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The Attorney as Defendant

By Jack Leavitt*

"... thousands of young men in the United States annually find their way to the bar, who are poorly qualified for its duties and responsibilities, and who, without the aid of the "cramming" law school, would have possessed neither the patience nor the force of character to have prepared themselves for their bar examinations."1

By custom and inclination, the lawyer is an officer of the court who becomes a momentary partisan for the sake of justice and a successful career. At times, however, events force him into an unaccustomed role, that of an interested party whose competence or integrity has been attacked in a law suit. His adversary, for the most part, is a former client, no longer satisfied with their previous relation of trust and confidence. During the past century, for example, members of the California bar have had to defend their professional reputations—sometimes successfully, sometimes not—against charges of negligence, breach of a fiduciary duty, fraud, undue influence, misuse of money, breach of contract, and the like.2

In dealing with this body of litigation, courts have established a simple framework by which to measure an attorney's conduct: he must act fairly, sensibly, and efficiently to uphold the honor of his profession while he pursues its rewards for private gain. Most lawyers satisfy these requirements. Those who fail, deliberately or inadvertently, become casebook examples of the disarray into which an attorney-client relationship can fall through unsatisfactory management. This article discusses the various ways in which attorneys have been breeding their own lawsuits, and examines how neat principles of jurisprudence are applied to the complex facts of professional legal practice.3


1 Stone, Law and Its Administration 174 (1924). Harlan F. Stone was Attorney General of the United States when he made this observation. In 1925 he became an Associate Justice of the United States Supreme Court, and in 1941, its Chief Justice.

2 The attorney often appeared as plaintiff in these cases, but the questions about his activities remained the same whether he was plaintiff or defendant. May we also note that disciplinary proceedings instituted by the State Bar are cited here only if they bear directly on an attorney-client dispute.

3 Although this issue of the Hastings Law Journal is primarily devoted to a discussion of torts, the present article cuts across the boundaries that traditionally divided different causes of action and includes within its scope all civil actions involving attor-
Fraud; Undue Influence; Breach of a Fiduciary Duty

Prescribed Standards of Trust and Confidence

When an attorney at law deals with a client, he is bound to *uber-rima fides*, superabounding faith. His own desires can never be brought in collision with the interests of the client. His role must be that of a representative acting for the principal, and neither a rival nor a competitor acting for himself. He must never take advantage of his position to speculate on the interests entrusted to him.\(^4\)

An attorney at law should be a paragon of candor, fairness, honor, and fidelity in all his dealings with those who place their trust in his ability and integrity, and he will at all times and under all circumstances be held to the full measure of what he ought to be.\(^5\)

To make certain these standards are kept, courts interpret the fiduciary relationship of attorney and client as placing the burden of greater integrity on the attorney. Although an attorney is permitted to have business dealings with his client, courts scrutinize these transactions with jealous care, especially when the negotiations relate to the very reason the attorney was hired. The client can set aside these transactions with ease unless the attorney shows by extrinsic evidence that the client acted in full knowledge of all relevant facts and understood their effect. As stated in the English rule laid down by Lord Eldon, the attorney must have given his client all reasonable advice against himself that he would have given against a third person.\(^6\)

Litigation against an attorney for failing to meet these requirements arises under the general headings of fraud, undue influence, and breach of a fiduciary duty. Each category shades into the other.


\(^5\) Sanguinetti v. Rossen, 12 Cal. App. 623, 107 P. 560 (1906). See also *In re Boone*, 83 F. 944 (N.D. Cal. 1897). When an attorney is guilty of conduct that stamps him as being unfit to remain a member of his profession, he should be disbarred. The acts complained of need not subject him to criminal indictment or civil liability, but must show unfitness for the confidence and trust required in the attorney-client relationship and in practice before the court. If he displays such a lack of personal honesty or good moral character as to render him unworthy of public confidence, these considerations are good grounds for his disbarment (although not every moral delinquency justifies such action).

\(^6\) Felton v. LeBreton, 92 Cal. 457, 28 Pac. 490 (1891). See also CAL. CIV. CODE § 2235, which has been consistently applied to the attorney-client relationship: “All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trust remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.”
either when the client asserts more than one theory for his action or when he states his grievances without specifically categorizing them. Proof of these matters, however, remains essentially the same, with one chief difference based on the manner in which the attorney carried out his objectionable activities. In some cases, the attorney has allegedly taken direct advantage of the client through face-to-face dealings; in other instances, the attorney has dealt with a third person on the basis of knowledge acquired from the client, allegedly to the client's detriment. Face-to-face dealings are likely to be attacked as stemming from undue influence; indirect advantage through a third party, as breach of a fiduciary duty; and either fact situation, as fraud.

From a procedural viewpoint, if an attorney is suing a client, the attorney makes out a *prima facie* case in his behalf when he shows execution of the agreement in question. To avoid the effect of this apparently valid agreement, the client must then establish that the fiduciary relationship of attorney and client existed at the time the transaction was made. By doing so, the client raises the rebuttable presumption of the agreement's invalidity. The attorney finally has the burden of showing that the agreement was fair and equitable and that he received no advantage from its execution. After this evidence is evaluated, one party receives a judgment that ordinarily is not disturbed on appeal since resolution of the facts is the function of the trial court. These controversies are generally based on conflicting evidence about the facts existing at the time of the disputed transaction. The attorney usually testifies that he made full disclosure and was fair in all respects. The client usually denies receiving the information that the attorney had to reveal in fulfilling his fiduciary obligations. Since most attorney-client conferences are held in private or, perhaps, with the attendance of the attorney's employees or the client's relatives, both sides can ordinarily present no more compelling evidence about these meetings than the personal testimony of interested parties. Juries are left with much to decide and more to confuse them.

**Existence of an Attorney-Client Relationship**

Before a client can raise the presumption of undue influence and insufficient consideration in the making of a compensation agreement with an attorney, he must establish that a confidential relationship existed and that the fiduciary used his position to gain an advantage. While the attorney must prove that the transaction was fair, that he made a reasonable use of the confidence placed in him, and that he

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gave honest advice about himself to the client, these principles apply only after the client has reposed confidence in the attorney and is proceeding under this influence.\(^9\) The presumption has no bearing on a transaction in which the attorney openly assumes a hostile attitude towards the client, nor does it apply to the contract that originally created the relationship and fixed the attorney’s compensation. Until the initial contract is made, the confidential relation does not exist and the parties deal at arm’s length in agreeing on its terms.\(^10\)

No particular contract is necessary to create the protected association. It is the fact of the relationship that gives rise to its rights and obligations, and not the formal or informal nature of the agreement.\(^11\) If there is a conflict in evidence about the existence of the relationship, the trier of fact must determine the factual basis for the opposing contentions. Otherwise, when no such conflict appears, the determination is a question of law.\(^12\)

The client can meet his burden by proving that the attorney’s professional dealings with him had been of a continuous nature for some time before the disputed agreement was made; that the attorney had filed an answer for him in a lawsuit; that the attorney had performed other legal services in his behalf; and that the disputed agreement was intimately connected with the very business for which the relation existed. Even though the attorney did not try to “make money” from his client, the client was entitled to believe that he was under the attorney’s care and that the attorney could charge for his services if he so desired.\(^13\)

An attorney can show that the fiduciary relationship did not exist before the making of a particular employment contract when he proves that, despite his having been the client’s attorney at an earlier time, he had given her a final accounting and had turned over his files at the end of that matter. Regardless of the fact that he had been in touch with her since their first association and had recommended a lawyer to her on another problem, he is not necessarily in a confidential relation when he prepares a contract for his new services.\(^14\)

The attorney does enter into a fiduciary relationship, however, when he takes over the defense of a personal injury action as the representative of an insurance company. In that event, by making an

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\(^10\) Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981 (1909).


\(^12\) Ferrara v. LaSala, 186 Cal. App. 2d 277, 9 Cal. Rptr. 179 (1960).

\(^13\) Id.

\(^14\) Calvert v. Stoner, 33 Cal. 2d 97, 199 P.2d 297 (1948). See also Porter v. Peckham, 44 Cal. 204 (1872).
insured defendant his client, he has no legal right to stipulate away the insured’s interests for the benefit of his other client, the insurance company.¹⁵

“Advantage” to the Attorney

The rebuttable presumption of undue influence arises whenever an attorney gains an advantage from an agreement with his client during the attorney-client relationship. “Advantage” occurs if the attorney’s position is improved, if he obtains a favorable opportunity, or if he otherwise gains, benefits, or profits from his fiduciary position. To raise this presumption, the client need only show that an advantage appeared, and not that it was unfair, unjust, or inequitable.¹⁶ The attorney must then try to overcome the presumption with proof that the transaction was fair and equitable, and that the client was well-enough informed to deal with him at arm’s length.¹⁷

What is nearly always discussed in these cases are two primary facts: the relative positions of the attorney and the client before and after the disputed agreement; and the client’s ability to make an intelligent bargain, judged according to his mental, physical, and psychological condition, as well as on the amount of necessary information the attorney had given him. Acting on these basic considerations, which can be appreciated more clearly by example than by generalization, courts have found advantage in the following situations:

The attorney had an official and financial interest in a business in which he urged his client to invest on the promise of “big returns.”¹⁸


In Bradner v. Vasquez, supra, a dissenting judge noted, “The meaning of ‘advantage’ as applied to the act of one who is both historically and technically a trustee may well be different in scope or at least as to occasions of application from its proper meaning when applied to a lawyer practicing his profession.” 43 Cal. 2d 147, 155, 272 P.2d 11, 16.

¹⁷ In re Witt’s Estate, 198 Cal. 407, 245 Pac. 197 (1926); Bold v. Velkov, 133 Cal. App. 2d 622, 284 P.2d 890 (1955); Roberts v. Wachter, 104 Cal. App. 2d 271, 231 P.2d 534 (1951); Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644 (1867) (which states that the element of damage to the client is an important consideration); McKinnon v. Cook & Zambriskie, 2 Lab. 37 (1857).

