Beating Breach of Fiduciary Duty Claims Against Lawyers at the Pleading Stage

The topic of breach of fiduciary duty by a lawyer was covered previously as part of a monograph, “The IDC Monograph, Legal Malpractice v. Breach of Fiduciary Duty: Determining the Proper Remedy,” Carter, A., IDC Quarterly, First Quarter 2007, Vol. 17, No. 1, pp. MII-1 – MII-8. This article takes another look at the subject, offers an update and some additional insights.

An attorney, who has the privilege of defending a fellow lawyer in a professional malpractice\(^1\) suit, usually finds that he or she must deal with a variety of theories pleaded in a multiple-count complaint. As with any other type of suit, simplifying the case by eliminating one or more of the plaintiff’s theories at the pleading stage can increase the chances of an ultimately successful defense, whether via a case-dispositive motion or a trial.

A former client’s complaint against his lawyer for professional malpractice can be couched in either contract or tort. *Collins v. Reynard*, 154 Ill. 2d 48, 50, 607 N.E.2d 1185 (1992); *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 270, 653 N.E.2d 915 (1st Dist. 1995); also see RESTATEMENT (THIRD) of the LAW GOVERNING LAWYERS, §§ 48 & 55.\(^2\) The former client is allowed to plead more than one theory in order to seek a recovery in the alternative, as provided by 735 ILCS 5/2-612. *Collins*, 154 Ill. 2d at 50; *Majumdar*, 274 Ill. App. 3d at 273.

Actions for breach of contract against an attorney must allege sufficient facts to indicate the terms of the contract, because those terms will determine the duty imposed and whether the attorney breached the duty. See *Majumdar*, 274 Ill. App. 3d at 270. A lawyer’s liability to a client for breach of contract is governed by general contract law. See RESTATEMENT (THIRD) of the LAW GOVERNING LAWYERS, § 55.

(Footnotes)
\(^1\) The term “legal malpractice” is sometimes used in court opinions or other legal authorities as encompassing all of the types of claims that a client might pursue against a lawyer, which arise out of the attorney-client relationship between the two. At other times the term is used to denote claims brought by clients against their lawyers for negligent legal work. When used herein, the term “legal malpractice” will refer to the latter type of claim. The term “professional malpractice” will be used to refer generally to all of the types of claims that a client might pursue against his lawyer, arising out of the legal representation of that client.

\(^2\) The Illinois Supreme Court has not adopted the entire RESTATEMENT (THIRD) of the LAW GOVERNING LAWYERS or any particular section of it. Nevertheless, several appellate court decisions and federal decisions under Illinois substantive law have cited various sections of it with approval. See, for example, *J.B. Esker & Sons, Inc. v. Cle-Pa’s Partnership*, 325 Ill. App. 3d 276, 286, 757 N.E.2d 1271 (5th Dist. 2001) (§ 36); *Colmar, Ltd. v. Fremantlemedia N. Am., Inc.*, 344 Ill. App. 3d 977, 986-987, 801 N.E.2d 1017 (1st Dist. 2003) (§ 3); *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 203, 872 N.E.2d 447 (1st Dist. 2007) (§ 53); *Hobley v. Burge*, 433 F.3d 946, 949-950 (7th Cir. 2006) (§§ 46 & 90); *Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 744 (7th Cir. 2004) (§§ 121 & 131).
To state a cause of action for legal malpractice, the plaintiff must plead that the defendant attorney owed the plaintiff a duty of care arising from an attorney-client relationship, a breach of that duty, and injury to the plaintiff as a proximate result of the breach. *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 199, 850 N.E.2d 183 (2006). Additionally, if the attorney’s representation involved the handling of litigation for the client, the plaintiff must prove that but for the attorney’s negligence, the client would have been successful in the underlying litigation. *Id.* at 200.

