2024 Professional Liability Practice Group Seminar

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Top Plaintiff Tactics & How to Respond to Them

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1. Time limited settlement demands | policy limit demands

A time-limited policy limits settlement demand is like a hand grenade with the pin out that has been pitched into your lap, and you need to treat it as such. Do not sit on it and do not ignore it.

Upon receipt by counsel or by the insurer of a time-limited policy limits demand, it must be communicated by defense counsel immediately to the insurance company and the insured. The insured should be instructed to get personal counsel (particularly in cases where there a multiple claimants and inadequate limits.) The insurance company should elevate the demand to upper management immediately and it is advisable for the insurance company to immediately engage outside coverage/bad faith counsel to advise the company.

Do not simply forward a demand by email and assume that the insured and the company got it. Call and make sure they have it.

Diary the deadline for a response.

Note, a trap for the unwary is that a time-limited demand may have monetary and non-monetary terms and they ALL must be met, or the demand may be deemed rejected. Counsel or the insurer must be very careful to inadvertently "reject" the demand by not responding properly. For example, if the demand says that limits must be "tendered" by a certain date, that term needs to be defined. Does it mean that the limits must be "offered" by the deadline, or does it mean that the limits must be "paid" by the deadline? Ask. Further, if there are things the insured must do, make sure to get them working on doing what they need to do.

If you are not ready to respond by the deadline, then put together a very detailed letter that explains why you cannot be ready. Assume that the letter may be an exhibit in a subsequent bad faith trial, so make it self-serving. If the insurer cannot respond by the deadline, they should seek the insured's consent to respond by asking for more time.

The minute you get a claim in that has injuries and multiple claimants you should begin working feverishly to develop information on liability and value. there is no excuse from not being ready to respond to a demand because the insurer or defense counsel have not done the proper work up.

Do not stupidly make demands for information in cases where the value is obvious such as a wrongful death case or a clear catastrophic injury.

The claim file and defense counsel's file should be saturated with references to the fact that your intent and purpose is to do what is in the best interest of the insured. Your file should not have anything in it that suggests that the company's motivation is to protect itself. Period. The insured's best interest is a safe harbor.

The insurer and outside bad faith counsel need to know on day one what the particular state allows with respect to how to dole out limits. Are you a state that let's you pay the biggest claim and ignore the others? Are you allowed to pay the first claim that is made? Do you have to try to pro rate your limits among multiple claimants? Does your state have a statute like Missouri or Georgia that dictate how time-limited demands are handled? Are you in a state where you can interplead your limits among all known claimants? Are you in a state where your duty is to use reasonable care in the insured's best interest to reasonably distribute your limits? (the majority).

If you interplead, do not stop defending your insured. If you have to hold back one dollar so that you have not "exhausted" your limits, then hold back a dollar or simply keep defending, but issue an ROR letter to the insured to let them know that you will still defend, but the limits will be gone. Try, if you can, to get a release for the insured in the interpleader. Interplead BEFORE the deadline passes to respond to the demand. When you interplead, put you limits into the court on Day one of the interpleader. Don't wait for the court to let you pay the limits. You do not want to be viewed as having held onto your money.

Last point. When you are faced with a time limited demand and you hire outside counsel to advise the company, be scrupulous about attorney client privilege. Do not have defense counsel and bad faith counsel in the same email string. Do not share communications between the company and bad faith counsel with defense counsel or the insured. The subject line of every email with outside coverage counsel should say "Attorney Client Privilege" so that you can demonstrate that it is your intent for those communications to be privileged. Do not have Zooms or conference calls with both defense counsel and bad faith counsel together. They will not be privileged. Also, watch what is put into claim notes because privilege can be destroyed by claim notes. Lastly, be careful how you use your bad faith counsel. They can talk to defense counsel, but it should be sparingly, and do not have your bad faith counsel "adjusting" the claim. If they appear to be adjusting the claim, then some courts will not respect the privilege and bad faith counsels' file may be discoverable.

Remember, that time-limited policy limits settlement demands can be step one toward a nuclear verdict. Don't let it happen.

Main take-away: Insurers MUST train their staffs AND their defense counsel to treat these demands seriously. Casually missing a deadline can create additional exposure.

2. Going for anger

Trial lawyers are capitalizing on the reality that anger is a better motivator than sympathy. Case presentations focus less on fault/cause; rather, plaintiffs seek to vilify the defendant and get the jury angry at the defense.

Even where punitive damages are not on the table, they are on the table. Jurors will use their damage award to send a message, punish the defendant, or motivate changes in the defendant's behavior, regardless of what the jury instructions say about the nature and purpose of their damage award. What this means is that the defense must select cases to try where they have the moral high ground or where they can truly offer a trial story that aligns them with righteousness.

It is important to understand who you are dealing with in terms of opposing counsel and what their techniques are. Do they employ the Reptile Theory; Trial by Human; or other popular techniques? Study and observe these techniques and be prepared to directly address them.

Defense accountability is important to diffuse anger. The defendant can always find something to accept responsibility for – even where they are contesting liability. Accepting responsibility right out of the gate is an effective way to diffuse anger.

While it is often effective to express accountability, the defense must be careful with apologies. One tactic from the plaintiff's bar is to use a trial-time apology to expose the fact that the defendant did not apologize or express condolences to the injured person at the time of the injury, in an effort to make the defendant look callous.

