PLAN
PROFESSIONAL LIABILITY
ATTORNEY NETWORK

Professional Liability Attorney Network Regional Meeting
Kansas City
March 12, 2015

LAWYER LIABILITY:
RECENT TRENDS AND DEFENSE STRATEGIES

Duty Related Issues

- Privity
  - Common Law Privity Defense: well-recognized and traditional malpractice defense
  - Traditional rule that an attorney owes a duty of care only to his or her client once served as a bedrock defense available to attorneys in suits brought by third parties in both contract and tort actions
  - *Nation Savings Bank v. Ward*, 100 U.S. 195 (1879)

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Erosion of the Privity Defense

- Many courts have relaxed the strict privity requirement in certain circumstances
- Six factors to consider in determining whether a duty was owed to the third party:
  1. The extent to which the transaction was intended to affect the plaintiff
  2. The foreseeability of harm to the plaintiff
  3. The degree of certainty that the plaintiff suffered injury
  4. The closeness of the connection between the defendant's conduct and the injury suffered
  5. The moral blame attached to the defendant's conduct; and
  6. The policy of preventing future harm.

Examples of relaxed privity

- Third party beneficiaries in estate planning
  - A majority of jurisdictions in the United States have abandoned the long-standing privity requirement for legal malpractice claims and now allow third-party intended beneficiaries to bring legal malpractice lawsuits against estate planning attorneys for negligence in will-drafting when the negligence frustrates the client's intent.
- Inter vivos transfers
- Wrongful Death beneficiaries
- Domestic relations
- Mortgage transactions

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Assignment to Non-clients

- Majority of courts reject assignability of legal malpractice claims
  - *Cook v. Nationwide Insurance Co*., F. Supp. 2d 807 (D. Md. 2013): If claims were assignable, attorney defendant may be forced to violate A-C privilege by disclosing confidential information to defend the malpractice claim.
- Minority of courts allow the assignment of legal malpractice claims under limited circumstances
  - *Villanueva v. First American Title Ins. Co*., 313 Ga. App. 164 (2011): No *per se* bar to assignment of legal malpractice claims finding when claim is involving financial loss and not based on fraud or personal tort.

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

- Legal malpractice claims are not assignable to an adversary in litigation or proceeding
  - *Kenco Enterprises Northwest, LLC v. Wiese, et al.*, 172 Wash. App. 607 (2013): Claim is not assignable where assignments between adversaries could give rise to potential conflicts of interest that would harm the legal profession.
- Trend towards allowing assignment in context of commercial transactions
  - *White Mountains Reins. Co. of Am. v. Borton Petrini, LLP*, 221 Cal. App. 4th 890 (2013): An assignment that is a small, incidental part of a larger commercial transaction between insurance companies is allowable.

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Breach Related Issues

- Experts necessary to establish breach?
  - Plaintiff must generally present expert testimony to establish
    - the applicable professional standard of care owed to client and;
    - that attorney's conduct breached that standard of care and caused the injury the plaintiff alleges
- Legal malpractice experts usually must refrain from testifying on the merits of the underlying case
  - *Labair v. Carey*, 367 Mont. 453 (2012): Expert cannot testify on the merits of the underlying medical malpractice case where testimony extends to the medical issues or viability of underlying claims.

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

When is expert testimony unnecessary?

- Common knowledge exception
  - Where an attorney's breach of duties to client are so obvious and egregious, plaintiff need not present expert testimony at trial to establish standard of care and breach thereof.
- When is Common Knowledge Exception is Triggered?
  - Neglecting to file important court documents
  - Neglecting to communicate with client
  - Neglecting to follow client's instructions

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Qualifications for Expert Witness

- Attorney must generally possess special knowledge beyond that exhibited by every attorney
- Generally low standard for qualification of experts in legal malpractice claims
  - *First Union Nat'l Bank v. Benham*: Court did not even address Daubert factors, only considered expert's experience/bases of his opinions
- Some courts require more explicit showing…
  - *Lifemark Hospitals, Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.*, 1999 WL 33579253 (E.D. La. Sept. 21, 1999).
- Attorneys should avoid hiring experts whose experience is primarily academic
  - *Hooper v. Gill*, 79 Md. App. 437 (1990): trial court struck the testimony of the plaintiff's legal expert because the expert testified that his "expertise" lay in the area of the Code of Professional Responsibility and not in the area of the civil standard of care.

