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Presents

GETTING YOUR CASE INTO THE END ZONE

May 10, 2023

The Fontaine Hotel
Kansas City, Missouri

EAGLE INTERNATIONAL ASSOCIATES

MISSION STATEMENT

Eagle International Associates is an international network of independent law firms, adjusters and claims related service providers throughout the United States, Canada and Europe. Eagle members are dedicated to providing insurance companies and self-insureds with the highest quality legal and adjusting services for competitive and fair compensation. As members, we are committed to the highest ethical standards and act with professionalism and civility in all our endeavors. Eagle members exceed their clients' expectations for quality and service. At every opportunity, we promote the use of Eagle and its members and refer existing relationships through active participation in Eagle's meetings, programs and seminars.

DIVERSITY POLICY

Eagle International Associates, Inc. is of the strong belief that our organization is stronger, more valuable, and more effective through the inclusion of adjustors and attorneys of diverse gender, sexual orientation, racial, ethnic, cultural backgrounds, and all religious or non-religious affiliations. Eagle recognizes that the inclusion of such diversity is vital in order to achieve excellence and to serve its clientele effectively. Eagle is committed to a further understanding of its cultural filters and the absolute need to accept each person as a valued, talented, unique individual, which, when working with other Eagle members, will bring the organization and all its members genuine benefits and competitive advantage in the marketplace.

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PROGRAM

11:30 am **Registration (Light Lunch)**

12:30 pm **Welcoming Remarks and Program Introduction**
Stephen J. Fields, Esq., Brinker & Doyen LLP, Eagle Chair

12:40 pm **Life Care Plans and How To Cut Them Down To Size**

Moderators:
Joshua G. Keller, Esq., Deutsch Kerrigan, LLP
Theodore J. Waldeck, Esq., Waldeck & Woodrow PA

Panelists:
Amy Evans, Executive Vice President Liability Claims Division, Intercare Insurance Services
Stacie Nunez, Life Care Planner, Seyler, Favaloro Ltd.
Daniel J. Ryan, Senior Claim Manager, Intact Insurance Specialty Solutions

1:40 pm **Old Professions and New Duties: How Cyber Breaches Impact Professional E&O Claims and Coverage and Why Everyone Here Should Care**

Moderators:
David D. Hudgins, Esq., Hudgins Law Firm, P.C.
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.

Panelists:
Patrick Groshong, Esq., Assistant Vice President, Cyber Claims Director Berkley Cyber Risk Solutions
Karen A. Thurlow, JD, Claims Consultant, Vice President North America, Swiss Re Corporate Solutions America Holding Corporation
Alison VanDyke, Assistant Vice President – Product Specialist, Zurich North America

2:40 pm **BREAK**

3:00 pm **How To Manage Policy Limit Demands**

Moderators:
Megan Cook, Esq., Bullivant Houser Bailey PC
Jennifer L. Howell, Esq., Brinker & Doyen, LLP

Panelists:
John P. Buckley, J.D., CPCU, Senior Vice President Claims, Western National Mutual Insurance Company
Phyllis Conley, Litigation Consultant, Sedgwick Delegated Authority
Chavon C. Williams-Beard, Attorney, Medical Protective

4:00 pm **Mediation Is The New Trial**

Moderators:
John E. Bordeau, Esq., Sanders Warren & Russell, LLP
Paul M. Finamore, Esq., Pessin Katz Law Firm

Panelists:
Jay Daugherty, Circuit Judge, Retired, Jay Daugherty Mediation and Arbitration
Cindy Khin, Casualty Resolution Director, Berkley Life Sciences
John R. Neff, Assistant Vice President, Mid-Continent Group

5:00pm **Closing Remarks**

Cocktail Reception

6:00 pm **Dinner**

APPROVED CE / CLE CREDIT HOURS

General Adjuster - Florida (4.0) and Texas (4.0)
Producer/Agent – Kansas (pending) and Missouri (4.0)
Legal – Illinois (4.0), Kansas (4.0) and Missouri (4.8)
Legal – Wisconsin (4.5)

THE OPINIONS AND VIEWS OF THE PANELISTS ARE THOSE OF THE PANELISTS ONLY, AND NOT THOSE OF THE PANELISTS' EMPLOYERS

GETTING YOUR CASE INTO THE END ZONE

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GETTING YOUR CASE INTO THE END ZONE
Kansas City 2023

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Phyllis is a former Member of the Dallas Claims Association and a Sedgwick Brand Ambassador. She has lived and traveled the length and breathe of the world sharing her knowledge and experience of claims, fraud investigation and litigation process for newly designated claim representatives and colleagues in the Insurance Industry.

Phyllis strives to build relationships with Insurers, Third Party carriers and vendors to reach amicable solutions to losses, growth and amicable settlements.

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Jay Daugherty currently works as a full-time mediator and arbitrator with one of the busiest mediation and arbitration practices in the Midwest having conducted over 3,500 mediations in the last 12 years. He is the principle of Jay Daugherty Mediation and Arbitration, a practice limited exclusively to ADR featuring the region's premier mediation and arbitration facilities located on the Plaza in Kansas City. The practice now has 10 ADR professionals working for it. Previously, he was a Circuit Judge for 20 years, an Administrative Law Judge for 7 years, and, as the Chair of Missouri's Supreme Court Commission on ADR, is one of Missouri's leaders in the evolution of alternative dispute resolution. Geographically, he has conducted mediations and arbitrations not only in the State of Missouri but in most major cities across the country.

Jay was raised in Hermann, Missouri, a small community in central Missouri famous for its German heritage and winemaking, Jay attended the University of Missouri (B.S. Public Administration); the University of Missouri-Kansas City (Juris Doctor); and the University of Nevada, The National Judicial College (Masters in the Judiciary).

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Mr. Finamore has been recognized in Best Lawyers in America in the areas of Insurance Law as well as in Litigation – Insurance. He has an AV- preeminent peer rating in Litigation, Insurance, and Labor and Employment. He has also been recognized as a top attorney by Maryland SuperLawyers magazine annually from 2008 through the present. He is a three-time recipient of the Golden Gavel Award from the Westfield Group of Insurance Companies. He is also a member of the Federation of Defense and Corporate Counsel.

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Mitch has devoted more than 40 years of service to the profession, holding numerous leadership positions in the American Bar Association, among others. He was elected to the ABA's Board of Governors and served for many years on its policy-making body, the House of Delegates. He was the chair of the ABA's Section Officers Conference, in which capacity he represented the approximately 240,000 members of the sections and divisions of the American Bar Association. Previously, he was chair of the ABA's 30,000 member Tort Trial and Insurance Practice Section and of the ABA's Standing Committee on Continuing Education of the Bar. He was also vice chair of the ABA's Presidential Commission on the Unintended Consequences of the Billable Hour (United States Supreme Court Justice Stephen G. Breyer, honorary chair).

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Chavon C. Williams-Beard brings a wealth of experience and expertise to the MedPro Group Claims team. She has over a decade of experience vigorously defending healthcare providers as a medical malpractice attorney and has built a reputation as a skilled and tenacious litigator. She has been named a Top-Rated Health Care Attorney by Super Lawyers, and has received the Missouri Lawyers Weekly Up and Coming Lawyer Award. At MedPro, she continues to work on behalf of healthcare providers, handling multi-million-dollar claims and lawsuits for the Midwest Division, and is a strong leader in the company's diversity initiatives. A native of St. Louis, Chavon received a B.S. in Criminal Justice and Sociology from St. Louis University and also received a J.D. from St. Louis University School of Law. She is licensed in Missouri and Illinois. Beyond her legal work, Chavon is the Founder of a Christian-based organization, Cheers to Freedom, where she empowers teenage girls and young women to discover their purpose and achieve their personal best.

CUTTING LIFE CARE PLANS AND PLANNERS DOWN TO SIZE

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Cutting Life Care Plans & Planners Down To Size

By: Joshua G. Keller

You check your inbox before leaving work on Friday, and you see an email from defense counsel attaching a life care plan they "recently received." You open the attachment and your jaw drops. The table of items and services are easy to read, but impossible to believe. This is not what you expected. Truth be told, you were not anticipating any life care plan because the plaintiff only had a mild concussion and a herniated disc. But here it is in all its glory. And it's expensive.

How did we get here? We all know there is a difference between the "real world" and the "courtroom world." In the real world, treating physicians, rarely if ever, order a life care plan, and plaintiffs, rarely, if ever, follow one. Life care plans are courtroom creations, and life care planners are creatures of the courtroom.

Plaintiff attorneys want jurors to perceive the life care planner as part of the healthcare team, even though they ordered the life care plan, hand-picked the life care planner, and paid all the invoices. Pay no attention to the plaintiff attorneys behind the curtain, but they have certain expectations. They expect life care planners to include every possible item/service, to solicit the medical opinions needed to support each item/service, and to zealously advocate for every item/service. In short, they expect… a return on their investment.

Life care planners know they are being paid to prepare a life care plan for use in litigation. They know who their client is and what their client wants. They know their professional career and income depend on repeat business and referrals. They feel the pressure to please.

If you want the jury to see the plaintiff's life care planner as a professional witness and the practice of life care planning as litigation support, you have to cut the life care plan and the life care planner down to size. The two most common types of life care planners are: (a) the medical

doctor who examines the plaintiff, prepares a life care plan, and occasionally supports the need for items in the life care plan with his/her own medical opinion; and (b) the certified life care planner who reviews the medical records, prepares a life care plan, and religiously gets a treating physician to "sign off" on the need for each item and service. The former rarely disagrees with the treating physicians; the latter is not qualified to offer an opinion on the cost of future medical needs.

