The Practical Practice

Considerations for Pre-Suit Resolution of Professional Liability Claims

By Ryan D. Bolick

We all want to do what we can to help a professional client avoid a lawsuit and maintain the client's reputation.

This article will discuss creative ways to handle claims to avoid a public lawsuit and protect the professional client's reputation. All of these suggestions arise from my experiences. My firm has implemented these actions and will offer some specific examples that we think will prove useful. Hopefully, some of the techniques will be new to you and will help you in the future.

Generally, as you are all aware, much of claims handling involves assessing information and risk. This article will focus on the initial investigation, during which creativity and imagination may help uncover information that would either help avoid a lawsuit entirely or resolve the lawsuit for a reasonable amount. Sometimes, you may even be able to avoid a complaint to the applicable licensure board if you are able to convince the claimant that no cause of action exists, or if you are able to resolve the issue quickly to the satisfaction of the claimant.

Claim and Law Investigation

Because all of us deal with multiple claims each day, we likely get into the habit of assuming that an asserted claim is valid. If we are not careful to look at every case with a renewed sense of urgency and consideration for our insured or client, we may miss an opportunity to avoid the lawsuit entirely. So, the first step is to investigate the nature or the claim and the law thoroughly. The following questions may be useful for you to consider each time you receive a new file:

- Is the claimant a client of the insured?
- Is a duty owed to the claimant by your insured/client?
- Is there a compelling argument that the insured/client did not breach any duty owed to the claimant?
- Is there a compelling argument that even if there was a duty, and a breach of that duty, such was still not a proximate cause of any loss?
- Is there a compelling argument that even if there was a duty and a breach of that duty, there are no damages?

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- Is there a statute of limitations issue?
- Do I have a copy of the engagement agreement?
- Are other parties partially or fully responsible for this claim?
- Has an administrative or licensure agency made a determination regarding the claimant's complaint?
- Is there any other documentation that I need to evaluate whether the liability or damages have actually accrued?

The most effective and efficient defense counsel develop the case early on, rather than simply reacting to the plaintiff's moves. In many cases, even if the initial efforts of counsel do not avoid a lawsuit, many times systematically assessing information and risk will result in a successful dismissal of the case, either based on a motion to dismiss or a motion for summary judgment.

Key Witness Affidavits

In addition to asking yourself the questions listed immediately above, you'll want to ask, would affidavits of key witnesses assist? Establishing a reputable expert-witness opinion regarding the standard of care may be helpful in convincing a claimant that his or her case is not as strong as the claimant may think. However, sometimes obtaining and presenting affidavits of persons involved in the underlying claim will also assist in changing the claimant's view of his or her case.

Affidavit Case Studies

First, in one case, a claim of professional negligence and misrepresentation against a real estate agent was avoided when an affidavit of the closing attorney revealed that the easements, of which the claimant alleged he was not aware, stated that the closing attorney had answered his question about the easements and that the claimant decided to move forward with full knowledge of the easements.

Second, in a legal malpractice case where the attorney was terminated from the defense of one co-defendant, and a claim was made prior to the end of the underlying litigation, an attorney obtained affidavits of similarly situated co-defendants' attorneys, stating that they did not believe that the terminated attorney had breached any standard of care during the representation. The result was that no case was ever filed against the terminated attorney or that attorney's firm.

Third, in a case involving a claim against a design professional, retaining an independent third-party consultant to review project documents and contracts, attend a site inspection, and provide an opinion regarding the design professional's standard of care resulted in no claim against the design professional.

Licensing Board Determinations

Next, you will want to find out if a licensing board has made a licensure or disciplinary decision about your issue that may assist in resolving the malpractice claim. Although the decision of a licensing board may not be admissible at a trial, determining whether the insured/client has already defended an ethical or licensure complaint could be important. This is especially the case when the licensing board has determined that the insured/client committed no violation of the ethical or licensure board rules. To what extent do the determinations of licensing boards affect your strategy and evaluation? It will depend on the profession and jurisdiction.

