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ATTORNEY AND CLIENT - DUTY OF ATTORNEY TO FOLLOW CLIENT'S INSTRUCTIONS

COMMENTS

ATTORNEY AND CLIENT — DUTY OF ATTORNEY TO FOLLOW CLIENT'S INSTRUCTIONS — "An attorney's duty, where he is specially instructed, is to follow the instructions of his client, except as to matters of detail connected with the conduct of the suit, and he is liable for all losses resulting from his failure to follow such instructions with reasonable promptness and care." [1]

1. *The Rule*

The underlying basis for this doctrine has never been clearly explained by the courts. Many of the cases holding the attorney liable for disobedience to his client's instructions do not distinguish this situation from the much more common one which occurs when the client

[1] 6 C. J. 704, sec. 234. For a fairly complete survey of the cases on this subject see 56 A. L. R. 962 (1928).

seeks to hold the attorney for negligence.[2] The rule seems to have had its origin in the early Massachusetts case of *Gilbert v. Williams*.[3] This was a collection case, the type of case in which the question of the attorney's liability under the rule most often arises. The client had forwarded to the defendant attorney a note for collection, with instructions to sue thereon immediately and attach the debtor's property. The attorney, however, being put off by the debtor's promises and apparent prosperity, delayed until the latter had become insolvent. In holding the attorney liable the court said, "Whenever an attorney disobeys the lawful instructions of his clients, and a loss ensues, for that loss the attorney is responsible." No citations or supporting reasons were given for this statement of law, but the decision was followed by other courts,[4] and the rule is later found full-blown and unexplained in the text-books [5] and legal periodicals.[6] It should be noted that the writers also tend to treat this subject as a branch of the subject of the attorney's duty to use due care.

It is submitted that the only true basis for this rule is to be found in the law of agency. An attorney is, to a large extent, the agent of his client and it is certainly one of the well-known rules of the law of agency that it is the duty of the agent to follow the instructions of his principal, on the theory that a promise to do so is an implied term of his contract.[7] In the works on agency the liability of attorneys and bill collectors is treated along with the liability of other kinds of agents,[8] and the Restatement of the Law of Agency, in the comments to the sections relating to the duty of the agent to follow instructions, clearly shows that the rule also covers the case of the attorney.[9] Moreover, at

[2] See O'Halloran v. Marshall, 8 Ind. App. 394, 35 N. E. 926 (1898); Cox v. Livingston, 2 W. & S. (Pa.) 103, 37 Am. Dec. 486 (1841); Read v. Patterson, 11 Lea (79 Tenn.) 430 (1883); Fox v. Jones, 4 Tex. App., Civ. Cas. (Willson) 48, 14 S. W. 1007 (1889); Hogg v. Martin, Riley Law (S. C.) 156 (1836).

[3] 8 Mass. 51, 5 Am. Dec. 77 (1811). The facts in this case are strikingly similar to those in the most recent decision in this field, W. L. Douglas Shoe Co. v. Rollwage, 187 Ark. 1084, 63 S. W. (2d) 841 (1933).

[4] Cox v. Livingston, 2 W. & S. (Pa.) 103, 37 Am. Dec. 486 (1841); Nave v. Baird, 12 Ind. 318 (1859). The Supreme Court of South Carolina seems by implication to have adopted the rule in the early case of Hogg v. Martin, Riley Law (S. C.) 156 (1836).

[5] 1 THORNTON, A TREATISE ON ATTORNEYS AT LAW, sec. 329 (1914).

[6] Black, "Responsibility of Attorneys to Clients for Negligence and Errors," 21 AM. L. REV. 238 (1887); Liability of Attorneys for Negligence, 68 UNITED STATES L. REV. 57 at 60 (1934).

[7] 1 CLARK & SKYLES, A TREATISE ON THE LAW OF AGENCY 875 (1905); MECHEM, OUTLINES OF THE LAW OF AGENCY, secs. 315-323 (1923); 1 MECHEM, TREATISE ON THE LAW OF AGENCY, 2nd ed., secs. 1244 *et seq.* (1914); 2 AM. L. INST. RESTATEMENT OF THE LAW OF AGENCY, sec. 385 (1933).

[8] MECHEM, OUTLINES OF THE LAW OF AGENCY, sec. 315 (1923).

