



2020 Annual Conference
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Dealing with the Inexperienced Plaintiff's Counsel – “The Hidden Cost”

Session Description:

This round table discussion will focus on the unique and complex issues that an inexperienced or “fish out of water” plaintiff’s counsel presents to claims professionals and defense counsel. Often the most difficult and costly cases to defend are not driven by experienced and skillful counsel, but by those who are either dabbling in the practice area or who are unskilled due to inexperience. This round table of claims and legal professionals will discuss strategies to deal with those types of opposing counsel. The discussion will reflect on experiences and strategies that have and have not worked pre-suit, during discovery, at alternative dispute resolution venues, and at trial to minimize the damage an unskilled opposing counsel can inflict on the value and costs of a case.

Narrative:

What We Mean by “Inferior Counsel”

When we use the term “inferior”, we are not demeaning the quality of the attorney. Rather the term is a catch-all to explain a variety of reasons why opposing counsel is difficult or presents different problems when compared to the high-caliber plaintiff’s attorney who may have significant expertise in transportation claims and be a very capable trial attorney. The first step is to identify when you have encountered an inferior plaintiff’s attorney.

There are numerous telltale signs as to when a plaintiff’s attorney is inferior. Each sign can be identified at the various stages of a claim or case. Today, as it is for most every business, it starts with the internet. If you research the plaintiff’s attorney and there is no website, this is a red flag for an inexperienced or inferior plaintiff’s attorney. The question becomes: how they could develop business that relies upon being found by the public, if they have no website. This is frequently the sign of a very new attorney or a semi-retired attorney. However, if the attorney has a website, evaluate it for practice areas. A second tell-tale sign of an inferior attorney is a website that lists a myriad of practice areas other than personal injury litigation, e.g., divorce law, criminal defense, insurance or other non-personal injury litigation – it is likely that you will encounter an inferior attorney.

There are numerous other telltale signs that may be less obvious that do not involve the internet – telephone communication. A common sign of a potential inferior counsel is that their cell phone doubles as their office telephone number. Frequently inferior counsel lacks the resources to have a separate business line. Another telephone related sign is that when you do call their office, no one ever answers the telephone. This is also sign that they may lack resources to have a full-time staff. The final telephone related sign is that the attorney never returns your call and is never in the office. While the lack of return calls may be common for busy practicing counsel, it can also be a sign that counsel is disorganized and unprepared.

Other signs of inferior counsel are that they file suit early, but never push or truly litigate the case. Often this is a result of inexperience that leads to paralysis. Because counsel knows they need to file to preserve the claim, they do. However, once they file suit, they lack the experience and knowledge to know how to properly prepare and litigate the case for trial. Further, when they attempt to conduct discovery, their efforts are scattered. They do not have a theory or theme for their case – sometimes with respect to both negligence and damages – and do not know where to begin their discovery efforts. These situations can often devolve to the inferior counsel believing they are entitled to apex depositions from the highest officers in the company and result in challenging and costly discovery disputes.

The final category of signs involving inferior counsel concern the personality of the plaintiff's attorney. The challenge often is "trust". If plaintiff's counsel never seems to believe or trust what they are being told by defense counsel, a healthy adversarial relationship cannot be developed. Additionally, a lack of experience by plaintiff's counsel is often revealed when (1) plaintiff's counsel is unable to fairly evaluate their case and (2) they are unwilling to provide a settlement demand due to a lack of genuine understanding as to the potential value of the case. Finally, inferior counsel often lacks client control. When counsel has no control over his client's expectations, special attention must be paid to how client control can be obtained, and how defense counsel can assist.

In our experience, inferior counsel can generally be grouped into two categories. The first category is "Dabbling Counsel" and the second is what we refer to as the "New Attorney".

The "Dabbling Counsel"

The dabbling counsel is an otherwise experienced attorney who simply has little to no experience handling complex commercial transportation claims. These could be attorneys who specialize in divorce or criminal defense who typically refer large civil matters to another counsel, but decided to keep the case for some reason, e.g., an existing or prior client referred the case or they are doing a friend/family member a favor. The reason they decide to dabble is often because they see what appears to be "big damages" or they think the cases are "easy" and will not require significant time or effort.

In our experience, the dabbling counsel is often unprepared for discovery and time that is invested in developing a viable theory of liability in a complicated commercial transportation case. Frequently, they are looking for a fast settlement at an unreasonable valuation. Often, they are understaffed and not capable of keeping up with discovery demands of a complicated case.

