An "All-in" Proposition

Complexities of Defending a Professional at Trial

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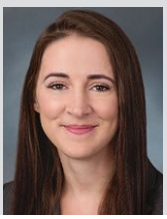
The complexities will have an effect on defending the professional, but the right trial techniques should mitigate the complications and exposure.

Trying a case is challenging enough. Trying a case where you are defending a licensed professional can be particularly challenging. Professionals, such as attorneys, accountants, architects, engineers, financial advisors, and broker dealers, each have a unique set of issues. But certain approaches, techniques, and theories can be equally applied to each profession at trial.

Challenges are enhanced by the complexities involved in professional liability trials. Defending professionals at trial is particularly demanding because the cases routinely involve multiple parties, expert witnesses, unique terminology, convoluted damages, and multiple legal theories. Adding the intangibles—the professional's reputation, media attention, and concerns about retaining the ability to work and earn in their profession—heighten the pressure even more. Reputation and licensure cannot be compromised.

This article is intended to identify creative and dependable tactics to maneuver through trial successfully from voir dire, opening statements, presentation of your client, and cross-examination, to closing arguments. Success at trial depends on completing a comprehensive background investigation of the facts of the case, effectively preparing and targeting written discovery, pouring through party files and third-party records, and thoroughly taking and defending depositions. This article does not address discovery and presumes



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that discovery was properly requested and disclosed so that all parties are ready for trial with limited surprises.

Trials: Defending Professionals Are Complex

These trials are often complex because they involve multiple parties and the potential for counterclaims and cross-claims.

Although co-defendants are particularly reluctant to share experts, fearing that they lose control or that issues may arise among co-defendants, it should be considered if it is feasible at trial. Jurors love simplicity and efficiency, and they generally reward the party that presents a case in that manner.

The old adage "when defendants beat up on each other, the plaintiff usually wins" rings true. In certain jurisdictions, counterclaims are compulsory or required for a multiparty jury verdict form to be issued by the court. To avoid defendant infighting in front of a jury, consider joint-defense or tolling agreements, unless there is a clear conflict among some or all defendants. Although these agreements are often entered into before trial, they should be considered or perhaps modified at trial to defer claims or establish parameters on contribution percentages in the event of a plaintiff verdict. These agreements may be discoverable in certain jurisdictions, which should not preclude professionals from entering into them when their cases proceed to trials. Under exceptional circumstances, unified defendants, particularly professionals who have a relationship with each other and frequently work together, or refer matters to each other, should seriously consider a unified defense, which may make the difference in a verdict.

Damages experts are expected in any case against an attorney, accountant, architect, engineer, or broker dealer. They typically have already been selected, disclosed, and deposed before trial, so the question is how to present the damages experts at trial. The best expert may not be the most qualified or have the shiniest resume; instead he or she is typically the one who can convey complicated legal, engineering, financial, or accounting principles and standards in a way that juror laypersons, and even judges, can understand. Although co-defendants are particularly reluctant to share experts, fearing that they lose control or that issues may arise among co-defendants, it should be considered if it is feasible at trial. Jurors love simplicity and efficiency, and they generally reward the party that presents a case in that manner. Sharing experts can benefit the presentation of multiple defendant professionals and reduce the potential adverse effect of the significant expense of the experts on the jurors.

The threshold liability question involves the standard of care that is applicable to the particular licensed professional at trial. Duty, primarily established by an engagement letter or a contract, must be established. The payment of fees or creation of a formal contract may have little effect on duty. Often it is the implied conduct, through statements and actions, which is at issue at trial, making testimony and credibility paramount. Enhance the professional's credibility at trial through documents and records that were contemporaneously created. Whenever possible, witness testimony should reflect the document, letter, or email generated during the representation or service period. This approach buttresses a professional's credibility and undermines the "he said/she said" dynamic.

Architect and engineer cases involve further complexities, some parts of which may await a decision in arbitration, while other parts may await a jury decision in litigation. The American Institute of Architects (AIA) and other association-developed form contracts require or encourage arbitration as a dispute resolution, but the arbitration will only occur between the parties to the contract, not third parties. It often occurs that an attorney will defend an architect or engineer against one party in arbitration and another in litigation on the same project, creating inefficiencies, added expenses, and the potential for inconsistent results.

The general thought is that compared with litigation, arbitration is faster, involves less discovery, is less expensive, and proceeds under relaxed rules of evidence. Appeal rights are limited or nonexistent in arbitration. Arbitration and litigation involving the same parties typically proceed on different schedules and the outcome of one may be dispositive on the outcome of the other. In that two-track system, the risks and complexities increase.

