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LEGAL MALPRACTICE CLAIMS AGAINST NON-EQUITY PARTNER, ASSOCIATE AND OF COUNSEL ATTORNEYS: WHAT ARE THE OPTIONS WHEN THE CLIENT EXPANDS THE LIST OF POTENTIAL DEFENDANTS?

By Glen R. Olson, Esq. & John Hong, Esq.¹

Introduction

It is statistically inevitable. On average, an attorney is sued approximately three times for legal malpractice over the course of his or her career.² This fact underscores the importance for all attorneys, including attorneys employed by or in non-equity partner or of counsel relationships with law firms, to understand the potential for legal malpractice liability. When these claims are asserted, there are often very significant defenses related to breach of the standard of care and damage causation, given the employed attorney's limited role in representation compared to that of the partner with responsibility for overall supervision of the case or transaction. Employed attorneys should be aware that when these claims arise, there are defense and indemnity issues that ought to be addressed.

Non-partner/non-shareholder attorneys should never assume that their status as employees or the existence of the presumptive "bigger targets" of the law firm and/or its equity partners means that a disgruntled client will limit his litigation targets. Admittedly, firm employees may not always control certain aspects of risk management relating to a particular client or assignment – client selection/intake perhaps being the most significant example. Involvement with difficult or demanding clients, however, creates all the more incentive to deliver legal services carefully and in a manner consistent with the standard of care. Employees, like firm owners, also need to keep the client informed of the status of the representation and avoid disconnects between the attorney's and client's views of the case.

Should the "inevitable" event happen, the next question concerns the rights of an associate attorney or non-equity partners sued by a client. The fact that a firm employee may be named in a legal malpractice action does not mean liability extends to the employee in all instances. As explained below, each attorney's actions are judged by the duty owed to the client under the circumstances and whether the relevant legal services were performed in a manner consistent with the standard of care. In other words, an

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² See James M. Fischer, *External Control over the American Bar*, 19 Geo. J. Legal Ethics 59 (Winter 2006).

associate given a spot assignment in a case should be subject to liability only based upon that spot assignment. His or her exposure should not extend to overseeing other attorneys, including partners, or vicarious liability for other attorneys with broader involvement in the case.

The Employed Attorney's Potential Exposure to Malpractice Claims

The threshold question for an attorney employed as an associate, non-equity partner, of counsel or a similar position is whether he or she may be sued as a defendant in a legal malpractice action. The answer is, unequivocally, yes. An element of a legal malpractice claim is the existence of an attorney-client relationship, which gives rise to the duty of care. When a client retains an attorney to represent his or her legal interests, that client establishes not only an attorney-client relationship with that individual partner or law firm as an entity, but “with any attorney who is a partner of or is employed by the retained attorney.”³

Even a limited relationship with a case or transaction may establish an attorney-client relationship. For instance, in *Streit v. Covington & Crowe*, a law firm made a one-time special appearance at a motion hearing as a professional courtesy to the client's attorneys of record. The client then sued not only his primary attorneys, but the associated law firm as well. In the legal malpractice action, the associated attorneys argued that they had insufficient involvement in the case to support the existence of an attorney-client relationship. The trial court agreed and entered summary judgment for the attorney defendants. The court found it particularly significant that the associated firm had not formally become attorneys of record for the client.⁴

The Court of Appeal in *Streit* disagreed and reversed the summary judgment. It observed that an attorney-client relationship can be created either expressly or by implication.⁵ The Court held that the single appearance established an attorney-client relationship between the associated counsel and the client, noting the fact that “...the association is limited to a single appearance is a distinction only of degree, not of kind.”⁶ Whether the associated attorney was selected and/or paid directly by the client, the attorney of record, or not at all, were irrelevant considerations.

Employed attorneys who work on particular transactions or cases, even in a limited role, may therefore be found to occupy an attorney-client relationship with the client. That the firm's management is initially responsible for approval or intake of the representation or the fact that employed attorney's work is supervised by a partner does not eliminate this relationship. Thus, the associate who makes a single appearance at a case management conference or drafts a memorandum used in the preparation of a discovery motion will likely be found to have formed an attorney-client relationship with the client. As *Streit* makes clear, it also does not matter whether the client has even met the employed attorney or whether that attorney is named on the case caption.

While this relationship gives rise to a duty of care to the client, whether the employed attorney breached that duty is a separate question, as discussed below. Nonetheless, the

³ *Streit v. Covington & Crowe*, 82 Cal.App.4th 441, 445 (2000).

⁴ *Id.* at 443-444.

⁵ *Id.* at 444.

