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Joint and several mediation

Preparing for and mediating cases with multiple clients

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By Miles B. Cooper

The lawyer looked around the room. With the lawyer was the team – skilled counsel handling a multi-plaintiff case. The clients? Unique individuals, all. A business leader, a social media maven, a researcher, a transactional lawyer – seated around a large conference table at mediation. The clients' only commonality? They were a few of the many cyclists injured over several days by a paving defect, created and left unresolved despite a multitude of calls following a trenching operation.

Groundwork

Representing multiple clients from the same event can benefit clients from a cost and efficiency perspective. Certain requirements must be met. These include determining whether actual conflicts exist rendering joint representation impossible, educating clients about potential conflicts and, presuming no actual conflicts exist, executing written potential conflict waivers. Since we've already discussed these topics in detail in February 2018's "Party Bus" (https://plaintiffmagazine.com/recent-issues/item/party-bus (https://www.coopers.law/party-bus/), we'll direct folks there for the foundational work in taking on multiple clients before one gets to settlement talks.

Haven't got a pot...

One topic not addressed previously is handling "limited pot" issues going into settlement talks. In some cases, one may learn after getting further into the case that the collectable proceeds – typically insurance limits – won't cover the total damages. In these situations, consider putting forward a mediation and binding arbitration agreement for all clients, including those represented by other firms. The agreement allows the collective to demand all proceeds and work together to divide the pot. If a distribution agreement cannot be reached, the parties initially mediate and if not resolved, convert to a binding arbitration (with the option of their own counsel at this phase). The thinking behind early agreement is people tend to be more willing to agree about an allocation method before the money becomes available. The resulting collective demand oft-times negates the need for mediating with the defense.

Joint and several

As we discuss joint approaches versus individual approaches, we explore briefing, preparation, and negotiating. Joint approaches work for some but not all phases. Consider the mediation briefs. Liability generally is a joint discussion. The individual damages, including medical treatment, exposure, and demands, are not. Consider a master liability brief with separate damages briefs for each client. These tend to be preferred by defense decision makers. The alternative would be separate briefs with the liability cut and pasted into each, with a clear statement that the liability discussions are identical in all briefs.

A joint mediation preparation session allows folks to leverage collective representation. Bringing people together, typically through a virtual meeting, gives the team an opportunity to talk about the process, expectations, the mediator, and obstacles. Clients in these sessions also tend to raise questions that benefit the whole. Separate, individual sessions following the joint session allow one to delve into the nuances in individual cases. Treatment hurdles, valuation challenges, and individual value expectation are better dealt with one on one. People can also have a hard time understanding case values. When they learn another person's case might have more value, it has the potential to embitter a client. That client can feel "less than" and impede resolution.

The joint and several method then flows into mediation itself. Jointly represented clients are typically put in the same room (read breakout room for virtual mediations). It is totally appropriate for the mediator to address joint issues jointly. The individual demands and offers, however, are communicated to the individuals. Build this into mediation time considerations, as each individual discussion will take time, lengthening each round in a multiparty mediation.

Last one in is a...

While going through the process the team needs to ensure that all the clients' interests are being considered collectively, with no client's situation putting another at risk. In most situations, the defense's desire for global resolution helps guide this to a solid joint outcome. The defense can sometimes attempt to drive wedges, however. One way is to try to carve off the cases that have larger value, leaving lower-value cases with the unenviable position of heading to trial when trial costs or the client's opportunity costs make trial risks challenging. These efforts can be thwarted by requiring the defense to pay fair value on the lower-value cases to settle the greater-value cases, so long as the greater-value cases agree to the strength-in-numbers approach. Should this raise concerns, a beatable formal offer to compromise or an expedited jury trial (or both) are great tools to help make sure a lower-value case still gets a good net result. They also help keep one's trial chops honed.

Outro

Back to our lawyer and the team. The team left the mediation facility late that night, the staff long gone. While they weren't done, a lot of good discussions had been held to lay the groundwork for resolution. Given the defendant's egregious behavior, the concept of resolution frustrated the lawyer's inner trial warrior while knowing settlement, in most cases, provides a far less stressful client experience.

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