Because Illinois courts recognize that, as a matter of law, a fiduciary relationship exists between an attorney and his client (*In re Imming*, 131 Ill. 2d 239, 545 N.E.2d 715 (1989); *Doe v. Roe*, 289 Ill. App. 3d 116, 122, 681 N.E.2d 640 (1st Dist. 1997)), the former client can pursue a claim for breach of fiduciary duty against the lawyer, in addition to claims of negligence or breach of contract. *See Doe v. Roe; also see* RESTATEMENT (THIRD) of the LAW GOVERNING LAWYERS, § 49. A claim for breach of fiduciary duty generally “falls under the rubric of professional malpractice.” *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 351, 736 N.E.2d 145 (1st Dist. 2000). Nevertheless, a claim for breach of fiduciary duty is not a tort claim; rather, it is governed by the substantive law of agency, contract and equity. *Doe v. Roe*, 289 Ill. App. 3d at 128-29.

Even though a breach of fiduciary duty claim can, and usually does, involve a plea for money damages, decisions in two of the appellate districts in Illinois have found that there is no right to jury trial for a breach of fiduciary duty claim. *Bank One, N.A. v. Borse*, 351 Ill. App. 3d 482, 488-89, 812 N.E.2d 1021 (2nd Dist. 2004); *Prodromos v. Everen Securities, Inc.*, No. 1-06-3685, 2009 Ill. App. LEXIS 120 (1st Dist. March 20, 2009). (Neither appeal involved a breach of fiduciary duty claim against a lawyer; but there is no reason to think the result would be different had the fiduciary been a lawyer.)

To state a cause of action for breach of fiduciary duty, the plaintiff must allege the existence of a fiduciary duty, a breach of that duty, and injury to the plaintiff as a proximate result of the breach. *Neade v. Portes*, 193 Ill. 2d 433, 440, 444, 739 N.E.2d 496 (2000); *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 32, 801 N.E.2d 1103 (1st Dist. 2003). “The rules concerning causation, damages, and defenses that apply to lawyer negligence actions . . . also govern actions for breach of fiduciary duty.” RESTATEMENT (THIRD) of the LAW GOVERNING LAWYERS, § 49, Comment e.

The fiduciary duty that an attorney owes to a client is one of fidelity, honesty and good faith in the performance of his obligation to the client. *Id.* The fiduciary duty prohibits the attorney from placing his personal interests above those of his client in his professional dealings with the client. *Doe v. Roe*, 289 Ill. App. 3d at 122.

Together, sections 49 and 16 of the Restatement (Third) of the Law Governing Lawyers set out the parameters for a client’s breach of fiduciary duty claim against a lawyer.

In addition to the other possible bases for civil liability . . . , a lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty to the client set forth in § 16(3) and if that failure is a legal cause of injury within the meaning of § 54.

RESTATEMENT (THIRD) of the LAW GOVERNING LAWYERS, § 49.

To the extent consistent with the lawyer’s other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation:

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(3) comply with obligations concerning the client’s confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client. . . .

RESTATEMENT (THIRD) of the LAW GOVERNING LAWYERS, § 16.
At first blush, it might appear fairly easy for an unhappy client to plead and prove a cause of action against a lawyer for breach of fiduciary duty. Consider, for example, a hearing in a domestic relations matter involving division of marital property or a maintenance award, where the lawyer does not achieve the result the client had hoped to achieve. What if the unfavorable result came about because the lawyer negligently failed to file a motion or present an argument that should have been presented? The unhappy client might plead a cause of action for legal malpractice. But add this to the consideration. What if the lawyer has been a golf partner of, or otherwise associated socially with, the opposing lawyer? Would it not be fairly easy for the client to claim also that his or her lawyer lost the case because of a breach of fiduciary duty, i.e., out of a lack of fidelity to the client due to his association with the other lawyer?

Fortunately, pursuit of a breach of fiduciary duty claim is not that simple. While Illinois courts have recognized that a plaintiff can plead breach of fiduciary duty by an attorney as a cause of action separate and distinct from a cause of action for professional negligence or breach of contract, the courts also have recognized that not every alleged malpractice by an attorney amounts to a breach of fiduciary duty. *Calhoun v. Rane*, 234 Ill. App. 3d 90, 599 N.E.2d 1318 (1st Dist. 1992); *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill. App. 3d 784, 767 N.E.2d 470, (1st Dist. 2002).