Options to reduce the risks associated with the arbitration–litigation two-track system are to move to stay one of the proceedings, given their interdependence and effect on resolution. Alternatively, by agreement of the parties, arbitration rights can be voluntarily expanded, although that will not be ordered unless it is required by contract. Discovery in each can be used in the other, although often an arbitration decision will not have a preclusive effect on the outcome of litigation. If permitted by an arbitrator or a judge, try as much of your case in the first proceeding that will take place, which is typically the arbitration hearing.

Broker dealers and financial advisors who sell securities are regulated by the Financial Industry Regulatory Authority (FINRA). FINRA is a non-governmental agency, formed in July 2007 to replace the National Association of Securities Dealers, Inc. (NASD). FINRA rules require customer disputes to be decided through an arbitration proceeding. The trier of fact in a FINRA arbitration consists of a panel of one or three arbitrators, not a jury. In the case of three arbitrators, which is the most common, there is a chairperson. The arbitrators are not required to be attorneys, or to have a background in the law or the securities industry, which is generally more favorable to the customer claimant than to the broker dealer or financial-advisor respondent. The arbitration proceeding is designed to streamline the discovery pro-

cess and reduce litigation expenses. For example, depositions are not allowed under the FINRA discovery rules, absent exigent circumstances, such as that the customer is very ill or of an advanced age, which may make him or her unavailable to testify at the final evidentiary hearing. Motion practice is also limited, and a motion to dismiss is generally not heard until after a claimant puts on his or her case in chief, thus requiring the defense to prepare for the final hearing and incur legal expenses before a case may be dismissed. Oftentimes broker dealers are dragged into an arbitration as a "deep pocket" or because the financial advisor has been suspended or barred from the securities industry. Because the arbitration panels have wide discretion, defending broker dealers and financial advisors is very challenging.

The evidentiary hearing is similar to a trial. Both sides give an opening and closing argument, present and cross-examine witnesses, provide expert testimony on liability and damages, depending on the party, and enter written documents into evidence. The one major difference is that there is no voir dire, since the arbitration panel is the trier of fact. Instead of voir dire, in a FINRA arbitration, in the early stages of the proceeding, the panel is chosen by the parties through a ranking system. At this time, each side is able to review the background, experience, and customer awards of the potential arbitrators to select their desired panel. Defense attorneys should select arbitrators with legal backgrounds and securities industry experience, with the strategic intent that there will be more attention paid to the letter of the law and the investment products and that the damages analysis will be better understood. Investment products, particularly these days, can be very complex. It is important for an arbitration panel to understand how they work. Otherwise, the panelists may gloss over the products as complicated and unsuitable, without giving deference to the investment objectives, risk tolerance, and financial means of the complaining customer.

The inability to depose witnesses and file dispositive motions early on adds to the complexity of defending broker dealers and financial advisors. In addition, FINRA does not have jurisdiction over third parties that are not registered with FINRA, which limits a broker dealer's ability to join third parties to apportion liability and damages as a defense strategy. Because of these and other limitations in the FINRA process, versus a court of law, it is critical for the defense to file a comprehensive answer laying out all the facts and arguments, with supporting exhibits, if possible, which is the earliest pleading stage of this process. It is crucial to lay out the defense early on because this may be the only chance that an attorney will have to present the case to the panel before the final hearing. Motions to compel written discovery are commonly filed in FINRA arbitrations, since discovery is limited. For example, requesting records from prior investment accounts of other broker dealers may be a good strategy to determine a claimant's investment history and appetite for risky investments.

After the parties present their respective cases, FINRA will render a written decision, generally within 30 days. In many instances, FINRA panels tend to render awards based on equitable considerations, not the strict letter of the law. As previously mentioned, this is why attorneys defending broker dealers and financial advisors try to select arbitrators who are attorneys or who worked in the securities enforcement field, in the hopes that the panel will give considerable deference to the law, rather than equity. Further, since some panels award damages to claimants based on only *some* showing of loss and minimum demonstrations of liability, a damages expert is almost always necessary to limit the amount of damages awarded, should there be a finding of liability. The process can be further complicated when a panel allows a claimant to amend his or complaint at the eleventh hour, or worse, assert additional claims or damages at the final hearing. Given the latitude that a panel has, defense attorneys need to forecast and be ready to defend, if necessary, potential claims and damages that may be asserted at the last minute. This can sometimes be gleaned from the profit and loss analysis of the customer's account, or by conversations with opposing counsel.