Both are dangerous. Both have developed a laundry list of items and services they repeatedly include and defend in their life care plans. Both have developed a system for getting the treating physician—who never previously recommended or considered those items and services—to agree that each "belongs" in the life care plan. Both have more deposition and trial experience than the young attorneys sent to depose them. They know the questions you are going to ask before you ask them, and they know how to safely answer or avoid those questions. They will punish you for every open-ended question, and they will smile when their assistant knocks on the door and says, "your time is up."

What you need is a protocol for processing the plaintiff's life care plan and a strategy for deposing the plaintiff's life care planner. Every claim adjuster and defense attorney need to know what to do when they receive a plaintiff's life care plan in a suspect case. Yes, every life care plan will be different. But you should develop your personal checklist of questions that you always ask about a life care plan the same day you receive it (not the month before the discovery deadline). What follows is 1) A list of 10 questions that you should ask when you first receive the plaintiff's life care plan, and 2) A list of creative ideas and strategies to employ when trying to cut the life care plan down to size.

Top 10 Questions To Ask
About Plaintiff's Life Care Plan

The following ten (10) questions can help triage a plaintiff's life care plan so you can start the process of verifying/rebutting the "big ticket" items that can be the difference between settling and trying your case.

1. **What type of life care planner prepared the plan?**

Find out whether the life care planner is a medical doctor (and which board specialty), registered nurse, mental health care counselor, case manager, and/or vocational rehabilitation counselor. Make sure you know their certifications and qualifications before selecting your own life care planner.

2. **Which items/services are currently utilized by plaintiff?**

There is always a period of treatment between an accident and the issuance of a life care plan. Focus on that period of time. Know what items/services were actually being utilized by the plaintiff in the "real world" before the life care planner issued a life care plan identifying additional items/services for the "courtroom world."

3. **Which items/services were previously recommended by a treating physician?**

Life care planners will pick up the phone and ask the treating physicians whether they would recommend or "sign off" on certain items/services being included in the life care plan. Identify what items/services the treating physician recommended before that life care planner called, and find out exactly what the life care planner said when soliciting support for additional items/services.

4. **Which items/services are "medically necessary" versus "medically beneficial"?**

Every item and service in a plaintiff's life care plan is not medically necessary. Start by identifying with your counsel, nurse, and/or experts which items in the plan are "medically

beneficial," but not "medically necessary." You need to know whether the plaintiff's life care planner (or the treating physicians who "signed off" on that life care plan) performed cost/benefit analysis before including each item/service in the plan. Some life care planners will actually include every medically beneficial item/service, regardless of the cost or benefit. Others will arbitrarily decide whether the benefit justifies the cost. Find out what methodology (or lack thereof) led to this life care plan.

5. **Is the "frequency" or "duration" listed for any item/service questionable?**

Always consider whether the frequency and duration listed for an item/service in a life care plan is supported by the evidence. The doctor cited as the source for the item/service may agree with the need for physical therapy, but may not have "signed off" on the specific frequency or duration.

6. **Which items/services does this life care planner routinely include in life care plans?**

Life care planners are not just creatures of the courtroom. They are also creatures of habit. They will routinely include the same sections and the same items/services in their life care plans. Identify those items/services as soon as you get the life care plan and discuss how you can prove that the life care planner was the first to propose the need for those items/services.

7. **Which of these items/services have been challenged in prior litigation?**

Unreasonable life care plans and unreliable life care planners are often challenged. Find out whether any of the items/services have been previously excluded either as the result of a *Daubert* motion or a motion in limine. Does the medical literature really support the effectiveness of radiofrequency ablations (burning nerve endings) for more than five years? Can a life care planner include $500,000 for "financial management" whenever the patient has been diagnosed with short term memory loss?

8. What are the best examples of unnecessary items/services in the life care plan?

Jurors remember examples, and a single example of the life care planner's willingness to include an unnecessary item/service can destroy that life care planner's credibility. Find that example. Does the plaintiff, who has a life expectancy of 80 years old, really need a "gym membership" and a "private trainer for "lifetime"? Does the life care planner have a "private trainer"? Does the life care planner pay for her 70 year-old mother to have a gym membership and a "private trainer"?

9. Which items/services should probably be included in any defense life care plan?

Identify whether there are certain "undisputed" or "inexpensive" items/services in the life care plan that should probably be included in the defense's life care plan. Make a list and make sure those items are eventually included in the defense life care plan.

10. What experts are needed to verify/rebut "big ticket" items in the life care plan?

The most important conversation you can have after receiving a life care plan is a conversation with your counsel, nurse, and/or medical experts about what additional experts you may need to verify/rebut the "big ticket" items. If plaintiff's life care plan unexpectedly includes 24-hour care for a plaintiff who has experienced a mild traumatic brain injury, you may need to retain a neurologist to examine the plaintiff. If plaintiff's life care plan unexpectedly includes expensive cognitive behavioral therapy for PTSD, you may need to retain a neuropsychologist who has treated PTSD patients. Do not be tempted to "laugh off" the plaintiff's life care plan. Stop and figure out where you stand. If you need more experts, retain them. If you need more time, move the court to extend discovery. Start your motion for a continuance or to compel an examination with: "We received a life care plan earlier this week…"

Finally, consider this creative option to cut the life care planner down to size. Don't throw away that life care plan when a case is completed. Hang onto it. In a couple months or years, check back in on the plaintiffs through social media and find out how they are doing. You may be surprised to learn that the plaintiff, whose life care planner said he required 24/7 care and cognitive rehabilitation for the rest of their life because of an alleged mild traumatic brain injury, can operate a bay boat and fish, can ride a bike, can hunt, can drive a car, etc.. Use this evidence to attack the credibility and reliability of the life care planner when they recommend a life care plan that provides for the same 24/7 care. Ask them if they follow up with their clients to make sure they're following the life care plan. Ask if they followed up with the TBI patient who posted a picture on Facebook driving a bay boat. I bet they didn't.

CREATIVE IDEAS FOR CROSS EXAMINATION

In addition to the top ten questions to help triage the recently received life care plan, below are a few creative ideas that your defense counsel can use to cross examine the life care planner and life care plan.

A. Ask "The Client" Question:

If a life care planner admits that the plaintiff attorney is his "client," the jury will never look at the deponent the same again. If a life care planner insists that the plaintiff is his "client" or "patient," you may be able to destroy his/her credibility by asking the right follow up questions like "Who is paying for your services, the plaintiff or his attorney?"

B. Ask if the Defense Life Care Planner Can Meet with Treating Physicians:

Defense life care planners are at a distinct disadvantage because they can't meet with a treating physician without a signed authorization from the plaintiff. Nine times out of ten, they won't agree, but don't let that stop you from asking for one. When the defense life care planner is

asked on cross examination, “Isn’t it true you did not meet with a single treating physician when you prepared your plan?” The life care planner can respond, “Well, we asked you for permission to meet with them, but you said, ‘no.’”

C. Ask about Prior Experience with Plaintiff & Plaintiff’s Counsel/Firm:

Make it clear that plaintiff’s counsel selected the deponent and explore “why” plaintiff’s counsel made that choice.

D. Explore Prior Trial Testimony:

Jurors know the vast majority of cases settle, and they want to know why this case didn’t. Find out how many times a life care planner has previously testified at trial and the results of those trials. If the life care planner has testified many times, and the life care plan in your case is ridiculous, the jury may conclude that the deponent has a history of having to defend ridiculous life care plans, especially if the verdicts were inconsistent with those life care plans. Nothing is better than helping the jury realize that the life care planner is to blame for your case going to trial… and for their having to serve on the jury.

E. Investigate Most Recent Defense Life Care Plan Prepared:

Life care planners sometimes start out doing defense life care plans and later switch to the plaintiff side. Over the course of their career, they may have done 50% plaintiff work and 50% defense work, even though they haven’t been hired by a defense attorney for 20 years. Always ask about the last 5 years of their practice or the last 5 life care plans.

F. Explore Practice of Life Care Planning:

Always make certain you know when and how life care planning became a part of the deponent’s practice. Dig deep whenever a deponent switched from one practice/career to life care planning. Find out whether failure or “more money” was the reason for leaving the old practice.

G. Determine Total Time Spent on Report:

Always start by confirming the total time spent on the report because that will limit the amount of research the life care planner could reasonably have done prior to issuing the report.

H. Establish what counsel did/did not send:

Most life care planners retained by plaintiff's counsel will only look at the documents sent by plaintiff's counsel. Few request additional materials. Establish and exploit that fact.

I. Discover Existence of any Notes:

The annotations and notes of a life care planner can reveal their bias and prejudice. Picture medical records where the life care planner notes, underlines, or highlights only the subjective evidence of traumatic brain injury (i.e., "reports memory loss") and does not note any of the objective evidence inconsistent with traumatic brain injury (i.e., "no LOC").

J. Explore "The Interview":

The vast majority of life care planners hired by plaintiff's counsel will meet with the plaintiff. Make sure you know as much as possible about that interview.

K. Ask the "Physically" Question:

Some courtroom life care planners never get in their car. They read what plaintiff's counsel sends them, draft a life care plan, and schedule a call with the treating physician to "support" each item and service. They don't physically visit the plaintiff's home or the recommended (very expensive) facility. Find out what plaintiff's life care planner "physically" did after receiving the materials from plaintiff's counsel. A life care planner may be surprised to learn that a facility no longer offers the services they recommend, but they failed to call or visit the facility before completing their plan. By focusing on what the life care planner "physically" did, you can

sometimes avoid the meaningless descriptions like "assessed", "evaluated", "analyzed", and "verified."

L. Identify Items/Services Proposed By Deponent:

Some life care planners are the first to propose certain items/services. Find out whether the deponent contacted the treating physician and proposed items/services never previously recommended or prescribed by the treating physician in a medical record or deposition. Find out whether the deponent called the treating physician (and how that call was handled) or mailed/emailed a draft report with a cover letter (and what was said in that cover letter).