As the court stated in *Metrick v. Chatz*, 266 Ill. App. 3d 649, 656, 639 N.E.2d 198 (1st Dist. 1994):

“Attorneys, like other professionals, are cursed with the mortal attribute of fallibility and at times they will make errors which render them liable to their clients for the resulting damages, but mere negligence is a far cry from a breach of fiduciary duty.”

When the allegations of legal malpractice in a complaint against an attorney are based on the same, or virtually identical, operative facts as are the allegations of breach of fiduciary duty in the complaint, the claim for breach of fiduciary duty is considered duplicative and should be dismissed. *Majumdar*, 274 Ill. App. 3d at 273-74; *Calhoun*, 234 Ill. App. 3d at 95; *Nettleton v. Stogdill*, No. 2-07-1215, ___ Ill. App. 3d __, 899 N.E.2d 1252, 1267 (2nd Dist. December 29, 2008); also see *Neade v. Portes*, 193 Ill. 2d at 440 (a suit involving allegations of medical malpractice and breach of fiduciary duty by a physician). In fact, Illinois courts have repeatedly dismissed breach of fiduciary duty claims against attorneys on the basis that they are duplicative of legal malpractice claims pleaded in the same action. *Brush v. Gilsdorf*, 335 Ill. App. 3d 356, 361, 783 N.E.2d 77 (3rd Dist. 2002).

Merely adding an allegation that the defendant attorney put his own interest ahead of the client’s, without more, will be insufficient for the plaintiff to avoid a dismissal of the breach of fiduciary duty count as duplicative in a multiple count complaint that also alleges a count of legal malpractice. *Nettleton v. Stogdill*, 2008 Ill. App. LEXIS 1326 at *36 (allegation that attorney put his interest ahead of client’s by scheduling a trial of another client’s suit, which conflicted with scheduling of the plaintiff’s trial, insufficient to avoid dismissal of breach of fiduciary claim as duplicative).

As one federal district judge has noted:

An attorney’s throwing one client to the wolves to save the other is malpractice, [citations omitted] whatever the plaintiff chooses to call it. [Citation omitted.] [The plaintiff] cannot be permitted, by recharacterizing the claim—whether by calling the conflict of interest a breach of fiduciary obligation or by contending that his contract with the law firm contained an implied promise not to commit such conflicts—[avoid having the claim be a legal malpractice claim]. That is the kind of formalist[ic] move that courts rightly reject.

*Parus Holdings, Inc. v. Banner & Witcoff, Ltd.*, 585 F. Supp. 2d 995, 1005-06 (bracketed material supplied by the court) (quoting *Hoagland, ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 744-45 (7th Cir. 2004)).

Similarly, adding a number of additional paragraphs to a count alleging breach of fiduciary duty by a former attorney will not avoid dismissal of that count as duplicative, if those additional paragraphs do not change the operative facts that form the basis of the legal malpractice count in the complaint. *Majumdar*, 274 Ill. App. 3d at 273-74.
Even allegations that the attorney “violated the professional conduct rules and thereby breached confidences and engaged in a conflict of interest” are not enough for a count alleging breach of fiduciary duty to survive a motion to dismiss on the basis that it is duplicative of a count alleging legal malpractice. *Parus Holdings*, 585 F. Supp. 2d at 1006.

Understanding that, as a matter of law, an attorney-client relationship imposes the obligations of a fiduciary on the attorney and that those obligations include fidelity, honesty, and good faith in dealings with and representation of a client, does any act short of absolute faithfulness, honesty or good faith subject the attorney to liability to the client for breach of fiduciary duty? Consider a few simple examples. An attorney, being strapped for time and faced with legal matters of multiple clients, all vying for his attention, works on a matter for one client when another client needs her matter attended to immediately. It seems that the client might have a reasonable argument that this is a breach of fiduciary duty on the basis of lack of fidelity. But based on *Nettleton*, such a claim would not survive a motion to dismiss if a claim of legal malpractice is also alleged.

