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In a series of ten articles, Jayme Vaccaro shares her strategies for successful resolution of medical malpractice claims. Article number six discusses when to hold and when to fold.

Ten Strategies for Successfully Resolving a Medical Malpractice Claim
Jayme T. Vaccaro, J.D.

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 Six: Know when to hold, know when to fold

Offers and demands, as well as deciding when to settle a case or go to trial are all part of the many decisions made during the life of a medical malpractice claim. As the claims, risk or legal professionals make these decisions, a combination of factors come into play. If you hold at the right time and amount, you consider it an acceptable outcome when the plaintiff takes you’re offer. If the offer is not taken, the temptation to “fold” mounts and you must strategically maneuver a resolution. How do we know when to hold or fold?

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

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I like to say there is a rhythm that develops between the claims/defense/risk team and the plaintiff attorney during settlement negotiations. While plenty of facts, numbers and details are shared by the parties, we should not underestimate the involved team understanding the settlement sweet spot and what will “get the job done.” If you’ve hired a competent claims team, you must trust the closest people to the claim. For example, it could be the claims specialist who ultimately has the best temperature on case settlement value. Preserving that “instinct” or “rapport” is crucial. It can get interrupted in many ways. Let’s take a look at how a settlement can get sabotaged as this delicate balance is disturbed and folding is the unfortunate outcome.

Example: The “Big Chill” that Killed

The parties entered the settlement phase of a high exposure case. The injuries to the plaintiff are severe and the damages, if the plaintiff was to win at trial, are high. There are strong defenses on standard of care and causation. If the defense loses at trial, the amount could far exceed the last offer by the defendant. Adding to the pressure, the plaintiff makes a statutory demand so any counter offers not equal to the policy limit could take the “lid off” the policy limit which could result in the carrier paying excess of policy limits if the plaintiff wins at trial.

This is a typical scenario in a high exposure medical malpractice case. Many experienced professionals in our field know that if full policy limits were offered every time such a demand was made, many more policy limit payments would in fact be made. The fear of “taking the lid off” is a real one but needs to be managed in good faith rather than fear. To do otherwise encourages the plaintiff attorney to make policy limit demands on any case high exposure case. With no downside, and a good chance at a “panic and pay carrier” nothing stops the plaintiff from making unreasonable demands.

In such a high stakes, tense situation, cool headed, experienced medical malpractice claims professionals should weather the storm of holding. They should hold if the settlement value is lower than the plaintiff’s demand, policy limits or not. In this fact scenario, if the claims specialist has reason to believe the plaintiff would resolve the matter in an agreeable range and was in a holding pattern because:

- The plaintiff indicated he’d take far below the policy limits;
- The low amount indicated the plaintiff knew his case was weak on the very same issues the defense knew their case was strong;
- You are dealing with a very reputable plaintiff attorney so if he senses his weaknesses and his demand is reflecting this, you are more confident to push for the amount you consider appropriate;
- The possibilities of winning at trial are high for the defense;
- The defense indicated they were ready, willing and able to try the case and the plaintiff believed it;
• The defense added a second highly skilled trial attorney to sit second chair thereby sending a strong signal they were going to try the case if the plaintiff did not take their offer;
• A win at trial left the plaintiff with no recovery;
• The defense had made a statutory demand and if they won at trial could go after the plaintiff for the costs of the lawsuit;
• The parties knew each other and had prior dealings leading to credibility (e.g. strong temperature for what was bluffing and what was real);
• With more time, the serious threat of actually trying the case, it was felt the plaintiff would eventually take the range the defense was at even if the timeline of the statutory demand was not met—the defense clearly signaled they were more than willing to hold.

In this holding pattern a very drastic change occurred: new claims management at the carrier’s company. The management had a very different appetite for risk and did not feel confident in the “hold.” The key concern was the downside of the case. The concerns were so great that all negotiations were cut off and the fear of “taking the lid off” was so overwhelming, negotiations stopped, no counters allowed and only full limits offered and eventually paid.

**Conclusion**
With such a fold comes a lack of faith in the dynamics of the ongoing negotiations; not appreciating the threat and confidence in a win at trial and most importantly, an announcement to the plaintiff’s bar in the shift of risk appetite with new claims management at the insurance company. Ironically, generally after the pendulum swings towards risk aversion, it swings back to confident and firm negotiations. Generally, the program or insurance carrier experiences a spike in severity that requires a correction and the risk aversion approach usually does not win the day.

Eventually the severity takes you back to trusting what a claims program can do when allowed. The medical malpractice industry did not earn what I call “super stats” for no good reason. As a reminder, if left to their natural instincts, our medical professional liability claims industry delivers 80% wins at trial; 80% dismissals of claims and lawsuits with no indemnity payments and other great outcomes. (See National Practitioner Data Bank, PIAA, Risk Authority, AON, Marsh and other annual MPL statistics). Risk appetite is key and the scenario described above could be that of a dying breed of claims and trial attorneys. There is risk aversion currently affecting our industry (see Strategy No. 10 for more discussion). As per claim severity goes up, the downside is great and trying cases is not always welcomed. My greatest concern is the second victim—the provider. They carry the settlement on their record. They miss the opportunity to have their day in court and experience the 80% odds of a defense verdict. This is not to say a physician may not feel nervous about the high stakes of a case. He may even demand a settlement.
Unfortunately, if every time a plaintiff demanded policy limits or every time a physician demanded a settlement on a high exposure case and a carrier/program “panicked and paid,” severity would explode. Plaintiff attorneys smell fear and are shrewd about their opponents. Effective holding and folding is paramount to acceptable outcomes. Draw that line, trust your team and hold out for that acceptable outcome as folding is just not a long term option for a sound claims program.

Visit next time for strategy #7: Know what the plaintiff wants out of the case: the sweet spot and it may not be money

About the Author:

Jayme Taormina Vaccaro has worked in the healthcare professional liability claims and risk field for 25 years. She represents physicians, large groups, allied health providers and hospitals in multispecialty medical malpractice claims. She is currently a Vice President of Specialty Claims at Sedgwick, the nation’s largest third party administrator. Prior to joining Sedgwick, she served as Vice President of Integrated Risk and Claims with MedAmerica Mutual Risk Retention Group and Assistant Vice President of Claims with TDC.

Jayme received her law degree from Lewis & Clark Law School in Portland, Oregon and her undergraduate degree from Cal State. She lives in Lafayette, California.