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In a series of ten articles, Jayme Vaccaro shares her strategies for successful resolution of medical malpractice claims. Article number four focuses on the tools one can use to achieve a better outcome.

Ten Strategies for Successfully Resolving a Medical Malpractice Claim

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From never being afraid to try a case – any case – to knowing what ultimately motivates the plaintiff, thinking outside the box and creativity can be a mantra for successfully resolving medical malpractice claims. Getting caught up in pretty file syndrome and rote processes without considering the intangibles of a case can sabotage a good outcome. Missing the elephant in the room and leaving all the power with the plaintiff attorney without realizing how, when and why we surrendered is unacceptable. Take back that authority and explore 10 ways to resolve your medical malpractice claims through these time tested strategies.

Strategy Number Four: Using your Tools

There is a veritable plethora of “tools” we can use to achieve a better outcome when resolving a medical malpractice claim. Sometimes the hardest part is actually using the tools we have. Consider indemnity agreements. Indemnity agreements are found in most healthcare contracts between hospitals and physicians. Depending upon your venue, they are rarely enforced or they do not have clear, concise language that benefits the parties. Having both a strong equitable indemnity and contractual indemnity claim can mean double trouble or pressure for an opponent.

THE TEN STRATEGIES

- Never be afraid to try the case: any case
- Always be aware of the plaintiff attorney’s vulnerabilities: leverage
- Always know where your codefendants lie in wait: friend or foe
- Use your tools: from high/lows to bifurcation
- The courtroom is sometimes not the place: alternative forums
- Know when to hold and know when to fold
- Know what the plaintiff wants out of the case: the sweet spot and it may not be money
- Back to Basics: know your case inside and out, legal, medical and the like
- Anyone can help you mediate: from the judge to the structured settlement representative
- Understand the risk appetite of your client/insured/defendant
Consider the option of negotiating a high/low agreement. Unless restricted by your venue, these arrangements can drastically lower the risk of a runaway verdict. Even if the parties agree to disagree on settlement value, they can try a case but avoid uncertainty. A high/low is an agreement between the plaintiff and defense on the maximum and minimum they will pay on a case even if the jury comes back with a different amount. The low amount, say one million, will be paid even if the defense wins at trial and a high, say five million, will be paid even if the defense loses and the jury comes back with a twenty-million-dollar verdict.

In a high stakes birth injury case, your CFO and excess carriers will sleep easier if they know you have arranged a high. While it may be painful to pay the agreed low if the defense “wins,” this type of agreement limits the parties’ risks.

Consider another tool: objecting to a “good faith settlement” of your codefendant. While many will argue for the majority of the motions, judges grant good faith findings and it’s not worth the effort or angering the plaintiff or codefendant. There are exceptions and you need to know them.

There are numerous other alternative considerations that remain tools in your tool box: waiving a jury, enforcing binding arbitration, bifurcation of issues and alternative mediation forums. While many of these tools have pros and cons, a key factor is knowing when the facts or case gives rise to using such tools. While use of an indemnity agreement may prove too hostile to a business relationship in one case, it may be perfect for another. If a high/low is not a good alternative in one case, keep your mind open for its use in another.

**Case Example #1: Everybody gets high, everybody gets low**
A 38-year-old woman was seen by physicians for blurred vision and a headache. Examined and discharged, she suffered a stroke the next day. The patient was left in a vegetative state. The woman and her husband are plaintiffs and the case is tried. The plaintiff boards over eleven million in damages.

The jury is out three days and from the questions asked, the plaintiff and defense could tell they were possibly hung (unable to reach a verdict). Both the defense and plaintiff are motivated to not try the case again. A high low is negotiated even in the event of a hung jury. The jury is in fact hung and the high/low is enforced. The parties had agreed that if the defendant won the trial they’d pay the low. They also agreed that if the jury was hung, the defense would pay the low.