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Recent Trends – Meeting Discovery Obligations

- Duty to preserve documents
  - Party to civil litigation has duty to preserve relevant information when the party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation
  - Duty to preserve information for discovery is generally triggered when a party reasonably anticipates litigation
    - Typically parties receive litigation holds

PLAN
PROFESSIONAL LIABILITY
ATTORNEY NETWORK

Electronic Discovery- What must be preserved?

- Because a majority of information is electronically stored now, the process of successfully preserving electronically stored information is daunting and exposes attorneys to liability risks
- When determining the scope of your duty to preserve, follow these steps:
  - Identify the who
  - Identify the what
  - Identify the where
  - Put in place a litigation hold
- Duty to prevent spoliation of documents
  - Attorneys have duty to prevent spoliation of electronic data

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Sanctions for failure to preserve documents

- *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 803 F. Supp. 2d 469 (E.D. Va. 2011): plaintiff moved for sanctions, alleging and proving that the defendant organization deliberately deleted relevant electronic documents. The court found that defendant violated its duty to preserve documents and materials relevant to litigation or pending litigations and awarded sanctions, including attorneys' fees, expenses and costs related to the motions, and an adverse inference instruction to the jury

- *Lester v. Allied Concrete Company*, 80 Va. Cir. 454 (2010): judge sanctioned plaintiff and plaintiff's attorney $700,000+ for hiding and destroying social media evidence.

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Production of Documents

- Failure to produce all relevant electronically stored documents can result in severe sanctions
  - *Brown v. Tellermate*, 2014 WL 2987051 (S.D. Ohio July 1, 2014): The court held that defendants failed to properly identify, preserve, and produce the subject data which would have been important to the case, and issued severe sanctions, including the preclusion of defendant's strongest defense strategy
- In order to avoid such sanctions, attorneys and clients must ensure that they understand the intricacies of their electronic data systems at the outset of discovery

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

- Inadvertent disclosures and FRE 502(d) agreements
  - Inadvertent disclosures of electronically stored information may result in waiver of the attorney-client privilege and attorney work-product doctrine
  - Federal Rule of Evidence 502 governs these inadvertent disclosures and provide safeguards and remedies for parties that fall victim to such inadvertent disclosures

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

- FRE 502(b) authorizes a court to order that a party who inadvertently disclosed privileged material may "clawback" privileged materials if 3 elements are met:
  - The disclosure is inadvertent
  - The holder of the privilege or protection took reasonable steps to prevent disclosure
  - The holder promptly took reasonable steps to rectify the error
- FRE 502(b) "clawback" provision does not always save parties in the event of inadvertent disclosures
  - *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, 271 F.R.D. 125 (S.D.W.Va.2010): plaintiff that inadvertently produced 980 privileged communications unable to clawback a smoking gun privileged document despite having implemented screening mechanisms, an agreement for returning inadvertently produced documents, and prompt notice of recall of the document.

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

FRE 502(d) Agreements

- FRE 502(d) gives attorneys/parties the option to enter into an agreement, prior to the start of discovery, whereby they stipulate what happens in cases of inadvertent disclosure.
- Most underused, yet most effective way to protect against inadvertent privilege waivers because:
  - Attorneys and clients do not need to look at how careful they were during the privilege screening process
  - Any disclosure constitute a waiver in your current case or in future cases involving the same parties in federal or state court
  - Attorneys and clients can clawback any inadvertently disclosed documents irrespective of the care taken by the party in reviewing them prior to production