M. Determine Whether Treating Physician Was Rubber Stamp:

Defense attorneys only get to see the finished life care plan. We know the life care planner likely asked a treating physician to "sign off" on every item, but what we don't know is whether that treating physician was a rubber stamp or actually rejected some of the deponent's proposed items/services. Find out!

N. Establish Lack of Follow-Up With Plaintiff/Family:

Life care planners know how to engage and connect with the jury. They attend CLEs to become more likeable witnesses. They know what to say, and they know how to say it with empathy. But actions speak louder than words. Find the questions you need to emphasize that the life care planner saw the plaintiff only one time, issued the life care plan, got paid, and moved on.

O. Confirm the Plaintiff Never Saw the Plan:

Typically, the life care planner does not send the life care plan to the plaintiff before finalizing it. Use this to your advantage. If the plaintiff testified that he/she won't have any more injections, surgeries, rhizotomies, medication, etc. because they don't like how they make them

feel or they don't see the benefit or they're scared to have the procedure or they don't like the provider, use this testimony to show that the treatment more likely than not, won't be incurred.

OLD PROFESSIONS AND NEW DUTIES:

How Cyber Breaches Impact Professional E&O Claims and Coverage and Why Everyone Here Should Care

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Old Professions and New Duties: How Cyber Breaches Impact Professional E&O Claims and Coverage and Why Everyone Here Should Care.

"I see thou wilt not trust the air
With secrets."

~ William Shakespeare, *Titus Andronicus,* Act IV, Scene 2.

I. New Claims Against Lawyers and Other Professionals: Loss of or Threat to Client Confidentiality Due to Cyber Risks

The days of client "secrets" being exposed by the spoken word into the air have largely passed us by. The development of document storage and, presently, electronic transmission and preservation of data has, however, proved to be a robust substitute for putting confidential information at risk of disclosure, whether by error or neglect. While these issues of technology are, in and of themselves, challenging enough for many professionals, they also serve to herald the coming of increased burdens and standards of care relating to the preservation of the confidences of their clients. Professionals who, in the course of doing business, obtain confidential and proprietary information from their clients should be sensitive to the likely expansion of the perceived duty of care to which to which they will be held. Technology questions are no longer limited to simply determining what system is best or how much money must be paid but may also be a source of ethical breach and legal liability.

The *Shore* Class Action Case: Anomaly or Fair Warning?

The case of *Shore v. Johnson & Bell, Ltd.* was filed in May 2016 in the United States District Court for the Northern District of Illinois but remained under seal until December 2016. The case was brought as a class action seeking both equitable and monetary relief. The basis for the action was the defendant law firm's alleged failure to keep its clients' information secure because its computer systems purportedly suffered from "critical vulnerabilities in its internet-accessible web services." The plaintiffs alleged that, as a result of those vulnerabilities, the confidential information entrusted to the firm by its clients had been exposed and was "at great risk of further unauthorized disclosure."

Allegations and Status

The complaint as filed contained counts for legal malpractice – breach of contract, legal malpractice – negligence, unjust enrichment, and breach of fiduciary duty. Plaintiffs sought relief in the form of a preliminary injunction enjoining the firm from exposing client confidential information through its internet-accessible portals, comprising the integrity of that information through its virtual private networks, and exposing the information through its email systems. Plaintiffs also sought an order requiring the firm

to inform its clients that its computer systems were not secure and that they face a threat of "further unauthorized disclosure of confidential information, compelling the firm to subject its systems to a third-party audit, requiring the firm to forfeit legal fees "earned during its breach with the plaintiffs and the class and "any profits diverted from spending on cybersecurity."

Notably, the complaint did not allege that any specific hacker had exploited the alleged system vulnerabilities or deficiencies. Likewise, the complaint filed by the named plaintiffs did not claim that they or any other client's confidential information had been disclosed to a third party – only that it was "inevitable" that it would. No specific data breach was identified or even claimed. Rather, plaintiffs relied on the "threat of publication of private information" as the cornerstone of their cause of action.

In defense, the law firm has argued that mere vulnerability to possible disclosure was an insufficient basis for stating a claim. The firm compared plaintiffs' complaint to the everyday situation in which a lawyer carries a briefcase, takes notes in open court or in a deposition or speaks with his or her client in public – situations in which "potential" exposure to third-party eyes and ears is possible. The firm claimed that the complaint alleged no concrete injury and that plaintiffs therefore lacked standing. It also argued that plaintiffs had no claim for breach of contract because the information had remained confidential in that no breach of the system has been alleged or identified, thereby affording the plaintiffs the benefit of the agreement to keep their confidential information confidential.

In May 2016, plaintiffs dismissed their claims without prejudice to refiling in arbitration. In July, they did so and filed a demand for class arbitration before JAMS. In late February 2017, the court issued a memorandum opinion and order granting a motion filed by the law firm to compel arbitration on an individual, rather than a class, basis. The court determined that this issue was one that was properly decided by the court and not the arbitrator and, having done so, proceeded to find that there was no evidence by which plaintiffs could demonstrate that the parties had entered into any contract whereby they had agreed to submit to class arbitration. The court ruled that, in the absence of any such evidence, the firm could not be compelled to participate in an arbitration by the class, a subject on which the firm's retainer agreement with the plaintiffs was apparently silent.

II. Issues and Implications

That the *Shore* case was ultimately resolved through arbitration should be of little comfort to professionals who are the guardians of their clients' personal data, confidences and secrets. The issues raised by the plaintiffs' complaint and the firm's initial motion to dismiss remain germane to professionals everywhere and worthy of consideration. Among those significant issues are:

- does breach of confidentiality constitute a breach of the e standard of care?
- if so, is mere exposure to loss of confidentiality sufficient?
- how are damages determined or calculated?

- what is a professional's duty with respect to implementation of technology?
- is this a legal duty or one of professional conduct (ethics)?
- if a professional has a legal duty to maintain a certain level of technological sophistication in his or her practice, how is that standard established and how is that duty defined and determined?
- how is "reasonableness" determined? Is it the same for a global mega-firm as for a solo practitioner?
- how would this play out in a court of law? Question of fact? Expert testimony?
- is there any existing guidance for answering these questions?

III. Duty to Preserve Confidentiality and Other Rules of Professional Conduct

The Illinois Rules of Professional Conduct are similar to the rules of many other states governing lawyers. As they are the rules at issue in the *Shore* case, they are addressed here as an example of how they might apply to these kinds of claims and to lawyers' standards of care generally and, by extension or analogy, possibly to other professions with like rules. The practitioner should be careful, however, to review the rules enacted in the particular jurisdiction involved in any such case and in evaluating the conduct of a lawyer or law firm.

As alleged in the *Shore* complaint, lawyers in Illinois are under a duty to protect client data. Rule 1.6(a)." Confidentiality of Information" states that, except under certain express circumstances, a lawyer "shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure."

Rule 1.1. "Competence" mandates that the lawyer provide competent representation to a client. Such competence, in turn, requires the legal knowledge, skill, thoroughness, and preparation necessary for the representation. Although not a rule that directly impacts the question of maintaining client confidentiality, the question of competence with technology and technology's role in providing legal services, including, for example, in communicating with courts and juries, could perhaps be used as a basis for arguing that a certain proficiency with many different aspects of technology as applied in the legal profession is required by rule.

Rule 1.15. "Safekeeping Property" mandates that a lawyer hold the property of clients in his or her possession in connection with a representation separate from the lawyer's own property. This rule is, by its terms, concerned primarily with financial matters and records but the term "property" is, itself, broad and the obligation to keep that property "safe" as embodied in the title of the rule could have implications on lawyers' duties with respect to a client's trade secrets, confidences and other proprietary information.

The *Shore* complaint alleged that the defendant law firm had acknowledged the specific dangers of cyberattacks on law firms and the need for firms to take steps to keep its records and data free from intrusion and to implement proactive safeguards. To the extent that the complaint or others like it that could be based on the alleged assurances or

promises of the law firm to keep clients' information confidential, one should note Rule 7.1. "Communications Concerning a Lawyer's Services," which prohibits a lawyer making a false or misleading communication about his or her services and deems a communication "false" or "misleading" if it contains a material misrepresentation of fact or law, omits a fact necessary to make the statement not materially misleading or if it is "likely to create an unjustified expectation about the results the lawyer can achieve." Given the sophistication of modern hackers and the widespread nature of the problem, can a plaintiff legitimately argue that any "promise" or assurance that a firm will keep data confidential is a violation of Rule 7.1 as one creating unjustified expectations about the results that lawyer can achieve?

Even the absence of any overt representations is unlikely to insulate professionals from claims of breach of standard of care if private information is disclosed. Given the increase in cyber attacks and phishing schemes and the attendant notoriety of the dangers of inadequate cyber security since the Shore case was filed in 2016, can professionals legitimately claim now that they could not reasonably anticipate these issues and the need to protect their clients' data from these challenges? Rather, it does not seem unreasonably to expect that we are all under some obligation, whether or not expressly acknowledged on our websites or other communications, to provide reasonable or adequate security for our clients' data and personal information.

IV. Traditional Notions of Professional Liability and Standard of Care/Judging What is "Reasonable" in Technology Used by Professionals

The above discussion of various rules of professional conduct should give one pause when considering the scope of a professional's exposure to claims for breach of the standard of care. It is not atypical for state common law to hold that a violation of a rule of professional conduct does not, in and of itself, constitute professional negligence. The preamble to the American Bar Association's Rules of Professional Conduct, for example, provides that violation of a Rule should not in itself give rise to a cause of action: "Violation of a Rule should not itself give rise to a cause of action against a lawyer, nor should it create any presumption in such a case that a legal duty has been breached." It is also noted, however, that a violation of a Rule can be evidence of the breach of the standard of ordinary care. The Preamble provides that, although "[the Rules] are not designed to be a basis for civil liability . . . these Rules may be used as non-conclusive evidence that a lawyer has breached a duty owed to a client."

