IADC COMMITTEE NEWSLETTER

PROFESSIONAL LIABILITY

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Defense attorneys defending professional malpractice actions of any variety should give serious consideration under appropriate facts to a stipulation to liability. The ability to offer an effective "apology" and to focus the jury on Plaintiff's inability to meet the burden of proof on damages very frequently outweighs the benefit of presenting questionable standard of care evidence. This article discusses this technique in-depth and its implications with case-specific hypotheticals.

Also in this issue, the American Bar Association recently issued a Formal Opinion as to the circumstances under which a lawyer is required to inform an existing client of a material error made in the client's representation.

Featured Articles

ABOUT THE COMMITTEE

The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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When Eating Crow is the Best Item on the Menu: Stipulating to Liability in Professional Liability Actions

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Attorneys defending professional liability matters frequently overlook and underutilize a defense tactic with great benefit to dilute the potency of a strong plaintiff case. This is a stipulation to the liability phase of the action. In the appropriate case, stipulating to liability allows the defendant to effectively "apologize" for making a mistake, focuses the jury on Plaintiff's inability to prove each and every element of the damages aspect of the case by the greater weight of the evidence, and may be used to highlight comparative fault or failure to mitigate on the part of plaintiff without any concomitant evidence of defendant's conduct clouding the jury's focus. Stipulating to liability in a "bad" liability case also greatly decreases the likelihood of a blockbuster plaintiff's verdict. Used appropriately and in the correct context, and explained effectively to a judge to prevent the introduction of harmful evidence, a liability stipulation can take the wind out of the sail of a plaintiff's case and significantly hold down an otherwise large verdict or settlement value.

This article discusses the context in which a liability stipulation is appropriate in professional liability cases using factual hypotheticals, discusses the benefits of this approach, discusses the implications and complexities of stipulating to liability, and discusses issues that should be addressed with judges and plaintiff's counsel relating to the stipulation of liability.

Any practitioner handling professional liability cases– whether the matter arises from a medical, dental, legal, design, or other professional matter– will come across a "bad" case soon and sure enough. This is the type of case that is indefensible; no expert, despite a search that may span all over the United States and internationally, will take the stand and testify your client acted in conformity with the governing standard of care; no causation expert will support your cause; all the professional literature suggests your client acted inconsistent with the standard of care; all the fact witnesses are lined up and ready to hammer your client; and, as if matters could not be worse, your client makes a poor witness and admits he or she made bad mistakes. If some or all of these factors are present, and if Plaintiff's counsel refuses to settle or values the case excessively high, one of the best moves the client can make is the liability stipulation. The liability stipulation allows the defendant to remove the issue of liability from the jury's consideration, apologize from the outset during jury *voir dire,* and focus the jury on the fact that a mistake was made for which an apology is offered, and focus on damages and Plaintiff's inability to meet the burden of proof on each and every element of damages.

Stipulating to liability is especially attractive when Plaintiff has a weak or relatively weak case on damages. Consider the hypothetical of a doctor that prescribes an excessive quantity of a high potency optical steroid to a young patient with a known history of glaucoma without monitoring intra-occular eye pressure in conformity with the required frequency, a violation of the required medical standard of care. Assume further for this hypothetical the "perfect plaintiff" for a dream damages argument to a jury- a married, working, women with a young family, whom is rendered virtually blind within a few years after initial treatment with the client. The client's conduct is indefensible from a standard of care and causation perspective. Assuming a defense attorney could find a standard of care or causation expert – a huge assumption – putting these types of experts on the stand would anger the jury significantly as their testimony would be against the much stronger and compelling evidence from Plaintiff's treating physicians and retained expert witnesses.

Fortunately, if the defense attorney is able to show Plaintiff's life care plan has major holes and Plaintiff has the capacity to work in some decreased capacity, the "sting" is removed from the client's standard of care violations and the case is a lot more palatable in front of a jury. In addition, under these hypothetical facts, a jury is much more inclined to be kind to a doctor come verdict time when the doctor has "fessed up" and admitted he or she made a mistake. Hence the stipulation of liability is much softer and allows defense attorneys to immediately apologize from the beginning and admit no professional is ever error free, that a mistake was made for which regret is offered, and that the client is trying to focus on whether plaintiff had met her burden of proof on all elements of damages.

Another hypothetical case in point is a design defect case situation. Consider a hypothetical plaintiff, a developer, suing a civil engineer for failure to obtain state

Department of Transportation approval for a slab bridge leading to an alleged massive delay claim. Assume further the client has never designed slab bridge and submits over ten submittals to the DOT for approval. The DOT turns each one down. Assume the client simply fails to follow step-by-step instructions in the DOT approved manual. Assume the client does not make a great witness, the DOT witnesses are strong, and the design defect is obvious to anyone reading the manual.

However, assume the damages case is very strong for the defense. The idea that purchasers are lined up to purchase parcels of development to build is a discovery a pipe dream for plaintiff, at best; zoning and annexing was not approved, no purchasers were even close to making an offer, and the design delay had no more connection to the alleged damages than the failure of the developer to find a buyer willing to build-out. Why not, under these facts, stipulate to liability? What's to lose? Better yet, how much is to be gained? A lot. Trying the case on liability would cloud the issues, confuse the jury from the outset, and cause the jury to form a jaundiced opinion of the defendant from the moment jury *voir dire* started, and cause defense counsel to try to force a round peg through a square hole from the outset, especially during the liability phase of the case. Under those facts, much is to be lost and little is to be gained, and the jury verdict could be higher if the hypothetical client refuses to stipulate to liability. This is a classic example of waving the white flag, stipulating to liability, and proving the lack of the delay claim.

