Mediation of the Professional Liability Action: Last Exit Ramp Before Trial

Legal Blogs and Updates

By Robert Ryan on 01.31.2024

As a trial attorney, I have dedicated my practice for 35 years to the representation of professionals, including physicians, attorneys, engineers, and architects, in the litigation and trial of substantial professional liability matters.

When a malpractice action is initiated against a professional, whether a physician, an attorney, or a design professional, the impact can be profound.

On a reputational basis, the action, particularly in a "high profile, high exposure" litigation matter, will publicly call into question, often unfairly, the professional's competence, potentially damaging his or her reputation with present and future clients, colleagues, and the public at large. The damages of a professional malpractice action, even one void of merit, can go far beyond the financial exposure of a single action, particularly in the digital era.

On a personal level, the impact can be even more devastating. A true professional's reputation is to be cherished as the foundation of one's professional life. Even more deeply, a professional's sense of self is often inextricably intertwined with one's standing in the profession. Any attorney who has served as defense counsel in a professional liability action can attest: A professional liability action can cut a professional to the core.

Consequently, it is a threshold obligation of defense counsel in any professional malpractice action to guide the professional as to viable alternative dispute resolution options available to resolve a pre-litigation claim or litigation action.

Over the years, the method of resolving the majority of professional liability matters, both in the pre-litigation claim stage and after litigation is initiated, has undergone a sea change.

Years ago, if a professional liability claim could not be resolved by standard settlement negotiations, the unavoidable consequence would be the initiation of a very public litigation action, the undertaking of expensive and prolonged discovery and motion practice, and, eventually, on the trial date years later, the pronouncement of a Judge, with all counsel present in chambers, directing the Court Clerk to "send for a jury".

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As a result, more often than not, the parties and counsel would then battle in open Court, for weeks or even months, in a jury trial over complex issues of liability, proximate cause, and damages. At trial, each party and their counsel knew that they carried the burden of persuading a panel of non-professional laypersons to subscribe to the merits of their respective positions. Persuade or not, the parties would ultimately be bound by the verdict of the jury.

Trial attorneys recognize more than most that the litigation and trial of malpractice actions can be a prolonged, expensive, soul-draining, and highly unpredictable method of resolving complex professional liability claims. The litigation of malpractice actions involves years of pleadings, discovery and motion practice; the constant joinder of new parties; extensive pre-trial preparation, motions and interlocutory appeals; jury selection; openings; the introduction of evidence; the direct testimony and crucial cross-examination of the professional; the introduction of conflicting expert testimony on the issue of deviation from accepted standards of professional practice and professional codes of ethics; multiple trial motions; critical summations; and, finally, a verdict, sometimes followed by the time and expense of an appeal. To a defendant professional, the process can seem to last a lifetime.

Thankfully, over the last thirty years or so, an alternative to the litigation and trial of professional liability matters, namely Mediation, has taken center stage across the country.

Mediation is an alternative dispute resolution process whereby the parties agree to voluntarily appear before an objective third party, i.e., a Mediator, in a confidential forum in the hope that the Mediator can assist the parties in negotiating and effectuating the terms of their own settlement. In a successful Mediation, the parties negotiate and implement their own settlement: the Mediator does not impose one on the parties. This is the most attractive characteristic of Mediation: the role of the Mediator is not to render a decision or rule on the merits of the claims or the defenses but, rather, to assist the parties in reaching a mutually acceptable resolution that, thereafter, will be memorialized in a formal, binding settlement agreement executed by the parties.

Mediation is usually voluntary (although in some states, like New Jersey, the Courts have endorsed programs mandating Mediation in litigation matters deemed appropriate for Mediation). It must be noted, however, that professionals, particularly architects and engineers, can be bound to mediate disputes by contract.

The benefits of Mediation are undeniable in the standard legal dispute or litigation matter: Mediation provides a confidential process designed to assist the parties in resolving their dispute on a less formal, less expensive, and less resource-consuming track than litigation and trial. The essence of Mediation is that the parties decide whether to resolve their dispute rather than have a jury do it for them. In many ways, it's a bit like the last exit ramp on the way to a jury trial.

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The benefits of Mediation to the professional in a malpractice action are even more pronounced:

1. No Binding Ruling by Mediator: The most compelling advantage of Mediation is the non-binding nature of the process during the negotiation phase. The goal of the Mediator is to facilitate the arrival of the parties at a mutually agreeable resolution of the dispute, one where the parties agree to be bound by a formal Mediation settlement. Unlike at trial or arbitration, the Mediator has no power to enter a ruling that concludes the dispute. The flexibility for any party to "walk away" from the negotiation process if not satisfied is often the deciding factor in a professional agreeing to mediate rather than litigate and be bound by a jury verdict.
2. Confidentiality: Professional liability claims invariably involve sensitive issues, such as attorney-client privilege in a legal malpractice action, that are best negotiated and resolved in a confidential forum. Rather than litigate these issues in a public setting, parties directly benefit from evaluating the plaintiff's claims and the professional's defenses in a protected, confidential forum. Additionally, settlement agreements memorializing a settlement reached in Mediation, subject to some legal exceptions, can incorporate terms and provisions such as confidentiality (subject to law), non-disparagement, and non-admission of professional fault, all terms beneficial to the professional.
3. Choice of Mediator With Expertise: In litigation, the parties and counsel normally have no role in the selection of the Judge who will preside over the litigation action and won't even meet the prospective panel of jurors until *voir dire* on the trial date. In contrast, in Mediation, the parties, with counsel, can jointly evaluate a range of Mediator candidates and, in time, retain an appropriate Mediator with the required expertise and temperament to facilitate the settlement of a complex legal malpractice or construction/ design malpractice action. The parties can then move forward knowing that the Mediator has a foundational understanding of the underlying subject matter of the malpractice claim, the controlling law and nuances at play in that matter, and the sensitive issues that will likely arise in the Mediation. Professionals who are the subject of litigation actions often appreciate the fact that as they present their defenses to the action, often among numerous parties with conflicting claims and counterclaims, those defenses are being presented to a Mediator with expertise in the professional's discipline that is the focus of the dispute rather than to a jury whose members have no formal training in the subject matter of the dispute. This advantage of Mediation alone can give the professional, particularly one subject to a first claim of professional fault, a comfort level that the "driver" of the process, the Mediator, will appreciate and understand the complexities of a particular subject matter, be it an attorney who represented a former client in a failed estate litigation or an engineer who designed a cultural center in a construction delay action. The Mediation process further allows the professional, who is the subject of the claim, a direct, personal role in the selection of the Mediator who will be charged with assisting the parties in reaching a resolution. In most cases, the professional's involvement in

