Tips on Mediating the Legal Malpractice Case

The legal malpractice case presents a number of interesting substantive and insurance coverage issues that must be addressed in mediation in order to settle the case. The substantive elements of the claim must be analyzed by the parties and the mediator. The element of causation must be addressed in terms of what is required to prove the litigation or transactional malpractice case. Insurance issues such as burning limits policies, consent/hammer clause, and cross claims for legal fees may be involved in the case and may need to be resolved in order to reach a settlement.

Prior to the mediation, the parties need to brief and be prepared to discuss the elements of the claim. Obviously, duty must be addressed and may present an issue depending on whether the claim is made by a client, a third party, or whether the attorney has a legal duty with respect to the subject of the claim. For example, there may be an issue as to whether there was an attorney-client relationship between the parties. In the context of a litigation malpractice claim regarding the failure to communicate a settlement offer, there may be a question of duty depending on whether the offer was in writing or not.

Did the lawyer defendant breach the duty? This issue often comes up in the context of a breach of fiduciary duty claim arising out of an alleged conflict of interest. Analysis of whether or not there was a conflict requiring a waiver in either the underlying representation of the client or the prior representation of a former client requires careful analysis by the parties and the mediator. It may be that the interests of both clients are the same and not adverse or that the representation of the former client was on a subject matter distinct from the one involved in the representation of the new client.

As mentioned earlier, causation is a very significant issue in a legal malpractice case. Was the lawyer's error the cause of the loss? In order to prove causation in a the transactional malpractice claim, the client is required to show that he would have gotten a better deal or would have walked away from the deal. This can be a very difficult burden to overcome, particularly if the adverse party in the underlying transaction testifies that he would have never agreed to the contract term that the client says should have been in the agreement. In a litigation malpractice claim involving proof at trial or some other contention of trial error, the burden is to establish that the error would have changed the outcome of the case; i.e. but for the error, would the client have won the case, which is a very significant burden for the plaintiff client. Some commentators have suggested that it requires another trial of the underlying case within the context of the legal malpractice case. This is certainly the case when the malpractice claim is that the lawyer failed to file a suit within the statute of limitations. In order to value the malpractice case, the trial of the case must include a trial of the underlying action to determine whether or not liability would have been imposed, and if so, the extent of the damages.

The blown statute of limitations case presents the challenge of analyzing not just the legal malpractice case, but the underlying case within the legal malpractice action. This could be any kind of case, from a personal injury accident claim to a more complex business litigation action. The challenge to counsel in the malpractice action is that they must brief two cases in presenting the malpractice case to the mediator. The corresponding challenge to the mediator is that the mediator must understand and appreciate the issues in both cases. For example, was there any merit to the underlying action? What were the recoverable damages? The nature of the underlying action may have some effect on the lawyers' choice of mediator. It may not be enough to find a mediator familiar with legal malpractice claims. The ideal mediator should have knowledge and experience in the substantive law of the underlying case which may have involved a complex patent or antitrust claim.

If the malpractice case wasn't already complex enough, many cases also present numerous insurance coverage related issues. One issue may be the limits of the malpractice insurance policy. These policies are referred to as burning limits policies meaning that defense costs diminish the limits. In a case where a lawyer or firm has a million dollar limit, the expenditure of a few hundred thousand dollars in defense costs, limits the amount available for settlement to the remaining six figures. When that is not enough to cover the damages, the situation presents the parties and the mediator with some challenges. Further defense of the case will reduce the amount available for settlement or payment of a judgment and may leave the attorney defendant with personal exposure. This may put a lot of pressure on the insurer, defense counsel and the insured lawyer to settle the case at mediation. It also puts the lawyer and his insurer in adversarial positions that are delicate and difficult for the mediator to address during the mediation unless the lawyer is represented by personal counsel.

The professional liability policy also requires that the attorney insured give his consent to the settlement of the malpractice claim. There are cases in which the lawyer does not want to consent and may have a legitimate reason for not doing so. Perhaps the case includes a cross claim for attorneys' fees and the lawyer does not believe that the malpractice claim has any merit and wants to collect the fees. The insurer on the other hand, wants to settle the case either because it assesses the risk of loss differently than the insured, it is concerned about damage exposure in excess of limits or wants to limit the amount of ongoing defense expenses. The insurance policy does have a provision commonly referred to as a "hammer clause" which provides that if the insurer could have settled the case and the insured will not give its consent, then the exposure under the insurance policy is limited to the amount of the putative settlement. The enforcement of such clauses is beyond the scope of this article, but suffice it to

say, the issue is a thorny one that the mediator must address in order to reach a settlement.

Obviously, the temperament and demeanor of the parties is an issue for the mediator in all mediations. In the legal malpractice case, the client plaintiff may be very upset with the lawyer and may need to vent the anger before any meaningful settlement discussions can take place. The lawyer may also be very upset about his otherwise impeccable reputation and angry that the client did not appreciate all that the lawyer did. To make matters worse, the client may not have paid the lawyer all or a portion of the fee. It is crucial that the mediator create an environment in which the parties are comfortable discussing their feelings about each other and the case in a constructive and empathetic manner.

The successful resolution of a legal malpractice case involves the juggling of several moving parts. They include presentation and understanding of the facts and law of the case, the underlying action or transaction, insurance issues that may be present in connection with the claim and/or an appreciation and understanding of the parties feelings about the case. The mediator must work through these issues with counsel in order to create a path to settlement of the case.

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