From an insurance standpoint, it is favorable that the FINRA arbitration discovery rules do not require the disclosure of insurance. However, since a FINRA panel does not render a reasoned award (unless agreed to by both sides, which almost never happens), this becomes a challenge for insurers during settlement, if there are covered and uncovered claims or damages. This also potentially puts insurers at risk of paying uncovered damages to avoid an adverse award. If a broker dealer suffers an adverse award, the payment must be made within 30 days of the decision, or FINRA will shut down the brokerage firm if its net capital is insufficient to cover the award. The second scenario—that the amount of an adverse award can put a brokerage firm out of business—puts pressure on the defense attorney, and in turn, on the insurer. There is also no ability to appeal an award (unless the appealing party can prove fraud by the panel), which may embolden claimants to seek unreasonable damages, when liability is at issue, to force a settlement.

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While FINRA is designed to resolve customer disputes efficiently, it is sometimes viewed as claimant friendly, leaving broker dealers to defend against hindsight investment remorse due to market declines, among other things, and "rogue" financial advisors who could not be supervised, even with the best policies and procedures in place. And similar to many other licensed professionals, the reputations and licenses of a firm and the individual brokers involved are at stake.

Defending an attorney client involves defending two cases, given the case-within-a-case principle. A plaintiff must show that but for an attorney's negligence, the plaintiff would have won the underlying case, or the underlying transaction would

have been more beneficial to the plaintiff. This can be further complicated when the legal malpractice case takes place several years after the underlying case and finding the original witnesses and parties poses a challenge.

Attorneys also are affected by duties owed to the court, public policy considerations, non-clients, beneficiaries, principal–agent concepts, and sometimes even to adversaries. As a fiduciary, attorneys must deal with different trial issues than architects or engineers must deal with, for example. Bifurcation or severance should be considered at trial in certain cases against professionals. In a legal malpractice case, the trial attorney should consider the possible advantages to bifurcating the underlying case-within-a-case from the trial for malpractice. In cases against professionals that may involve intentional torts or statutory violations, bifurcation may be an effective trial strategy to limit what a jury hears. For instance, bifurcation could keep a jury from hearing contentions of misrepresentation, statutory violation, and breach of contract, which could taint the jury, particularly if there is no right to a jury trial on certain counts or theories.

The defending attorney cannot discuss the standard of care early enough in a trial involving a professional!

Attorneys defending professionals must be ever-vigilant to restrict testimony that implies warranty or statutory obligations, which may inappropriately impact the applicable standard of care. For example, in most jurisdictions, architects and engineers as professionals are not deemed to give express or implied warranties, which are routinely imposed against contractors. Warranty concepts undermine the applicability of the standard of care and may create a new or modified standard. Exercising the ordinary and reasonable level of skill, knowledge, and prudence common to members of that profession cannot be codified or over simplified. Errors of judgment do not typically create liability because professionals do not guarantee their work or advice. Trial testimony that implies statutory standards, warranties, or guarantees must be objected to and limited to avoid confusing a jury and the inappropriate application of the law by a judge.

Voir Dire

Voir dire questions must be oriented to determine juror feelings about the profession. Do jurors really know what architects do? Have they ever worked with an accountant? It is likely that jurors have a feeling or bias toward attorneys, given their reputation, particularly as identified in television and movies? Ask prospective jurors if they will really listen to the experts, given the sophistication of their anticipated testimony. Ask your client for voir dire questioning ideas. If there is a disparity of power between the plaintiff and the defendant professional, gauge a jury's feelings. If the professional is a public figure or quasi-famous through, for example, ads on buses in the city, bring it up in voir dire.

Opening Statement

By now a defendant professional has been introduced to the jury, but the defending attorney should provide more context and more about the client's personality and expertise in the opening statement. Hopefully by the trial the defending attorney knows the client's personality and how he or she will respond on the stand. Tailor the statements about him or her, both as a person and professional, in the opening statement. Depending on the dynamic of the case, determine whether a fact-based or more emotional opening presentation is strategic. The applicable standard should be identified promptly at the beginning of trial and reiterated throughout trial for better juror understanding. The defending attorney cannot discuss the standard of care early enough in a trial involving a professional!

Presentation of Your Client

Without question, a defendant professional will be called as an adverse witness in a plaintiff's case. The question is always how much subject area to cover with a client in the plaintiff's versus the defendant's case. A defending attorney wants a jury to "like" the client defendant as soon as possible, which can be established through credibility, trial appearance, and dedication to the profession. A dedicated professional will be viewed favorably by a jury. Arrogance or combativeness will not. Take advantage of the opportunity to conduct a "friendly" cross-exam of the client during the plaintiff's case in chief and bring out the evidence that the defense needs in a controlled setting.