3. Demonizing the corporate rep

Instilling anger at the defendant often begins and ends with the corporate rep. Plaintiffs may videotape their 30b6 of the defendant and use that deposition not as a discovery tool but as an opportunity to get sounds bites for trial, and even opening statement. The questions may revolve around the size and geographic scope of the defendant (to create the impression they are wealthy), the defendant's lack of written policies, the defendant's discovery compliance, the defendant's investigation of or immediate response to the incident, etc.

Selecting a corporate witness who can handle aggressive questioning while appearing genuine, authentic, empathetic, and sincere is key. Defense counsel should practice with the corporate rep and video the practice session.

4. Using professional responsibility rules to inflame the jury

A violation of the rules of professional conduct does not give rise to a claim against an attorney. Despite most states' rules making this expressly clear, plaintiff's counsels still plead the alleged violations in Complaints and attempt to include the reference to them in jury instructions. Defense counsel should address any claim for violation of the rules of professional conduct both in dispositive motions and in motions in limine. Any reference to the rules of professional conduct during trial should be immediately address with the judge to ensure that the evidence is used to support a claim that a violation of the rules gives rise to a claim. Further, ensuring that the defense expert on the standard of care is properly prepared to address any questions about the rules of professional conduct is equally important in preventing an overzealous plaintiff's counsel.

5. Ignoring traditional indicators of value & focusing on intangibles

Rather than focusing on special damages or economic damages, Plaintiffs are focusing on less quantifiable harms like trauma, emotional distress, stress, pain, suffering, and the impact of an injury on one's functioning and daily living. Plaintiffs' lawyers are no longer content to consider a multiplier of special damages or some other traditional guidepost as a benchmark to evaluate cases. Defense lawyers must adapt to these techniques so that they are properly evaluating cases, appreciating the risk of trial for certain plaintiffs or injuries, and advising clients about the full scope of damages.

6. Asking for BIG numbers

Plaintiffs' lawyers have learned that the only way to get a big verdict is to ask for one. Because jurors has been desensitized to large verdicts, salaries, bonuses, etc., they rarely flinch at enormous blackboarded amounts.

The defense must counter-anchor. But don't state the number bluntly; rather, build up to it so that each component of the final number and the final number feels generous.

7. Delaying settlement discussions

Most plaintiffs and their counsel want to settle as quickly as possible. However, delaying settlement negotiations in professional liability cases occurs most often when there is a perception, rightly or wrongly, that the settlement amount will increase as trial draws near or when there are fee shifting provisions applicable to the claim. The best way to combat delayed settlement negotiations is to consider using offers of judgment or making an early settlement offer to force the plaintiff's counsel to confront settlement with their client. Additionally, consider raising an early settlement conference or mediation with the court, which typically favor efforts for the parties to engage in settlement negotiations.

8. Bringing in national trial counsel

In serious injury or death cases, it is not uncommon for local lawyers to affiliate with a national trial counsel firm with a reputation and track record of nuclear verdicts. In this instances, it is important to evaluate who you will be confronting at trial; and, to learn their style and techniques. These trial lawyers put on seminars, publish books, and have tutorials on YouTube. Transcripts or videos of their performances may be available as well. These materials should be studied to develop counter-measures, to inform motions in limine, and to educate the defense trial team and judge as to what to expect in the courtroom.

9. Weaponizing discovery/discovery disputes

To gain a tactical advantage or paint the defendant in a bad light, some Plaintiffs will aggressively pursue discovery and urge that any less-than-perfect response is a violation of the discovery rules. These Plaintiffs may actively seek sanctions or evidentiary presumptions as a result of perceived or real discovery glitches. It is important to know if your opponent engages in these tactics, whether your judge is sensitive to them, and to keep your discovery responses full and up to date.

Nobody enjoys litigating discovery disputes, but they can sometimes create a critical turning point in litigation. We most often see plaintiff's counsel engaging in hide-the-ball tactics in professional liability cases when there is subsequent counsel involved in the underlying case and that subsequent counsel's actions or advice undermine the plaintiff's malpractice claims. Typically a defense based upon proximate causation being cut off by the subsequent counsel will need to be factually supported by obtaining the full and complete communication between the plaintiff and their subsequent counsel. To combat a plaintiff's counsel from creating discovery disputes, defense counsel needs to be vigilant in raising the discovery issues to the court and making a record should an appeal become necessary.

10. Leveraging statutes to maximize damages

Treble damages in professional liability claims are thankfully rare. However, there are certain situations where treble damages may arise, such as when authorized by statute or in states where the conduct of an attorney allows for treble, punitive or exemplary damages, such as conversion of client funds or other egregious behavior. In some states, statutes related to property damages, crime victim relief acts, and attorney deceit can be leveraged to argue for exemplary or treble damages. In those situations, an effective way to address the treble damages is to address the merits of the claim that typically undermine the plaintiff's ability to actually prove a claim for treble damages. Additionally, most claims for punitive damages required a heightened burden of proof, such as requiring evidence that is clear and convincing before punitive damages can be awarded. In most cases, if an attorney's actions are even close to arising to the level where punitive damages are truly considered, all efforts should be made to engage in meaningful settlement negotiations, even if a settlement requires an enhanced payment short of the amount of a treble damage figure.