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Pragmatic Issues on Settlement v. Trial for Legal Malpractice Cases

I. Settlement v. Trial

The defendant in a legal malpractice action will almost always have strong feelings about his or her conduct and actions during the course of the representation of the now disgruntled plaintiff client. The defendant attorney will also be quite familiar with the standard of care, which is usually the issue in a legal malpractice lawsuit. As such, unlike a standard tort defendant who relies on the insurance carrier and appointed defense counsel for advice, the defendant attorney in a legal malpractice action may have strong feelings on the need to aggressively defend the claim, and not simply look towards settlement.

Some cases are straightforward and easy, such as a blown statute of limitations. However, many of the claims that turned into lawsuits involve close issues as to whether or not the defendant attorney did, in fact, violate the applicable standard of care. The plaintiff will almost always have an expert stating the defendant attorney violated the standard of care, while the defendant attorney disagrees with that analysis. The retained defense counsel also will have views and opinions on all issues involved in the case, for both liability and proximate cause of damages. The carrier must receive input from all of these sources in doing its analysis as to the value of the claim.

At times the participating parties for the defense, that being the defendant attorney, assigned defense counsel, and the carrier, are in general agreement on the risk and value of the case. That makes things easy. However, at other times there is divergence of opinion as to the risks and therefore the proper settlement value of a particular claim. This can lead to sharp differences of opinion as to the best way to proceed in the litigation. When such differences arise, the carrier needs to come up with pragmatic strategies to move the case forward, while appropriately considering various viewpoints from the defense perspective, especially whether or not the case should be worked up for trial or positioned for early settlement.

A. Pros and cons to both defendant attorney and carrier

From the carrier's perspective, a reasonable and quick resolution of the case is of primary concern. As such, an early evaluation of the risk of a verdict against the defendant attorney needs to be accurately assessed. This means taking the emotion out of the equation, and critically evaluating the evidence as it relates to a possible violation of the standard of care, along with an analysis of provable damages. Even if there is a more than 50% chance of a defense verdict, there are still substantial risks involved, and the carrier in most cases wants to put a monetary evaluation on that remaining risk, and hopefully resolve

the case. The insured defendant attorney, however, may well take the position that, since he or she firmly believes that there is no violation a standard of care, any settlement is distasteful, and the attorney would like to aggressively defend the case through trial, despite there being some risk involved.

B. Benefits of settlement

The main benefit to both the carrier and the defendant attorney is the elimination of risk, and a quick resolution of the lawsuit. It is here that appointed defense counsel can take the lead in comprehensively communicating the benefits to the defendant attorney, who may be reticent to settle. There are a number of hidden costs to the trying of the case, even if a defense verdict is ultimately achieved. These include notoriety at the courthouse of the defendant attorney being visible and having a public trial for legal malpractice being brought against him or her. Another negative result of proceeding to trial is the extensive time away from the practice of law that a full defense of a legal malpractice case places on the defendant attorney. Often, the defendant attorney has not adequately considered the monetary losses that he or she will incur because of the time away from their practice of law to prepare for and then defend a case through trial, which would usually encompass several weeks. Finally, the emotional toll on the defendant attorney needs to be discussed, since it has oftentimes a negative effect on the defendant client which has not been fully considered.

C. Benefits to trial

The obvious benefit to defendant attorneys is vindication that they did not commit malpractice, and they can rightfully claim the case was bogus, and that their competence should not be questioned. Another perceived advantage is that, by being willing to proceed to trial to fully defend the malpractice claim, this will deter any future claims from other perhaps disgruntled clients, who may or may not exist. The defendant attorney may also believe that a total defense victory well somehow help with their malpractice insurance rates in later years.

II. Areas of Potential Conflict

A. Vindication for defendant attorney versus excessive cost for carrier

As mentioned above, the most common conflict between a carrier and its insured defendant attorney will be the addressing of these two competing goals in any malpractice litigation. The defendant attorney has already paid the insurance premium, and wants a day in court to validate that they did not commit any malpractice. The carrier, on the other hand, is looking at it from a more cost/benefit analysis, which necessarily means evaluating the risk, and putting of monetary number on that evaluation. What happens if the carrier has made such an evaluation, and it turns out that plaintiff's counsel has indicated a willingness to settle in that general range and monetary amount? The carrier wants to settle. The question, then, becomes whether or not the defendant attorney, who is still objecting to any such settlement, can prevent a settlement from being reached, and force the matter to trial.

