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Special Report

Preparing for Mediation of Professional Liability Cases

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Cases involving business tort and negligence claims against professionals, such as attorneys, accountants, engineers and health-care providers, are prime candidates for settlement through mediation. But they also require specific preparation by mediators and attorneys.

Professional liability cases lend themselves to early mediation for at least three reasons: insurance coverage, resource-drain and publicity.

Speedy resolution may preserve the maximum insurance coverage available. Professional liability claims are complex, and as defense costs go up, coverage available for satisfying the claim goes down (which is why these insurance policies are known as cannibalizing or diminishing policies).

All litigation takes a toll on participants. However, the professional defendant loses billable time during the dispute. He or she also will be emotionally distracted — generally to a greater degree than anticipated. Many professionals identify strongly with the roles for which they have undergone lengthy training and made significant sacrifices. An unhappy client's or patient's allegations that the work was substandard can create significant distress.

Early settlement also decreases the risk of adverse publicity. While the risk and cost of adverse publicity is never as big a motivation for the defendant as the plaintiff thinks, it is nevertheless a major factor to a professional defendant.

The mediator and the attorneys must be prepared for the professional liability mediation. Mediators must understand the profession at issue, including relevant industry standards and practices. They also should perform independent research regarding applicable law and regulations.

Attorneys must counteract the strong emotions that permeate a professional liability case by discussing the case's strengths and weaknesses with their clients. Lawyers err when they depend on the mediator to be the first (and only) bearer of the bad news about a case's flaws. Mediators usually cannot trump repeated glowing reports that the attorneys have given the clients about the chances of their case's success.

Lawyers also must be ready for wide-ranging arguments at the mediation. Summary judgment motions and expert witnesses are a major part of almost all professional liability cases. Even if the mediation is conducted early in the litigation, both sides should be prepared to discuss summary judgment issues and the quality and strength of the experts' opinions.

In Session

Who should attend? When the case is against the professional and his or her professional corporation, limited liability partnership or other professional entity, it is helpful to have the organization's managing partner, general counsel or senior executive present in addition to the defendant-professional. That organizational representative usually will support the defendant-professional but will have a different perspective on the dispute. That detached view can be useful to all

parties, including the insurance company representative.

Whose lawyers should be present? Coverage disputes are common in professional liability cases. It is a good idea for the defendant to have independent coverage counsel in addition to the defense counsel provided by the insurance carrier. Coverage counsel can aid the defendant in evaluating the strength of any reservations of coverage and can provide added motivation to settle when the defendant wants a settlement.

What tone is appropriate? Opening statements should be factual and strong but not inflammatory. At best, theatrics can weaken counsel's arguments; at worst, they can become reasons for the other side not to settle. General respect for all parties helps everyone focus on the risks of litigation and could lessen the desire to make the opponent eat his or her words.

Plaintiffs especially need to be prepared for the opening sessions. They may want their lawyers to really let loose on the professional in the opening. But plaintiff's counsel should remind the client that the audience is the insurance adjuster and the mediator, not the professional.

What about consent clauses? Some insurance policies have a consent clause that requires the defendant to consent to any settlement. Such a clause creates a danger for the unhappy former client/patient and the defendant-professional. A defendant who refuses to consent to a settlement the insurance carrier wants to accept will reduce the available insurance coverage to the amount of the rejected settlement offer. Plaintiff's counsel must be careful when extending offers in the face of a consent clause for fear of reducing the insurance funds available and trying the case with inadequate insurance to cover the plaintiff's losses.

Professional liability cases involve certain unique aspects that all participants should understand to maximize the chances of a successful mediation. If the mediator and attorneys are well prepared and participate in the mediation session with a full understanding of the law, facts and interests of the parties involved in the case, professional liability cases are excellent candidates for settlement through mediation. TNL

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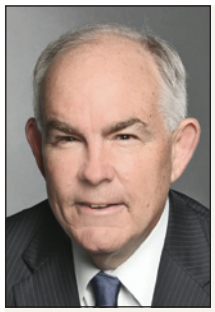

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