⁶ *Id.* at 445.

firm employee may find it difficult to demur to a legal malpractice cause of action on the sole ground that as an employee, he or she was not in an attorney-client relationship with the plaintiff.

Involvement With a Case or Transaction Is Not Equivalent to a Breach of Duty

A client suing a law firm, its partners and employee attorneys is likely to assert that assignment to handle the case or transaction per se makes the attorneys jointly and severally liable for what occurs in the case. There are a number of hurdles that a plaintiff must jump before recovering against any of the individual attorneys, however. These hurdles should be addressed specifically with respect to each defendant, including the non-equity partners, associates or of counsel attorneys that the client has sued.

California law requires a plaintiff to “prove the causation element according to the ‘but for’ test, meaning that harm or loss would not have occurred without the attorney’s malpractice.”⁷ Where the underlying action was a litigated matter, the client must establish it sustained damages through proving the case-within-the-case.⁸

An attorney’s duty of care to a client is comprised of: (1) having that degree of learning or skill normally possessed by attorneys of good standing, practicing in the same locality or under similar circumstances; (2) use of the care or skill ordinarily exercised by reputable members of the profession; and (3) use of reasonable diligence and the attorney’s best judgment in the exercise of his or her skill to accomplish the best possible result for the client.⁹ Attorneys are given wide latitude in choosing among legitimate but competing considerations and are not liable for an informed tactical choice within the range of reasonable competence.¹⁰ Even in the event of an error an attorney is “not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or the validity of an instrument that he is engaged to draft, and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers.”¹¹

These standards for determining attorney liability are rendered meaningless if each lawyer sued by a client is not evaluated according to whether his or her work fell below the standard of care. In other words, on motions for summary judgment or at trial, employed attorneys should be allowed to show what aspects of the transaction or case they actually were involved in and offer expert testimony that they did not breach the standard of care.

The former client in these cases can be expected to also assert that particular strategies were jointly made by the attorneys in the underlying case or transaction and therefore all are liable. Thus, an employed lawyer must be able to demonstrate what aspects of the case in which he or she was actually involved. One example is where an associate conducts legal research for a partner trying a case. If the errors concern trial tactics unrelated to the legal research, the mere fact of the associate’s assignment should not be enough to show a breach of the associate’s standard of care.

Malpractice Indemnification for Associates and Of Counsel

⁷ *Viner v. Sweet*, 30 Cal.4th 1232, 1235 (2003).

⁸ *Mattco Forge, Inc. v. Arthur Young & Co.*, 52 Cal.App.4th 820 (1997).

⁹ *Smith v. Lewis*, 13 Cal.3d 349, 355 (1975).

¹⁰ *Barner v. Leeds*, 24 Cal.4th 676, 690 (2000).

¹¹ *Lucas v. Hamm*, 56 Cal.2d 583, 591 (1961).

Assuming that an employed attorney is sued as to work on an underlying transaction or case, what are his or her defense or indemnification rights vis-à-vis the employer?

Labor Code section 2802 (“Section 2802”) states that “an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.” The employer is vicariously liable for risks broadly incidental to the employer’s enterprise, as long as the employee’s conduct is “not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business.”¹² The conduct need not benefit the employer, may be willful or malicious, and even may violate the employer’s direct orders or policies.¹³

Section 2802 was once interpreted “to require employers in general to pay defense costs incurred by employees when defending *unfounded* third party civil actions challenging the employees’ conduct within the course and scope of their employment.”¹⁴ However, the limitation of indemnity rights to unfounded actions has since been abandoned.¹⁵

Section 2802’s standard for indemnification is closely related to the respondeat superior/vicarious liability doctrines.¹⁶ It requires an employer to pay any judgment against an employee for conduct arising out of the course and scope of employment, as well as to pay the costs of defending the suit of an employee who is sued for such conduct.¹⁷ For all practical purposes, the employee attorney has a statutory right to coverage for defense and indemnity payments arising from his or her work for the employing law firm.¹⁸

Moreover, an employee is likely to be covered by the law firm’s professional liability insurance policy. Even if the employee has left the firm by the time suit is initiated, policies typically cover both “past and present” employees. The insurance policy covering the employee at his or her new place of employment may even apply. The possibility is remote, however, because typical professional liability insurance policies cover only errors and omissions arising from work performed for the named insured. Still, the conservative approach, in the event of suit against an employee after his or her departure, is to investigate both areas of potential insurance coverage.