¹⁸ Zeller v. Knapp, 115 Cal. App. 486, 1 P.2d 1071 (1931). In presenting her evidence, the client testified: “I said, ‘Mr. Knapp, of course, I want a safe investment. I don’t know anything about these investments. I don’t know a thing about them.’ He said, ‘Well, that is just why I want to look after your money and you do not need to worry about anything of the sort because you know an attorney does not make mistakes.’” 115 Cal. App. 486, 488, 1 P.2d 1071, 1072.
The client (an emaciated woman subject to hemorrhages, of eccentric mind, and interested in astrology and fortune telling) named her attorney as the sole beneficiary in her will, after an earlier agreement that she would leave him one-half of her property in return for his providing her with the necessities of life.\textsuperscript{19}

The attorney induced his client to enter into a business transaction about which he concealed material facts and to which the client would not have consented if she knew his real interest in the transaction—even though she did not suffer a substantial financial loss.\textsuperscript{20}

The attorney had his client exchange an unsecured 10,000 dollar note given to pay legal fees for a secured 10,000 dollar note, backed by property worth 50,000 dollars.\textsuperscript{21}

The attorney and client originally agreed that the attorney’s fee would be measured at two-tenths of the client’s share in certain property, and the attorney later obtained an assignment of three-tenths.\textsuperscript{22}

The attorney and client originally agreed that the attorney could be discharged “with or without cause,” and the attorney obtained a later contract that he could be discharged only for “legal cause.”\textsuperscript{23}

The client, a widow dying of cancer and under the influence of opiates, changed an original document that made the attorney her agent in selling shares to a later document that gave the attorney half the proceeds of the sale.\textsuperscript{24}

The client needed capital to carry on his activities in a corporation, and the attorney prevailed on him to part with his control of the undertaking, to the attorney’s benefit.\textsuperscript{25}

The attorney advised his client it would be best to fix his fee between themselves rather than let the probate court do so, accepted

\textsuperscript{19} In re Witt’s Estate, 198 Cal. 407, 245 Pac. 197 (1926). See Priester v. Citizens National Trust and Savings Bank, 131 Cal. App. 2d 314, 280 P.2d 835 (1955), in which a blind and extremely nervous client transferred nearly all his assets to his attorney as security for a “fair” attorney’s fee. In re Corbett’s Estate, 123 Cal. App. 2d 465, 266 P.2d 935 (1954), in which a 67 year old widow, who was a sherry addict with poor judgment and varying lucidity, bequeathed nearly all her estate to her attorney and his wife. In re Johnson’s Estate, 85 Cal. App. 2d 760, 193 P.2d 782 (1948), in which an 83 year old widow, of weak mentality, personally unkempt, and inclined to rambling conversation, named her attorney as residuary legatee.

\textsuperscript{20} In re Soale, 31 Cal. App. 144, 159 Pac. 1065 (1916) (a disbarment proceeding).

\textsuperscript{21} Magee v. Brenneman, 188 Cal. 562, 206 Pac. 37 (1922). See Metropolis Trust & Savings Bank v. Monier, 169 Cal. 592, 147 P. 265 (1915), which required an attorney to offer affirmative proof of the facts surrounding an advantageous transaction in which he received a secured note for $20,000 from his client.

\textsuperscript{22} Bonifacio v. Stuart, 52 Cal. App. 487, 199 Pac. 69 (1921).

\textsuperscript{23} Bradner v. Vasquez, 43 Cal. 2d 147, 272 P.2d 11 (1954). See also Cooley v. Miller & Lux, 168 Cal. 120, 142 Pac. 83 (1914).

\textsuperscript{24} In re Hamaker’s Estate, 114 Cal. App. 2d 533, 250 P.2d 637 (1952).

her note for 2,000 dollars, and never told her that probating the estate was a simple matter and the court-ordered fee would have been only 361 dollars, thirty-seven cents.26

**The Need for Independent Advice**

One important gauge of fair dealing between an attorney and his client is the availability of independent advice to guide the client. "Independent advice is not indispensable,"27 but is a factor in the court's search for undue influence.28 There is no absolute need for a client to seek independent advice if he had the opportunity to do so, was not prevented from doing so, fully understood what he was doing, and disposed of property as his own voluntary act.29 The more advisable procedure, however, requires an independent and disinterested attorney to be called in to complete the transaction.30

Even if the attorney suggested that his client obtain independent advice, but did not "insist" that she do so, he may be found guilty of using undue influence to have himself named as her residuary legatee.31 The presence of another lawyer (e.g., the client's long-time family friend who appears as a "friend" and not as a "lawyer") may also prove insufficient to rebut the presumption of undue influence. This is true despite the fact that the "lawyer-friend" tells the client he is giving the attorney more than he should for the transaction, and the client insists on going ahead because the attorney would not accept the case on any other basis.32

Where there is an amplified fiduciary relationship (e.g., the dual relationships of attorney-client and older brother-younger sister), it can become the attorney's "definite duty" to insist that the client obtain

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27 Kirsch v. Huber, 264 F.2d 387, 395 (9th Cir. 1959).


29 See President, etc. of Bowdoin College v. Merritt, 75 F. 480 (N.D. Cal. 1896).


31 In re Corbett's Estate, 123 Cal. App. 2d 465, 469, 470, 266 P.2d 935, 936, 938 (1954). The court noted: "He did suggest that she get another attorney to prepare the will, but she stated that he was her attorney and she wanted him to do it." Then the court catalogued the attorney's faults as including "his failure to insist that she obtain independent advice. . . ."

independent legal counsel before making a permanent disposition of her property.\textsuperscript{33}

But independent legal advice is unnecessary when the attorney repudiates his relationship to the client, deals with him at arm's length in an openly and vigorously hostile attitude, and is neither trusted nor relied on by the client.\textsuperscript{34}

\textbf{The “Unfair” Agreement}

To the question, “Can a written instrument be contradicted by a man, who simply says that he did not know what he was signing—that he did not read it?” the answer is, “Most certainly when a fiduciary relation has been shown to exist.”\textsuperscript{35} If an attorney tries to enforce an advantageous contract, he must show that the agreement was fair and that the client was fully advised of his rights and liabilities. The attorney may claim, “The agreement speaks for itself. It is not my job to interpret this contract.” Unfortunately for his attitude, the law requires him to make it manifest that he gave his client all reasonable advice that would have been due to a third person.\textsuperscript{36}

When he takes his client's savings, promising to invest her money safely and return it with interest within three to five years, the attorney can assume the duties of an involuntary trustee and become liable for her loss from his activities. Evidence of his responsibility is shown by the facts which include a statement that, “I am your lawyer, why not trust me, I am a lawyer, I would not do anything that is wrong.”\textsuperscript{37} When he places a pen in his client's hand, guides the hand, and has the client sign a document appointing him as the client's general agent, all during a time the client is hospitalized in a dull stupor, he commits fraudulent and unlawful acts that entitle the client's administrator to recover the property so obtained.\textsuperscript{38} When he persuades his client to deed property

\textsuperscript{33} Tidwell v. Richman, 127 F. Supp. 526 (S.D. Cal. 1953), modified on other grounds Richman v. Tidwell, 234 F.2d 361 (9th Cir. 1956). The attorney-brother attempted to justify his gaining complete control over his sister's property by stating that he was afraid of fortune hunters pursuing the sister. Disposing of this argument, the court observed, “Although making no claim to being a woman of great physical beauty Mrs. Tidwell is nonetheless a person of considerable personal charm and attraction. It would be expected that if she were without estate, she would still be appealing as a prospect for matrimony.” 127 F. Supp. at 528.

\textsuperscript{34} Boardman v. Crittenden, 52 Cal. App. 438, 198 Pac. 1020 (1921).

\textsuperscript{35} Bonifacio v. Stuart, 52 Cal. App. 487, 490, 491, 199 Pac. 69, 70, 71 (1921).

\textsuperscript{36} Ferrara v. LaSala, 186 Cal. App. 2d 277, 286, 9 Cal. Rptr. 179, 186 (1960).


to him as a means of defrauding the client's judgment creditors, the client can have the deed annulled and a foreclosure set aside on the grounds of extrinsic fraud.  

Even without the existence of a fiduciary duty, a client can quiet title to real property conveyed to an attorney by showing that the attorney exerted "moral, social or domestic force" which controlled the client's "free action." This is especially true if the client is susceptible because of "mental weakness, old age, ignorance, necessitous condition, and the like." 

A strong presumption of undue influence arises when a confidential relationship is coupled with activity on the attorney's part in framing the disputed transaction. So, for example, an attorney who is named as sole beneficiary in his client's will can lose his rights on evidence that he prepared the will in his own office, discussed the document with the testatrix before she signed it, and had two of his employees act as witnesses. "Mere negative conduct" towards a client may also result in a finding that the attorney benefited as a result of unfair dealing. By failing to give the client all the information a disinterested legal advisor would have given, the attorney fails in his duty, regardless of the fact that he neither asks the client to transfer property to him nor makes any false representations. The value of his services is not increased, so as to indicate fairness in the transaction, because he shows the client made repeated visits to his office when she had no one else to talk to. It is "out of harmony with professional ethics" to charge a fee for these social calls.

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41 In re Witt's Estate, 198 Cal. 407, 245 Pac. 197 (1926).

42 Thornley v. Jones, 96 Cal. App. 219, 274 Pac. 93 (1929). The client, about 80 years old, was "of a trusting and confiding disposition," in failing health, and with impaired senses. For other cases (including disbarment proceedings) that involve unfair dealings with a client, see In re Barry Yao Co., 172 F.Supp. 375 (S.D. Cal. 1959) (a bankruptcy proceeding in which the attorney misrepresented the value and extent of his services); Lucas v. Sweet, 47 Cal. 2d 20, 300 P.2d 828 (1956) (an action in which the attorney, as holder of a note and default judgment against the client, failed to notify the client about a sheriff's sale of the client's property); Clark v. State Bar, 39 Cal. 2d 161, 246 P.2d 1 (1952) (a disbarment proceeding in which the attorney, as a guardian, was grossly negligent and presented a misleading account to the court); People v. Stanford, 16 Cal. 2d 247, 105 P.2d 699 (1940) (a disbarment proceeding in which the attorney was found guilty of grand theft from a client); In re Danford, 157 Cal. 425, 108 Pac. 322 (1910) (a disbarment proceeding in which the attorney misrepresented the kind of services he could perform for his client).
**The “Fair” Agreement**

An attorney is not under an actual incapacity to deal with or purchase from his client. In transactions that bear on the confidential relationship, all the attorney must show is that there has been no violation of confidence and no advantage taken. ⁴³ Although courts view attorney-client transactions with suspicion and utmost scrutiny, the attorney can satisfy a court of the agreement’s fairness by proving that it was based on honesty and good faith and that the client freely entered into the transaction. ⁴⁴ If a client fully understands the nature of an agreement about attorney’s fees, and there is no misrepresentation, concealment, fraud, or abuse to disturb the confidential relationship, the attorney is entitled to his agreed-on fee. ⁴⁵ The fact, if it is a fact, that the attorney over-reached the client in other transactions does not subject the compensation agreement to any infirmity. ⁴⁶ In dealing with a client who is an experienced businessman, the attorney need not describe “item by item, the legal meaning of each provision in the contract” between the client and a third person, despite the attorney’s receiving benefits from the contract. ⁴⁷

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⁴³ McCormick v. Settle, 70 Cal. App. 351, 233 Pac. 350 (1925). For related cases, see Stieglitz v. Settle, 175 Cal. 131, 165 Pac. 436 (1917); Stieglitz v. Settle, 50 Cal. App. 581, 195 Pac. 705 (1917). An attorney for a seller may properly receive money from the purchaser of the land, after the sale, if: the money had nothing to do with the purchase price or sale of the land; there was no previous agreement for payment of the money; in helping to complete the sale under a commission agreement with the client-seller, the attorney never solicited or expected any sum from the transaction other than the agreed-on commission; and the purchaser “voluntarily and on his own initiative” gave the money to the seller’s business agent, who divided it with the attorney. On these facts, the attorney is entitled to his commission from the seller.