For example, with regard to attorneys, the Model Rules of Professional Conduct that have been adopted by many states, have addressed this issue:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

Preamble & Scope, Model Rules of Prof'l Conduct (2019).

As for failing to adhere to licensing board rules generally, it does not appear that any states have adopted a bright-line rule. For example, both the North Carolina Board of Dental Examiners and the North Carolina Real Estate Commission have adopted "negligence" as the approach for a violation of those state rules.

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Without any statutory or common law guidance permitting admission as evidence, there is an argument that such a licensing board rule-violation determination should not be admissible because the rules and authority of licensing boards come from statutory law. Licensing boards are not juries: they do not have the ability to determine and enter judgments for damages. Defense counsel would argue that to admit a licensing board rule-violation determination would deprive the professional of a jury trial on the issue. Defense

counsel would also argue that such a determination would not be relevant to the issue of a breach of the standard of care, unless the licensing agency could somehow show that it applied the same standard as the pattern jury instructions in determining whether professional negligence (or some other claim) occurred. Certainly, there is a policy argument that consistency in these determinations is necessary. Allowing evidence of a violation based on a potentially different standard is patently unfair, and even if such a determination were relevant, it would be potentially unduly prejudicial under Federal Rule of Evidence 404.

A well-drafted engagement agreement may assist you in arguing that the claims being asserted are not within the scope of your professional's engagement.

New York courts have specifically addressed the admissibility of a licensing board rule-violation determination with regard to physicians. These opinions provide examples of valuable arguments for limiting evidence of a licensing board's determinations.

In *Stevenson v. Goomar*, 148 A.D.2d 217, 544 N.Y.S.2d 690 (N.Y. App. Div. 1989), and *Sanchez v. Orozco*, 178 A.D.2d 391, 578 N.Y.S.2d 145 (N.Y. App. Div. 1991), the courts refused to apply collateral estoppel to the decisions of the Office of Professional Medical Conduct (OPMC) and held that a finding of professional misconduct is merely evidence of negligence. Even though the parties had full ability to challenge the findings before the OPMC, the court determined that fundamental fairness would not allow these determinations to be conclusive in a civil suit for malpractice.

However, based on statutory authority, New York courts have held that findings of fact determined by the New York State Department of Health are admissible in civil proceedings:

> Plaintiff points to Public Health Law §10(2), providing in effect that the "written reports" of Department of Health investigations "shall be presumptive evidence of the facts so stated therein, and shall be received as such in all courts and places." The Court will assume that, if otherwise properly rendered admissible as evidence (*see* CPLR 4540), had the Hearing Committee and ARB [Administrative Review Board for Professional Medical Conduct] written determinations here concerned Dr. Ho's treatment of Plaintiff, the findings of fact contained therein, but not the opinions or conclusions of law, would be admissible as presumptive evidence of those facts.

Cipriano v. Ho, 29 Misc. 3d 952, 958, 908 N.Y.S.2d 552, 556–57 (N.Y. Sup. Ct. 2010) (citations omitted).

Given these examples, it is important to know whether and to what extent a licensing board's investigation or determination regarding the claim may be used in your civil lawsuit.

Insurance professionals and defense lawyers would argue that a professional should be able to present evidence of an acquittal of alleged rules violations by a licensing board. The argument would be most effective if the professional could show that the rules or standards adjudicated by the board were the same as those presented in the claim for damages. Even if a court rejected the argument that the determination could be used as trial evidence, you could present this information to your expert to use in forming his or her opinions. Similarly, we would likely do all that we could to prohibit the introduction of determinations adverse to our client using some of the suggestions mentioned above.

Engagement Agreements

You will also want to find out if your professional had an engagement agreement, and if so, will it affect the right of the claimant to file suit?

Mediation Requirements in Engagement Agreements

The increasing trend of including a mediation requirement in engagement agreements may assist you in avoiding lawsuits. In this circumstance you will at least have the opportunity to resolve the matter prior to filing suit.

The Engagement Agreement Scope

A well-drafted engagement agreement may assist you in arguing that the claims being asserted are not within the scope of your professional's engagement. This is especially the case with claims of omission. An agreement that clearly defines the engagement may be your ticket to eliminating the claim. You could miss such an opportunity if you fail to review the engagement agreement of your client.

