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Special Problems in Negotiating Professional Liability Claims

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> I think that if there is only one truth that people need to learn, in the world, especially today, it is this: the intellect is only theoretically independent of desire and appetite in ordinary, actual practice. It is constantly being blinded and perverted by the ends and aims of passion, and the evidence it presents to us with such a show of impartiality and objectivity is fraught with interest and prop a-ganda. We have become marvelous at self-delusion; all the more so, because we have gone to such trouble to convince ourselves of our own absolute infallibility. The desires of the flesh-and by that I mean not only sinful desires, but even the ordinary, normal appetites for comfort and ease and human respect, are fruitful sources of every kind of error and misjudgment, and because we have these yearnings in us, our intellects ... present to us everything distorted and accommodated to the norms of our desire.
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> Thomas Merton

Introduction

For counsel who litigate professional liability cases, perhaps the greatest utility of mediation lies in its educational capacities. For, nearly always, the precondition to a resolution of the case will be the parties' negotiation of a common, if uncomfortable, understanding of the dispute. For starters, this requires education. This article describes some of the more usual, and therefore important, impediments that typically must be surmounted in order to effectuate this end. These include (1) overcoming resistance to opening negotiations; (2) getting stakeholders to the negotiating table; (3) special insurance coverage issues; and (4) the structuring of progressive and/or multi-track negotiations where ancillary or multiple claims or parties exist.

Resistance to Starting Negotiations

In professional liability cases, getting a negotiation underway is particularly difficult. Defense counsel will often be faced with a client who is adamant that the allegations against him are groundless and who, therefore, wishes to defeat the claim via motion or trial rather than resolve it through negotiations. In these circumstances, it is difficult-in the sense that the advice may be unwanted-for defense counsel to suggest that the client engage in a serious settlement initiative.

Nevertheless, and notwithstanding the client's negative predisposition against negotiation, defense counsel may, for a variety of sound reasons, know that such negotiations are vital and in the client's best interests. Moreover, some cases must be settled. In these circumstances, it rests with defense counsel to convince the client of the wisdom of coming to the negotiating table. In the authors' experience, ultimately this recommendation is nearly always accepted by the professional as a sensible opportunity to learn whether a pragmatic, if imperfect, solution to the dispute is possible.

Getting Stakeholders to the Table

Most attorneys and mediators would agree that nothing is more important to the success of a negotiation than having all the right stakeholders, that is to say the interested parties,at the negotiating table. Nowhere is this truer than in negotiations aimed at resolving malpractice claims. Therefore, counsel and the mediator are well advised to ensure that the claimant, the professional, insurance representatives, and all trial counsel personally attend the mediation.

Securing the defendant professional's personal attendance at the mediation is particularly crucial for a number of reasons. First, tl1e professional may need to be educated to particular facts or risk factors that he does not adequately appreciate or understand. His education in this regard may be particularly important since most professionalliability policies contain consent clauses which preclude settlement without the professional's assent. Second, the professional's expertise and knowledge of the facts may be needed in the mediation to educate the claimant to weaknesses in his claim. If the claimant's view of tl1e case can be changed, often negotiating concessions will follow that permit a resolution. Third, from a pure negotiation viewpoint, the professional's personal attendance at the mediation is vital to the dynamics of the negotiation in two other respects. (1) It is unlikely that the claimant will be satisfied with the process if the professional is not present and, in some cases, may consider non-attendance a further affront. (2) Such attendance serves to satisfY the claimant that the negotiation has reached completion, *i.e.)* that the terms negotiated in the mediation are the best that could be gotten. Indeed, in order to conclude the negotiation *all* sides must be convinced that there has been a full airing of the dispute, and that all negotiators have reached their maximum positions. If even one side is not satisfied of this, the negotiation will languish in impasse. Hence, the presence and participation at the mediation of tl1e actual disputants is vital.

Insurance Coverage Issues

The insurer's assertion of coverage issues in the settlement phase of the case may raise potential ethical problems for defense counsel. Broadly speaking, legal representation provided by insurance defense counsel is guided by the ethical maxim that an attorney retained in that capacity cannot advise either the insured or the insurer as to the coverage issues that arise in connection with the litigation. Nevertheless, this stricture does not foreclose a limited, circumspect role for defense counsel concerning insurance matters unrelated to the precise coverage issues raised by the insurer.

For example, the best interests of the insured are usually served by an inquiry with that client regarding the exist-

ence of other policies potentially applicable to the claims, *e.g.)* other professional liability policies, excess policies, or umbrella policies. Actions taken by the attorney on behalf of the insured to effect timely notice of suit and a tender of defense to such other insurers are unlikely to compromise the ethical neutrality required in relations with the two clients. Furthermore, defense counsel is well advised to ascertain that the insured has been informed of the insurer's position regarding settlement and the related coverage issues.