⁴⁴ United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 Pac. 901 (1908). Cf. Huston v. Schohr, 63 Cal. App. 2d 267, 275, 146 P.2d 730, 733 (1944): “We do not believe that either reason or authority requires that when a court instructs a jury that in all dealings between attorney and client the highest degree of fairness and good faith is required of the attorneys in dealing with their client in securing the document, it is also necessary to go further and advise the jury that the courts view such transactions with suspicion.”


⁴⁶ Combs v. Hughes, 160 Cal. App. 2d 809, 326 P.2d 1 (1958) (in which the attorney established that he fully performed the terms of his contract and that his fees were reasonable). See also Bailey v. Security Trust Co., 179 Cal. 540, 815, 177 Pac. 444, 449 (1919) in which the attorney was permitted to retain a stock option obtained from the client at a price the attorney represented the stock to be worth (even though this represented value was less than adequate), where there was no showing of “unfaith” or “unfairness.”

⁴⁷ Kirsch v. Huber, 264 P.2d 387 (9th Cir. 1959).
Undue influence can be rebutted even where the client is over seventy-six years old and physically weak, suffers from neuralgia and the feebleness natural to age, has pains in her head, and spends much of the day lying on a sofa—and her attorney is “a man of strong and fixed opinions, settled convictions, and great strength of mind and will power.” But, in such cases, it is useful to have as additional facts that the attorney never sought to obtain any advantage for himself and was not a beneficiary under the disputed trust, although he did serve as trustee for 25,000 dollars plus commissions.

The necessary proof of fair dealing may be established by the uncorroborated (and contradicted) testimony of the attorney himself. If the trial judge accepts the attorney’s evidence, the finding will ordinarily not be disturbed on appeal.

Whether the uncorroborated testimony of the respondent [attorney] under such circumstances is that substantial evidence required by law to support a finding was a question addressed to the trial judge. However controversial the question of the propriety of such a conclusion might be in this or any other similar situation attending a trial, it is well settled that such a conclusion cannot be disturbed on appeal. . . . It must of course be assumed that the trial court gave to the evidence that close scrutiny required in cases involving a transaction between an attorney and his client.

48 President, Etc., of Bowdoin College v. Merritt, 75 F. 480 (N.D. Cal. 1896). “. . . if Judge Stanley could have imagined the difficulties, troubles, and annoyances, and attacks upon his character, he might have demanded a higher fee.” 75 F. at 508. See also In re Phillippi’s Estate, 76 Cal. App. 2d 100, 172 P.2d 377 (1946).

49 Hawkins v. Faries, 49 Cal. App. 2d 186, 193-94, 121 P.2d 20, 24 (1942). Cf. Johnson v. Cogwill, 262 F. 306 (9th Cir. 1920). It was proper for the trial court to dismiss plaintiff cestui’s complaint alleging that an attorney and a trustee wrongfully divided certain fees. After hearing the witnesses, the court could hold there was no substantial direct evidence to support the complaint, despite testimony that the attorney admitted the fee-splitting to a witness. “A contrary conclusion could be founded only upon the view that the elder Denson [the attorney, since deceased] had willfully committed perjury in his deposition, that Cowgill [the trustee] had also deliberately perjured himself, and that the two had combined in a wicked purpose to deceive Johnson and to enrich Cowgill, the trustee of the Johnson trust. It would also have to be founded upon the premise that Denson, a lawyer of presumably good character, had wrongfully concealed from his associates all knowledge of a matter in which they were deeply interested, morally as well as financially, and concerning which he should have informed them.” 262 F. at 314.

For other cases that involve “fair” dealings, see: Smallpage v. Winafred Orchards Co., 154 Cal. App. 2d 676, 316 P.2d 751 (1957) (in which the appellate court refused to disturb the trial court’s finding, based on substantial evidence, that the attorney sufficiently overcame the presumption of undue influence and insufficient consideration); Marlenee v. Brown, 21 Cal. 2d 668, 134 P.2d 770 (1943) (in which the presumption of undue influence was rebutted because the client was thoroughly conversant with “every move” made by her attorney and fully agreed on the method used in conveying title through the attorney to a third party); American Box & Drum Co. v. Harron, 44 Cal. App. 2d 370, 112 P.2d 332 (1941) (in which the attorney withdrew from employment with both the plain-
**Purchase of Claim Held Against Client**

When an attorney, dealing with a third party, buys a claim against his client for less than its face value, he cannot use this transaction to make a profit from his client. If, for example, he purchases his client's promissory notes at a discount, the client has a right to buy the notes from him at the lower price. Because he has breached a fiduciary duty, the attorney becomes an involuntary trustee who must assign the notes to his client on tender and payment of the consideration that the attorney had paid out.

This restriction does not apply when a client, in full knowledge of the facts, delays unreasonably before she asserts her rights against an attorney who acted in good faith, but in his own interest. The attorney can keep property he bought at a sheriff's sale, even though the land had been his client's, if he informs her in detail of what he had done and why, asks for (but does not receive) her consent to his acquiring the property in the event she could not redeem it, and repeatedly warns her she would lose all her rights unless she redeemed before a certain date. Had the client acted promptly, she could have taken advantage of her attorney's purchase, subject only to reimbursing him for his outlay and for the reasonable value of his services. By failing to do so, she is estopped from questioning the attorney's conduct, despite his committing the technical sin of acting without her express consent.

**Money Had and Received**

**Duties of the Attorney**

At various times in an attorney-client relationship the attorney handles money rightfully belonging to the client. When the attorney

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50 Sutliff v. Clunie, 4 Cal. Unrep. 697, 37 Pac. 224 (1894).

51 See Martin v. Hood, 203 Cal. 351, 264 Pac. 478 (1928) (dictum); Andrews v. Wilbur, 5 Cal. Unrep. 144, 41 Pac. 790 (1895). See also McArthur v. Goodwin, 173 Cal. 499, 160 Pac. 679 (1916). An attorney at law is forbidden to purchase an interest adverse to his client in a thing in controversy. If he does so, as by purchasing tax titles to the client's property without the client's knowledge, his fraudulent actions make him an involuntary trustee without any interest in the property. And see In re Los Angeles Lumber Products Co., 46 F. Supp. 77 (S.D. Cal. 1942).

52 Tomblin v. Hill, 206 Cal. 689, 275 Pac. 941 (1929). Apparently the attorney was trying to protect himself from a complete loss in a claim for compensation, and to protect a third person who had loaned the client money on the attorney's representation.
functions primarily as a business advisor, he often obtains money directly from his client to use in commercial activities that are sometimes specified by the client and sometimes chosen through the lawyer's own discretion. When litigation is at issue, the attorney frequently serves as the intermediary who collects funds that a third person owes to the client. In either circumstance, the attorney must be able to render an accurate account of the funds he received and expended. He must satisfy not only the fact of fairness, but the appearance of fairness as well. Should he fail to give a proper accounting, he makes himself vulnerable to the equitable action of money had and received, which borders on the tort action of conversion.

The general rule is clear. In receiving money on his client's behalf, the attorney takes the funds as a fiduciary and must account for whatever he receives. He must answer for secret profits, for buying claims that a third person held against the client, and for accepting property which he had no authority to accept as full payment of a third person's debt to the client.

His conduct must bear up under the closest scrutiny, especially when his clients are women without business experience, who are so largely influenced by his advice. If a woman client has given him money whenever he requested her to do so, she can retrieve the entire amount unless he produces records showing how he disposed of these sums or presents a written agreement specifying his fees. Even when he claims that he made expenditures in carrying on her business activities and is therefore entitled to retain at least that amount, he must still return all the money she had entrusted to him if he failed to show vouchers for these alleged expenses. He is also liable in this action under facts which reveal that, after being hired to recover money claimed by the client, he received a check made out to her name, persuaded her to endorse it without looking at the amount written on its face, and took the money into his own possession from the teller's counter at the bank. Though he later gave her an amount from which

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53 McRaven v. Dameron, 82 Cal. 57, 23 Pac. 33 (1889). But see Bacon v. Bacon, 32 Cal. 2d 131, 194 P.2d 697 (1947). An attorney properly hired by the trustee of oil development lands need not render a special accounting to the landowners when the owners object to the attorney's retaining a percentage of the oil royalties. Since the trustee had the requisite hiring authority, the attorney had a right to retain the money he earned as reasonable compensation for his services.