Therefore, a proper analysis of the potential malpractice of attorneys and other professionals arising out of an alleged breach of confidentiality must take place at two distinct levels. First, the question of whether the professional has breached a rule of professional conduct may certainly be germane and relevant and may lead to evidence that can be admitted in a malpractice action. However, even if the professional rule has been breached, one cannot automatically conclude that the professional has committed an actionable professional error or omission or is otherwise liable to the client in tort. That second question requires an assessment under the standards applicable in professional malpractice actions, whether, as in *Shore*, under a contract, negligence or other theory.

When negligence is alleged, traditional notions of duty of care must be considered. In order to prevail on a tort-based claim of malpractice, a plaintiff generally must prove that the relationship with the client created a duty on the part of the professional and that the professional breached that duty. A professional's duty of care typically arises upon formation of that relationship. A professional breaches his or her duty of care when failing to exercise the care and skill expected of a member of his or her profession under the facts and circumstances of the particular situation. The plaintiff in a malpractice action must also establish injury or damages and that, "but for" the professional's breach of the standard of care, the client would not have suffered any damages.

In certain jurisdictions, the plaintiff in a professional negligence case bears the burden to establish the standard of care through expert witness testimony. This requirement is premised on the proposition that, without expert testimony, jurors, not skilled in the profession, are not equipped to judge the professional's conduct. Courts have recognized two exceptions to this rule: where the professional's conduct is so grossly negligent, or the procedure so common, that the jury can readily appraise it without the need for expert testimony. As explained in the Restatement (Second) of Torts, the skill a professional must exercise is "that special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and experience." Restatement (Second) of Torts §299A, comment. a, at 73 (1965).

How then is one to assess the question of a professional's exercise of care and skill in the context of that professional's use of technology to safeguard a client's confidential information and data? Is adequate technology determined by what is possible, as testified to by technology experts? Or, in contrast, would testimony relating to a professional's standard of care have to be offered only by a member of that profession, who would presumably discuss what members of that profession typically use or should use when implementing technology? If the latter is the standard applied to professions which, like lawyers, practice in big and small firms and in solo practice, does it matter whether the defendant is a global mega-firm with hundreds of millions of dollars in revenue or a local solo practitioner earning less than $100,000? Are standards applicable to client confidences different for different professionals within the same profession based on economics or perceived sophistication of practice? Should a client's expectations and potential legal remedies for breach of those confidences depend on the size of the firm or, more precisely, the amount of money spent on technology?

There are presently few, if any, answers to these or an abundance of similar questions. Many go to the fundamental tenets of the professional-client relationship and impact the philosophical, moral and economic questions of whether practice by solo and small firm professionals, who are often the only segment serving broad swaths of our nation, will be encouraged or will, instead, be held to standards of care that present fundamental and practical obstacles to their practices. The gravity of these issues and their impact on the professions should sound a clear and loud warning to professional organizations and will hopefully encourage their proactive involvement in forging solutions to these issues. Alternatively, we can sit back passively and await the rulings of various courts,

confronted by perceived innocent "victims" of third-party hackers who have obtained client cinformation or funds through their professionals' computer systems. It is indeed ironic that the professional individual or firm, themselves victims of these third-party criminal acts, may, as a result, be subject to increased legal liability as well.

V. Liability Without Breach

As noted above, one of the more interesting issues raised in by the *Shore* case is the fact that the plaintiffs did not allege that the defendant firm's systems had, in fact, been hacked or that any confidential client information had, in fact, been obtained or accessed by a third party. In contrast, the plaintiffs claimed that the information was exposed and easily accessible and that such disclosure was "inevitable." This, in turn, led to the firm's argument that exposure does not equal breach and that plaintiffs lacked standing to bring a claim as they had suffered no concrete injury. Plaintiffs countered that argument by claiming that the firm had entered into a contract and charged fees that were based, at least in part, on its promise to keep the plaintiffs' information safe and secure.

Lest one be lulled into a false sense of security by the "certainty" that, without actual injury, no cause of action exists, the Illinois Supreme Court's treatment of the now infamous Illinois Biometric Information Privacy Act ("BIPA") should be noted. In its first substantive consideration of the statute, the Supreme Court noted:

> Through the Act, our General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information. See Patel v. Facebook Inc., 290 F. Supp. 3d 948, 953 (N.D. Cal. 2018). The duties imposed on private entities by section 15 of the Act (740 ILCS 14/15 (West 2016)) regarding the collection, retention, disclosure, and destruction of a person's or customer's biometric identifiers or biometric information define the contours of that statutory right. Accordingly, when a private entity fails to comply with one of section 15's requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person - 11 - or customer whose biometric identifier or biometric information is subject to the breach. Consistent with the authority cited above, such a person or customer would clearly be "aggrieved" within the meaning of section 20 of the Act (id. § 20) and entitled to seek recovery under that provision. No additional consequences need be pleaded or proved. The violation, in itself, is sufficient to support the individual's or customer's statutory cause of action.

Rosenbach v. Six Flags Entertainment Corporation, 2019 IL 123186 ¶33 (Jan.25, 2019).

In that case, the Court based its decision in large part on the existence of a statutory scheme and, in particular on what the legislature did and did not expressly provide in the Act. That may or may not differ from consideration of similar questions under common

law but it would seem foolhardy to assume that, when dealing with similar client confidences and information, "injury" in the traditional sense of the word (e.g., bodily injury, direct economic loss, etc.) will be a prerequisite to a cause of action. Or, will a plaintiff's burden to prove damages in a tort claim for professional malpractice be satisfied merely by demonstrating that its confidential information was exposed to even if not accessed by a third party? Will the alleged loss of the bargained-for benefit of safeguarded confidentiality, whether express or implied in the professional-client relationship, be enough to sustain a tort action against the professional?

Questions likewise abound with respect to the damages that could, under such scenarios be sought or recovered. Defendant professionals will certainly argue, as did the law firm in *Shore*, that there can be no standing to sue where there is no actual breach of confidence and that there is therefore no cause for granting a plaintiff either compensatory damages or equitable relief. In contrast, though, must a plaintiff wait until the confidence is breached before enjoying legal rights? This is a pertinent concern given the view of some courts that the mere potential or threatened publication of private information may constitute irreparable harm given that, once the information is made public, there is nothing a court can do to mitigate or eliminate the potential for that harm.

One potential answer to this conundrum lies in the ability of the client to obtain information relating to the professional's methods for preserving its confidential information. A client is certainly free to pick and choose its professional service providers based in whole or in part on the perceived ability of those professionals to keep information protected and confidential. Even if the client suffers some loss of the benefit of a perceived bargain with that professional when discovering that its information may be exposed, it is free to change professionals and demand return or deletion of all confidential information an data, rather than merely await a purportedly "inevitable" breach of confidence. Furthermore, if such a change of professionals is made and results in excess or increased fees to the client, recovery could arguably be sought through a breach of contract action – a claim that is fundamentally different than one for malpractice and professional negligence.

VI. Insurance Coverage for Professional Errors and Omissions Involving Cyber Security

Another common problem confronting professionals in their daily practice is their handling of money on behalf of their clients. This arises in commercial transactions, claims settlements and various other scenarios in which the professional becomes the repository of the client's funds and is responsible for transferring those funds to a third party. Due to the well-publicized explosion in phishing schemes and other criminal acts involving hacking into the professional's computer or email system and issuing false instructions for transfer of those funds, professionals have found themselves the subject of claims when the money ends up in the wrong hands due at least in part to problems with their cyber security. Are these claims covered by insurance? If so, is that coverage found under a traditional errors and omissions policy or is a separate or stand-alone cyber coverage needed?

Take the hypothetical case of a construction manager retained to provide construction management services for its client. Pursuant to the contract entered into by the client ("Client") and the construction manager ("Manager") and under common law, Manager agreed to provide commercially reasonable and responsible oversight for the management of payments and other construction management services. Among its services to Client, Manager was to provide "pay application management" for the involved Project and represented that it would do so in a reasonable manner. "***Pay applications"*** are detailed bundles of documents used to request ***payment*** on construction jobs such as the Project and a smooth and orderly process and effective implementation and management of that process is a crucial component of a successful job.

Assume that Manager's computer system was hacked and an imposter directed payment of a particular invoice to be sent to an address and account that was fraudulent and did not belong to the vendor presenting that invoice. Client claims that, as a result of Manager's breach of the contract and of a construction manager's standard of care, its payment was misdirected and it was forced to make a second payment in order to satisfy the invoice of the proper vendor. In particular, Client alleges that Manager acted negligently in at least two different ways. First, Manager unreasonably failed to put into place a protocol or management system that ensured that invoices presented by sub-contractors were properly paid. Client asserts that implementation of such systems is ly the essential component and requirement of any kind of reasonable pay application management system. As part of a system to ensure proper payment, it is incumbent on a pay application manager to know who presented the invoice, who is to receive any payment resulting therefrom and to put into place a system that enables payments to timely, accurately and safely reach the proper payee. Client contends that the absence of a secure and responsible system for matching invoices to payees constitutes negligence, a breach of the standard of care of reasonable payment application managers in the industry and led directly to its damages.

Manager presents this claim to its errors and omissions insurer. No separate cyber coverage was purchased. Is the claim covered?

As it turns out, this is not an easy question to answer and that ambiguity is reason enough for all professionals to carefully review their insurance coverage and to assess the security surrounding their handling of funds. It should likewise serve as a stern warning to insurance companies who seek to broadly exclude any claim relating in any way to cyber activity that they need to clean up their wording.