What if a client, concerned about the progress of her legal matter, calls the lawyer’s office and, per the lawyer’s prior instruction, the lawyer’s assistant tells the client that the lawyer is in court, when the lawyer is actually on the golf course or at a gambling casino? This seems to be a breach of the fiduciary obligations of honesty and good faith. Such a communication certainly could raise concerns under Rules 1.3, 1.4(a) and 8.4(a)(4) of the Illinois Supreme Court Rules of Professional Conduct. Does that cause it to subject the lawyer to liability for breach of fiduciary duty? One might posit that the answer is “no,” because the client has not suffered any damages. This would be a valid point; because breach of a Rule of Professional Conduct without consequent damages to the client will not permit a claim for breach of fiduciary duty to stand. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d at 353.

But complicate the picture. What if the lawyer delays filing a personal injury suit for the client for a considerable period of time because of the lawyer’s attention to other legal matters or several trips to the golf course or casino? Assume that there is a pre-judgment interest statute in effect and the time when the client would have become eligible for the interest is delayed due to the postponed filing of the suit. Or assume a potentially more drastic circumstance—the suit does not get filed before the statute of limitations runs. It would appear that the client could allege a cause of action for breach of fiduciary duty: the existence of a fiduciary relationship, breach of the fiduciary duty, and damages proximately resulting from the breach. But if a claim of legal malpractice is alleged, would the additional claim of breach of fiduciary duty survive a motion to dismiss on the basis that it is duplicative of the legal malpractice claim? The operative facts would appear to be the same under either theory: through lawyer inattention, suit was not filed soon enough, thereby depriving the client of money from the opposing party.

So the question arises: What is it that distinguishes a claim for breach of fiduciary duty against an attorney from a claim of legal malpractice, such that the former will not be dismissed on the basis that it is duplicative of the latter? Looking at the question from the standpoint of an attorney defending one of these suits, the question is: What is it that counsel defending a lawyer in a multiple-count complaint can look for in support of a motion to dismiss a breach of fiduciary duty claim?

There is a paucity of reported decisions by Illinois courts, which instruct on what constitutes a claim for breach of fiduciary duty against an attorney, sufficiently pleaded to overcome a motion to dismiss. This probably arises from the fact that most reported decisions on the subject have resulted in dismissal of the breach of fiduciary duty claim as duplicative, but without explanation regarding what would make the claims not duplicative. See, for example, *Calhoun; Metrick; Majumdar; and Fabricare Equipment Credit Corp.*

One reported decision that recognized a properly pleaded breach of fiduciary duty claim against a lawyer is *Doe v. Roe*. However, there was no issue regarding duplicative counts in that case. The complaint at issue on appeal (the third amended complaint) pleaded only a single theory against the former attorney and his law firm. The third amended complaint alleged that the attorney breached his fiduciary duty to the plaintiff when he failed to seek reimbursement from the plaintiff’s former husband for her attorney’s fees in an action for dissolution of marriage. The third amended complaint further alleged that the attorney failed to seek the fees...
because the attorney was having an affair with the plaintiff and feared that if he filed a petition for reimbursement of the fees, the plaintiff’s former husband would bring out the affair and thereby personally embarrass the attorney and subject him to potential professional discipline. The trial court dismissed the third amended complaint for failure to allege a cause of action; but the appellate court reversed, finding that a proper cause of action for breach of fiduciary duty was pleaded.