Unbeknownst to the defense, the plaintiff did not want to retry or prolong the case because the husband, also a plaintiff, wanted to divorce his wife after the trial. The plaintiff did not know the defense was concerned that, while the second physician to see the patient on her return visit was never named in the
case, his partnership was named. If it was discovered that it was actually the second physician who had the true exposure, it could be a case of huge liability for the partnership.

Where the parties prior to trial could not reach a settlement amount, the high/low resolved the case for both parties for reasons and amounts all could live with.

**Example #2: Objecting to a Good Faith Settlement: Creating Bad Blood?**

There are three codefendants in a medical malpractice lawsuit. Two of the defendants have large, self-insured retentions with layers of excess insurance available. The third defendant has a one-million-dollar policy which he shares with his group. The group is a large intentionally underinsured asset-rich entity. The injury to the patient is catastrophic and large damages are sought. The physician and group tender the one-million-dollar policy and the plaintiff accepts it. The remaining codefendants have minimal liability but high exposure due to joint and several liability and available limits. Evaluation of the case shows the lead actor was the physician and the remaining codefendants remain in the case due to an ostensible agency theory.

One codefendant objects to the settlement arguing that the physician and his group would have paid proportionately more than the one million but for the shared and limited insurance available. Moreover, the physician and group intentionally carry minimal limits, gambling that the plaintiff will take it and higher limit codefendants will pay the remainder of the settlement. The codefendant shows proof of the group’s size and wealth, and explains the plaintiff’s attorney’s incentive to take the million: the remaining codefendants with larger limits are an easier target with deeper pockets.

The judge finds the settlement in good faith but states that, in this case, the group was not named. Had it been named, different considerations would have been explored. While you lost the motion, the judge gave a hint at what might have been with a different fact scenario.

While some might deem these arguments treacherous, if they are not made the larger limit codefendant is basically serving as excess coverage for the underinsured physician/group. It is true these motions are often denied. However, when the difference between a single or small physician group and a mega group carrying such limits is competently explained, judges may be more apt to grant your motion. You will never know how a judge may rule on this type of fact scenario unless you make your motions. In the example given, yes, the judge, as many will argue, did not overturn the good faith settlement finding. He did, however, give a hint as to how he might rule had the group been named. This example is a reminder that you must look at each case separately to discover the right tools.
Example #3: Admitting Liability: Taboo Voodoo?

An x-ray reveals a large mass in the patient’s right lung. The patient is not told and two years later is diagnosed with terminal stage IV lung cancer. The patient sues for malpractice. While the defense admits the standard of care was not met and the delay in diagnosis caused the patient harm, the plaintiff and defense cannot agree on settlement value. The patient was a high wage earner; however, the defense has legitimate issues with the plaintiff attorney’s case value.

The defense needs to make a difficult decision: pay full jury verdict value and then some, or try the case on damages. If the case is tried on damages only, little or no evidence on the standard of care and causation is submitted to the jury. This takes away the impact, sympathy and potential emotional aspect of the case. The hope is the jury will focus on real damages. The main issues presented are work history, life expectancy and earning capacity. This is a very limited compared to a full blown medical malpractice trial.

This case is tried and the jury finds against the defense. The amount, however, is closer to the defendant’s damage assessment, not the plaintiff’s unreasonable demand.

It is unfortunate when such a case must be tried and the parties cannot reach a settlement without the jury’s help. Admitting negligence is a tool in your tool box. Do the math on such a case: pay $15M or take a chance with a jury and pay $5M. When the numbers don’t make sense it is time to reach into your tool box and focus on how to achieve a better outcome.

Conclusion

Medical malpractice claims have tools available that may accomplish better outcomes. Use of these options includes knowing when a case or fact scenario fits the right alternative. Taking a chance and using your tools available requires team work and thinking outside that box. Sometimes, you need to try a few times before you get the result desired. Not trying may leave you with an unsatisfactory result and overpaying on your claim.

If you have such tools but rarely use them, is it time to rethink the unthinkable? Key to this strategy is always keeping your tools in mind and knowing when they are best used.

Visit next time for strategy #5:

The courtroom is sometimes not the place: alternative forums.
About the Author:

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