Recent errors and omissions insurance policies commonly contain an exclusion for claims arising out of cyber-related incidents. In particular, such "Cyber Events" exclusions often exclude coverage "arising directly or indirectly out of any **cyber event**." By this wording, it has been argued that insurers adopt a limited "causation" model for determining whether the exclusion applies – the loss in question must "arise' out of the defined "cyber event."

This language can be contrasted with other ***standard*** policy wordings available and used in the insurance industry. For example, the Insurance Services Office ("ISO") has issued form CP 10 75 12 20, which, in relevant part states:

> The following exclusion is added to Paragraph **B. Exclusions:**
> We will not pay for loss or damage caused directly or indirectly by the following. ***Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.***

Even policies with less broadly worded exclusions have been recognized in the industry as **NOT** providing a blanket exclusion for losses that may involve some kind of cyber-related event. One author studying the professional indemnity ("PI") insurance market in the UK, for example, has noted:

> Given the variety of potential claims against professionals, it is not always easy to draw the line on whether certain claims, which could be said to be cyber-related in one way or another, should be considered PI risks and fall for cover under PI policies, or are not PI risks and should be excluded and passed to the specialist cyber insurance market. ***For example, if a hacker steals a professional's own money, one would not expect the PI policy to respond to this loss. But what if it were client money? What if the hacker does not steal the client's money directly, but intervenes in the professional/client email chain, tricking the professional into paying away the client's money to the hacker? Should it make a difference if the professional is negligent in its implementation of its cyber-security measures?***

https://beale-law.com/wp-content/uploads/2020/12/December-Article-Silent-Cyber-in-Professional-Indemnity-Insurance-1.pdf (emphasis added).

The confusion over the extent of coverage provided by causation-based exclusions has been a hot topic well known particularly to the London market, arising initially under property policies. See, for example the discussion of "London Market Cyber Exclusions" at https://www.bmsgroup.com/assets/downloads/London-Market-Cyber-Exclusions.pdf, wherein it is noted in a discussion that is equally applicable to the coverage available or excluded for cyber events under professional liability policies:

> From the 1st January 2020, Lloyd's underwriters have been required to clarify their position on these cyber exposures. Both the insurance and reinsurance marketplace of Lloyd's have mandated that all policies clearly state whether they will provide affirmative coverage and if not, an appropriate exclusion must be applied. In the wake of this mandate, clients and brokers expected their markets to either:
>
> • introduce cyber exclusions to policies that didn't have them before;

• replace their previous cyber exclusions with more recently developed ones, or;

•reallocate or charge additional premium and offer affirmative cyber coverage.

Among those "clarifications," broader and more exclusionary wordings for cyber events have since been adopted by some insurers, the primary examples of which are form LMA 5400, which reads in pertinent part:

> Notwithstanding any provision to the contrary within this Policy or any endorsement thereto this Policy excludes any:
>
> > 1.1 Cyber Loss, unless subject to the provisions of paragraph 2;
> > 1.2 loss, damage, liability, claim, cost, expense of whatsoever nature directly or indirectly caused by, contributed to by, resulting from, arising out of or in connection with any loss of use, reduction in functionality, repair, replacement, restoration or reproduction of any Data, including any amount pertaining to the value of such Data, unless subject to the provisions of paragraph 3;
>
> ***regardless of any other cause or event contributing concurrently or in any other sequence thereto.***

https://insurance-endorsements.com/wp-content/uploads/2020/08/LMA5400-Property-Cyber-and-Data-Endorsement.pdf (emphasis added);

and LMA 5401, which reads in pertinent part:

> Notwithstanding any provision to the contrary within this Policy or any endorsement thereto this Policy excludes any:
>
> > 1.1 Cyber Loss;
> > 1.2 loss, damage, liability, claim, cost, expense of whatsoever nature directly or indirectly caused by, contributed to by, resulting from, arising out of or in connection with any loss of use, reduction in functionality, repair, replacement, restoration or reproduction of any Data, including any amount pertaining to the value of such Data;
>
> ***regardless of any other cause or event contributing concurrently or in any other sequence thereto.***

https://insurance-endorsements.com/wp-content/uploads/2020/08/LMA5401-Property-Cyber-and-Data-Exclusion.pdf (emphasis added).

Both LMA 5400 and LMA 5401, as well as other forms available in the London Market and to insurers worldwide through ISO, contain language that makes it more clear that anything connected with a defined cyber event, regardless of whether a direct, indirect cause ***or concurrent cause,*** is excluded from coverage.

In the subject hypothetical, professional errors and omissions allegedly committed by Manager would seem to present examples of precisely these kinds of concurrent causes. Thus, depending on the specific allegations made against a professional and, of equal importance, the particular language of the professional's errors and omissions policy, Manager may or may not enjoy the luxury of a defense and ultimate indemnity for the claims of Client. Are those claims excluded from an E&O policy because they "arise from" cyber event or is the Manager covered for the Client's claim that Manager's various acts of negligence and failure to meet the basic standard of care for construction managers left Client without a commercially reasonable and secure system for receiving and paying invoices and allowed a payment to be misdirected.

One can well imagine that, with this evidence of industry knowledge of the ambiguities of various exclusions firmly in mind, courts may well place the burden on insurers to provide more clarity in cases of doubt. As participants in a market that has been aware of the ambiguities of coverage relating to losses when a cyber-related event is only partially at play, insurers may be held to their own burden to craft clearer cyber exclusions if they wish to exclude any loss connected in any way to a cyber event, whether contributing concurrently or in any other sequence.

It is not the intent here to suggest that coverage does or does not exist under any particular factual scenario or under any particular insurance policy. One cannot help but note, however, that cyber coverage is not always purchased separately and, while cyber-related incidents are becoming more and more commonplace in the professional workplace, coverage for claims emanating out of those incidents may or may not follow. Neither professionals nor their insurers should feel terribly comfortable about this situation.

VII. Conclusion

The *Shore* case presents a fascinating set of new and issues for professionals. The facts of the case may or may not be common and much study is needed of the degrees to which professionals are taking due care with their clients' confidential information. Clearly, rules of professional conduct requiring the safeguarding of clients' personal information and "secrets" open up new exposures and, potentially, new obligations. Moreover, in certain circumstances, presumably when actual breach is found and professionals have failed to take reasonable care to protect client information or make certain that a client payment has been transferred to the proper payee, a case for professional malpractice may result.

Viewed through another lens, *Shore* presses the envelope of professional malpractice beyond all recognition and potentially obliterates traditional notions of negligence and standard of care. The issues raised vividly portray the growing tension between the promise and threat of technology on the one hand and the ability of professionals to protect their clients' confidences in the everyday practice. Likewise, these issues should inspire the professions and clients as well, to urgently address the risks inherent in their office systems and in operating in a cyber world fraught with hackers and trolls. *Shore* may be a mere anomaly or it may augur a tempestuous future in the development of malpractice law.

Regardless of its impact, however, what is becoming clear is that professionals who, in the face of their undeniable duty to protect their clients' confidences, ignore the risk of their systems being compromised, are doing so at their own peril. Today's email communication, stored client data and vpn server may be just as laughable tomorrow as were Titus's unfortunate Romans who trusted the air with secrets and suffered the unpleasant consequences.

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HOW TO MANAGE POLICY LIMIT DEMANDS ON HIGH EXPOSURE CASES

The Best Offense is a Good Defense

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HOW TO MANAGE POLICY LIMIT DEMANDS ON HIGH EXPOSURE CASES
THE BEST OFFENSE IS A GOOD DEFENSE

It is Friday afternoon, and we are all looking forward to the weekend. All of a sudden at around 4 p.m., maybe even closer to 5 p.m., an email hits the inbox with the subject line: POLICY LIMIT DEMAND. You sigh. You put your head down. Maybe you use some questionable language. Either way, you know significant time, money and resources are about to be expended due to receiving the policy limit demand. Below are some things to take into consideration when addressing a policy limit demand on a case with high exposure.

I. Kickoff – The policy limit demand letter

If you get a notice of a policy limit demand the last thing you should do is put it off and respond shortly before the deadline to respond. A thorough investigation needs to be done as soon as possible. It is important to get someone on the ground to start investigating a significant claim as soon as possible. This is the opportunity to begin formulating your defense. Collect medical records, witness statements, documents from the insured and consider experts. The collection of evidence early is always better than a year or two down the road.

Consider the use of local claim adjusters or private investigators. If pre-suit and you are not able to take depositions at this time, a claims adjustor or private investigator should be utilized to locate important witnesses and obtain their statements. If the claim involves a motor vehicle accident, obtain statements from all of the witnesses listed on the accident report. Take photographs of the scene. In a significant accident, get an accident reconstructionist on board as soon as possible. In a medical malpractice case, do not just rely on your insured physician's opinion of the care. Have an independent review of the chart by an expert. Consider whether starting surveillance on a claimant could capture the plaintiff performing activities they now claim they can no longer perform. Pre-suit is the time to capture a claimant on video because they may be more careful once suit is filed. However, note that in most states video surveillance is considered to be a statement, and will have to be produced in discovery.

Ask for medical authorizations to begin collecting records and bills. Any information obtained early is beneficial. Being aggressive early outlines the groundwork to defend the "bad faith" claim the plaintiff's attorney will throw out at some point.

