evaluate the full range of choices. For example, redoing the job correctly is often the best option if it remains available.

[5] At least one court, however, found "an important distinction between an ongoing attorney-client relationship and a remedial effort concerning past representation." *Bauer v. Ferriby & Houston, P.C.*(1999) 235 Mich. App.536 (holding attorney's remedial declaration, made at the former client's request, did not re-establish the attorney-client relationship for statute of limitations purposes).

[6] "A member shall not . . . contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice . . . ."
Rule 3-400(A) of the Rules of Professional Conduct.

[7] Attorneys are encouraged not to ignore insurance considerations. First, the former client's request for assistance may constitute a claim or potential claim requiring that it be reported to a malpractice insurer promptly or at least in connection with renewal application disclosures. Second, many carriers are open to assisting insureds in navigating these issues.

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