Defense counsel may permissibly assist the insured in understanding a reservation of rights letter or similar communication from the insurer and advise the insured to seek the advice of independent counsel regarding the coverage issues raised by insurer. Of course, in doing so, the attorney must refrain from advocacy or advice to either client regarding the merits of the insurer's noncoverage claim. However, the recent adoption of one policy provision in particular by some insurers further blurs the line between defense representation and impermissible coverage advice.

Some professional liability policies now contain a provision which reduces the policy limits by the amount of funds expended in defense of the malpractice action. This type of provision has been variously described as a "defense within limits" provision or a "defense cost containment" clause. More colloquially, a policy containing such a clause has been called a "cannibal" policy or a "diminishing limits" policy. In any event, regardless of its characterization, by making the monetary limits of the policy's indemnity protection dependent on the costs of defense, such a provision imposes additional responsibilities on defense counsel.

In a "diminishing limits" policy, the limits stated on the policy's declarations page cannot be assumed to be an accurate statement of the amount of insurance available to respond to the pending malpractice action. The true limits of the policy can be determined only on the basis of information concerning the attorney's fees and costs incurred in defense of the insured. Consequently, there must be timely, accurate and complete information which permits a correct calculation of the policy limits. Accordingly, the attorney must closely monitor the law firm's billings in the case in order to maintain a current accounting of defense expenditures. However, even when procedures to that end are conscientiously followed, problems may still arise.

In discharge of its contractual obligations, the insurer also must track the costs of defense chargeable to the policy. To avoid any discrepancies between the insurer's records and the attorney's billings, the attorney is well advised to seek confirmation from the insurer regarding its accounting of defense expenditures. In some cases, costs of defense and/or claim payments in prior cases may have already reduced the limits. Unless the insurer has furnished this information, the attorney can ascertain it only upon request. Such a request can also uncover any disagreements between the insured and the insurer regarding the limits remaining.

A "diminishing limits" policy makes even more critical an early cost-benefit analysis of the malpractice case. Such an analysis would include not only an evaluation of liability and damages but also a projected defense budget and an estimate of its effect on the policy limits. Advice to both clients to consider some form of Alternative Dispute Resolution in an early stage of the litigation may protect the insured by avoiding defense expenditures, especially in cases where the limits have been reduced by other claims or where the potential exposure raises serious concerns whether sufficient limits will remain after projected defense costs have been expended.

Progressive and Multi-Track Negotiations

Finally, it deserves mention that some professional liability cases require multiple negotiation sessions or a multi-track approach. As used in this article, a multi-track negotiation is defined as one in which the mediator, or co-mediators, manage simultaneous negotiations oflegally distinct disputes, normally between various factions or subsets of parties in the case. For example, a simultaneous negotiation involving the underlying, or liability, case, conducted in tandem with a negotiation of coverage issues being asserted by multiple carriers vis-a-vis one another would constitute a simple form of multi-track negotiation.

These phased and/or multi-track approaches are in response to and in recognition of the fact that professional liability claims often arise in the context oflarger legal battles, for example: an architect sued alongside a developer, contractor(s), and material suppliers for construction defects, only some of which involve alleged negligence by the professional. In still other cases, multiple mediation sessions or a single multi-track session may be required simply because the parties are too numerous, or the claims are sufficiently complex in and of themselves. A common example of this occurs when the professional has multiple potential insurers and those insurers have asserted coverage issues as against the professional and/or one another. Where this is the case, negotiation of the dispute is sometimes best approached in a phased or progressive fashion, while other times a single session multi-track approach might be best. Either way, one or the other approach is called for where there are simultaneously coexisting liability, insurance, and/or other ancillary claims which either constrain the availability of settlement funds needed to resolve the underlying case or otherwise require resolution on their own separate terms. Suffice it to say, negotiation ofthese cases demands a flexible and integrative approach to structuring negotiations on a case-specific basis.

Conclusion

The above discussion suggests some of the issues and questions that defense counsel may wish to consider as a case is moved toward mediation. Perhaps its cautionary message is best summed up in the admonition: assume nothing. Do not assume that your client will be receptive to negotiation. Often, at least initially, he won't be. Do not assume that all necessary stalceholders, including your own client, will grasp the importance of their personally attending the mediation. Often they will not. Do not assume that insurance issues will resolve themselves. Typically, they must be incorpo-

rated into the mediation framework deliberately and with advance planning. Finally, do not assume that mediation is a one-size-fits-all process. Consider what kind of negotiation your case needs in order to advance settlement, and find a mediator who will effectuate that process.

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