If you can obtain the following information:

Age
Gender
Occupation
Level of education
Dependents, if any, their ages, and to what extent they rely on the claimant financially and for companionship
Nature and extent of the injury
Whether the injury is permanent
Extent of pain and suffering
Extent of disruption the injury creates in the individual's lifestyle

Special damages
Anticipated medical bills incurred to date and for future care
Lost any wages
Typical value of local court verdicts
Liability factors (factors in calculating compensatory and/or punitive damages)
Whether the case involves ordinary negligence or gross negligence
Whether the case involves any comparative or contributory negligence
Any legal limits to recovery, such as a cap on certain types of damages
Any other parties' contributions to the loss
The insured's credibility as a witness
The claimant's credibility as a witness

II. Putting in the right players - Early Retention of Counsel and Experts

Have a plan to defend the litigation. Do not react simply to plaintiff's attorney's actions. Be aggressive and defend the case. In order to do that, one needs to draft the right team to implement the best defense and offensive plays

1. Retaining counsel

The plaintiff has an attorney, so consider retaining defense counsel early to assist in the investigation. Retaining Defense counsel as soon as possible on catastrophic cases is beneficial for a number of reasons. First, it protects the interest of the insured, and will ensure a great deal of the pre-suit investigation is privileged. Second, the claims adjuster and the Defense counsel work in conjunction instead of having to bring the attorney up to speed when suit is filed. Finally, the Defense counsel can act as a buffer when dealing with the difficult plaintiff's attorney.

2. Expert Retention

Make sure you have experts evaluate the case early. This means retaining liability, causation and damages experts long before any depositions have been taken. Have an economist, life care planner and vocational rehab experts look at catastrophic injury cases. Plaintiff's attorney will likely have all of these experts, so getting them to the table early will help set reserves and put a value on the case. The experts will help plan your defense. Experts can point out potential deficiencies that will need to be addressed early on in the case. It is better to know in advance any weak link as opposed to finding out down the road.

3. Mock Trials/Focus Group

Focus Groups have their limitations. Typically, the focus group hears a limited presentation of the facts in a span of 3-4 hours. A catastrophic injury trial could take weeks. Further, there is no voir dire to eliminate jurors. Finally, mock trials/focus groups could cost close to $100,000 or more depending upon the number of jurors requested. Having more than one panel of jurors will provide more feedback, and likely provide a better indication as to what to expect from your eventual jury. Consider having at least 2 panels at a minimum.

It is important to put on the strongest plaintiff's case possible in a mock trial. Exclude evidence if you think there is any chance it will not come in at trial. You can always provide the focus group the evidence later on in their deliberations. Make sure the attorney playing the role of the plaintiff's attorney acts like the real plaintiff's attorney. Try to videotape depositions, so those can be played to the focus group. Finally, have a strong jury consultant to conduct questioning during the deliberations.

III. **How to respond to the demand and make the right play call**

Whether Bad Faith Will Be Alleged

At some point either in the letter or after the demand letter is sent, the plaintiff's attorney will likely throw out the term "bad faith." Obviously be familiar with your state's laws on fair claims handling to avoid any subsequent bad faith claim. In addition, keep the insured informed of all developments during the process. Insureds are usually unfamiliar with the litigation process. Advising the insured about the potential exposure to the insured has to be a part of the plan. Keep the insured appraised of your evaluation of the case. The insured can provide valuable insight.

Some states have policy limits or time limit demand statutes. Missouri's statute is RSMo 537.058. There are several requirements that must be met in order to qualify as a policy limit demand pursuant to the statute. The demand must be 1) in writing, 2) sent certified mail to the insurer or representative, 3) stay open at least 90 days, 4) include the date and location of the loss, 5) describe all known injuries, 6) list medical providers from date of loss through the demand and litany of other requirements pursuant to the statute. These requirements are important otherwise the demand cannot be utilized in a bad faith claim against the insurer.

An insurer must also be aware of each state's unfair claims practices. Although most states have adopted the Unfair Claims Settlement Practices Act, many states have varying statutory and regulatory laws to govern fair claims practices. See EAGLE INT'L ASSOC., INC., FAIR CLAIMS HANDLING STATUTES A 50 STATE SURVEY (February 2017). The following states and territories have adopted the most recent version of the NAIC Model Act in a substantially similar manner: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Marianas, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. While District of Columbia, Iowa, Nevada and Oklahoma have not adopted the Model Code, these states and territories have enacted statutory and regulatory provisions to govern unfair practices. See D.C. ST. § 31-2231.17; IOWA CODE § 507B.4(9) (Am. 2018); N.R.S. 686A.310 (Am. 1991); NAC 686A.600-690; 36 O.S. §§ 1250.1 et. seq.; OKLA. ADMIN. CODE 365:15-3-5, -7. While Alabama has not adopted any statutory law, it has regulatory law providing for fair claims practices. See ALA. ADMIN. CODE. r. 482-1-124-482-1-125 (2003/2014); 482-12-24 (1971). The only state that does not have any statutory or regulatory provisions governing fair claims handling is Mississippi. Mississippi has, however, codified certain guidelines for insurers. See MISS. CODE ANN. § 83-9-5

Eagle also recently updated their publication on Mandatory UM UIM Settlement Offers and Deadlines for the 50 States and District of Columbia for cases involving Underinsured and uninsured claims.

SETTLEMENT PRACTICES to avoid Bad faith

Be mindful of crafting a response to the policy limit demand. An acceptance must be a mirror image of the offer. "To establish a valid contract, there must be both an offer and an unequivocal acceptance of that offer." Muilenburg, Inc. v. Cherokee Rose Design & Build, LLC, 250 S.W.3d 848, 852 (Mo. App. S.D. 2008). An insurer must give its insured's interests "at least equal consideration with its own when the insured is a defendant in a suit in which the recovery may exceed the policy limits." See Adduci v. Vigilant Ins. Co., 424 N.E.2d 645, 648 (Ill. App. 1981); Kavanaugh v. Interstate Fire & Casualty Co., 342 N.E.2d 116, 120 (Ill. App. 1975); McKinley v. Guar. Nat'l Ins. Co., 159 P.3d 884 (Idaho 2007). Negligent failure to settle typically requires the insured establish (1) the claim is within the scope of coverage, (2) a demand was made that was within policy limits, and (3) the demand was such that an ordinary prudent insurer would have accepted it, considering the likelihood and degree of the insured's potential exposure. See Twin City Fire Ins. Co. v. Country Mut'l Ins. Co., 23 F.3d 1175 (7th Cir. (Ill.) 1994); Yorkshire Ins. Co. v. Seger, 279 S.W.3d 755, 768 (Tex. App. 2007); G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929). An insurer must settle, if possible, "where a reasonably prudent person faced with the prospect of paying the total recovery would do so." Robinson v. State Farm Fire & Casualty Co., 583 So.2d 1063, 1067 (Fla. App. 1991).

In handling demands, whether within policy limits or above, the insurer must do more than just act reasonably—it must be able to prove that all steps taken in either negotiating a settlement or denying settlement was done reasonably. Documenting the claim file and keeping accurate and complete records of all communications and decisions within the claim analysis is essential. All materials should be date stamped in order for the file to be reconstructed at a later date. Bad faith claims with regard to settlement decisions are often determined by looking at all of the evidence and conducting an analysis of what was available at the time the settlement decisions were made. In addition to file stamping documents, all phone communications should be documented in writing and in as much detail as possible, including attempts to contact an insured or others integral to an investigation, even where the person called is not reached. All activity including investigations into damages should be noted by date within the file. Dilatory behavior on behalf of an insurer can be the foundation upon which a bad faith claim is structured.

Notwithstanding the requirement to fully and completely document the claim file, the insurer must assume that everything within that file will be discovered by the party making a bad faith claim. Brown v. Superior Court In and For Maricopa County, 670 P.2d 725, 734 (Ariz. 1983). Gratuitous comments in correspondence or memoranda should be avoided. This is true for both those handling the claim on behalf of the insurance company as well as any counsel or experts retained by the insurance company.

Comments such as "this lady is such a liar" or "I'm sick of this guy" should never be included in any portion of the claim file. However, it is important to document any difficulties that arise in dealing with the insured or claimant. For example, an insured's failure to timely respond to a demand for proof of loss, an unreasonable restriction on medical authorizations or failure to timely provide medical authorizations, a claimant or insured's dishonesty relaying essential facts or where the claimant has otherwise delayed the investigation should all be things noted in detail within the file.

IV. How to get across the goal line – some things to consider

Your team is assembled, you have a game plan and now is the time to be certain you cross the goal line. Whether negotiating a settlement directly or utilizing mediation, there are several factors to consider. With offers and responding to the policy limit demand. As stated above, they are trying to set up the insurer for bad faith. Ask for more time if necessary. Communicate early and often with claimant attorney and the insureds. Promptly identify what information you need. Spell out the offers in writing clearly and concisely. Continue utilizing your experts and defense team to resolve the case.

Determine whether there are any liens involved, including Medicare or Medicaid. Liens matter to the analysis of a claim. Everyone has been through the claim that in reality is only worth about $50,000 based on the liability and damages issues, but the liens on the case total $35,000. These claims are some of the most difficult to resolve and early evaluation of these issues can result in a dialogue with the lienholder – whether by plaintiff's counsel or defense counsel – about the strengths and weaknesses of the case in an effort to negotiate the lien down. The process for ensuring compliance with Medicare liens is lengthy and can take months to accomplish. It is best to start that process at the beginning of the case so a favorable settlement further down the claims road is not impeded by the Medicare conditional payments/final settlement detail process.

Conclusion

Policy limit demands on high exposure cases can be stressful, aggravating and tiresome. Having a good defense to take the demand head on is key to resolution. Assemble a team of adjusters, attorneys and experts to formulate a defense to these cases that will properly evaluate and reserve the case. Preparation and obtaining all information as soon as possible will avoid unexpected outcomes and cross the goal line.