Exculpatory Contracts

Although strictly construed, most courts allow parties to limit their liability by agreement in contracts. You will want to know both the common law and statutory approach in the relevant jurisdiction. With so many views regarding the enforceability of exculpatory contracts, there is a reasonable chance that when you represent an insured professional, the insured will have such a clause in his or her engagement agreement or contract for service. And the views vary greatly among jurisdictions. On the other hand, exculpatory contracts could be prohibited by the ethical rules of the state board regulating a specific profession. Make sure that you look for such a clause in your client's engagement agreement or contract for services, and then find out if it is enforceable.

Common Law on Exculpatory Contracts

When one of the parties is a "professional" the limitation-of-liability-by-agreement analysis may involve evaluating the public interest, or public policy, which ultimately may hold such limitations of liability unenforceable. Still, there are instances where exculpatory contracts will limit the liability of the professional, and therefore, it is worthwhile to review the general analysis that courts use to determine their enforceability.

> Under the Restatement Second, Contracts, a term exempting a party from tort liability for harm caused **negligently** is unenforceable on the grounds of public policy if: (a) the term exempts an employer from liability to an employee

for injury in the course of his or her employment; (b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty; or (c) the other party is similarly a member of a class protected against the class to which the first party belongs. The Restatement also contains provisions pertaining to the enforceability, under public policy analyses, of a term exempting a party from tort liability for harm caused intentionally or recklessly, and of a term unreasonably exempting a party from the legal consequences of a misrearticle.

As the restatement suggests, exculpatory clauses are analyzed on principles of contract law and on public policy grounds. In determining whether an exculpatory clause violates public policy, a court will consider (1) whether there was a disparity in bargaining power between the parties and (2) the types of services being offered or provided, taking into consideration whether they are public or essential services.

17A Am. Jur. 2d Contracts §280 (emphasis added) (notes omitted).

The public or essential services and public policy arguments are generally the same arguments with different names. These are the arguments made against the enforceability of exculpatory contracts with "professionals."

State courts hold many varying views on what constitutes a violation of public policy, or more specifically, whether the actions to be performed are "public services." Most states have not attempted to identify specific factors, establish a definition, or articulate a test to determine whether exculpatory contracts for services are unenforceable on public policy grounds.

Some courts have attempted to identify a standard by which to determine whether public policy would not permit enforcing exculpatory contracts for contracted services. California identified the following factors, and for a while, it appears that Maryland followed suit:

Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Winterstein v. Wilcom, 16 Md. App. 130, 137, 293 A.2d 821, 825, *cert. denied*, 266 Md. 744 (1972) (quoting *Tunkl v. Regents of the Univ. of Calif.,* 60 Cal.2d 98–101, 383 P.2d 445-46, 32 Cal. Rptr. 33, 37–38 (1963) (footnotes omitted)). The *Tunkl* factors, as they are known, are the minority approach. In addition to California, four other states have adopted the *Tunkl* analysis. *See Morgan v. S. Cent. Bell Tel. Co.*, 466 So.2d 107, 117 (Ala. 1985); *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 62 Cal. Rptr.3d 527, 161 P.3d 1095, 1099–1102 (2007); *Bodyslimmer, Inc. v. Sanford*, 197 Ga. App. 565, 398 S.E.2d 840, 841 (1990); *Glassford v. BrickKicker*, 191 Vt. 1, 35 A.3d 1044, 1050 (2011); *Vodopest v. MacGregor*, 128 Wash.2d 840, 913 P.2d 779, 786 (1996).

Multiple other states have relied on some of the factors in *Tunkl* without adopting its standard. *See Copeland v. Healthsouth/ Methodist Rehab. Hosp., LP*, 565 S.W.3d 260, 273 (Tenn. 2018).