56 Horn v. Hamilton, 89 Cal. 276, 26 Pac. 833 (1891).


his fee had been subtracted, along with a receipt in full for his services, he never informed her of the full amount of the recovery or the cost of his services. These dealings constitute a breach of his fiduciary obligation.\textsuperscript{50}

The attorney who disregards his duties by refusing to account for the funds of ignorant, credulous, or impecunious clients shows such an absence of fair dealing that he is properly disbarred in the public interest.\textsuperscript{60}

**Duties of the Client**

A client, however, also has some obligations towards the attorney. Courts recognize the unspoken fact that a lawyer, as a businessman, commonly has an economic interest in the money he handles for his client, primarily where a contingent fee arrangement exists. Therefore, the attorney who satisfactorily performs a contract calling for reasonable compensation may retain a reasonable sum from the amount he collects for his client, while turning the balance over to the client. Until it is legally ascertained that the attorney kept an unreasonable amount in relation to his services, there are no grounds on which to sue him for conversion of the retained money.\textsuperscript{61}

The client with a grievance must respect the statute of limitations. If he simply alleges that he was never informed of how much money his attorney had collected for him, but does not directly allege fraud, the client's conduct amounts to gross negligence. His failure to discover the attorney's wrongdoing, if any, falls within the statutory bar since the client should have pressed for information at an earlier time. "Natural curiosity, as well as business prudence, would have compelled him to make the inquiry, and his failure to make it was inexcusable negligence. . . . Such inquiry is entirely consistent with the utmost confidence in the attorney."\textsuperscript{62}

**Rights of Third Parties**

The money an attorney has retained may actually belong to a third party, who can recover this amount after satisfactory proof. If, however, an attorney has collected money from a third party under a judgment and execution that was later set aside, the attorney is liable only for the money that was in his hands at the time the appellate court reversed the earlier judgment.\textsuperscript{63}

\textsuperscript{50} Black v. Riley, 20 Cal. App. 199, 128 Pac. 764 (1912).
\textsuperscript{60} Bruns v. State Bar, 18 Cal. 2d 667, 117 P.2d 327 (1941).
\textsuperscript{61} Pullin v. Allen, 37 Cal. App. 218, 173 Pac. 772 (1918).
\textsuperscript{62} Simpson v. Dalziel, 135 Cal. 599, 603, 67 Pac. 1080, 1082 (1902).
\textsuperscript{63} Brown v. Howard, 86 Cal. App. 532, 261 Pac. 732 (1927). Presumably the earlier judgment and execution were valid on their face.
In unusual situations, money, ordinarily the most negotiable of instruments, carries with it such defects in title that the action for money had and received becomes proper. When an attorney, for example, accepts money from an accused thief as his fee for defending her and is informed by a sheriff that there is a “hold” order on her funds because of the theft, the attorney takes the money with knowledge of its infirmities. He is liable to the true owner, a stranger, for the money he receives after so strong a warning about his client’s tenuous claim to ownership.64

Interpreting the Employment Contract

Applicability of Ordinary Contract Rules

Assuming that an employment contract between an attorney and a client is made without any defects arising from a fiduciary relationship, the agreement is still subject to ordinary contract rules. The attorney must receive consideration for his services before he becomes obligated to perform them;65 the client cannot make the attorney bring legal proceedings against a third party until the client has perfected his rights against that party;66 the attorney is entitled to reasonable notice that his client has new work to be performed;67 and the attorney cannot be summarily ordered to refund a retainer fee because a judge believes it has not been earned.68 For legal cause, either party can

64 Stiller v. Rogers, 69 Cal. App. 2d Supp. 805, 159 P.2d 457 (1948). Compare this misadventure with the well-circulated story about Clarence Darrow and the fee he once named as his price for defending an accused thief. The accused, on learning the high cost of his possible freedom, quickly left Darrow’s office. Within a short time he returned, breathless, and handed Darrow the required sum in cash. Darrow rejected it. “I never accept money that’s been stolen,” he declared, paused, and added, “… so recently.”

65 Cavillaud v. Yale, 3 Cal. 108, 58 Am. Dec. 388 (1853). A demurrer is good against a client’s complaint that the attorney abandoned an appeal if the client does not allege payment of the attorney’s fees. An attorney is always entitled to his retaining fee in advance unless he agrees otherwise, and payment must be pleaded as distinctly as any other condition precedent.

66 Bayly v. Lee, 174 Cal. 137, 163 Pac. 96 (1916). If the client has not made tender or payment to a third person, the attorney cannot sue that person for breach of contract. The attorney does not therefore breach his own contract by a failure to bring suit prematurely.

67 Pelton v. Andrews, 24 Cal. App. 2d 124, 127, 74 P.2d 528, 530 (1937). When a client hires an attorney to perform legal services “from time to time” in connection with certain patents, but withholds information about one patent application until three weeks before its deadline, this notice period is unreasonably short, especially if given in July, “a time in which an attorney might be expected to be on vacation.”

68 Tomsky v. Superior Court, 131 Cal. 620, 623, 63 Pac. 1020, 1021 (1901). An attorney cannot summarily be convicted of contempt for refusing to repay part of his claimed fees to the guardian of an estate. “It is true he is an attorney of the court and an officer thereof, but that does not deprive him of the equal protection of the law.” But cf. Cohen v. Hurley, 81 Sup. Ct. 954 (1961).
avoid the contract by showing fraud, noncompliance with the contract terms, or failure of consideration. On the client's death, the relationship is automatically terminated unless there is a special employment contract such as a specific agreement to conduct a suit to final judgment or to pay a set fee for the entire case.

Uncertainty and Ambiguity

Some factors in a contract dispute are deliberately weighted against the attorney. Since he is presumably familiar with legal terms and proceedings and accustomed to use appropriate language in framing contracts, while his client usually has no special knowledge on these subjects, an uncertain and ambiguous contract is construed most strongly against the attorney. If, for example, an agreement for attorney's fees uses the word "security" to describe the very property established as the fee, the contract may be treated as a mortgage, to satisfy the client's understanding, rather than as an outright conveyance, as the attorney has urged.

When the contract is fairly and reasonably susceptible of two constructions, the attorney must inform the client of this susceptibility. Before he proceeds further in performing the agreement, he must point out the contract's ambiguity and definitely and clearly obtain his client's views on the subject. An attorney should not litigate a matter after he and his client had both assumed a trial would be avoided unless, as soon as he discovers the matter requires litigation, he notifies the client and either rescinds the contract or demands some different fee arrangement. The attorney may not proceed with a case as though the contract is still in force, with a mental reservation that he can repudiate or rescind it after the trial, nor may he remain silent about any charge outside the contract until the litigation has ended. If he fails to notify his client about these unforeseen events, he is bound by the original compensation agreement. Although the result may be unfortunate for the attorney, "we cannot for this reason relieve him. It is his business, in the course of his professional life, to often assist

73 Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 66 Pac. 621 (1901).
74 Lavenson v. Wise, 131 Cal. 369, 63 Pac. 622 (1901). An attorney obtains knowledge that a suit will be litigated when he is served with an answer setting up defenses.
75 Id.
76 Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 66 Pac. 21 (1901).
in compelling other parties to abide by their contracts. He must abide by his.\textsuperscript{77}

In the absence of a special agreement, however, a client is bound to repay his attorney for all outlays made by the attorney to pay the expenses of carrying on the litigation. The attorney must bear his own personal and travelling expenses.\textsuperscript{78}

\textit{Rights and Duties After Judgment}

Under a fair construction of the usual employment agreement, the attorney cannot rest when he obtains a judgment for his client, but must secure its satisfaction or execution before becoming entitled to compensation for his professional services. If he obtains a judgment without securing its satisfaction, his conduct amounts to an abandonment of the agreement before its terms have been fulfilled. He may also commit abandonment by settling with the judgment debtors for an amount less than that called for in the judgment, unless he has received his client’s consent.\textsuperscript{79} Through a similar rule, but from a different point of view, a client cannot compromise and settle a judgment to the exclusion of his attorney’s rights if the client had given the attorney an interest in the judgment.\textsuperscript{80}

\textit{Effect of Discharging the Attorney}

The attorney performing under a contingent fee arrangement, based on winning a particular case, does not have a lien on the judgment. Whenever the client lacks confidence in the attorney’s integrity, judgment, or capacity, the client has an absolute right to discharge his lawyer. The attorney’s compensation is then based either on the express agreement or on the reasonable value of his services.\textsuperscript{81} As a rule, the attorney can recover under the contract terms if he is discharged without legal cause,\textsuperscript{82} but can claim compensation for only the reasonable value of his services when the client fires him for good reason.\textsuperscript{83} Misinforming and misdirecting a client in a way that would defeat the

\textsuperscript{77} Id. at 630, 66 Pac. at 21.
\textsuperscript{78} Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981 (1909).
\textsuperscript{80} McGown v. Dalzell, 72 Cal. App. 197, 236 Pac. 941 (1925). Unless the client transfers this interest to the attorney, the attorney receives no lien on the judgment from the mere fact that he has a contingent fee contract providing for payment of his legal services in the action.
\textsuperscript{81} Gage v. Atwater, 136 Cal. 170, 68 Pac. 581 (1902).
\textsuperscript{83} Salopek v. Schoemann, 20 Cal. 2d 150, 124 P.2d 21 (1942); Moser v. Western Harness Racing Assn., 89 Cal. App. 2d 1, 200 P.2d 7 (1948). See also Kruger Estate, 130 Cal. 621, 63 P. 31 (1900).
client's expressed desires is legal cause for discharge. So, too, is the giving of "unsound" advice on a simple matter about which the facts are clear and the authorities are in agreement.

But an attorney has not committed professional misconduct to the point of justifying his discharge if the client complains that the attorney joked about her inquiry on the specific questions she would be asked at a deposition hearing, and simply complimented her on her ability to "take care of herself"; that he made a facetious remark about a possible divorce suit between the client and her husband; that he suggested that she "go out and dig up all the dirt" she could about her opponent in pending litigation (although the attorney denied this); and that he insisted she abide by their written agreement and produce sufficient cash for a jury trial, even though she asked to be tried by the court alone. These incidents are "not uncommon to the practice of nearly every lawyer of extensive trial experience," and cannot be used to deprive the attorney of his contract rights.

Prohibited Contracts

Because the Rules of Professional Conduct impose special restrictions on an attorney's business and professional activities, courts must sometimes decide how to act when an attorney enters into an agreement that violates the Rules. In the ordinary case involving a tainted contract, where both parties are found equally guilty, the court denies its resources to the disputing parties and leaves them to their own devices. The attorney, however, is peculiarly affected by his professional obligations. When he violates the Rules of Professional Conduct, as by agreeing to split fees with an investigator, he cannot defend himself in a suit asking compensation for the investigatory work by pleading the contract's illegality. The parties are not in pari delicto, since the Rules prohibit only the attorney and not the layman from certain activities. To permit the attorney to retain the money he promised to pay would put a premium on the attorney's disregard of the rules made for his guidance and conduct.

Need for Clearly Ascertainable Damages

A client suing an attorney for breach of contract must allege and prove damages that are clearly ascertainable in their nature and their origin. If the client alleges that her attorney, after being hired,
wrongfully withdrew from one lawsuit and one bankruptcy proceeding, as a result of which she suffered damages through being deprived of his "superior skill and ability," her complaint is properly demurrable. She cannot maintain an action on the ground that the results in her other litigation would have been different under a particular attorney's management. The court, though it must realize that some lawyers are better than others, justifies its position by stating:

There are no means whereby such question can be determined. Observation teaches us the result of a trial cannot be predicted with any degree of certainty, even though conducted by lawyers possessing the marked skill and ability attributed under oath, upon information and belief, to defendant.