Another case in which a breach of fiduciary duty claim against a lawyer was allowed to stand is Coughlin v. Serine, 154 Ill. App. 3d 510, 515, 507 N.E.2d 505 (1st Dist. 1987). In that case the plaintiff, an attorney, sued his former client for an unpaid “bonus” the client allegedly had agreed to pay the attorney in addition to hourly fees in connection with the attorney’s work on a contract matter for the client. The client filed a counterclaim, alleging multiple counts, including legal malpractice, breach of fiduciary duty and breach of contract. The trial court’s dismissal of these counts was reversed on appeal. With respect to the breach of fiduciary duty claim, the appellate court found the allegations that the attorney charged for unnecessary services and thereby unlawfully profited, overcharged fees, and sought a bonus that was not agreed upon, were sufficient to allege a cause of action.

In Neade v. Portes the Illinois Supreme Court discussed the difference between a professional negligence claim and a breach of fiduciary duty claim in considering whether physicians are subject to liability for breach of fiduciary duty in addition to liability for negligent medical care. In that case the court stated that “[a] fiduciary relationship imposes a general duty on the fiduciary to refrain from ‘seeking a selfish benefit during the relationship.’” 193 Ill. 2d at 440 (quoting Kurtz v. Solomon, 275 Ill. App. 3d 643, 651, 656 N.E.2d 184 (1st Dist. 1995)).

Is a “selfish” or unlawful benefit to the attorney at the expense of the client a sine qua non for a breach of fiduciary duty claim against the attorney to survive a motion to dismiss, when a count of legal malpractice is also pleaded? Neither the Illinois Supreme Court nor the appellate court has reached that conclusion thus far. It appears that this may be because no one has presented the issue to them.

Court decisions based on Illinois law in contexts other than attorney-client relationships support the proposition that an unlawful benefit to the fiduciary is a requirement for a valid breach of fiduciary duty claim. For example, in a shareholders’ derivative suit against a bank and its directors, in which the plaintiffs claimed breach of fiduciary duty, the appellate court stated:

The party asserting a fiduciary relationship and a breach thereof, “must also affirmatively show that [the defendant] was the dominant party and that it gained” from the transaction. (Brown v. Commercial National Bank (1968), 94 Ill. App. 2d 273, 279, 237 N.E.2d 567, aff’d (1969), 42 Ill. 2d 365, 247 N.E.2d 894, cert. denied (1969), 396 U.S. 961, 24 L. Ed. 2d 425, 90 S. Ct. 436.) This rule of law was applied in Karris v. Water Tower Trust & Savings Bank, 72 Ill. App. 3d 339, 389 N.E.2d 1359 (1st 1979) where it was determined the plaintiff failed to show that the bank directors profited from the transactions at issue.


Similarly, in a suit for breach of fiduciary duty brought by a beneficiary of a land trust against a bank and its directors, the United States Court of Appeals, Seventh Circuit, noted that “[i]n order to prove a breach of fiduciary duty [the plaintiff] must prove that [the bank] benefited from the breach.” Pommier v. Peoples Bank of Marycrest, 967 F.2d 1115, 1120, n. 4 (7th Cir. (Ill.) 1992).

The court in another breach of fiduciary duty suit against a bank reached the same conclusion. Resolution Trust Corp. v. Keefe, No. 92-3207, 1993 U.S. Dist. LEXIS 17701 (C.D. Ill. February 19, 1993). Despite reciting that the elements of a cause of action for breach of fiduciary duty consist of a fiduciary relationship, duty, breach and damages, the court noted that the plaintiff must also show that the dominant party (the fiduciary) gained from the transaction. Id. at *7 (citing Fields v. Sax, 123 Ill. App. 3d at 463).

Court decisions from other jurisdictions also offer support for the proposition that an allegation of unlawful “advantage” or “benefit” gained by the lawyer at the expense of the client is essential for a breach of fiduciary duty claim to avoid dismissal in the face of an additional count for legal malpractice.
The essence of a breach of fiduciary duty involves the “integrity and fidelity” of an attorney. [Citation removed.] A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client’s interests to his own, retaining the client’s funds, using the client’s confidences improperly, taking advantage of the client’s trust, engaging in self-dealing, or making misrepresentations.