Later, Maryland adopted the "totality of the circumstances" test to determine if the services involved were such that an exculpatory contract should not be enforced. *Wolf v. Ford*, 335 Md. 525, 533, 644 A.2d 522, 526 (1994) (holding that an exculpatory contract with an investment broker was enforceable). Other states have also rejected the *Tunkl* factors. In fact, most states, even if they do not follow the *Tunkl* factors, now consider and analyze the public policy and public service issues on a case-by-case basis and under the totality of the circumstances. *Hanks v. Powder Ridge Rest. Corp.*, 276 Conn. 314, 885 A.2d 734, 744 (2005) (citations omitted) (agreeing with the Maryland and Vermont Supreme Courts that the public interest must be determined based on the totality of the circumstances and that the analysis, guided but not limited by *Tunkl*, "is informed by any other factors that may be relevant given the factual circumstances of the case and current societal expectations"); *Williston* §19:22.

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Tennessee initially determined that exculpatory contracts for all "professionals" who are licensed are against public policy and are therefore prohibited. *Olson v. Molzen*, 558 S.W. 2d. 429 (Tenn. 1977) (stating, "A professional person should not be permitted to hide behind the protective shield of an exculpatory contract and insist that he is not answerable for his own negligence. We do not approve the procurement of a license to commit negligence in professional practice."). However, Tennessee also backed off this determination and adopted the totality of the circumstances test with three specific factors to consider. *Copeland v. Healthsouth/Methodist Rehab. Hosp., LP*, 565 S.W.3d 260, 274 (Tenn. 2018). Importantly, the court in *Copeland v. Healthsouth* held that "there is no 'professional services criterion' that restricts application of this analysis to contracts for professional services."

Some states statutorily prohibit design professionals from limiting their liability through contract.

North Carolina is in the majority of states that weigh the substantial public interest on a case-by-case basis. *Hyatt v. Mini Storage on Green*, 763 S.E.2d 166 (N.C. Ct. App. 2014) (holding that contracts that exculpate persons from liability for negligence will be enforced unless the contract violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest). No specific definition or test is applied by the North Carolina courts to make this determination. Given the status of the common law in North Carolina, it is known that the courts do not believe that an accountant or real estate agent limiting their liability in an agreement with a client "is contrary to a substantial public interest." *Provectus Biopharmaceuticals, Inc., v. RSM US LLP f/k/a McGladrey, LLP*, 2018 WL 4700371 (N.C. Super. 2018). *See* N.C. Real Estate Comm'n Form Listing Agreement & Buyers Agency Agreement ex. A & B (limiting the liability of a realtor in a dual agency situation to breaches of the North Carolina real estate licensure law and/or intentional wrongful conduct).

Still other states have held contracts that limit a design professional's liability to be enforceable, and those courts focus on the bargaining power of the individuals. *See Markborough California, Inc. v. Superior Court,* 227 Cal. App. 3d 705, 277 Cal. Rptr. 919 (4th Dist. 1991). The Third Circuit, applying Pennsylvania law also distinguished a design professional's relationship with his or her clients from those of other professionals to justify the enforcement of a limitation of liability:

> We have already noted that the contract before us does not relieve Sullivan of all liability for malpractice. In addition, this contract does not involve an agreement between a professional and an unsuspecting consumer. Nor does it involve an agreement between a client and attorney, or a patient and physician. Such contracts involve fiduciary relationships that are given special protection even to the extent of affording certain communications between such parties a testimonial privilege.

Valhal Corp. v. Sullivan Associates, Inc., 44 F.3d 195, 205–06 (3d Cir. 1995).

Statutes on Exculpatory Contracts

Some states statutorily prohibit design professionals from limiting their liability through contract. Virginia, for instance, has enacted a statute specifically prohibiting exculpatory contracts for design professionals:

> No such organization [practicing architecture, engineering, land surveying, or landscape architecture or offering of the title of certified interior designer] shall limit the liability of any licensee or certificate holder for damages arising from his acts or limit such corporation, partnership, sole proprietorship, limited liability company, or other entity from liability for acts of its employees or agents.

Va. Code Ann. §54.1-411.A.

