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THE 'STANDARD' RELEASE POSES A TRAP FOR THE UNWARY LAWYER

Focus Column

By Leonard S. Levy

As practicing attorneys, we have all drafted release language designed to provide our clients with the maximum amount of protection from further liability. In doing so, it is common to obtain a "1542 waiver," whereby a release that would otherwise, pursuant to Civil Code Section 1542, extend to known claims becomes extended to cover claims whether known or unknown. Civil Code Section 1542 provides:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

As a full-time neutral, I have observed attorneys, on countless occasions, insist that the release of their client contain a waiver of Civil Code Section 1542. In fact, there is rarely a situation where the attorney does not insist that any release of his client contain language waiving the constraints of Section 1542, so that his or her client is released to the greatest possible extent.

It is the rare occasion in which an insistence that the release contain such a waiver merits any discussion whatsoever. Any resistance to its inclusion is usually met with a statement such as, "If I don't include the waiver, I think it would be malpractice." Its inclusion has become so common that the general feeling among attorneys may be that, while it might not constitute malpractice, the failure to include such language is certainly never in the best interests of the party being released.

Until a few weeks ago, I might have agreed. That was when I received a phone call from the State Bar, inquiring about an attorney-client fee dispute I had mediated to resolution.

The impetus of the call was a settlement agreement, memorializing the settlement of an attorney-client fee dispute. The agreement contained a Civil Code Section 1542 waiver. The State Bar representative wanted to know the nature of my discussions with counsel representing the attorney in the mediation, and my role, if any, in the 1542 waiver being included in the release. I could not reveal what was discussed or took place during the course of the mediation, and, quite frankly did not remember the discussion leading up to the inclusion of that language in the settlement agreement.

I asked whether there was something wrong with the inclusion of such a waiver in that context. The response was that there might very well be a problem with including a 1542 waiver in a settlement agreement involving a fee dispute with a client. The basis of that position appears to be Rule 3-400 of the Rules of Professional Conduct. That rule

reads:

"A member shall not:

(A) Contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice; or

(B) Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice."

The point of view of the State Bar, or at least of this particular representative, appears to be that a 1542 waiver violates Rule 3-400, because it prospectively limits a member's liability to the client for professional malpractice, and because the waiver resulted in the settlement of a claim or potential claim for the member's malpractice, notwithstanding the fact that words to the effect of "malpractice" or "professional liability" were not included in the settlement agreement. Included was, simply, a waiver of Section 1542, in the context of a fee dispute, not a malpractice claim.

Given the fact that 3-400 (B) refers to the settlement of a claim for the member's liability to the client for the member's professional malpractice, it would appear that the bar's reasoning is that if the attorney is going to use the Section 1542 release as a defense to a malpractice claim, and has not informed the client in writing that the client may seek the advice of an independent lawyer of the client's choice regarding settlement and is given a reasonable opportunity to seek that advice, then that use of the release means that the attorney has settled a claim for the member's professional malpractice, even though the actual dispute at the time was limited to fees.

It would follow then, that if an attorney is settling a fee dispute with a client, in the context of a mediation or otherwise, and is memorializing that settlement, that the client be informed, in writing, as part of the agreement, that he or she has the right to seek the advice of an independent lawyer of the client's choice regarding the settlement.

It would also be advisable, it would seem, to make the settlement agreement effective only after some period of time giving the client the reasonable opportunity to seek the advice of the independent counsel.

If the client is represented by counsel at a mediation of a fee dispute, it may appear, at first glance, that the requirements of 3-400 (B) are satisfied. After all, the party (former client) is, as part of the mediation process, receiving the very advice he or she is being advised he or she has the right to.

Nevertheless, to strictly comply with that section, a recitation of the language contained therein would be advisable, along with a recitation that the client has received that advice. Note, however, it has been my experience that the client, in the mediation of fee disputes very often appears without counsel. (In fact, in the matter that prompted the State Bar call to me, the attorney appeared with counsel, but the former client did not.) In that case, clearly, a recitation of the 3-400 (B) language is required.

It also appeared that the State Bar position, as expressed to me, included an assertion that Rule 3-400 (A) may also have been violated. Since the dispute being mediated was a fee dispute, not a claim for professional malpractice, the argument seemed to be that the settlement agreement was a contract "prospectively limiting the member's liability to the client for the member's professional malpractice."

That is a more difficult interpretation to accept, since it would appear that the word

"prospectively" is intended to impart limiting liability for services rendered in the future (i.e. after the agreement is entered into), and, in the context of mediating this particular fee dispute, no further professional services were contemplated.

The only situation I could foresee that would merit such an interpretation would be one in which the fee dispute were resolved, the attorney continued to represent the client, or represented the client in a new matter, and asserted the 1542 waiver in the fee dispute settlement as barring any claim for professional malpractice for the attorney's services, (rendered either before or after the settlement of the fee dispute).

In this scenario, as with the one mentioned above, it would be the attorney's subsequent assertion of the Section 1542 waiver as barring a malpractice claim that would cause the violation of 3-400, rather than the act of including the 1542 waiver in the settlement agreement in the first instance. However, unlike the provisions of 3-400 (B), which specifically allows an attorney to settle such claims if the client is informed in writing, as that subsection mandates, there is no such saving language in subsection (A). That is, informing the client in writing of his or her right to seek the advice of independent counsel does not appear to preclude the assertion that 3-400 (A) has been violated.

Does that mean that one should not include a 1542 waiver in the settlement of attorney-client fee disputes?

While that would be one way of avoiding the problem, I would suggest that there might be at least one other means of not running afoul of the State Bar's apparent interpretation of 3-400 (A). It is suggested that if you want the 1542 waiver language, that you include words to the effect that such a waiver does not include claims for professional malpractice.

Some may be reluctant to do so, because the inclusion of such language "red flags" the issue of malpractice. However, if the client, under 3-400 (B) is informed of the right to seek independent counsel and follows through on that right, it is highly unlikely that such independent counsel would not insist upon a similar "carve out" from the 1542 waiver language.

It would be extremely helpful if the State Bar set forth its position on this issue in the State Bar Journal, a suggestion I made to the State Bar's representative who contacted me on this subject. Until the bar does, its interpretation may come as a surprise to a significant number of members of the California Bar.

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