selecting the Mediator can assist in the professional "buying into" the process, particularly if the Mediator can establish from the outset of the process a demonstrable, in-depth knowledge of the subject matter of the dispute.

4. Stay of Litigation: In many circumstances, the parties may seek a temporary stay from the Court of any pending litigation during the course of the Mediation so as to allow the parties to focus on resolving the claim rather than on continued litigation, with its associated financial and time commitments. In many cases, both a plaintiff and a defendant professional embroiled in high stakes litigation will welcome the option of attempting to confidentially resolve the claim, where appropriate, rather than actively and publicly litigating a matter, a process that can involve seemingly endless discovery and trial demands.
5. Professional Liability Insurance: In most actions, the professional confronted with a professional liability claim will carry professional liability insurance coverage. A significant benefit of Mediation is that the process not only permits, but actively encourages, the insurance carrier and coverage counsel, if appropriate, to attend the Mediation and directly participate in the Mediator's settlement negotiation efforts. In the process, insurance-related issues impacting a potential settlement that may arise between and among the professional, counsel, the insurance carrier and coverage counsel during the Mediation, such as consent to settle, the nature and scope of insurance coverage, coverage exclusions or limitations, and the future impacts of a settlement on the professional, can be jointly assessed and resolved in one setting as a settlement is formulated.
6. Early Mediation: In the past, parties in a complex professional liability action would actively engage in litigation, sometimes for years, before entertaining Mediation as a dispute resolution option. More recently, particularly when the parties are represented by sophisticated, experienced counsel on all sides, parties have broached the option of Mediation much earlier in the litigation timeline, often as early as the close of pleadings. Under those circumstances, Mediation can be effective if the parties and counsel can negotiate in good faith as to the exchange of threshold claim and discovery information with the understanding that this exchange — and the need to supplement discovery exchanges in Mediation as required to assess the claim and defenses — is designed to foster a rational negotiation of the claim rather than engaging in prolonged discovery that may, in reality, get the parties to the same place after years of avoidable litigation.
7. The Need To Be Heard: The need of parties, and in particular a professional facing a malpractice claim, to be heard directly, and not only through counsel, should never be underestimated. Whether directly to an adverse party or to only the Mediator in a closed session, the need of a professional to defend his or her professional conduct and, to some degree, simply vent one's frustrations with a sometimes dysfunctional legal system can play a major role in the parties coming to common ground.

8. Mediator Ex Parte Communications: The parties set the rules of the Mediation subject to the approval of the Mediator. For example, if the goal of Mediation is to reach a mutually agreeable resolution, counsel and the parties can and should give the Mediator the right to engage in ex parte exchanges with each party's counsel so as to further the settlement process. Crucially, in Mediation, counsel for any party can simultaneously reserve the right to advise the Mediator that a particular disclosure to the Mediator should be considered confidential and not subject to disclosure to another party. In this setting, the Mediator is provided with the tools to freely and flexibly assist the parties in formulating their evolving settlement positions in the hope of moving the dispute closer to resolution.
9. Intra-Mediation Discovery: On occasion, even the best Mediation plan will hit a roadblock, i.e., the need for the exchange of expert reports on liability or damages or the taking of a key fact deposition before settlement negotiations can proceed. When properly managed by an experienced Mediator and with the good faith efforts of all counsel, there is no reason the parties cannot exchange claim and defense-related information or limited discovery by consent, subject to protective conditions where negotiated, including taking select depositions simultaneously with an ongoing Mediation.
10. Multiple Mediation Sessions: Most complex professional liability actions are not resolved, notwithstanding the best intentions of all, in a single Mediation session. Mediation gives the parties flexibility in scheduling and rescheduling sessions to give the settlement negotiations time to "settle" (and sometimes "cool off") between sessions or to pause a Mediation temporarily to allow the parties to resolve a particular fact or legal issue impacting the resolution of the matter.

As a trial attorney, I am a fervent believer in the jury system. Without a doubt, the jury system is the cornerstone of our judicial system, a time-honored process that relies on the wisdom of Trial Judges; the ability of attorney advocates to present their arguments on issues of liability, proximate cause and damages in an understandable and persuasive manner; and the dedication of jurors, who each bring to the Courthouse the benefits of common sense, based on their differing life experiences, and a commitment to render a fair, just verdict. The trial of a professional liability action will always be the ultimate "dispute resolution process".

Today, however, when professional liability actions have become increasingly more complex, with litigation expenses mounting week after week and parties often being required to litigate a matter for three to five years before even getting the opportunity to present their respective positions to a jury, Mediation has become the single best option for resolving professional liability claims.

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