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MEDIATION IS THE NEW TRIAL

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MEDIATION IS THE NEW TRIAL

Mediation is a widely utilized method of dispute resolution where Plaintiffs, Defendants, insurers and others, engage a third-party impartial mediator can engage in a meaningful exchange of thoughts regarding a case to ultimately come to a mutually beneficial settlement. Mediation is a beneficial form of dispute resolution in that it allows parties to speak freely about the case at hand, focus on the case at the same time, control mutually beneficial financial outcomes of the case, and resolve matters quickly and at a lower cost than proceeding to trial. The mediation process involves opening statements by the disputants, joint discussions between the disputants, private caucuses between each party and the mediator, and closure. However beneficial this mediation process might be, it does leave open a question for the parties of what is happening in the other rooms during their private caucus time. This paper will discuss various aspects of the mediation process, examine these aspects from the Plaintiff's point of view, and analyze how defense attorneys can best use this understanding to obtain favorable outcomes for their clients in mediation.

I. TIMING OF MEDIATION

There are many windows of opportunity during which parties can explore the possibility of mediation, ranging from when the dispute arises, to after discovery, all the way up until trial. Most often, mediation takes place after the exchange of written discovery and the deposition of the Plaintiff. However, given the variety of times that mediation can take place, it is important to consider if and how the Plaintiff's tactics vary based on when the case is being mediated.

A. Pre-Suit Mediation

The earlier in the claims/litigation process that a case is, the easier it is to negotiate better settlements with the Plaintiff, making pre-suit mediation an attractive option for defense counsel. Plaintiffs can be more likely to settle for less money early on for several reasons. First, offering to settle early puts pressure on Plaintiff's attorneys to settle, as if they recommend settlement, they are essentially assuring their client that they can increase their net recovery, without the expenses incurred during further prosecution of the case. Additionally, Plaintiffs themselves are more likely to accept settlements early on, as opposed to going through the emotional and practical time and energy commitment of years of discovery and litigation. However, when a Plaintiff has unrealistic expectations about a case, then going through discovery or partial discovery before mediation might be a better option.

B. Mediation Early in the Discovery Process

Similarly to pre-suit mediation, Plaintiffs also tend to be inclined to pursue mediation and accept settlements early on in the discovery process. This allows them to avoid the time, expense, and emotional trauma of extending the discovery process longer than need be. Of course, if early

discovery proves extremely favorable for the Plaintiff, they will be less willing to pursue mediation and early settlement, but if it goes poorly, they will be more likely to settle. At this point, it is most important to know your case, understand the strengths and weaknesses, and anticipate how Plaintiff is most likely feeling about their case to understand how likely they are to settle.

C. Mediation Pending Summary Judgment/Motions in Limine

When motions are pending that could significantly impact the outcome of a case, parties tend to develop a heightened awareness of the risks involved in letting the controversy be decided by a third party rather than through mutual agreement. This can encourage mediation in and of itself. When considering this from the Plaintiff's perspective, this may push the Plaintiff to give more consideration to settlement offers that they may have declined before.

D. Mediation on the Eve of Trial

When mediation comes late in the process, the emphasis of the process changes. The process becomes almost solely focused on developing settlement terms that both parties will find agreeable and acceptable, and does away with dealing with other components of mediation like parties underlying emotions. This means that if a Plaintiff and/or opposing counsel has previously been irrational, over emotional, or not agreeable, this is when they are most likely to act and accept reasonable settlements. Late-stage mediations generally serve a purpose to avoid the high risks of trial, so even emotional and argumentative Plaintiffs may be willing to settle on a reasonable deal here, even if they had not been willing to previously.

II. JOINT OPENING SESSIONS

Another key evaluation that the Defense will want to consider is whether or not an opening session will be helpful or harmful in the resolution of the case. The opening session generally serves several purposes in that it allows the mediator to explain the mediation process and establish ground rules for the mediation, permits parties to see and assess one another, enables attorneys to share their clients' positions, and allows the parties to speak directly to the opposing party's decision maker. However beneficial opening sessions may be, sometimes they are better foregone in the mediation process.

A. When is a Joint Opening Session Helpful or Harmful?

An opening session, per the purposes listed above, can be beneficial for both parties in that it promotes constructive discussion and transparency that lays a foundation that allows issues to be resolved more quickly. However, sometimes opening sessions may be more harmful and ought to be avoided. For example, in situations where a Plaintiff seems overly emotional or irrational in their desires, this may hinder their ability to negotiate well in a group setting. In

situations such as these, it may be better to resolve to negotiate from behind closed doors in order to minimize the likelihood of aggravating the Plaintiff. Similarly, if there is animosity between counsel and the Plaintiff's counsel seems unwilling to listen to arguments coming from the Defense, it may be wise to forego a joint opening session to avoid the wasted time of presenting arguments that will, ultimately, be ignored by the other side.

B. Best Methods to Increase Efficacy of Joint Opening Sessions

If you have chosen to hold a joint opening session, the following may be helpful in increasing the efficacy of the session:

- Call the opposing counsel prior to the mediation. Here you can ask the opposing counsel to explain her client's position, find out if they need any more information from you before proceeding, determine the attorney's relationship with their client, and build rapport with the opposing counsel before entering an adversarial environment.
- Call the mediator prior to the mediation. This will allow you to set the stage for the mediator and let them know of any unique facts or concerns you have about the mediation and opening session. This will allow them to better moderate the situation.
- Only use demonstrative aids in the opening session with clear purpose. Use aids that help your opponent better understand your position but without being so long in presentation as to lose the aid's desired effect.
- Think about how you can use this session to show the other side the merits of your case and convince them of your position, as this is likely the only time you have to speak directly to the opposing party.
- Address the other side, not the mediator. Again, this may be your only chance to address them, so use this to your advantage.
- Make it expressly clear that you are willing to listen thoughtfully to the other side and understand and consider their position, and ask that they do the same for you.
- If your client is credible and presents well, consider letting them speak during the opening session. This will allow the other side to see that your client would be a strength for your case at trial, and additionally, it might have a therapeutic value for the disputing clients.

III. INITIAL ROUND

After the opening session, if one took place, parties will separate and begin private caucuses with the mediator. The mediator typically uses this initial caucus to develop a trusting relationship with the parties and to better understand the facts, law, and controversy from each party's point of view. The mediator also, generally, tries to obtain an initial offer or demand in the first round of caucuses, and tries to encourage reasonableness from the get-go. Given the individual and sequential nature of the caucuses, however, it is important to consider what is happening in the other room during the initial private caucus.

A. The Plaintiff's Room

Typically, the mediator starts in the Plaintiff's room unless circumstances would indicate that it makes more sense to start with the Defendant, i.e., if prior negotiations left a Plaintiff's previous offer unanswered. As mentioned before, the mediator will use this time to build trust and better understand the Plaintiff's theory of the case. The mediator may also use this as time to read the room and understand the situation in its entirety; for example, who was control of the room – Plaintiff, or counsel? Additionally, they may note whether or not the Plaintiff seems emotional about the case to the extent that it might make it difficult to engage in meaningful negotiations. If that is the case, the mediator might spend more time in the Plaintiff's room to quell these emotions before moving on to substantive negotiations. Once the initial caucus with the Plaintiff has concluded, the mediator will move on to the Defense's room. Before departure, mediators will typically give the Plaintiff's room some things to think about in their absence, for example, issues that may have come up during opening that the mediator thinks would benefit the Plaintiff and counsel to discuss further in their absence.

B. The Defendant's Room

The Defendant's initial caucus will, typically, be similar to that of the Plaintiff's in that the mediator has the same goals of building trust and increasing their understanding. Of course, at this point, the mediator has already heard the Plaintiff's point of view. Sometimes, this leads the Defense to treat their initial round as an essential opportunity to persuade the mediator on the merits of their case. However, mediators report that this is not the most productive use of this initial meeting. The goal of the mediation is to persuade the other side to settle, not the mediator. While, of course, it is important to explain the merits of your case, mediators are typically reluctant to too quickly embrace one side's theory. This means that your time here is better spent being candid and factual rather than overly persuasive. This will lead to the most transparent opening caucus, which will increase both the mediator's efficiency, as well as a favorable view of your party.

C. What Information is Shared Between the Parties?

Because mediation involves at least two parties, sometimes more if there are co-defendants, the mediator will be going between different rooms to facilitate discussions and share information. A question may then arise about what, and how much, information is the mediator sharing between rooms. Rules with respect to confidentiality vary between jurisdictions and mediators. However, mediators should never disclose anything that parties reasonably expect to be kept confidential without someone's explicit permission. In terms of during an initial round, a mediator is less likely to share a lot of information between rooms. This is because of the nature of the initial round as a method to increase trust and simply understand issues better. After this has been established, mediators begin to share more information between rooms in the following rounds.

IV. FOLLOWING ROUNDS

The following rounds of private caucuses are where the actual settlement negotiation truly starts and finishes. These caucuses can give rise to some tricky situations involving the Plaintiff, some of which are detailed below.

A. Delivering Difficult News

No client likes to hear bad news about his or her case. However, frequently, during mediation, a mediator will identify the weaknesses of a party's case, such as strong legal defenses from the other side that eliminate the claim, damage defenses that significantly lower the value of the Plaintiff's case, and witness problems with the case. When this is the case, the mediator typically bears the burden of delivering this bad news. As such, when the mediator must deliver bad news to a Plaintiff, they are typically experienced in cushioning negative responses. While of course some Plaintiffs will be angry, upset, or emotional, Plaintiffs typically handle bad news better coming from a mediator, someone who serves as a neutral agent of reality, as opposed to their counsel, someone who they see as their advocate. The impact of clients who do not handle bad news well is discussed in the next section on Difficult Plaintiffs.

B. Discussions without the Plaintiff

Sometimes, it may be beneficial for attorneys to meet privately either with each other or with the mediator. Mediators report that this tends to be an efficient method of settling cases swiftly that seemed as though they may have been at an impasse. Taking the two attorneys and the mediator to the side can allow for some transparency in discussion about where they are in the mediation and why. Being out of the earshot of the Plaintiff can frequently lead to quicker settlements, so if things are going poorly during the mediation, consider requesting a conference without the Plaintiff present.