Much of the defense of a professional depends on the testimony of co-workers or office staff, the very people who are not licensed professionals. Proper communication between a professional and a client to enable the client to make informed decisions about the representation or services that the professional will provide is intertwined with the applicable standard of care. So many cases against professionals stem from ineffective or insufficient communication. Support critical phone calls with the phone records confirming when calls were made. Many claims rely on oral conversations or discussions not memorialized in writing. Support those conversations with additional backup or staff testimony. This is particularly true with expanded scope cases, which can occur with all professionals. Often modifications to initial engagements or contracts are not effectively memorialized. Show a jury that a plaintiff is suing the defendant over what the plaintiff expected and not what plaintiff requested or contracted the professional to do.

Trial Strategy

Keeping it simple at trial is not easy, particularly when defending a complex and sophisticated case. Based on a plaintiff's presentation, witness strength, and feel for a jury, determinations must be made as pertains to the scope of the defense presentation. When suing an attorney, the attorney–client privilege is waived. In Illinois and a few other states, the accountant privilege is held by the accountant, not the client. This restricts conversations or certain evidence pertaining to those communications, which may be helpful to the defense to ensure privileges are not unintentionally waived.

Privilege issues do not arise in defense of architects or engineers. In our experience, there is more "paper generated" in the course of design and construction, which undermines the "he said/she said" approach that is more often seen in the defense of attorneys and accountants. Even so, whether additional services were authorized or the reason for change orders make up much of the evidence in a trial against design professionals. The documents do not lie and must be reviewed through the witnesses for the jury.

Focus on Causation at Trial

Mistakes can be made and shown, but if mistakes did not cause actual damage to a plaintiff, then the defending attorney will earn a defense verdict. Causation is the biggest hurdle in prosecuting a claim against a professional and many plaintiff lawyers have a hard time proving it. Even when causation can be shown, it can be difficult in some situations to show the damages claimed. For example, a client sues his or her former accountant, alleging that a mistake on his or her tax return caused him to pay hundreds of thousands of dollars in taxes and penalties. Even if the client can prove the mistake, the fact remains that absent the mistake, the client would still have had to pay the taxes. So the only recoverable damages are the penalties.

Closing Argument

Now the jury "knows" the defending attorney's client as an educated, experienced professional. Hopefully any misconceived bias or prejudice that a jury may have had about the profession has eroded. Consider the best argument to attack an element of a plaintiff's cause of action and focus on it. Depending on the case, it may only be one element. For example, damages and proximate cause may be the only issues in dispute in a professional liability trial, so start with them. Depending on the presentation, opening, and how the evidence went in, consider whether to lean more on the facts or emotions to clear the client.

Recap the defense expert's testimony and stress the weaknesses in the plaintiff's expert. Claims against professionals are expert driven, and despite all the preparation and credibility that a client professional may have, a jury will heavily rely on the expert testimony in reaching a verdict. In fact, a jury is instructed to rely on the "opinion testimony from the qualified witnesses" (*i.e.*, the experts); the jury cannot determine how a reasonably careful professional would act from the jurors' own personal knowledge. It is critical to focus on the defense expert's testimony in closing.

Conclusion

Why try such a case in the first place?! These days, it seems few actually want to go to trial given the uncertainty, particularly in certain urban jurisdictions. But some cases simply must be tried. Most professionals' liability policies permit settlement upon client consent, and some clients refuse to provide it, despite a purported hammer clause, which may exist in the policy. Of course, a client may consent if it is not too late to settle during trial, depending on how the testimony goes. Settlement should be considered or discussed as trial proceeds.

Cases are also tried to decrease damages if a plaintiff is unreasonable. In that case, more effort and testimony should be presented at trial related to damages than to liability, preserving the professional defendant's credibility so that the jury may be more open to persuasion on damages. Other cases must be tried to obtain a not guilty verdict because some professionals are loath to agree to settle, thinking that it is tantamount to an admission and will affect their reputation if it is made public. And finally, although not as prevalent with professional liability carriers, coverage issues require trials at times. Often deductible amounts or first dollar defense features of a professional liability policy compel a trial, particularly if the professional pays nothing if a not guilty verdict is rendered.

Trying a professional liability case is an "all-in" proposition. Similar to a trial attorney, a client must be very prepared and focused. Eliminate any distractions. Counsel a client to attend the entire trial, certainly while the jury is seated. Licensed professionals are busy, but the professional's work must wait until trial concludes. The complexities will have an effect on defending the professional at trial, but the right trial techniques should mitigate the complications and exposure. FD