Finally, what happens if a suit against an employed attorney arises out of work performed for a particular client that has also “left” the original firm? This can happen, for instance, when an employed attorney or partner takes a client to a new firm or firms over a period of time. Again, all of the insurance policies applicable to the work should be evaluated. In the absence of insurance coverage, an employed attorney seeking defense or indemnity

¹² *Cassady v. Morgan, Lewis & Bockius LLP*, 145 Cal.App.4th 220, 231 (2006).

¹³ *Id.*

¹⁴ *Devereaux v. Latham & Watkins*, 32 Cal.App.4th 1571, 1583 (1995) (emphasis added).

¹⁵ See *Cassady v. Morgan, Lewis & Bockius LLP*, 145 Cal.App.4th at 230; *Jacobus v. Krambo Corp.* 78 Cal.App.4th 1096, 1100-1101 (2000).

¹⁶ See *Devereaux v. Latham & Watkins*, 32 Cal.App.4th at 1583; *Douglas v. Los Angeles Herald-Examiner*, 50 Cal.App.3d 449, 461 (1975).

¹⁷ *Cassady*, 145 Cal.App.4th at 230-231; *Jacobus v. Krambo Corp.*, 78 Cal.App.4th at 1101.

¹⁸ Even helping a client arrange bail and ensuring the payment of the law firm’s fees, by going to the client’s residence to obtain and convert duffel bags of cash, has been found to be within the scope of the firm’s business for which an employed attorney is covered. See, e.g., *PCO, Inc. v. Christensen, Miller, Frank, Jacobs, Glaser, Weil & Shapiro, LLP*, 150 Cal.App.4th 384, 391-394 (2007) (“PCO”).

expenses from a previous employer bears the burden of showing what work was done at the previous firm.¹⁹

Section 2802 applies not only to associates, but of counsel as well.²⁰ It bears noting that because of counsel and other contractual employment relationships may vary in their terms, the outcome may be different depending upon how the specific relationship is defined by the parties. However, as long as an attorney is able to establish that he or she was employed by the law firm, indemnification should be mandatory per the plain language of Section 2802.

Indemnification for Non-Equity Partners

Whether Section 2802 applies to non-equity partners is a entirely different matter because of the unique nature of such a position. Like an employee, a non-equity partner typically invests no capital in the firm, is not liable for the firm's debts, has no voting rights on ownership-related matters, and may be terminated at the election of the firm's management. On the other hand, a non-equity partner is held out as a partner to the general public. No reported decision based on Section 2802 has addressed whether non-equity partners may be considered "employees" for purposes of Labor Code indemnification rights. Other statutory provisions, however, provide guidance on the issue and the particular indemnity issues may be the subject of a contract between the non-equity partner and her firm as well.

Corporations Code section 16305(a) ("Section 16305") states that "a partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership." Courts have interpreted "acting in the ordinary course of business" similarly to "in the discharge of his or her duties" from Section 2802. That is, courts have created liability in the partnership pursuant to the respondeat superior doctrine for the tort of a non-equity partner committed within the scope of the employer's business.²¹ Similar to Section 2802, Section 16305 extends the partnership's liability for the non-equity partner's unauthorized and/or intentional acts, even where the law firm receives no benefit.²²

However, the statutes depart in one significant and practical manner. Unlike the Labor Code section 2802, Section 16305 does not contain the word, "shall," to describe the employer's duty to indemnify the employee. In other words, a non-equity partner may contractually waive indemnification rights from the partnership even for conduct arising

¹⁹ *Cassady v. Morgan, Lewis & Bockius LLP*, 145 Cal.App.4th at 234-235.

²⁰ The attorney in *Cassady* who demanded indemnification was formerly of counsel for the co-defendant law firm.

²¹ *PCO*, 150 Cal.App.4th 384.

²² *Id.*

within the course and scope of the employer's business.²³ A non-equity partner would be wise to keep an eye out for such a provision in his or her partnership agreements.²⁴

Again, the non-equity partner's right to a defense and indemnification may also derive from a firm's professional liability insurance policy. The firm would be prudent to look first at that policy to ascertain its rights and obligations to such a claim.

Other Statutory Rights to Indemnification

The respondeat superior doctrine also applies to law firms organized as a corporation. Corporations Code section 317(d) ("Section 317") mandates indemnification by corporations of "agents" for "expenses actually and reasonably incurred." The legislative history of Section 317 suggests that the indemnification right relates only to corporate derivative actions. However, the statute is unambiguous; its terms require indemnification of an attorney who successfully defends a legal malpractice action brought by a former corporate client.²⁵

Section 317(d) departs significantly from Sections 2802 and 16305 because it mandates indemnification only where the prospective indemnitee acted in good faith and in a manner believed to be in the best interests of the corporation, and was successful on the merits in the proceeding.²⁶ Indemnification under Section 317(d) requires a determination that personal motives, as opposed to the corporate good, are not predominant in a transaction giving rise to the action.²⁷ It also requires a final and favorable termination of the proceedings on the merits.²⁸

It seems unlikely that an employed attorney of a law practice organized as a corporation would benefit significantly from invoking Section 317(d)'s indemnification rights. The attorney might do better to analogize his or her role to that of an employee and proceed under Section 2802 and/or refer to the firm's professional liability insurance policy.