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

- Rule 502(d) agreements proven effective in recent cases:
  - *Chevron Corp. v. The Weinberg Group*, 286 F.R.D. 95 (D.D.C. 2012: court entered a Rule 502(d) order allowing the defendant to knowingly produce privileged materials without waiving any privileges regarding the subject matter of the documents in any proceedings
  - *Rajala v. McGuire Woods, LLP*, 2013 WL 50200 (D. Kan. Jan. 3, 2013): court held that an inadvertently produced document did not waive privilege and could be clawed back by the producing party because the court had entered a Rule 502(d) order before the disclosure

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Causation Related Issues

- What is the standard for proving causation?
  - Most courts apply the "case within a case" analysis
    - *Labair v. Carey*, 367 Mont. 453 (2012): in legal malpractice suit arising from a SOL issue in the underlying case, court held that the client must use the case-within-a-case procedure to show that it was more likely than not that client would have recovered in the underlying case
  - Some courts do not apply "case-within-a-case" doctrine
    - *Crist v. Lovacono*, 2011 WL 1498366 (Miss. April 21, 2011): prematurely settling of case in order to maximize their fees, the clients were not required to prove they would have prevailed if the underlying cases had been tried
  - Hybrid Standards (burden shifting)
    - *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart & Kolas*, 408 F. Supp. 2d 59, 61 (D. Mass. 2006): Burden should shift to attorney to disprove causation," and "since the client ha[d] no obligation to prove the case at trial, he should not have to in a malpractice claim."

Transactional Cases

- Majority of courts apply a quasi "case-within-a-case" analysis/rationale in transactional malpractice cases
  - *Viner v. Sweet*, 70 P.3d 1046 (Cal. 2013):
    - Plaintiffs in transactional malpractice action, had to show that but for alleged malpractice of attorney and firm who represented them in sale of the company, it was more likely than not that they would have obtained a more favorable result.
- Some courts have not adopted this approach:
  - Nicolet v. Lindquist, 34 F.3d 453 (7th Cir. 1994).
    - "[A]ll a plaintiff must show is that to a rational trier of fact, confronted with evidence, the plaintiff suffered some harm as a consequence of a law firm's negligence."

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Damages Related Issues

- Expert required to establish damages?
  - Depends on speculative or complicated nature of damages claimed
- Where case-within-case doctrine is applied, and expert required in underlying case, expert will likewise be required in legal malpractice case
- Where damages are too speculative, even with expert testimony, damages will not be awarded.

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Affirmative Defense Issues

- Comparative fault
  - Nearly all courts (Wyoming is the primary exception) that have considered the defense have held, either directly or implicitly, that the defense is available in a legal malpractice action.
    - *Marion Partners v. Weatherspoon & Voltz*, 215 N.C. App. 357 (2011) (contributory negligence applied because plaintiff had a separate duty to ascertain the contents of the contract he was signing)
    - *But see Whitney v. Hunt-Scanlon*, 106 A.D.3d 671, 967 N.Y.S.2d 21 (1st Dep't App. 2013) (To permit an affirmative defense of comparative negligence in a legal malpractice case, there must be a showing that the client did or did not do something that hindered the law firm from performing its duties toward its client)

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

Statute of limitations

- Discovery Rule:
  - Statute of limitations for an action for legal malpractice accrues at the time the client discovers, or through the use of reasonable diligence should have discovered, the negligent act of the attorney (often, SOL tolls while attorney-client relationship is still intact).
- Occurrence Rule (Majority Rule):
  - Cause of action based on attorney negligence occurs when the attorney negligence occurs, not when it is discovered.

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

In pari delicto defense

- *in pari delicto* defense is available if plaintiff is a voluntary participant in the unlawful activity that is the subject of the malpractice claim
- Defense can apply based on actions of an agent of the actual client

- Exceptions to the Defense
  - Where wrongful acts by client brought about by oppression, imposition of hardship, undue influence, or due to great inequality in condition or age between client and lawyer.

PLAN
PROFESSIONAL LIABILITY ATTORNEY NETWORK

THE END

Thank you for your attention.

PLAN
PROFESSIONAL LIABILITY
ATTORNEY NETWORK