Disqualification Because of Prior Representation

In their determination to keep the attorney-client relationship free of abuse, courts forbid an attorney from nullifying his fiduciary duties even after he and his client have severed their association. The relation 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 later taking a position hostile to his original client and inimical to the very interest he originally guarded. [The attorney's lips are forever sealed] against disclosure of information gained through the confidential relationship.

Even if his own professional standing has been troubled because his client dismissed him for handling litigation in an allegedly poor manner, the attorney cannot justify himself by changing sides in the dispute. Permitting him to do so would allow him to use confidential knowledge in an improper way. The ban applies regardless of the fact that he was formerly attorney for all parties in the present dispute, and would now represent one against the other.

Attorneys may search for novel ways to avoid this restriction, but courts reject these tactics if they threaten the integrity of the earlier

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89 Lane v. Storke, 10 Cal. App. 347, 101 Pac. 937 (1909). But would a demurrer have been sustained if the complaint had alleged that the client was damaged in her other actions because counsel were unavailable or because her new attorney lacked the time to prepare the cases adequately?
90 Id. at 350, 101 Pac. at 938.
91 This matter usually arises on a motion before or during a trial in which the attorney's new client and alleged ex-client are the real parties.
92 In re Boone, 83 F. 944 (N.D. Cal. 1897).
94 Ibid.
95 Ibid. See also Valentine v. Stewart, 15 Cal. 387 (1860).
relationship. One attorney, for example, was disbarred for offering to share information about his client's allegedly defective patent with an opponent in pending litigation. To justify himself, the attorney introduced a document, drawn by him and signed by his client, that released the attorney from all the duties, burdens, obligations, and privileges peculiar to the attorney-client relationship, including an implied consent for the attorney to appear against him without restriction. The court held the attempted release void as being contrary to public policy. "An attorney cannot use the knowledge acquired confidentially from his client in trafficking with his client's interests."96

As an exception to these restrictions, an attorney may "with perfect propriety" represent his client's adversary on matters with which he had no previous connection. The adversity of a new client to an old client is not, by itself, a bar to the attorney's new undertaking. The proper test is whether the attorney will now be called upon to exercise an interest inconsistent with his established duty. Inconsistency appears when the attorney's new position requires him to injuriously affect the former client in a matter which once united them, or to use against the former client information acquired through their past relationship of trust and confidence.97

With these considerations in mind, courts have permitted attorneys to appear as counsel, despite a party's complaint of "former representation," in the following instances:

The attorney for the administrator of an estate may serve as attorney for the person claiming title to the estate when the administrator is not a proper party to the litigation and has no possible interest in the outcome. (Dissent: If the administrator of an estate is a lawyer, he cannot bring suit in behalf of a claimant. Since the administrator's attorney is "one" with him in contemplation of law, the attorney should also be prohibited from bringing suit.)98

An attorney may appear as counsel against his former friend when he had never been the complaining party's personal attorney, although they had previously been business and social associates and the attorney had represented certain companies and groups in which the friend was interested.99

An attorney for a corporation may represent it in an action the company brings against one of its officers, and may use information received from the officer in connection with company matters. Corporate counsel represent the corporation, its stockholders, and its

96 In re Boone, 83 F. 944, 953 (N.D. Cal. 1897).
97 Id.
98 McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008 (1902).
officers in their representative capacity, but do not personally repre-
sent the officers. "It would be a sorry state of affairs"\textsuperscript{100} if the cor-
poration, through its attorney, could not use information that an officer
was bound to disclose to the company.

These exceptions represent a collision of personal acquaintances
rather than a debasing of protected interests. The courts, though
strict to impose a ban when an attorney-client relationship has been
proven, wait for the relation to be shown before they disqualify an
attorney. Distant contact between one party and the opposing attor-
ney, a common enough occurrence, cannot be used to harass the at-
torney and his new client.

**Relation of Opponents**

**And Creditors of Client**

Occasionally, attorneys have to defend themselves against charges
brought by their client's opponents or by persons to whom the client
owes a duty. As a general rule, attorneys are not liable under these
circumstances for acts performed in the exercise of their proper func-
tion as attorneys, provided the acts are done in good faith and are
pertinent to the matter in question. Whether the attorney acted in
good faith is a matter for the trial court to determine.\textsuperscript{101} In a con-
spiracy suit, for example, where plaintiff's allegations tend to prove
an alleged concert of action between the attorney, his client, and
others, the attorney's status as attorney does not immunize him from
liability for torts he personally committed or for wrongs done through
the conspiracy he allegedly joined.\textsuperscript{102} Similarly, if the attorney sends
a copyright infringement notice that injures the plaintiff, and the
plaintiff alleges the notice was sent with malice and purposely to
inflict injury on him, the attorney's involvement is judged in the light
of surrounding circumstances.\textsuperscript{103} And if an attorney wrongfully levies
execution on property, thereby slandering the owner's title, he is liable
for damages.\textsuperscript{104}

But when the attorney for a winning party prepares findings in
accordance with the court's order for judgment, and omits alleged
facts that were rejected by the trial judge, he is not liable to the losing
party for these omissions. Answering a claim that the attorney "knew"
the findings of fact and conclusions of law were false and by filing

\textsuperscript{100} Meehan v. Hopps, 144 Cal. App. 2d 284, 290, 301 P.2d 10, 14 (1956).
\textsuperscript{104} Gudger v. Manton, 21 Cal. 2d 537, 134 P.2d 217 (1943).
them "allowed, cooperated, and have willfully and aggressively attempted to divest Plaintiff herein of her property through fraud," the court stated that the losing party "no doubt sincerely believes that this decision was a gross miscarriage of justice... [yet] no attorney can be held liable for omitting from findings facts which after a full hearing the trial judge has concluded are not true."105

On miscellaneous matters, the attorney has also been protected:

If an attorney, after an "honest, industrious search of the authorities, upon facts stated to him by his client," advises bringing suit against a third person, he is not liable to the third person for malicious prosecution. Under the attorney's oath of office, he is not only "authorized" but "obligated" to bring his client's claim before the court. The fact that this honest position is later determined to be erroneous does not impair the attorney's protection.106

When an attorney has conducted himself with propriety and the complainant is not his client, the complainant has no right to invoke the court's extraordinary power of summary proceeding to compel the attorney to pay back a fee taken from an estate in which the complainant has a contingent interest.107

After an attorney has purchased his insolvent client's sheriff's certificates of sale from the man who bought them at an execution sale, a creditor of the client cannot raise a presumption of fraud from the mere relation of attorney and client. Since the transaction was fair between the attorney and his client, and since the attorney owed no special duty to the client's creditors, the creditor cannot impress a constructive trust against the property.108

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105 Rousseau v. O'Gara, 148 Cal. App. 2d 676, 677, 678, 307 P.2d 376, 378 (1957). Note, however, that the court added, "We need not decide whether an attorney might be held liable in damages for knowingly presenting false evidence in a case. The allegations here fall far short of such a situation."


107 Brunings v. Townsend, 139 Cal. 137, 72 Pac. 919 (1903).

108 Fisher v. McInerney, 137 Cal. 28, 69 Pac. 622, 92 Am. St. Rep. 68 (1902), But cf. Galpin v. Page, 85 U.S. 350 (1873). See also Hedden v. Waldeck, 9 Cal. 2d 631, 638-39, 72 P.2d 114, 118 (1939). If attorneys are entitled to a reasonable fee for their services and their client owns no other property than the land in dispute, the attorneys, as compared with a creditor of the client, have a right to take the property as their compensation. "[T]he transaction may not be declared fraudulent for the reason that by deeding the property the client was rendered insolvent. . . . It is presumed that the attorneys, in fixing their fees, acted honestly, and only asked of their client fees which they considered reasonable." The creditor cannot have the transfer set aside as being an attempt to prevent him from realizing on his subsequent judgment against the client. No presumption of fraud arises because the attorney is the client's son-in-law. When an attorney buys his client's property at a judicial sale, the law imputes to him knowledge of defects in the legal proceedings that were taken under his direction. The
Negligence in the Performance
Of Professional Duties

Prescribed Standards of Care and Skill

According to a popular complaint, "The only trouble with having
talent is that people expect you to use it." Phrased in a more judicial
context, courts oblige an individual to reasonably satisfy the require-
ments of a job for which he claims competence and which he willingly
sets out to perform. The attorney, by accepting employment, impliedly
agrees to use ordinary judgment, care, skill, and diligence in carrying
out the tasks he has undertaken. If he fails in these respects, he is
likely to forfeit all claim for compensation and can also become liable
for any damage the client suffered from this neglect.

The lawyer can thus properly be classified with members of various
other professions who are considered to possess knowledge, skill or
even intelligence superior to that of an ordinary man and are, as a
consequence, held to a higher minimum standard of conduct.

Justifying the attorney's liability is the fact that his client, when
pursuing a right against a third person, is bound by the attorney's
errors and omissions, and would often be left without a remedy unless
he could charge the attorney with avoidable fault.

Applied to actual events, these principles establish that, on proper
proof, an attorney is negligent for: giving faulty legal advice; con-

109 National Savings Bank of D.C., 100 U.S. 195 (1880); Kruger Estate, 130 Cal.
621, 63 Pac. 31 (1900); Gambert v. Hart, 44 Cal. 542 (1872); Sprague v. Morgan, 185
Cal. App. 2d —, 8 Cal. Rptr. 347 (1960); Pete v. Henderson, 124 Cal. App. 2d 487,
269 P.2d 78 (1954); Moser v. Western Harness Racing Ass'n, 89 Cal. App. 2d 1, 200
P.2d 7 (1948).

110 See National Savings Bank of D.C., 100 U.S. 195 (1880) for a general statement
of this proposition. See Salopek v. Schoemann, 20 Cal. 2d 150, 124 P.2d 21 (1942) and
Moser v. Western Harness Racing Ass'n, 89 Cal. App. 2d 1, 200 P.2d 7 (1948) for de-
cisions on an attorney's right to compensation after he committed acts of negligence. See
Cambert v. Hart, 44 Cal. 542 (1872) for the statement that, despite the English rule
holding an attorney liable only for gross negligence or gross ignorance, the firmly estab-
lished American rule is that an attorney becomes liable to his client for failure to use
ordinary skill and care in the course of his professional employment.


112 See, e.g., Wyoming Pac. Oil Co. v. Preston, 171 Cal. App. 2d 735, 341 P.2d
732 (1959), holding that an attorney's negligence is not necessarily a ground for setting
aside a third party's default judgment against the client. See also Frost v. Hanscome,
198 Cal. 550, 246 Pac. 53 (1926).

