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**[Defense Ethics and Professionalism]**

Civility and Respect Will Lead to Better Results

by Salvatore J. DeSantis

Zealous representation of your client does not require a “scorched earth” approach. Rather, a hostile and unapproachable attorney will frequently do his client a disservice. I have found that through cooperation and less aggression, the litigation process does not have to be so expensive or time consuming. Hostility between counsel for the parties can be tempered through open and frequent discussions. While this article focuses on insurance defense practice, the theme suggested is universal and can be applied to any area of law practice. Put simply, communication across party lines is critical to success in litigation.

In the instance that a defendant’s insurance carrier may want to take a hard line, a “no pay” position because there is suspected fraud or no liability, the file will usually not be closed quickly and amicably. Yet, civility and respect will enable a more efficient resolution of even those claims. The goal of claims handlers is to reduce the number of pending files through efficient resolution of claims. We need to help them achieve that goal.

Upon receipt of a lawsuit from a claims department, outside counsel must call the claims handler to outline the proposed defense strategy and define what would constitute a successful resolution. “Success” does not necessarily mean that you achieve a defense verdict or get a dismissal on summary judgment after lengthy discovery. A successful case is one in which you achieve the best result, in the shortest amount of time, in a cost-effective manner without surprises.

The insurance carrier may simply want you to obtain the plaintiff’s medical records and an independent medical examination, so that the case can be settled. If this is the strategy, then building rapport with opposing counsel and asking him to help you get the desired records through an authorization is crucial, since obtaining routine discovery through the courts can take months. Similarly, if you know that the demand will far exceed the defendant’s policy limits, your strategy may include demonstrating to the plaintiff’s lawyer early on that your client is judgment proof. You may even help to find other potential sources of recovery for the plaintiff. The sooner you establish your client’s exposure the better.

The first telephone call to plaintiff’s attorney sets the tone of the litigation. Use it to disprove the stereotype that defense attorneys are only concerned about increasing billable hours. Rather, subtly demonstrate that defense firms get more cases when they show a pattern of efficient, competent claim resolution. Also, use the call to gather pertinent facts about the incident, injuries, and requested damages. Absent a good

working relationship with the plaintiff's attorney, you may not piece together factual details for months.

The best course is usually not to file an answer and send discovery requests to the plaintiff, who will take months to respond, and then with limited information and objections. Instead, try to get facts by a friendly telephone call to plaintiff's counsel; this is possible if you have already established a relationship built on civility and respect.

The plaintiff's lawyer is usually very willing to discuss details of his or her client's case. He may apprise you of the alleged mechanism and extent of injury, the location of the accident, identity of witnesses, applicable reports, and investigation details. He may also agree to provide you with copies of photographs, reports, and witness statements. You will then have a snapshot of the position being taken by the other side. Remember that the telephone call is not a one-way street; you should be prepared to provide some basic information about your own client. Through this give and take, the issues can be defined and the case properly evaluated.

The plaintiff's settlement demand should be obtained and discussion should begin about the value of the case as early as possible, even in the initial call, and continue throughout the fact-finding stage. If plaintiff's counsel initially demands what you consider to be an exorbitant sum, it is usually counterproductive to berate the plaintiff's lawyer about the demand or the quality of the case. It is the rare opponent who is bluffed into submission. Rather, you should ask why the plaintiff feels the case is worth the amount demanded and convince her that she is overvaluing her client's case by pointing out specific areas in which the demand is inflated. You can also ask for documentation to support the special damages demand. There still may be disagreement as to value, but at least you know your opponent's position early on and can alert the insurer and client of the same.

The biggest obstacle to a settlement is often the ego of the lawyers representing the parties. By building relationships based on civility and respect with your adversaries, you can define the parameters of what it will take to settle the case or move towards trial more expeditiously without needless motions and threatening letters. It can also make litigation more enjoyable for you and, ultimately, may improve the public's perception of our profession.

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