Risk Management Tips for the Employed Attorney

Employed attorneys should be as vigilant as law firm owners or managers, with respect to recognizing and managing legal malpractice exposures. One important example is the area of conflicts of interest. Employed attorneys, including newer members of the bar, should become very familiar with the rules of professional conduct and with the firm's procedures, including case management software, for checking conflicts. These include prior representation of adverse parties, situations that can lead to the firm's withdrawal from the case and disgorgement of fees. Each attorney bears the responsibility of

²³ *Id.* at 392 ("Unless there is a specific agreement to the contrary, the retention of one partner of a law firm is a retention of the entire firm, so that any attorney in the firm may perform services.").

²⁴ Corporations Code section 16401 states that a partnership "shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of the business of the partnership or for the preservation of its business or property." Arguably, this language precludes a non-equity partner from contractually waiving his or her right to indemnification. However, there is no reported case discussing either section 16401 or its predecessor section 15018(b) in this regard.

²⁵ *Katayama v. Interpacific Properties, Inc.*, 190 Cal.App.3d 1604 (1987), opn. ordered nonpub. June 25, 1987.

²⁶ *Bancorp v. Thorton Grant*, 26 Cal.App.4th 926 (1994); *Branson v. Sun-Diamond Growers*, 24 Cal.App.4th 327 (1994).

²⁷ *Plate v. Sun-Diamond Growers*, 225 Cal.App.3d 11, 15 (1990).

²⁸ *Dalaney v. American Pacific Holding Corp.*, 42 Cal.App.4th 822 (1996).

knowing and complying with the relevant rules, and the firm's error in failing to recognize a conflict can become the employed attorney's problem as well.

Another significant risk management area for all attorneys is client selection. Most often, the firm's partners accept new representations and associate attorneys are assigned to work on such matters. The associate may have little or no control over the firm's decision to accept the client. An employed attorney should nevertheless be just as vigilant as a partner to the warning signs of difficult clients. Is the client motivated by spite? Does the client have unreasonable expectations for monetary recovery or other relief? Has the client previously sued other professionals or is the client a vexatious litigant? Is the client reluctant to fund firm retainers or pay expenses? Is the client non-responsive to requests for cooperation in responding to or propounding discovery? All of these are warning signs that should lead an associate attorney to discuss with the partner the status of the client's representation and whether the firm is creating an exposure for itself, its partners and its employed attorneys.

Once the client is selected, managing that client's expectation is also very important. Clients that are not kept informed of developments in a particular case or transaction may be surprised with adverse developments. If the client is apprised of the nature of the challenges presented by the representation, including adverse developments and the attorneys' plan for responding to them, the risk of a legal malpractice claim may be greatly reduced. Also, should the client pursue such a claim, the record of advice given by the attorneys will be critical to their defense. Associate attorneys and non-equity partners are often the first line of communication with the client and therefore occupy a very important role with respect to the firm's overall risk management.

Associate attorneys and non-equity partners may also find themselves at ground zero in discovery disputes. Given the prevalence of electronic discovery, including issues of spoliation of evidence and document retention, employed attorneys must be mindful of the client's discovery obligations. A client falling behind in discovery responses, or inaccurately responding to discovery, is a red flag that must be brought to the attention of the firm's partners. A failure to comply with discovery obligations can lead to devastating outcome for the client and for a firm in a later legal malpractice claim.

This is a non-exhaustive list of concerns for newer attorneys. It goes without saying, however, that all attorneys must be vigilant in looking for the warning signs in the context of representations and avoiding risks whenever necessary.

Conclusion

Employed attorneys, as well as firm owners and managers must be mindful of legal malpractice risk and vigilant in the delivery of legal services. These risks may be hedged by legal malpractice insurance policies and statutory rights to indemnification. Still, it is best to be mindful of the basic legal principle that if a tortious act has been committed by an agent under authority of his principal, the fact that the principal thus becomes liable does not exonerate the agent from liability.²⁹

²⁹ *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladston*, 107 Cal.App.4th 54 (2003).