Crist, 129 Cal. App. 2d 144, 276 P.2d 614 (1954); Perkins v. West Coast Lumber Co.,
4 Cal. Unrep. 155, 33 Pac. 1118 (1893).
ducting a trial in a defective manner;\textsuperscript{114} failing to observe the required procedures for obtaining a new trial or perfecting an appeal;\textsuperscript{115} violating his associate counsel's rights in their relationship with the heirs to an estate;\textsuperscript{116} submitting fatally defective findings (which, though adopted by the trial judge, are still traceable to the attorney's error);\textsuperscript{117} and disregarding his client's specific instructions to prosecute a suit on an overdue note and mortgage (even though his delaying strategy was employed to spend enough time so that the mortgagor would die before trial and make recovery easier).\textsuperscript{118}

Negligence, however, is only one of the facts that must be shown to make the attorney's conduct actionable, especially where the client is seeking damages rather than simply trying to defeat the attorney's claim for compensation.

\textbf{Elements Necessary to Establish Negligence}

\textit{In Giving Legal Advice}

As a general rule, when an attorney's disputed conduct involves legal advice rather than courtroom performance, the client must prove four things to establish actionable negligence. He must show that:

- (1) An attorney-client relationship existed;\textsuperscript{119}
- (2) In connection with the relationship the attorney gave the client certain advice;
- (3) The client relied on this advice and, as a result, did things he would not otherwise have done;
- (4) As a direct and proximate result of this advice and the doing of these acts, he was damaged and suffered a loss.\textsuperscript{120}

\textsuperscript{116} Pierce v. Wagner, 134 F.2d 958 (9th Cir. 1943). By alleging facts that show both negligence and the breach of an agreement to associate as counsel in an estate distribution case, plaintiff attorney has stated a good cause of action against defendant attorney. A motion to dismiss should not be granted since the complaint alleges "the failure to perform acts which in reason should have been performed by appellee as attorney" (at 960), and further alleges that damage resulted from this failure.
\textsuperscript{117} Armstrong v. Adams, 102 Cal. App. 677, 283 Pac. 871 (1929).
\textsuperscript{118} Lally v. Kuster, 177 Cal. 783, 171 Pac. 961 (1918); for a later related decision, see Lally v. Kuster, 48 Cal. App. 355, 192 Pac. 78 (1920). An attorney is guilty of negligence for ignoring his client's specific instructions and following his own course when, as a result, a suit to foreclose a mortgage is dismissed for want of prosecution and the statute of limitations has run on a suit for the debt.
\textsuperscript{119} But see text at notes 163-174 for a discussion of privity in bringing suit.
To illustrate these principles in detail, a complaint is good against a general demurrer when it alleges that:  

1. The plaintiff retained the defendant as an attorney to represent her in purchasing an interest in a restaurant business;  
2. He agreed to do so in a skillful and diligent manner;  
3. In connection with his duties he advised her it was unnecessary for her to comply with California Civil Code section 3440, on the recording and publishing of certain sale notices, and also unnecessary to escrow the purchase price;  
4. This advice was negligent and unskillful;  
5. She relied on this advice and in consequence failed to do certain things:  
   a. She did not prepare, publish, or record notice of the intended sale;  
   b. She did not escrow the purchase price for payment of claims, if any were later found to exist;  
   c. She did not otherwise comply with California Civil Code section 3440;  
   d. She paid 4,000 dollars directly to the seller on transfer of the partnership interest;  
6. If it had not been for the attorney’s negligence:  
   a. She would have done the acts required of her by statute;  
   b. She would not have paid 4,000 dollars to the seller;  
   c. She would have learned, through compliance with the statute, of the existence of outstanding creditors, and would not have suffered the damages she later sustained;  
7. As a direct, proximate, and sole result of the failure to comply with California Civil Code section 3440, she suffered the following damages:

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122 Although courts accept the allegation that a client “did things she would not otherwise have done,” the phrase is semantically awkward when applied to an act that was omitted. Here, the client did not file the required notice. She implies that she would have filed it except for the attorney’s negligent advice. In fact, she probably knew nothing about the statutory requirement when she hired her attorney and would have omitted the filing unless she had received other legal advice. No doubt the phrase should be taken to mean that she “did things she would not have done under proper legal guidance.”
123 See preceding note.
124 In discussing other relevant cases, the court in Modica v. Crist, 129 Cal. App. 2d 144, 147, 276 P.2d 614, 616 (1954) noted: “We should not attach undue significance to the words ‘sole’ and ‘solely.’” The court declared there is no requirement that a negligence complaint against an attorney allege that the loss was caused “solely” by the attorney’s negligence, nor must the complaint negative other probable causes for the loss.
(a) A $4,000 dollar initial payment to the seller for a half interest in the restaurant business;
(b) The seller's outstanding debts of $1,148 dollars, fifty-one cents at the date of the transfer, paid by the plaintiff in an effort to salvage the business;
(c) Partnership debts of $2,592 dollars, fifty-one cents incurred after the transfer of the partnership interest, paid by the plaintiff;

(8) If it had not been for the attorney's negligence, she would have been apprised in time of the seller's outstanding indebtedness and would have avoided her losses by repudiating the agreement of sale.

In finding this complaint good, the court in Modica v. Crist the court distinguished and explained several earlier cases that the defendants had advanced as barriers to the client's cause of action. Under the Modica interpretation, which analyzed the precedents fairly and accurately, the adjudicated cases supported the client's rights: Lally v. Kuster uses a "but for" clause (i.e., "but for" the attorney's negligence, the injury would not have occurred) to mean that the attorney's negligence is actionable if it is "a" proximate cause of the injury, and not necessarily the only cause; Martin v. Hood represents a case in which the client could not recover because no damage has occurred; McGregor v. Wright denies recovery under a real holding that there was no causal connection between the allegedly erroneous legal advice and the claimed injury, and that the asserted financial loss had an uncertain and speculative quality to it; and Feldesman v. McGovern stands for the proposition that failure to plead proximate cause is a good ground for demurrer. The effect of Modica is to emphasize the fact that a negligent attorney should be treated like an ordinary wrongdoer. When he violates prescribed standards of conduct, the attorney must not be given substantive or procedural advantages over his fellow tortfeasors.

As guides to be used in measuring the quality of an attorney's advice, courts have considered whether his proposed course of action would have defeated his client's specifically expressed wishes whether the state of the law surrounding the controversial advice is

126 177 Cal. 783, 171 Pac. 961 (1918).
127 203 Cal. 351, 264 Pac. 478 (1928).
128 117 Cal. App. 186, 112 P.2d 624 (1931) (in which a trustee sued because his reliance on the attorney's advice allegedly cost him his position as trustee).
129 44 Cal. App. 2d 566, 112 P.2d 645 (1941) (in which a client sued because his attorney had failed to file a petition in bankruptcy).
clear and well established, and whether the legal authorities on the particular point are readily available to the attorney.

An attorney, for example, is properly dismissed as corporate counsel if he states that a new corporation can shed its obligations to a pre-incorporation subscriber by passing a resolution to that effect and by striking the unwanted subscriber’s name from the subscription list. “[W]ith but slight research,” said the court, “a wealth of authority on the subject is readily available,” including California Jurisprudence (a “handy reference work”), many relevant court decisions, the case law of other jurisdictions, the leading treatises on corporations, American Jurisprudence, Corpus Juris Secundum, and other works—all of which would have shown the attorney that his advice was “unsound.”

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132 Id. See also Lucas v. Hamm, 11 Cal. Rptr. 727 (1961), hearing granted May 3, 1961, by the California Supreme Court.

133 Moser v. Western Harness Racing Ass’n, 89 Cal. App. 2d 1, 9, 200 P.2d 7, 11 (1948). See also Lucas v. Hamm, supra note 126. In Lucas, the attorney included this clause in a will:

“This trust shall cease and terminate at 12 o’clock noon on a day five years after the date upon which the order distributing the trust property to the trustee is made by the court having jurisdiction over the probate of this will.” (11 Cal. Rptr. at 728.)

Since this clause made the residual trust null and void, the court found the attorney negligent for permitting it to appear, even when the injured parties lacked privity with him. Referring to a 1938 district court of appeals decision which ruled that a similar provision in a will violated the rules against perpetuities and suspension of the power of alienation, the court held the attorney negligent for not having learned of this authority.

The district court of appeals decision, which will not be officially reported, reveals how some courts view an attorney’s professional obligations. Against a claim that no actionable negligence was pleaded because the rules against perpetuities and the suspension of the power of alienation are difficult for the ordinary lawyer, the court stated:

“We agree the subject is difficult, but the law today has its specialties, and even as the general practitioner in medicine must seek the aid of the specialist in his profession, so the general practitioner in law, when faced with a problem beyond his capabilities must turn to the expert in his profession to the end that his client is properly served. . . . All that the respondent Hamm had to do in the present case was to examine the decisions of the courts of his own state and he would have had the answer to the problem he now says is confused and uncertain.” (11 Cal. Rptr. at 731.)

What this court assumes is that something in the particular clause would (or should) have triggered a competent attorney into further research on the problems of perpetuities and suspension of the power of alienation. Yet at least one other attorney (the present author) would have found this clause innocent and would have not been propelled from a reading of its language to an examination of the particular rules that regulate trusts. Stated from a different point of view, the injured parties were likely to be hurt in this manner by any number of well-meaning lawyers.

On balance, then, should we penalize a client (i.e., by penalizing his heirs) for an attorney’s innocent mistake, or penalize the attorney for lacking expertise in a specialized legal area which appears, on its face, to be within his competence? Probably, if the legal profession is to command respect for its integrity, the attorney should find the means of protecting himself, perhaps by malpractice insurance. His clients are in a poor position to protect their interests from an attorney’s innocent fault.
Perhaps the most meaningful philosophy used in setting standards for attorneys, however, is an unspoken implication from a case penalizing a non-lawyer for drawing a faulty will. After deciding the privity question against him (and permitting an injured beneficiary to sue), the court stated that the defendant, a notary public, was not qualified to undertake the legal tasks he had assumed for himself. “His conduct was not only negligent but was also highly improper” and should be discouraged. But why discourage laymen from practicing law? Unquestionably, though not expressly declared by the court, because the public can be protected from incompetent legal aid only when its members consult licensed attorneys for these services. Lawyers, under this premise, can be trusted to do the job they are supposed to do. Unless attorneys accept this responsibility and offer restitution for their mistakes, what theory justifies their having exclusive rights to practice law in our society?

