Bloomberg BNA | ABA

ABA/BNA
Lawyers' Manual on Professional Conduct™

How to Pour Water on the Fire of Punitive Damages

By Melissa M. Lessell

Punitive damages claims are on the rise in legal malpractice cases. This not only changes the nature of the allegations brought against attorney-defendants but also significantly impacts the strategy employed throughout the litigation in light of the higher dollar value exposure and coverage concerns, according to speakers at the Fall 2015 National Legal Malpractice Conference.

Panelists Laura B. Frankel, consulting director for CNA in Chicago, Rachel T. Nguyen, loss prevention counsel for ALAS Inc. in Chicago, and sometimes-plaintiffs' counsel, Frank J. Beltran of the Beltran Firm in Atlanta, along with moderator Shari L. Klevens of Dentons US LLP in Washington, D.C., outlined the best approach for handling cases with punitive damage claims from a variety of perspectives and provided background on the types of cases in which punitive damages are arising.

Punitive Basics

Punitive damages laws vary state to state, both in terms of recoverability, calculation or existence of a punitive damages cap.

Nguyen suggested that a law firm may be exposed to a punitive damages claim even if the state it practices in does not allow such a claim, such as when the billing guidelines or engagement letter call for the law of another state to apply in the case of a malpractice claim.

A 2014 survey concluded that 67 percent of all legal malpractice cases involving punitive damages are in the trusts and estates practice area. This is because lawyers have a fiduciary duty when acting as an executor or trustee. When that duty is allegedly violated, civil suits are often filed with punitive damages components to them. Additionally, escrow agents often see punitive damages components to civil suits filed against them as they are also charged with fiduciary duties in most states.

Melissa Lessell is a partner in the New Orleans office of Deutsch, Kerrigan & Stiles LLP, where she represents lawyers, accountants, agents and other professionals in litigation and disciplinary proceedings.

Beltran said he finds good fodder to support his clients' punitive damages claims in situations where a lawyer modifies, conceals or deletes evidence, including e-mails.

He said he points out to the jury that a lawyer can't delete an e-mail by mistake, as the lawyer must delete it from his in-box, then delete it from the delete box and finally confirm the desire to permanently delete the e-mails. Beltran said he themes his malpractice cases that contain punitive damages demands to center around dishonesty, fraud, malice, intentional conduct and self-dealing.

Lawyers also should be aware of the potential for punitive damages as an element of a damage claim in a malpractice suit when punitive damages were sought in the underlying matter.

Some states such as Illinois, New York and California do not allow the award of that type of punitive damages, reasoning that the purpose of punitive damages is to punish the tortfeasor, not the attorney. However, others hold that punitive damages from the underlying case may be a recoverable element of a plaintiff's malpractice damage claim because they could have been recovered in the underlying case but for the alleged error or omission by the attorney-defendant.

The methodology by which punitive damages are calculated also varies depending on the jurisdiction. In certain states, the amount of punitive damages is formula-based—no more than 10 times the amount of compensatory damages awarded in the case, for example. In others, damages are based on the financial wherewithal of the law firm.

What Typically Triggers a Claim

Frankel said there has been a ''great increase in legal malpractice punitive damage claims across the country'' and stressed the importance of identifying the types of attorney behavior that trigger such claims.

Often times, she said, these cases include conduct where the defendant-attorney conceals malpractice, has a conflict of interest or displays a conscious indifference to rights and interests of his or her client. Beltran said juries particularly hate ''self-dealing'' and typically believe lawyers can only ''serve one master.''

Punitive damages claims are frequently brought in malpractice cases in which the lawyers tried to fix an error in the underlying case without disclosing it to their client. Once the error comes to light, the former client will argue that the lawyers intentionally con-

 ISSN 0740-4050

cealed the malpractice. Even if done with the best of intentions, this creates an appearance of impropriety.

Klevens remarked that failing to disclose an error can give rise to both a breach of fiduciary duty and conflict claims for which punitive damages may be awarded.