The "New Attorney"

The new attorney is one who may have no civil experience but has taken a client in order to generate more business. These individuals could be recent graduates, those struggling to generate business, or those changing practice areas, and they think they understand discovery because they have dealt with limited discovery in criminal prosecution matters. They frequently have no idea where to start, and no idea where to go after they file the complaint.

Pre-suit Strategies

If possible, recognizing the type of inferior counsel you are dealing with at the pre-suit stage is invaluable. Looking for several of the tell-tale signs will confirm for you that you are dealing with inferior counsel.

Strategies to address the problem will be case specific, however, building trust and rapport is critical to any effort. Depending on the severity of the matter, often an in-person meeting bridges the gaps and helps put the inferior counsel at ease. Helping the new attorney obtain his client's medical records pre-suit so they can be reviewed is often mutually beneficial. Meeting the dabbling counsel in their office can often help resolve matters short of any additional expense.

Resolution strategies at this stage are like resolution strategies at different stages. The critical component is trust. If you or your local counsel cannot develop trust with the inferior counsel, that must be outsourced. Potential solutions that have worked in the past include reaching out to an attorney who inferior counsel does trust to find out if there is a way to obtain assistance from that "friendly" counsel. Frequently that option is unavailable. The next-best option is to retain a mediator who the inferior counsel trusts. While that effort may inflate the expenses to resolve the case, if the goal is resolution, it is often the only available option. The goal is to find a mediator who will talk inferior counsel through the resolution process and put them at ease that they are making good decisions concerning settlement. The risk, of course, is that the mediator may value the case in excess of your evaluation. That underscores the importance of valuing the case, round tabling values and jury verdict and settlement research. The mediator should be vetted to ensure he is not going to be entirely adversarial to your position.

Discovery

Discovery can present numerous obstacles in dealing with inferior counsel. Frequently inferior opposing counsel unnecessarily drive up legal expenses. However, the converse can also be true where inferior counsel does little during discovery. Accordingly, careful consideration must be given to strategy.

Occasionally, a friendly discussion can go a long way to building trust. It may be that suggesting the deposition of the driver and a local safety manager may dissuade inferior counsel from believing they need to take a high-ranking corporate officer or risk manager's deposition in the case. Such a discussion is a good place to start, especially with the new attorney.

If the olive-branch approach is unsuccessful, then motion practice should be considered. Getting in front of abusive or irrelevant discovery requests or deposition requests is frequently necessary when dealing with inferior counsel. Most often these requests come from the dabbling counsel, who believes they can use these techniques to leverage quick settlements.

Consideration must also be given to what discovery defense counsel wants or needs for trial to defend defendant's alleged conduct. Defense counsel may need to make sure they have identified the correct people and produced the correct documents (even if they were not requested) to avoid any issues at trial. Careful attention must be given to how defense counsel intends to try the case, the trial theme and proper foundation must be established during discovery to avoid any preclusion at trial.

Many states provide defendants with the recourse of pursuing frivolous litigation claims. Defense counsel can seek attorneys' fees and costs if a frivolous lawsuit is filed. Motion practice is usually required, and defense counsel may need to be aggressive to get the attention of inferior counsel.

Settlement Negotiations

Some settlement strategies employed during litigation are like those that may be used pre-suit. If familiarity and trust cannot be gained during litigation, attempt to outsource that to a mediator who can walk inferior counsel through the resolution process. One other strategy that is not available pre-suit is the use of the Court for settlement purposes. Nearly every venue can refer the parties to a settlement conference with either the Judge assigned to the case or a Settlement or Magistrate Judge, depending on the venue. While typically court referred

settlement, conferences are shorter than mediations, the Judges will hopefully have credibility with inferior counsel and can be very helpful in bringing cases to a resolution.

Trial Strategies

If the inferior counsel manages to keep their case alive to the point of trial, the most significant risk comes from the new attorney. The new attorney is dangerous in the court room. Not only may they be unpredictable, but incompetence can invoke sympathy from the Court and the jury. The real risk is that the jury will sympathize with both the new attorney and the plaintiff, which creates a situation where the jury will begin to do the job for the new attorney. It is important that defense counsel take the high moral ground at trial if it is anticipated that the new attorney's lack of courtroom experience will result in sympathy from the jury.