**In Connection With Litigation**

Despite an attorney’s best efforts in presenting a case he deserves to win, the court or the jury may render a verdict against him. The loss alone is not actionable, but the attorney can be held liable for committing certain acts or making certain omissions that caused the loss, if ordinary skill and care would have avoided that result. However, a claim that an attorney was negligent in prosecuting or defending a lawsuit must be accompanied by proof that careful management of the client’s suit would have resulted in recovery and collection of a favorable judgment or, in the case of a defense, that proper handling would have resulted in a judgment for the client.

The client must show that he put the attorney in full possession of the facts which supported his position, that the facts existed, and that they were susceptible of proof at the trial by the exercise of proper diligence on the attorney’s part. To support his claim that the attorney was negligent in failing to perform some necessary act, the client must specify what the act was and must prove that if the attorney had performed it, the client would have benefited. Not only

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135 See text at notes 163-174.
137 Cf. the popular story of the attorney who, after winning his first lawsuit, wired his client, “Justice has triumphed.” He received a one-word reply. “Appeal.”
139 Hastings v. Halleck, 13 Cal. 203, 2 Lab. 218 (1859).
140 Feldsman v. McGovern, 44 Cal. App. 2d 566, 112 P.2d 645 (1941). If the client fails to allege that he was entitled to a petition in bankruptcy or that the petition would have been granted on proper application, a demurrer is appropriate against a complaint charging the attorney with negligence for failing to file the petition. Although bankruptcy
does the client bear these burdens, but he must establish that he was damaged by the attorney’s conduct.\textsuperscript{141} To the extent that he does not minimize these damages when the opportunity exists, the client’s recovery is accordingly reduced.\textsuperscript{142}

Proving that he suffered a real injury from the attorney’s conduct is often the client’s most difficult task. He must virtually re-litigate a case that has already been decided against him and show that the earlier judgment was an erroneous result caused by his attorney’s negligence. This “rehearing” is not, however, a collateral attack on the judgment, since the winning party in that suit is not affected by the client’s present action against his attorney. In reversing a trial judge who refused to accept proof about the propriety of another trial judge’s final judgment, an appellate court has clarified the purpose of the second suit:\textsuperscript{143}

Such proof would not constitute a collateral attack on the judgment. The judgment in the first action, as between the parties to that action, is final. The purpose of the present action is not to reverse that judgment. It has been finally determined that the judgment creditor in the first action is entitled to that money. The appellant is not trying to gain recoupment from that judgment creditor. He is seeking to recover damages from his attorney, who was not a party to the first action, for his negligence in permitting the judgment to become final without taking an appeal. If he can prove that the judgment in that case was erroneous and would have been reversed, he should be permitted to do so. In that event he has proved damage proximately caused by the negligence. If this were not the rule, attorneys would be placed in a special class, in that they, unlike other persons, would be freed from liability for certain damages directly and proximately caused by their negligence. There is no reason for placing them in such a special class.

Given the opportunity to present proof of his injury, the client nevertheless faces some complex legal problems. If, for example, an attorney negligently failed to file a notice of a pending mortgage suit, the client cannot maintain an action against him where no one acquired any interest in the mortgaged premises during the pendency of the suit is not a contested action, the client must allege that he meets the prescribed standards of bankruptcy court before he can hold the attorney negligent in failing to obtain this relief.\textsuperscript{141} Campbell v. Magana, 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (1960).

\textsuperscript{142} Theobald v. Byers, 193 Cal. App. 2d 69, 13 Cal. Rptr. 864 (1961). A client’s failure to file a claim in bankruptcy as a general unsecured creditor of a third person reduces the amount recoverable from an attorney because of the attorney’s negligent failure to have a chattel mortgage acknowledged and recorded. (If the chattel mortgage had been properly recorded, the client would have been secured for the full value of a loan made to the third person. Under existing conditions, however, the client still could have recovered some money from the third person through timely action. By failing to take this action, the client cannot hold the attorney liable for this amount.)\textsuperscript{143} Pete v. Henderson, 124 Cal. App. 2d 487, 490, 269 P.2d 78, 79-80 (1954).
and the client purchased the property at the mortgage sale, paying the full amount of his debt and costs.\textsuperscript{144} Similarly, a nonsuit is proper if an attorney negligently failed to levy execution against a third person on the client’s behalf, where the property in question belonged not to the third person but to his wife.\textsuperscript{145} An attorney is also safe from liability where, after having conferred with a probate judge, he became convinced that his clients had no rights to a share in an estate and, despite a conflict of authority, the court later finds the attorney was correct.\textsuperscript{146}

But an attorney is liable for mismanaging a cause in trial court, failing to perfect the record for a new trial, and failing to appeal an adverse judgment when a third person’s complaint against the client was radically defective and wholly insufficient to support the judgment. Since an appeal would have defeated that judgment, it is “inexcusable” for the attorney to allow his client’s rights to “become lost in the abortive attempt to obtain a new trial” if a new trial was not necessary for her protection. Furthermore, the defective order for a new trial was a “positive damage” to the client because it “compelled her to incur additional costs upon appeal taken from the order, and without any reasonably well-grounded hope of success upon her part.”\textsuperscript{147}

One more fact to be considered in weighing the attorney’s conduct is the state of the law at the time of his allegedly negligent acts or omissions. By common knowledge, the law changes, often suddenly, often through an invisible dilution of supposedly indestructible rules. These changes come about because an attorney insists on the validity of his client’s rights despite all contrary authority. Therefore, should the accused attorney be judged only by the legal rules existing when he took the action that was later protested as negligent? Or should he be tried on the assumption that, by proper action, he could have brought about changes for his client’s benefit?

In a leading case nearly a century old (Gambert v. Hart\textsuperscript{148}), the court held that the client suffered damage because later changes in the law would have benefited him if his case had been properly

\textsuperscript{144} Hinckley v. Krug, 4 Cal. Unrep. 208, 34 Pac. 118 (1893).
\textsuperscript{145} Siddall v. Haight, 132 Cal. 320, 64 Pac. 410 (1901).
\textsuperscript{146} McMillan v. Greer, 85 Cal. App. 558, 259 Pac. 995 (1927) (semble).
\textsuperscript{147} Drais v. Hogan, 50 Cal. 121, 127, 128 (1875). See also Campbell v. Magana, 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (1960). Even though defendant attorneys were negligent in permitting the statute of limitations to run in plaintiff client’s personal injury action against a third person, the client cannot recover from the attorneys since she suffered no damage. On the facts before the court she lacked a good cause of action against the third person. Note, however, that the settlement value of her lawsuit, as distinguished from its recovery value, had been eliminated from the case. Would her attorneys have been liable if their negligence had prevented her from obtaining a cash settlement in exchange for a promise not to sue the third person?
\textsuperscript{148} 44 Cal. 542 (1872).
handled. On the facts, the attorney negligently filed a defective motion for a new trial in a controversy between the client and a third person, as a result of which the client's case could not be considered on its merits during an appeal. The attorney argued that his client suffered no damage because under then-existing law the client would still have been liable to the third person and would not have had the judgment reversed on appeal. Between the time of the defective appeal, however, and the client's present action against his attorney, the California Supreme Court overruled the earlier cases that had made the client's appeal theoretically useless. The court then declared, with respect to the negligently handled case, that:

If we had been at liberty to look into the merits of the case it may be that it would not have been decided until after the decision of Hahn v. Kelly, or, if decided before, the presumption is it would have been decided in accordance with the principles announced in that case, which was decided at the same term. The trial court, therefore, erred in holding that the mistake or "blunder" of the defendant [attorney] could not have resulted in a damage to the plaintiff [client].

Even under this decision, however, it is inconceivable that the attorney would have been considered negligent if, after losing a properly-conducted trial, he advised against taking an appeal. A hope of changing the law must often be measured by the out-of-pocket expenses necessarily risked in seeking that result, and by intangibles that cannot be assessed in terms of negligence.

Where a doubtful or debatable point of law is involved, the attorney is not liable for lacking knowledge about its true state. If, for example, under a mistaken view of the workmen's compensation law, an attorney lets the statute of limitations expire during the time he represented the client, he may successfully defend himself against a charge of negligence. The eventuality that a later court decision removed the obscure point from its doubtful status

[D]oes not in our view affect the question of respondent's [i.e., the attorney's] negligence prior to its rendition. The fact that greater prudence might have caused him to initiate what he believed to be a futile petition cannot, in lieu of a showing that he should have known it to be otherwise, now cause him to be subjected to a judgment of malpractice.

Perhaps the balance between the interests of the attorney and the client should be struck to assure the attorney's absolute compliance with settled legal procedures (e.g., time for filing papers, types of notice required, etc.) and to permit the attorney the widest possible

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discretion in all matters that require sound judgment and the weighing of imponderables.

Defenses
Contributory Negligence

Just as members of other professions can show that a layman was injured because he failed or refused to follow the professional's advice, an attorney can raise the defense of contributory negligence against an injured client. Undoubtedly a client should be considered negligent for disregarding his attorney's specific instructions, especially since one has already been held grossly negligent for the simple act of failing to ask his attorney about the disposition of certain money the attorney had collected. 151

But contributory negligence should have no place as a defense against an obedient client who originally hired the attorney to help him avoid the very acts which are now labelled negligent. In rejecting this defense after a client had failed to ask his attorney about acknowledgment or recording of a chattel mortgage, one court has stated: 152

Clearly the value of an attorney's services in connection with a transaction of this nature consists largely of his superior knowledge of the necessary legal formalities which must be fulfilled in order for a document to be valid in the eyes of the law. If laymen such as appellants were already familiar with the requirements to be met in order to attain the legal status of secured creditors, it would seem likely that there would be a considerable decrease in the demand for the attorney's services.

The layman should be penalized for ignorance of legal matters only when he refuses proper help, and not when the attorney he hires fails in his duties.