Frankel pointed out that the failure to disclose an error in an underlying case can be an issue when the underlying case settled. After learning about the error, she said, the plaintiff will second guess whether the case should be tried and/or the settlement itself, wondering if the settlement value was impacted as a result of the lawyer's error. This too can result in a punitive damages claim in the subsequent malpractice action.

Coverage Concerns

Speaking from her experience and based on the typical CNA professional liability policy, Frankel noted that punitive damages claims are ''typically not covered by an E&O policy.'' She said the CNA policy's definition of damages specifically excludes punitive damages and statutory damages.

Most lawyer professional liability policies have an intentional act exclusion, which may form a basis to issue a reservation of rights letter, as the conduct that forms the basis for a punitive damages claim is often intentional. Frankel advises strategizing around these coverage issues and, assuming the insured agrees, using them as leverage when possible.

On the other hand, Nguyen stated that ALAS's position is to ''stand by its law firms'' on punitive damages claims and cover them. Nguyen said that as a member of ALAS's risk management practice group, she makes a point to study past claims containing punitive damages components to see whether the insurer can ''pour water on a punitive damage claim before a claim is filed.''

Mediation and the Use of Private Counsel

Frankel indicated that because most professional liability policies do not coverage punitive damages awards, once the parties are on board with the strategy she uses this to her advantage in mediations.

She said she balances the interest of her insureds, reassuring them that she does not intend to leave them out in the cold, but pressuring plaintiff's counsel to realize that she will consider a reasonable settlement but that punitive damages, uncovered by her policy, are not up for discussion.

Frankel advises sending an unequivocal message to plaintiff's counsel that the punitive damages claim is not being seriously considered while asserting the conduct alleged in the case would not result in a punitive damages award if tried. She stressed that communication and consensus among the defense counsel, insured and claims counsel is critical prior to mediation.

Beltran remarked that he is often surprised that plaintiffs' attorneys fail to read the relevant insurance policies when prosecuting a malpractice action. Plaintiffs' attorneys may plead themselves out of coverage by alleging fraud, intentional acts or punitive damages, he said.

Moreover, because a plaintiffs' attorney may not understand the coverage issues, he said, it gives the defense more room to maneuver as the plaintiffs' attorney may be afraid of getting an uncollectible judgment.

The panel agreed as a whole that the appearance of personal counsel or coverage counsel at a mediation where there is a punitive damages component raises red flags.

Nguyen cautioned the attendees to think of ''the message the optics of who attends the mediation sends the other side.'' Frankel said having personal or coverage counsel at the mediation shows a concern about excess or punitive damage exposure and thus ''sends absolutely the wrong message.''

Motion and Trial Practice

As for deciding whether to file a dispositive motion, it is important to assess what the standard for awarding punitive damages is in that jurisdiction and whether the conduct rises to the level such that punitive damages should be awarded.

Moreover, Frankel said, if there is arguably conduct that rises to the level of recklessness, fraud or an intentional act, counsel for the attorney-defendant may wish to withhold filing a motion because a denial of the motion may ''empower plaintiffs' counsel,'' validating plaintiffs' counsel's belief that they have a colorable basis for a punitive damage claim.

When determining if there is a statute of limitations defense for the punitive damages claim, Frankel said the statute pertaining to legal malpractice should not be the end of the inquiry. Rather, any statute of limitation or repose pertaining to breach of fiduciary duties, fraud or concealment must be examined as well.

''If there is a legitimate basis for a punitive damage claim, it can significantly impact the landscape of the case,'' Frankel stated.

She said the type of witness the lawyer-defendant makes is one of the most important factors in deciding whether to try a case.

Klevens noted that nonmerit-based issues often impact juries in punitive damages cases. As an example she discussed a past case in which the jury found the attorney-defendant to be arrogant and full of swagger. She told the audience you ''can't coach the swagger out of someone.''

She contrasted that particular lawyer-defendant with one whose defense attorneys seemed to like him and incorporated him into the group, the takeaway being that the attitudes of defense counsel towards their attorney-clients are often picked up on by the jurors.

  MOPC ISSN 0740-4050