Similarly, North Carolina has enacted a statute, effective in August of 2019, which also makes exculpatory clauses in contracts with design professionals invalid:

> Provisions in, or in connection with, a construction agreement or design professional agreement purporting to require a promisor to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy, void and unenforceable. Nothing contained in this subsection shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees.

N.C. Gen. Stat. §22B-1(a).

Ethical Rules on Exculpatory Contracts

As mentioned, also be mindful that an exculpatory contract could be prohibited by the ethical rules of the state board regulating a particular profession. For instance, the Model Rules of Professional Conduct prohibit such a contract:

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

Model Rules of Prof'l Conduct R. 1.8 (Current Clients: Specific Rules).

Tolling Agreements

Often, it is unclear whether a potentially tortious action or inaction by a professional will result in damages. In those situations, a tolling agreement may be useful. The question is, when would a tolling agreement be helpful?

Tolling Agreement Case Studies

In the first case to be discussed, the claimant alleged legal malpractice against his or her defense counsel after the plaintiff obtained summary judgment. After a review of the trial court's order, the transcript of the hearing, and the law, the insurer and its counsel determined that there was an excellent chance that the decision of the trial court would be overturned. The insurer and its counsel entered into a tolling agreement, and the issue then became, was the claimant responsible to pursue the appeal? This article will address that contingency in more detail the "What About Claims Repair?" section below.

Second, in situations involving numerous potential parties that may be implicated in a faulty project, such a condo project, and involving voluminous project documents, a tolling agreement may be helpful in holding off a claim.

What About Claims Repair?

Claims repair is likely most useful when dealing with attorney malpractice because the underlying suit may still be going on or the mistake may be rectified by motion (Federal Rule of Civil Procedure 60) or some other means. If malpractice is discovered by the insured counsel, and he or she brings it to the attention of the carrier, then there are several issues to consider before acting.

First, the attorney must inform his or her client of the facts and circumstances of the issue the attorney believes may have created a conflict or may represent a malpractice claim. However, due to the conflict of interest that has likely been created in such a situation, the attorney should be careful not to characterize those facts and circumstances as malpractice:

(a) A lawyer shall:
  (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;…
  (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Model Rules of Prof'l Conduct R. 1.4.

Second, is the attorney required to withdraw, or should the attorney withdraw even if it isn't required? To make those decisions, the attorney will need to answer additional questions. Model Rule of Professional Conduct 1.7 is instructive:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  (1) the representation of one client will be directly adverse to another client; or….
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  (2) the representation is not prohibited by law;
  (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  (4) each affected client gives informed consent, confirmed in writing.

Model Rules of Prof'l Conduct R. 1.7. Based on the rule, as you see, the lawyer will need to answer additional questions:

- Is this a waivable conflict? Should the lawyer continue representing the client when a potential issue that can implicate the lawyer arises?
- When and how should the lawyer discuss with the client that a malpractice may have occurred?
- How does delaying termination of the relationship affect the claim?
- Is the claim ripe? It would not be if the damages were not yet suffered. *Farm CreditBank of St. Louis v. Gamble* 554 N.E.2nd 779 (Ill. App. Ct. 1990).

If the lawyer decides that he or she is able to continue the representation, there are other practical considerations and pitfalls. Can the lawyer exacerbate the damages? Or limit them? If the lawyer continues to represent the client, in what form should that take place? In a joint representation? After making disclosures? Mishandling the potential conflict can create further exposure. Is there a risk for increased damages?

If the lawyer obtains consent from the client to continue, is the lawyer admitting fault? Can this result in denial of coverage for the lawyer by his or her insurer?

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Claims repair is particularly useful in legal malpractice claims where the malpractice allegation has not yet been asserted or damages have not yet accrued. Potentially, the attorney's carrier may decide to hire counsel to assist the insured attorney.

Conclusion

Certain information and risk evaluation strategies may help you to help your professional client avoid a public lawsuit and preserve the client's reputation. These include investigating a claim and the law thoroughly, evaluating whether key witness affidavits will assist, looking into licensing board determinations related to the claim, locating and understanding how an engagement agreement may affect the claimant's rights, gauging how useful a tolling agreement may be, and considering claim repair. FD