Another hypothetical example would be the case of a pharmacist filling multiple prescriptions in spite of warnings on his system that the patient is a drug seeker and needs to be limited in obtaining opioids; the patient had multiple scrips after a few careful rounds of doctor-shopping. As with the other examples, trying to defend the pharmacist's clear violations of his own policies would be counter-productive in being unlikely to prevail and likely to anger a finder of fact. Fortunately, where the damage claims in a case like this involved the fees the patient incurred in defending a criminal action stemming from the sale of said opioids, the causation and damage defenses were so strong that stipulating to liability cost nothing in the context of the case. In a case like this, the plaintiff's own conduct provides a ready defense as well.

This is not the only arena where stipulating to liability can also be useful if the defendant does not believe it will win on negligence but wants to try the case solely on comparative fault or failure to mitigate damages. Stipulating to negligence completely removes the issue of defendant's conduct and focuses the jury on the Plaintiff's conduct, allowing the defendant to apologize from the outset for defendant's conduct and hone the jury on Plaintiff's conduct. Other variants of stipulations to liability exist and are likely jurisdiction dependent, such as stipulations to breaches of the standard of care but not causation; stipulations to negligence and gross negligence, but not contributory negligence or gross contributory negligence.

In the context of any stipulation to liability, defense counsel should make sure

appropriate motions *in limine* are filed at the outset of the trial and objections are renewed at the time Plaintiff's counsel tries to introduce any evidence of liability. Examples of Motions *In Limine* include motions under Federal Rules of Evidence 401-403 or their state counterparts barring the introduction of or witness or counsel reference to any facts relating to the liability aspects of the case, such as whether defendant complied with the standard of care or caused the damages at issue. A crafty plaintiff's counsel may resist an attempt on the part of defense counsel to stipulate to liability arguing that plaintiff should be entitled to prove its case. However, for purposes of judicial economy and to prevent unfair prejudice and inflaming the jury, most judges are going to allow the stipulation.

Stipulating to liability is not always the best route to follow, particularly in professional liability cases. Practitioners in this area know that these cases are often easier to defend because the often elusive "standard of care" is malleable and can, in many circumstances, require significantly less than the reasonable person standard required in an ordinary negligence claim; the law in many jurisdictions is favorable, if not forgiving to professionals, and this often puts plaintiff's in these cases behind the eight ball from the outset; and, juries are typically skeptical of claims against professionals. In addition, stipulations to liability, which by implication result in payment either by judgment on a jury verdict or by settlement, will most often result in mandatory-reporting to state disciplinary boards or in the case of medical professionals the National Practitioner Data Bank. However, when the ugly case comes in the door, as it will, defense practitioners ought to give some serious consideration to stipulating to all or some of Plaintiff's case-in-chief, which stops the music mid song in a big-value case.

A Lawyer's Duty to Inform a Client of Errors Made in Representation

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Under Rule 1.4 of the Model Rules of Professional Conduct a lawyer should "fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." The comments to Rule 1.4 further provide that a lawyer may not withhold information from a client to serve the lawyer's own objectives.

The American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 481 on April 17, 2018. The opinion explains the circumstances under which a lawyer is required to inform an existing client of a material error made in the client's representation.

An error is material where a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice the client or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

The opinion recognizes that determining whether an error is material may be difficult due to the fact that errors exist along a continuum. The opinion provides some general guidance with respect to determining when an error rises to the level

of a material error. Errors that effectively undermine the client's primary objective, such as where a lawyer fails to file suit before the statute of limitations runs or fails to time timely notice an appeal, are plainly material. Further, errors that will cause financial loss to the client or create a substantial delay in the case are likely to be considered material under most circumstances. At the other end of the spectrum, errors that are easily correctable with no risk of harm or prejudice to the client are not material, such as where a lawyer makes a non-substantive typographical error.

The opinion cautions that a lawyer's disclosure obligation is not defined by whether the error could create a colorable malpractice claim and encompasses errors that do not create a risk of professional liability for the lawyer. Even where the error does create a foreseeable risk of harm to the client, the error must still be disclosed if it would "cause a reasonable client to lose confidence in the lawyer's ability." The opinion does not precisely define the scope of a lawyer's disclosure obligations or provide bright-line rules for distinguishing between material and non-material errors. The opinion concludes that determining whether an error is material requires a case- and fact-specific inquiry.

Where the duty to disclose a material error arises, a lawyer must promptly consult with the client. A lawyer may attempt to remedy the error before informing the client, but the requirement of prompt disclosure still applies and the fact that remedying the error may require additional time does not excuse a lawyer's obligation to disclose the error promptly.

It should be noted that the disclosure obligation only applies to existing clients. There is no such obligation to former clients. The opinion distinguishes between former and existing clients in a common sense manner that is consistent with case law related to termination of the attorney-client relationship. Episodic clients who regularly hire the same lawyer when the need arises, but whose legal needs are not continuous, should likely be treated as an existing client under most circumstances. The opinion provides, however, that whether an episodic client is a current or former client will ultimately depend on the facts of the case.

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