[9] 2 AM. L. INST. RESTATEMENT OF THE LAW OF AGENCY, sec. 385 (1933).

least one of the courts, in a case involving an attorney's disobedience to his client's instructions, clearly placed its decision on agency grounds.[10] Hence, it is submitted that where an attorney is sued for failure to obey instructions, the courts should recognize fully that they are dealing with what is essentially an agency problem, and not a problem peculiar to the law of attorney and client.[11] The result of this approach would be to make the rule something like this: it is the duty of an attorney to obey the instructions of his client, and if he disobeys them he is liable for any loss which the client thereby may proximately sustain, subject to the following exceptions (discussed in detail below): (1) an attorney may be excused if he acts contrary to instructions in a sudden emergency; (2) the instructions must be clear; (3) the instructions cannot override the established customs of the legal profession as to an attorney's rights and duties — that is, they cannot interfere with the attorney's right to control the conduct of a case; (4) where the attorney has advanced money to the client, he need do nothing to imperil security; (5) where the client waives the right of demanding obedience, or ratifies the acts of the attorney, the latter is not liable; (6) the attorney need not and should not follow instructions to commit unlawful or immoral acts.[12]

It should be noted, of course, that under the general rule the action for failure to follow instructions is one for breach of contract,[13] and that no damages can be recovered save those proximately resulting from the attorney's failure to obey,[14] so that if nothing could have been collected had the instructions been followed,[15] or if the proximate cause of the loss was negligence on the part of the client,[16] no substantial damages can be recovered, though there seems to be some disagreement as to nominal damages.[17] Also it should be borne in mind that

[10] Sproul v. Lloyd, 96 N. J. L. 314, 115 Atl. 667 (1921).

[11] This duty continues even after judgment: Hett v. Pun Pong, 18 Can. Sup. Ct. (Duval) 290 (1890) (failure to register judgment on instructions).

[12] See MECHEM, OUTLINES OF THE LAW OF AGENCY, secs. 315-323 (1923); *cf.* 2 AM. L. INST. RESTATEMENT OF THE LAW OF AGENCY, secs. 385, 411-420 (1933). It is not contended, however, that the attorney is nothing more than an agent. It should always be borne in mind that he has a dual personality: (1) as agent of his client, and (2) as an officer of the court.

[13] Cornell v. Edsen, 78 Wash. 662, 139 Pac. 602, 51 L. R. A. (N. S.) 279 (1914).

[14] Lally v. Kuster, 177 Cal. 783, 171 Pac. 961 (1918).

[15] Lally v. Kuster, 177 Cal. 783, 171 Pac. 961 (1918); for other cases on damages in this field, see Whitney v. Abbott, 191 Mass. 59, 77 N. E. 524 (1906); Hogg v. Martin, Riley Law (S. C.) 156 (1836).

[16] Read v. Patterson, 11 Lea (79 Tenn.) 430 (1883).

[17] *Cf.* Nave v. Baird, 12 Ind. 318 (1859); Sproul v. Lloyd, 96 N. J. L. 314, 115 Atl. 667 (1921); Read v. Patterson, 11 Lea (79 Tenn.) 430 (1883).

the duty to follow instructions may be used as a defense by the attorney as well as a basis of recovery by the client.[18]

2. Exceptions to the Rule

(1) As to acts in emergencies, no case has been found in which the courts have applied this exception, and it is difficult to imagine one in which the problem would arise. In such an event, however, the usual rules of agency should control — that is, it must be a genuine emergency, not caused by the attorney's fault; there must be no opportunity for communication with the client; and there must be a situation where action is needed and strict compliance with instructions is impossible or, in the reasonable judgment of the attorney, is detrimental to the interests of the client.[19]

(2) Instructions must be clear; if there is a doubt as to the meaning of the instructions, the attorney should not be held liable for adopting a reasonable interpretation.[20] Trouble may arise here when a note is forwarded "for collection." The Supreme Court of Pennsylvania has held that such instructions mean that suit must be brought;[21] but the decision, despite the language of the opinion, might very well have been placed upon the ground of negligence.[22] It is submitted, however, in view of the usual necessity of advancing costs, that forwarding an item "for collection," without more, should not be construed as an instruction to bring suit. It should be noted that if it is difficult to ascertain what the instructions were, it will be presumed that the attorney acted in accordance with them.[23]

(3) Instructions cannot control the conduct of the case. This exception to the rule is always recognized,[24] and is in accord with Canons 18 and 24 of the American Bar Association's Code of Ethics.[25] Under

[18] Lord v. Hamilton, 34 Ore. 443, 56 Pac. 525 (1899); Harris' Appeal, 4 Pa. Sup. Ct. (Sadler) 169, 6 Atl. 761 (1886); Carr's Ex'x v. Glover, 70 Mo. App. 242 (1897).