C. Reconvening the Parties

During the course of mediation, parties should consider the possibility of meeting with the opposing counsel. This is especially useful if it appears as though parties have reached a potential impasse. Consider asking the mediator if they think it would be helpful to meet with the opposing counsel, either with or without the clients. This meeting can be used to ask what is going on in the other room, to clarify either client's position, and to see if settlement is likely or possible. This can provide you with some insight as to what is happening behind closed doors and either come to a resolution more quickly, or cease mediation if it appears that a settlement cannot be reached.

D. Dealing with Animosity Between Counsel

Mediators report that they are frequently discouraged and disappointed by opposing attorneys who foster a great amount of animosity towards one another during the mediation process. When mediators notice this animosity, it signals to them that counsel has an unwillingness to

compromise or settle. Negotiations between feuding attorneys tend to be less successful as a result of clouded judgment. Here, the best advice is truly to treat the opposing counsel with respect and show a willingness to listen and negotiate in good faith. The importance of this cannot be overstated for defense counsel – Plaintiffs are frequently upset and feel victimized or ignored by the Defendant. If defense counsel can show sympathy and willingness to listen, agreements are often reached more quickly. If, to the best of your efforts, the animosity is still not being subdued, as a last resort, see if it may be possible to bring in one of your partners for the mediation instead.

V. DIFFICULT PLAINTIFFS

There are a variety of types of Plaintiffs that one may encounter in the mediation process. Depending on how a Plaintiff feels and behaves, mediation strategies may need to be adjusted in order to effectively accommodate the Plaintiff. Below are several types of commonly difficult Plaintiffs and tactics for handling them.

A. Types of Difficult Plaintiffs

- The Angry Plaintiff: The angry Plaintiff may be angry about the incident giving rise to the claim but without any real damages, angry about the incident and unrealistic about how litigation will unfold, or some combination thereof.
- The Emotional Plaintiff: The emotional Plaintiff may be too emotional or sad about the incident to be rational about the value of the case.
- The Know-It-All Plaintiff: The know-it-all Plaintiff somehow seems to know more than the mediator, attorneys, judges, and jurors combined.
- The Uncontrollable Plaintiff: The uncontrollable Plaintiff is one where even Plaintiff's counsel cannot gain control over a Plaintiff's expectations, or they have set the Plaintiff's expectations too high.

B. Tactics to Handle Difficult Plaintiffs

The first thing to do when you know you are dealing with an emotional or difficult Plaintiff is to inform the mediator before mediation begins. The mediator's knowledge of the Plaintiff's difficulties will allow them to best prepare to handle the situation when the mediation actually occurs. It is important to note that dealing with an emotional plaintiff is primarily the job of the mediator, not the Defense, and will primarily take place behind closed doors during private caucuses. This means two things: 1) the more information you can share with the mediator, the better, as it will allow them to be as prepared as possible to deal with potential irrationalities; and 2) you must remember to be patient during the process when dealing with emotional Plaintiffs. Mediators may need to spend more time in the Plaintiff's room, since they are discussing not only the settlements at hand, but the emotions involved as well. Delays can be viewed as a good thing when dealing with difficult Plaintiffs, as it likely means a mediator is doing everything they can to quell the Plaintiff's emotions before engaging in talks of settlement.

Another tactic to consider when you are dealing with a Plaintiff who you know is emotional is to either decline a joint session or opening statement, or at the very least, be very selective in your word choice during these sessions, if they transpire. You will want to sound as non-confrontational and non-argumentative as possible in order to avoid upsetting the Plaintiff further. Also, in these sessions, consider offering a statement of sincere sympathy and condolences on the client's behalf. This can easily be done without making admissions of fault, and serves an excellent purpose of defusing anger before negotiations really get started to open the way to serious settlement discussions.

Something to note in all cases with difficult Plaintiffs is that it may be hard or impossible to settle if a Plaintiff is overly emotional or irrational about the issues at hand. In these cases, if mediation is clearly not leading towards a mutually beneficial settlement, the Defense can still garner some benefits from engaging in the mediation process. First, the Defense should still be able to leave the mediation with a better understanding of the Plaintiff's case. Discussions had in opening, as well as Plaintiff's proposed settlements, will allow the Defense to better understand what the Plaintiff's expectations are, perhaps what their theory of the case is, and how to best proceed going forward with this new information. Second, the Defense should be able to least see what the bottom line number that the Plaintiff will accept is. Even if a case cannot be settled at mediation proper because of an irrational Plaintiff, given that most cases settle, having this information will allow Defense counsel to better negotiate and strategize going forward about how to settle the case, and at what cost.

VI. CONTROLLING THE MEDIATOR

In addition to all advice already given about how to appear favorably to the mediator, consider the following to have an overall positive impact on the mediator and increase your chances of success in the mediation:

- Know your case: Credibility and knowledge are two of the most powerful sources of success in mediation. Counsel should know the merits of the case, as well as the weaknesses, and discuss these knowledgably and openly with the client as well as the mediator. Appearing prepared makes the mediator more likely to respond to your position favorably.
- Anticipate the other side's position: Having a knowledge and understanding of the other side's finances, incentives, BATNA (best alternative to a negotiated agreement), WATNA (worst alternative to a negotiated agreement), and PATNA (probable alternative to a negotiated agreement) will allow you to negotiate effectively and focus the mediator on issues that are going to be potential barriers to settlement.
- Send the mediator information in advance: Any information provided to the mediator prior to the mediation will give them a better understanding of the factual and legal issues, especially from your perspective. This will make the mediator more prepared to explain and argue for your client's position in the mediation.
- Be reasonable and provide evidence for all offers: If you propose wildly unreasonable offers and/or do not provide evidence for why you are offering what you are offering, the mediator is less likely to see you as taking the mediation as seriously, and, as a result, is

less likely to take you and your position seriously. Being realistic and reasonable will be attractive to the mediator and encourage them to be an effective advocate for you when they are in the Plaintiff's room.

VII. IMPACT OF ADJUSTERS ON THE MEDIATION PROCESS

In situations where the Defendant is or involves an insurance carrier, insurance adjusters become interested parties in the mediation process. Whether attending the mediation or not, adjusters certainly can play a crucial role in the success of a mediation.

A. Settlement Authority

One of the biggest problems that mediators point to in mediations involving insurance carriers is the lack of proper settlement authority. When adjusters do not attend the mediation, they are depending on counsel to come to an appropriate settlement during the mediation. However, they are also intending for counsel to negotiate a settlement within a predetermined range that they find to be acceptable and have therefore authorized. Sometimes, the mediation process does not go according to plan, or perhaps even reveals new information that changes the possible settlement amount drastically. When this is the case, counsel may not have proper authority to agree to the most reasonable settlement. In these situations, counsel will then have to spend time contacting and phoning the adjuster, sometimes multiple times, in order to get proper authority. Not only does this irritate mediators and Plaintiffs, but sometimes it jeopardizes and leads to ultimate failure of a settlement altogether. Adjusters should make sure to work with counsel closely to provide proper settlement authority prior to mediations to account for all potential circumstances.

B. Plaintiff Tactics

When adjusters are involved in attending the mediation, Plaintiffs and counsel sometimes use this to their advantage. Up until this point, the Plaintiff has been but a faceless claimant to the adjuster. When faced with the Plaintiff directly, Plaintiffs and their counsel frequently seize this opportunity to speak as highly, personally, and humanely about the Plaintiff and their situation as possible so as to humanize the Plaintiff to the adjuster. Ideally, this tactic is used to garner sympathy and increase the limit of where the adjuster is willing to settle. Adjusters should be aware of this tactic and keep the concrete facts of the case at the forefront of their decision-making.

VIII. PLAINTIFF'S ADVANTAGES AND DISADVANTAGES

When considering what is going on in the Plaintiff's room during a mediation, one important consideration to keep in mind is what inherent advantages and disadvantages a Plaintiff has in every mediation. Some of these are detailed below and ought to be kept in mind when considering strategy from the Defense's point of view.

A. Plaintiff's Advantages

- Defendant's Exposure: Oftentimes, the Defendant in a case will be an insurance company or a corporation. When this is the case, Plaintiffs find themselves with some negotiating leverage in mediations, since Defendants usually prefer settlement over going to trial in order to minimize any negative exposure.
- Circumstantial Advantages: Sometimes various circumstances lead to a Plaintiff's advantage in mediation. These include if the Plaintiff was severely and/or obviously injured, if the Plaintiff would appear to be a favorable witness, or if the Defendant and/or the Defendant's industry is looked upon negatively by society at large. If any of these are the case in a mediation, the Plaintiff may be able to use this to their advantage.

B. Plaintiff's Disadvantages

- Emotional Involvement: Plaintiffs tend to be more emotionally invested in a case than a Defendant, especially when the Defendant is a corporation or insurance company. To a company, the Plaintiff's case is just another claim, but to the Plaintiff, it is viewed as a lot more. This can impact a Plaintiff to their detriment in a mediation in several ways, for example, inefficient negotiation as a result, or clouded judgment.
- Financial Involvement: Plaintiffs are also usually more financially invested into a case than the Defendant. The Plaintiff bears the financial cost of a lawsuit until payment is rendered, whereas Defendants are not out much until the time of payment. This puts the Plaintiff at a negotiating disadvantage and makes them more likely to settle.

IX. CONCLUSION

In sum, while mediation is frequently a cost-effective and time-saving method of resolving controversies, it is most beneficial for the parties to understand their opposing counsel and what mediation looks like from the other's perspective before the mediation actually begins. By evaluating the timing of the mediation, the emotions of the Plaintiff, the strategy behind choosing whether or not to engage in joint sessions and more, counsel will be substantially

more effective in obtaining favorable results for their clients by understanding not only their client's needs and positions, but those of the other parties as well.

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