B. Consent to settle and hammer clauses.

If the policy language has a typical consent to settle provision, the defendant attorney can certainly raise that point as the basis for not allowing a settlement to occur. In response, the carrier, depending on the

policy language, will have a so-called “hammer clause”, which can put pressure on the defendant attorney to relent, and allow the settlement to take place.

A typical hammer clause in a professional liability policy reads as follows:

“Insurer shall not settle any claim without the written consent of the named insured which consent shall not be unreasonably withheld. If however, the named insured refuses to consent to a settlement recommended by insurer and elects to contest the claim or continue legal proceedings in connection with such claim, insurer’s liability for the claim shall not exceed the amount for which the claim could have been settled, including claim expenses up to the date of such refusal, or the applicable limit of liability, whichever is less."

At first blush, this seems to give the carrier the option to settle the case on its own, and if the insured defendant attorney refuses, then the risk of loss over and above the final settlement offer would be borne by the insured attorney. However, a closer reading of the language discloses some troublesome ambiguity.

While the first sentence clearly states that the legal malpractice claim cannot be settled without the written consent of the named insured, it also says that such consent shall not be unreasonably withheld. What constitutes “unreasonably” in this context is, of course, undefined. The second sentence simply states that if the insured refuses to consent to settle as recommended by the insurer, but forces the matters to go to trial, the risk of an award above the insurer's settlement offer is to be borne by the defendant insured attorney. The slightly different wording between these two sentences and their meaning has led some courts to concludes that, as long as the consent is not unreasonably withheld, then the carrier must pay the full amount of any trial verdict and judgment, even if it made an offer acceptable to the plaintiff to settle for less than that award.

In the case of Freedman v. United National Insurance Company, a 2011 US District Court case out of California, the court concluded that as long as the refusal to consent to settle was not unreasonable, then the carrier must pay the entire judgment. This was so despite the language in the second sentence of the hammer clause. In essence, the court looked at the clause as a whole, and concluded that, as long as the insured defendant attorney had a viable basis or reason to not want to settle the case, there was nothing the carrier could do to protect itself by trying to settle or limit its damages to its final settlement offer amount. See also Clauson v. New England insurance Company, a Rhode Island federal court case from 2001, 254 F.3d 331.

In summary, while a hammer clause can put some pressure on the defendant insured attorney to settle a case, it does not guarantee that the carrier can avoid exposure to pay a final verdict, even if well beyond the amount it offered to settle that was acceptable to the plaintiff pre-trial. It is here that careful and cooperative discussions with the insured defendant attorney is required so that both sides understand the risks of loss if the matter does proceed to trial.

C. Duty of loyalty of appointed defense counsel.

Appointed defense counsel plays a key role in attempting to resolve these potential disputes and conflict between the carrier and the defendant attorney. While part of a tripartite relationship, the main fiduciary duty of the appointed defense counsel is to the defendant attorney. Vigorous representation of the defendant attorney is mandatory. Thus, as long as the case is moving forward, and there is no

agreement as to which way to proceed as far as settlement versus trial, the duty of loyalty goes to the defendant attorney, not the carrier. On the other hand, appointed defense counsel must keep the carrier informed accurately as to both favorable and unfavorable facts of the case, as well as giving an independent analysis of the risks involved in the lawsuit. These are cases, usually, in which there is no reservation of rights concern, so it is not a situation where the defendant attorney would be left without available insurance coverage to cover any potential loss at trial. If some facts were to be uncovered that could somehow negatively affect coverage itself, that information should be kept between the defendant attorney and defense counsel, and not shared with the carrier.

From a practical standpoint, the role of appointed defense counsel in the case, once an overall evaluation of the situation has been made, is to adequately and fully apprise the defendant attorney, as well as the carrier, of the best strategy in defending the lawsuit. If defense counsel believes settlement is in everyone's interest, that should be conveyed clearly and early on to the defendant attorney. If, on the other hand, the case is basically without merit, that fact should be conveyed to the carrier as well as the defendant attorney, to ensure that the proper defense, such as the retention of experts and the taking of depositions, has been fully accomplished.