[19] See MECHEM, OUTLINES OF THE LAW OF AGENCY, sec. 318 (1923).

[20] See MECHEM, OUTLINES OF THE LAW OF AGENCY, sec. 319 (1923).

[21] Cox v. Livingston, 2 W. & S. (Pa.) 103, 37 Am. Dec. 486 (1841).

[22] For other cases of obscure instructions, see Scales v. Grayson, Emmerson & McTaggert, 16 Sask. L. R. 44, 68 D. L. R. 194 (1922) (difficult to ascertain what bid was authorized at sale—defect cured by later instructions); Hogg v. Martin, Riley Law (S. C.) 156 (1836).

[23] Holmes v. Peck, 1 R. I. 242 (1849).

[24] See 6 C. J. 704; 1 THORNTON, ATTORNEYS AT LAW, sec. 329 (1914); Nave v. Baird, 12 Ind. 318 (1859); Gorham v. Gale, 7 Cow. (N. Y.) 739 (1827); Anonymous, 1 Wend. (N. Y.) 108 (1828). *Cf.* O'Halloran v. Marshall, 8 Ind. App. 394, 35 N. E. 926 (1893); Thompson v. Pershing, 86 Ind. 303 (1882).

[25] Canon 18: Treatment of Witnesses and Litigants: ". . . The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to

this exception the attorney may refuse to apply for a change of venue, or refuse to put in evidence the testimony of a witness, if there is a doubt as to its materiality;[26] he may waive a default [27] and other technical advantages;[28] and may make stipulations,[29] and generally assume control of the action.[30] A difficulty arises here when *C*, a lawyer, hires *A*, another lawyer, to handle a case in which *C* is the defendant, *A* agreeing expressly to follow *C's* instructions as to the conduct of the case. *C* then instructs *A* to violate a non-obligatory agreement with opposing counsel. The Restatement of the Law of Agency [31] states that in this hypothetical situation *A* is not bound to follow the instructions, thus apparently placing a client who is himself an attorney on the same footing as any other client. It is not altogether clear, however, that the Restatement solution is the proper one. The only reason for disregarding such a contract would be that it is against public policy, but just what public policy is violated is not altogether apparent.

(4) The attorney need not imperil security where he has loaned money to the client; this is the usual agency rule and should have no special features when applied to the law of attorney and client.[32]

(5) That waiver by the client of the attorney's obedience was a good defense was recognized in the original case of *Gilbert v. Wil-*

demand that his counsel shall abuse the opposite party or indulge in offensive personalities. . . ."

Canon 24: "As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross-interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety."

[26] Nave v. Baird, 12 Ind. 318 (1859).

[27] Anonymous, 1 Wend. (N. Y.) 108 (1828).

[28] Gorham v. Gale, 7 Cow. (N. Y.) 739 (1827).

[29] McLyman v. Miller, 52 R. I. 374, 161 Atl. 111 (1932); Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321 (1895); Bingham v. Bd. of Supervisors, 6 Minn. 82 (1861); Ish v. Crane, 13 Ohio St. 574 (1862).

[30] 1 THORNTON, ATTORNEYS AT LAW, sec. 329 (1914); Gorham v. Gale, 7 Cow. (N. Y.) 739 (1827); Moulton v. Bowker, 115 Mass. 36 (1874).

[31] 2 AM. L. INST. RESTATEMENT OF THE LAW OF AGENCY, sec. 385 (1933). *Cf.* Carr's Ex'x v. Glover, 70 Mo. App. 242 (1897), where *C*, an eminent attorney, employed *A*, another lawyer, to defend a suit against him. *C* instructed *A* to plead to the jurisdiction. *A* did this, the plea was overruled and the court refused to allow a plea to the merits. *Held*, in a counterclaim by *C* against *A's* estate, that in this situation *C* did not rely on *A's* ability to conduct the case and that under the circumstances *C* had estopped himself from claiming damages from *A*.