Other state appellate court and federal district court decisions in Texas also have recognized the distinction between a legal negligence claim and a breach of fiduciary duty claim against an attorney by noting that the latter requires that the attorney benefited by improperly taking advantage of the relationship with the client. For example, recently a federal district judge in Texas noted the distinction between a breach of fiduciary duty claim and a legal malpractice claim against an attorney as follows: “Consequently, the focus in a breach-of-fiduciary-duty claim is ‘whether an attorney obtained an improper benefit from representing a client, while the focus of a legal malpractice claim is whether an attorney adequately represented a client.’” Archer v. The Medical Protective Company of Fort Wayne, Indiana, No. 2:03-CV-314-C, 2004 U.S. Dist. LEXIS 9770, at *15 (N.D. Tex. May 28, 2004). Also see, for example, Duerr v. Brown, 262 S.W.3d 63 (Tex. App. 2008); Nat’l Benevolent Protective Ass’n of the Christian Church (Disciples of Christ) v. Weil, Gotshal & Manges, L.L.P., No. SA-07-CV-00379, 2008 U.S. Dist. LEXIS 49084 (W.D. Tex. June 3, 2008); and Floyd v. Hefner, 556 F. Supp 2d 617 (S.D. Tex. 2008).

According to the Utah Appellate Court, professional malpractice actions based on breach of fiduciary duty “are grounded on the fundamental principle that attorneys must be completely loyal to their clients and must never use their position of trust to take advantage of client confidences for themselves or for other parties.” Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1290 (Utah App. 1996). This statement was repeated in Walter v. Stewart, 67 P.3d 1042, 1046 (Utah App. 2003).

Federal district court judges in Florida and New York reached similar conclusions. See, for example, Gomez v. Hawkins Concrete Construction Co., 623 F. Supp. 194, 199 (N.D. Fla. 1985) (“The test [for a breach of fiduciary duty claim] is whether the attorney has entered into a transaction with his client of advantage to himself.”); and Chateau Hip v. Gilhuly, No. 95 Civ. 10320, 1996 U.S. Dist. LEXIS 11055, at *17 (S.D.N.Y. August 1, 1996) (“A claim for breach of fiduciary duty against an attorney must allege that the attorney took advantage of or placed his interests above those of his client.”).

The Illinois appellate court decision in Doe v. Roe, although not a case involving the issue of duplicative counts, falls in line with these decisions from other jurisdictions in terms of what is a properly pleaded breach of fiduciary duty claim against an attorney. The plaintiff in that case alleged a set of circumstances whereby the attorney, by not pursuing attorneys fees from the other side for his client, placed his own interests ahead of his client’s and thereby gained an advantage or benefit for himself. The benefit or advantage to the attorney was not a direct monetary benefit; nevertheless, it was a benefit to the attorney (being able to avoid personal embarrassment and possible professional discipline) at the expense of the client. And the decision in Coughlin v. Serine, where multiple counts were pleaded and allowed to stand, presents a clear case of alleged unlawful benefits to the attorney (unearned fees, overcharged fees and an improperly claimed bonus for legal work).

One federal district judge has commented that “Illinois law . . . is clear that a distinct breach of fiduciary duty claim generally cannot be brought against an attorney by a client.” Parus Holdings, 585 F. Supp. 2d at 1005. As a practical matter, it is difficult to imagine a breach of fiduciary duty claim involving damages to the client but no improper benefit to the lawyer, which would not be duplicative of a legal malpractice claim against the lawyer. Perhaps this explains the paucity of decisions allowing breach of fiduciary duty claims against lawyers to proceed past the pleading stage.

When defending a fellow lawyer against a breach of fiduciary duty claim, due consideration should be given to a motion to dismiss. If multiple theories are alleged, consider moving to dismiss the breach of fiduciary duty claim on the basis of what it is duplicative of one or more other counts. Whether faced with a
single-count or multiple-count complaint that includes a claim of breach of fiduciary duty, consider a motion to dismiss on the basis that the plaintiff has not pleaded an unlawful benefit or advantage to the lawyer.

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