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PERSPECTIVE

## Product liability pitfalls for non-California lawyers

By Howard Smith

How many times has this happened to you? It's two in the morning and you can't sleep. So you watch an old episode of "Columbo." Its five to three and Columbo is about to explain who committed the murder, but first a commercial. It's an attorney solicitation: Have you used a medical device or drug and now suffer from ill health — well you may be entitled to financial compensation. The commercial tells the client what to do, but does the attorney know what to do?

The out-of-state attorney refers the client to an attorney in California. Unfortunately, that non-California attorney must fully comply with California legal standards, as he remains jointly and severally liable to the client with new counsel. *Floro v. Lawton*, 187 Cal. App. 2d 657, 671 (1960).

Counsel needs to know who they represent, because in California it's not only the injured party — counsel must also provide legal advice to the party's spouse. *Meighan v. Shore*, 34 Cal. App. 4th 1025, 1029, 1042-43 (1995) (An attorney has a duty to inform the client's spouse of claim for loss of consortium despite attorney's statement he was representing the client only.).

Counsel also needs to know which claims they need to pursue. Normally, the insertion of a medical device may give rise to medical malpractice and product liability claims. If counsel intends to represent the client for only the product liability claim, their retainer agreement should disclose that fact. However, language in the retainer agreement may not be sufficient to avoid the obligation to pursue the medical malpractice claim. *Nichols v. Keller*, 15 Cal. App. 4th 1672, 1687 (1993) (An attorney may have an obligation to assist a client with reasonably

apparent legal problems outside the scope of the retention.).

Counsel should provide the client with full disclosure of the differences between claims pursued in the superior court versus multidistrict litigation (MDL). In a state court action, counsel files a complaint, fully litigates the action, and takes the case to trial if necessary. In MDL, counsel files the complaint, which is later consolidated in a central proceeding with other plaintiffs. No formal discovery is conducted, but instead the product manufacturer discloses information under a case management order. From the onset, the action is directed towards settlement and usually settles for an amount less than could be obtained in formal litigation.

This exposes counsel to second guessing if the client retains new counsel to review the handling of the matter under the assertion counsel took "the easy way out" by failing to actively pursue the litigation to the detriment of the client. Numerous legal defenses are available to defend against these claims.

First, the former client may retain new counsel to substitute in as counsel of record to pursue the ongoing product liability claim. New counsel will then file a concurrent legal malpractice action against prior counsel. Unfortunately, the available legal defenses do not include filing a cross-complaint against new counsel.

Under California law when an attorney is sued for malpractice, he cannot file a cross-complaint for indemnity against the client's subsequent attorney. *Gibson, Dunn & Crutcher v. Superior Court*, 94 Cal. App. 3d 924, 933 (1979). The California Supreme Court has stated the question of whether an attorney being sued for malpractice may recover indemnity from concurrent counsel is to be decided on a case-by-case basis. *Musser v. Provencher*, 28 Cal.

4th 274, 284 (2002). This allows attorneys who jointly represented the same client to file cross-complaints against each other for indemnity. However, concurrent counsel refers to joint counsel who concurrently represented the client, but not prior versus subsequent counsel. *Forensis Group Inc. v. Frantz, Townsend & Foldenauer*, 130 Cal. App. 4th 14, 28-29 (2005).

Instead, prior counsel may pursue new counsel's failure to properly pursue the product liability action through the duty to mitigate: The plaintiff in a legal malpractice action has a duty to make a reasonable effort to avoid or mitigate his damages. *Horne v. Peckham*, 97 Cal. App. 3d 404, 418 (1979). If the client fails to do so, his damages will be reduced by the amount attributable to the failure. *Lewis v. Superior Court*, 77 Cal. App. 3d 844, 853 (1978).

Once new counsel has resolved the product liability action, prior counsel may argue the actions of new counsel break the chain of causation. This rule was applied in *Stuart v. Superior Court*, 14 Cal. App. 4th 124, 126-27 (1992), where the plaintiff brought a legal malpractice action for the failure to serve a personal injury complaint within three years and return the proof of service within sixty days after expiration of the three-year period. The plaintiff discharged counsel and retained another attorney before expiration of the statutory time period, and the second attorney failed to return the proof of service in a timely manner.

Summary judgment was proper since the attorney-client relationship between the plaintiff and the first attorney had ended upon the filing of a substitution of attorney form in the action before the time for serving the complaint and returning the proof of service; and at that point the new attorney bore sole

responsibility for meeting the still pending time limitations.

After the conclusion of the prior action, the former client may also retain new counsel to evaluate the settlement. Where the underlying product liability action has been resolved — by either prior or new counsel — an attorney alleged to have obtained an inadequate settlement for the former client may argue any claim for legal malpractice is entirely speculative. In *Namikas v. Miller*, 225 Cal. App. 4th 1574, 1582 (2014), the Court of Appeal confirmed the difficulty a plaintiff will encounter in pursuing "a settle and sue" case in the context of a legal malpractice action. Specifically, in *Namikas*, the court found a client had failed to establish she would have obtained a more favorable judgment or settlement in the underlying matter than the settlement the attorney had obtained for the former client because the plaintiff's claimed damages were too speculative.

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