[32] MECHEM, OUTLINES OF THE LAW OF AGENCY, sec. 322 (1923).

liams,[33] but the facts in that case were held not to constitute a waiver. In another early case,[34] however, the court found a waiver where, after instructions, the client and the debtor agreed to leave the matter to arbitration. It would thus seem that if, after instructions are given, the client clearly adopts any position, or gives further orders, inconsistent with the original instructions, obedience is waived.[35] Ratification should, of course, be founded on acquiescence in or acceptance of benefits, with knowledge by the client of an agreement made by the attorney in violation of instructions.[36] Thus, where an attorney was instructed not to bid beyond a certain amount at a sale and he did bid higher, ratification was found in the act of the client accepting the deed when he could have refused.[37] Where the instructions relate to the conduct of the suit, it would seem that acquiescence by the client would not bind him as to matters which he does not understand; but if he acquiesces in a simple matter which the ordinary layman could grasp as easily as a lawyer, he should be estopped. On the other hand, if the client is himself a lawyer, he certainly cannot protest.[38]

(6) As to unlawful instructions, no case can be found in which the fact that the instructions were unlawful or immoral has been used by the attorney as a defense, but all the writers seem to recognize this qualification.[39] It is also, of course, clear that an attorney is liable for torts committed by him, in bad faith and without a reasonable basis in law for his action, even though he acted under express instructions;[40]

[33] 8 Mass. 51, 5 Am. Dec. 77 (1811). In that case the attorney, after instructions to sue, reported that the debtor had said he would pay if the note were sent. In reply the client forwarded the note with this statement: "Agreeable to your request, I enclose note." *Held*, no waiver, but merely a natural statement that if the debt were paid at once, no suit need be brought.

[34] Hogg v. Martin, Riley Law (S. C.) 156 (1836).

[35] *Cf.* Fletcher v. Jubb, Booth & Helliwell, [1920] 1 K. B. 275; noted in 33 HARV. L. REV. 605 (1920).

[36] MECHEM, OUTLINES OF THE LAW OF AGENCY, sec. 323 (1923).

[37] Sproul v. Lloyd, 96 N. J. L. 314, 115 Atl. 667 (1921); *cf.* Scales v. Grayson, Emmerson & McTaggert, 16 Sask. L. R. 44, 68 D. L. R. 194 (1922), where the client refused to accept the deed and brought suit, though it was apparently too late to abandon the sale.

[38] Carr's Ex'x v. Glover, 70 Mo. App. 242 (1897).

[39] See 6 C. J. 704; 2 AM. L. INST. RESTATEMENT OF THE LAW OF AGENCY, sec. 411 (1933); MECHEM, OUTLINES OF THE LAW OF AGENCY, sec. 315 (1923). If a person, however, leads a client reasonably to believe that he is an attorney when he is not, he cannot escape liability because the acts which he contracted to do cannot legally be performed by him. See note to 2 AM. L. INST. RESTATEMENT OF THE LAW OF AGENCY, sec. 411 (1933).

[40] *Cf.* Langen v. Borkowski, 188 Wis. 277, 206 N. W. 181 (1925); Fischer v. Langbein, 103 N. Y. 84, 8 N. E. 251 (1886); Reilly v. United States Fidelity & Guaranty Co., (C. C. A. 9th, 1926) 15 F. (2d) 314.

and the client himself is liable where the attorney acted under his instructions.[41]

It should be noted that this exception has a double aspect. In addition to civil liability, the attorney is also inviting disciplinary proceedings when he follows unlawful instructions, such instructions being no excuse for misconduct.[42] On the other hand, if the instructions are ones which he should have followed he also runs the risk of censure or discipline for failing to do so,[43] though to discipline an attorney for such a failure it would seem that his conduct must amount to gross neglect bordering on moral turpitude,[44] or there must be some false representation on the attorney's part that he is following instructions.[45]

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[41] See cases cited in 35 A. L. R. 657 (1925). Thus, a client employing an attorney to collect a debt is liable for false imprisonment of the debtor when the attorney acted under express instructions: Monson v. Rouse, 86 Mo. App. 97 (1900); Guilleaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141 (1883); Brooks v. Hodgkinson, 4 H. & N. 712, 157 Eng. Rep. 1021 (1859).

[42] See Straub, "Mistaken Zeal by an Attorney on Behalf of his Client," 30 Law Notes 227 (March 1927). See Ex parte Giberson, 4 Cranch (C. C.) 503, Fed. Cas. No. 5388 (1835); State Board of Examiners v. Lane, 93 Minn. 425, 101 N. W. 613 (1904).

[43] See cases in 69 A. L. R. 705 (1930).

[44] Marsh v. State Bar, 210 Cal. 303, 291 Pac. 583 (1930); People ex rel. Colorado Bar Ass'n v. Hillyer, 88 Colo. 428, 297 Pac. 1004 (1931). *Cf.* State v. Soderburg, (Wis. 1934) 255 N. W. 906.

[45] In re Rosenkrans, 84 N. J. Eq. 232, 94 Atl. 42 (1915); In re Maloney, 35 N. D. 1, 153 N. W. 385 (1915); In re Robinson, 163 App. Div. 844, 147 N. Y. S. 103 (1914).