Statute of Limitations

When an attorney commits a negligent act that violates his employment contract, he is ordinarily subject to suit only within the time permitted by the statute of limitations. Under California Code of Civil Procedure sections 337 and 339, actions on contracts, obligations, or liabilities must be instituted within four years if founded on an instrument in writing, and within two years if based on an unwritten agreement. Suits against attorneys for negligence in the management of an action have been barred after two years from the time the negligence

151 See Simpson v. Dalziel, 135 Cal. 599, 67 Pac. 1080 (1902).
152 Theobald v. Byers, 193 Cal. App. 2d ———, 13 Cal. Rptr. 864, 866 (1961). See also Piatarone v. Masterson, 180 Cal. App. 2d 305, 4 Cal. Rptr. 610 (1960). In this case, with somewhat vague reasoning, the court held no prejudicial error was committed by the giving of an erroneous instruction that required the client to prove his freedom from contributory negligence.
occurred, presumably because the employment contracts were oral.\textsuperscript{153}

But the attorney is estopped from raising the statute of limitations if a client fails to make inquiry about his statements because the client reposed trust and confidence in him and relied on his representations.\textsuperscript{154}

Unquestionably, where the confidential relationship of attorney and client exists, the client’s failure to discover the facts constituting fraud or misrepresentation may be excused.\textsuperscript{155} And yet the appropriate statute of limitations may be asserted to bar a fraud action if fraud is alleged indirectly at best, and if the client’s failure to ask the attorney about the disposition of certain money can be classified as “inexcusable negligence” that runs counter to “natural curiosity” and “business prudence.”\textsuperscript{156}

Immediately after the attorney violates his employment contract by committing a negligent act, the client may begin his action. Although this early suit might result in only nominal damages, the client can show proof of actual damages up to the date of the verdict.\textsuperscript{157} By failing to bring prompt action, the client risks the inertia that often matures into unconscionable delay. He can then be deprived of his otherwise valid chance to recover damages. Among examples of injured clients being denied remedies for failing to act within the prescribed time are cases where:

(1) An attorney negligently failed to sue the endorser of a promissory note in his client’s behalf after the drawer proved insolvent. Since the client’s cause accrued within a reasonable time after the note was received for collection or, at all events, after the attorney’s failure to collect money from the maker, the client had to bring suit against his attorney within a statutory period that started to run as soon as the cause of action accrued.\textsuperscript{158}

(2) A client sought to toll the statute of limitations by charging the attorney with concealing a fact that delayed discovery of the attorney’s negligence until after the statute of limitations had expired. But the attorney could not be held responsible for concealment when the client had already known of the fact in question because, at an earlier time, the attorney had so informed him. To suspend the run-
ning of the statute because of fraudulent concealment or misrepresent-
ition, the client must be actually ignorant of these facts.159

(3) An attorney failed to bring suit and attachment proceedings
on certain promissory notes, as a result of which other creditors ob-
tained liens on the property and deprived the client of his security.
Since the liens were public records, the client had "means of knowl-
dge" (which is equivalent to "knowledge" in law) concerning the
attorney's negligence. The statute of limitations begins to run (appar-
ently) from the time the client should have known he had a cause
of action. 160

Means and sources of knowledge of the alleged breach and injury
were at all times available to plaintiffs and ordinary diligence on
their part in consulting such means and sources would have furnished
them with all the information sufficient to discover the breach and
commence suit within the two year period.

(4) One partner of a law firm embezzled money from his client,
but the other partner, the present defendant, neither knew of the
embezzlement nor received any benefit from the embezzled money.
The client could have sued the innocent attorney only on principles of
agency, for money had and received, but could not sue him directly
for fraud. If the statute of limitations has run on the money had and
received count, the action is barred against the innocent
partner.161

Negligence in the conduct of a trial gives rise to a cause of action
that accrues when the "injurious" judgment is entered. If the statutory
time has elapsed between entry of the judgment and the beginning
of a suit against the negligent attorney, the client loses his remedy,
even though the second action is brought within the statutory time
measured from the negligent attorney's motion for new trial or failure
to appeal. "The negligence if any occurred prior to the entry of the
judgment; the acts subsequent thereto relate to damages rather than
liability."162

Lack of Privity

The doctrine of privity is an attempt to scale down to manageable
proportions John Donne's assertion that, "No man is an Iland, intire
of itself; every man is a peece of the Continent, a part of the maine. . . ."
Taking the view that responsibility to mankind must be limited in
practical affairs, the privity theory frees a tortfeasor from liability
except to a limited class of injured persons. Without such a limitation,

161 Gibson v. Henly, 131 Cal. 6, 63 Pac. 61 (1900).
the ill-effects of man’s negligence might lead to boundless actions and litigious intricacies as each wrongful act is followed down the chain of results to its final effect.\textsuperscript{163}

The theory, in principle, still holds good, but has been greatly liberalized since the nineteenth century. In many situations, modern courts permit a person not in privity to recover damages for the negligent performance of a contract. Nevertheless, in the absence of privity, liability has been denied if the injury to the person bringing suit was not foreseeable, or if the potential advantage to the injured person from performance of the contract was only a collateral consideration for the parties to the original transaction. Whether a particular defendant will be held liable to a third person not in privity is a matter of policy. Courts balance various factors, among which are the extent to which the transaction was intended to affect the person bringing suit, the foreseeability of harm to him, the degree of certainty that he suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.\textsuperscript{64}

The California doctrine of privity, as it affects attorneys, has its roots in \textit{Buckley v. Gray},\textsuperscript{166} a case that magnified its precedents and has since been disapproved by the California Supreme Court.\textsuperscript{66} In \textit{Buckley}, an attorney was negligent for excluding certain parties from a will despite the testatrix’ wishes and for using the plaintiff, the testatrix’ son, as a subscribing witness, as a result of which the devise to him was rendered void. The court sustained a demurrer to the son’s complaint, holding that he lacked privity with the attorney and so could not bring the action. According to \textit{Buckley}, an attorney is liable for negligence in the conduct of his professional duties to his client alone, and not to third parties who were strangers to the contract for employment and services. Only when an attorney has been guilty of fraud, collusion, or a malicious or tortious act is the privity requirement ignored. The rule protecting beneficiaries of a third-party beneficiary contract has no applicability to cases involving wills, since it applies


\textsuperscript{164} See \textit{Biakanja v. Irving}, 49 Cal. 2d 647, 320 P.2d 16 (1958). See also \textit{Pierce v. Wagner}, 134 F.2d 958 (9th Cir. 1943), in which defendant, who allegedly breached his agreement as an associate counsel with plaintiff attorney, argued that only the client, who was not a party, could recover for an attorney’s negligence. Skirting the issue, the court permitted plaintiff to bring an action on an estate matter because the complaint was not solely founded on negligence but alleged the violation of a right arising from the association agreement between plaintiff and defendant.

\textsuperscript{165} 110 Cal. 339, 42 Pac. 900 (1895).

\textsuperscript{166} \textit{Biakanja v. Irving}, 49 Cal. 2d 647, 320 P.2d 16 (1958).
only to instances where the contract is made “expressly” for the benefit of the third person. The rule does not apply where the third person is merely incidental to the contract or remotely benefited from its terms. Because plaintiff son had no vested right in his mother’s will, which remained purely ambulatory and could be changed at any time, he had only a mere possibility of benefit, and not a right which could make him privy to the contract. To bolster its conclusion, the Buckley court stated:\textsuperscript{167}

... [T]he rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity by contract or otherwise, by reason of which the former owes some legal duty to the latter.

As an example of the “universal” rule that guided its decision, the Buckley court cited the United States Supreme Court’s opinion in National Savings Bank of D.C. v. Ward.\textsuperscript{168} What Buckley failed to note, however, is that the highest court in the land had split six to three in that case, with the Chief Justice and two Associate Justices dissenting. National Savings Bank of D.C. v. Ward involved an attorney, the defendant, who was hired by a landowner to prepare title certificates after a title search on certain land. Because of his negligence, the attorney prepared a defective certificate, which the landowner then used in securing a loan from a bank, the plaintiff. Holding that the bank could not recover from the attorney since the person occasioning the loss must owe a duty, contractual or otherwise, to the person sustaining the loss, the court noted that the bank had never retained or employed the attorney and had not paid him anything for making the title certificates. Furthermore, the attorney never performed any service at the bank’s request or in its behalf, and did not know that the title certificates were to be used to help the landowner get a loan from the bank. Finally, neither fraud nor collusion was alleged.

Dissenting from this position, Chief Justice Waite declared:\textsuperscript{169}

I think if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person as evidence of the fact certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found.

After lying dormant for years, at least where attorneys’ personal lia-

\textsuperscript{167} Buckley v. Gray, 110 Cal. 339, 342-43 (1895).
\textsuperscript{168} 100 U.S. (10 OTTO) 195 (1880).
\textsuperscript{169} Id. at 207.
bility was concerned, these arguments about privity were re-animated in recent litigation. The Buckle reasoning held firm to absolve a non-lawyer from liability for negligently preparing an invalid will, where the intended beneficiary sued because he was deprived of his expected inheritance. Not having been a party to the original transaction, the beneficiary could not bring suit against the defendant for carelessness or negligence in failing to prepare a valid will.170

The following year the California Supreme Court, faced with another suit involving a defective will prepared by a non-lawyer, declared that an injured beneficiary did have standing to sue the person who drew the will.171 As a result, the beneficiary recovered a judgment for the difference between the amount she would have received if the will had been valid and the amount actually distributed to her. To reach its decision, the court "disapproved" conflicting statements in Buckley v. Gray172 and Mickel v. Murphy.173 When a person drawing a will (here, a notary public) must have been aware from its terms that faulty solemnization would cause the will to be invalid and make the intended beneficiary suffer the very loss that did occur, that person should not be protected by immunity from civil suit. If immunity existed, the only person who suffered a loss would be denied a right of action.174

Because Biakanja v. Irving involved the negligence of a notary public whose unauthorized practice of law violated the Business and Professions Code, it may be argued that liability was imposed on him to discourage non-accredited persons from practicing law, and that the privity doctrine should be retained in favor of authorized practitioners. To do so, however, would hold the layman to stricter accountability for his legal efforts than the attorney. Assuming that such an argument prevailed, a testator would advisedly consult a non-lawyer to draw his will since his beneficiaries would obtain either a valid will or a good cause of action against the person who drew it.

170 Mickel v. Murphy, 147 Cal. App. 2d 718, 305 P.2d 993 (1957). This case is complicated by the fact that the defendant, a non-lawyer, may actually have been hired only as a "scrivenor" of legal instruments, rather than as a person qualified to prepare a will.


172 110 Cal. 339, 42 Pac. 900 (1895).


174 Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958). See also Lucas v. Hamm, 11 Cal. Rptr. 727 (1961), hearing granted May 3, 1961, by the California Supreme Court. The District Court of Appeals, in an opinion that will not be officially reported, states (at 731) that, "in our opinion the Supreme Court established that lack of privity of contract will no longer bar a suit by a designated beneficiary of a will to recover for loss occasioned by an attorney's negligence in drawing the instrument. Rejection of the privity doctrine in this type of case is particularly justified because no other person can recover for the loss caused by the attorney's negligence."