III. Resolution of Conflicts and Proper Handling

A. Heart-to-heart discussions regarding trial costs and potential negative results of a trial

All the parties involved in the defense of the legal malpractice action, the carrier, the defendant attorney, and appointed defense counsel need to have early and open discussions as to all the various factors and risks that are involved in defending the claim. Too often, early on in the litigation the parties simply look at the possible defenses to a malpractice claim, and fail to address all the potentially unpleasant and negative events and factors that can occur during a trial of a legal malpractice case. As explained earlier, there are hidden negative results that can arise from a full trial of such a malpractice claim. The defendant attorney, in particular, needs to told by appointed defense counsel of these potentially negative issues. In defending legal malpractice actions, most all defendant attorneys, even if they prevail at the end of the trial, have regrets about having gone through that arduous process. The reasons that lead to that conclusion and regret are better addressed well before trial, not after the result occurs.

The discussions above are made easier when a rapport has been established with your defendant attorney and appointed defense. As with all other lines of insurance, your insureds (in our case the defendant attorney) want their opinions and sentiments to be heard and do not want to be treated as another file number. Frequent contact with the defendant attorney and appointed defense counsel will create a comfort between the parties making those heart-to-heart conversations easier and productive.

B. Possible verdicts and appeals

If the matter does proceed to trial, some type of verdict will result. If it results in a finding of malpractice, and an award of damages, even if modest, the negative effects on the defendant attorney are obvious. In addition, the carrier has incurred tremendous costs in defending a case which was ultimately loss, and which could have been avoided through a settlement. In this scenario, no one is happy, and finger-pointing may occur. Litigation could even result from a very poor verdict, in which no participant is safe from being named in the litigation.

If the trial is won, and a defense verdict occurs, there is still the issue of the plaintiff filing an appeal, which can drag on for years. That is obviously distasteful to the carrier, which will continue to incur costs, even though the trial resulted in a defense verdict. It may be in both the carrier and the defendant attorney's best interest to once again discuss settlement with plaintiff's counsel, since a very reasonable settlement, without any admission of fault, could probably be reached. This should be fully explored if that situation occurs.

C. Millennials and current jury panels and affects on verdicts regarding defendant attorneys

In many jurisdictions the jury panel has quickly evolved over the past several years. With millennial's now being the majority age group on many jury panels, how they view litigation, monetary awards, and attorneys in general needs to be considered. For instance, in medical malpractice cases and/wrongful death lawsuits, monetary damages have increased dramatically in some jurisdictions. What the defendant attorney in a legal malpractice action may think is the risk of losing and having a large verdict entered against him or her may not apply in their present lawsuit. Jury verdicts from years ago are often of no benefit in that analysis, and appointed defense counsel needs to keep everyone apprised as to current trends and how juries are awarding damages in tort cases, including against attorneys.

D. Bad faith law and possible claims against adjuster and carrier.

Both the carrier and appointed defense counsel must be careful to avoid any hint of bad faith in the handling and defense of the legal malpractice claim being brought against the defendant attorney. Clear communication is crucial to avoid any misunderstanding which can lead to a bad faith claim from an unhappy defendant attorney. Forcing a settlement down the defendant attorney's throat, even if potentially allowable under the policy, may cause problems down the road for the carrier. Also, the individual adjuster, not just the insurance company, may be held liable in a bad faith claim. *See Keodalah v. Allstate*, 3 Wash. App. 2d. 31 (2018).

The appointed defense counsel is sometimes caught in the middle. The duty of loyalty lies with the defendant attorney, but counsel must also adequately apprise, as accurately as possible, the carrier of what the risks in a case entail. Defense counsel must coordinate on all issues with the defendant attorney, even before reporting to the carrier, in some circumstances. At times, the defendant attorney will retain personal counsel to evaluate the case on his or her behalf. If so, the carrier appointed defense counsel must adequately involve that personal attorney of the defendant to make sure there's no potential claim of bad faith in the handling of the lawsuit. Each jurisdiction has specific rules on insurance handling and obligations of defense counsel, and these need to be fully understood when defending a legal malpractice claim or lawsuit.