



Mediation and the Professional Liability Dispute

By: Bruce A. Friedman

Involved in a legal malpractice or professional liability dispute? As you are likely aware, it is common for a legal malpractice claim to be countered by a fee claim by the lawyer defendant arising out of the former representation of the plaintiff client. The pendency of the fee claim raises some difficult issues with respect to consent and policy limits demands. Plaintiff usually couples the settlement demand with a condition that the counterclaim for fees be dismissed. If the lawyer defendant and counterclaimant refuses, then the insurer is not in a position to settle the malpractice claim because it does not have the consent of its insured. On the other hand, the insured lawyer and the plaintiff client may run the risk that the insurer may be insulated from liability for an excess of limits judgment as the insurer cannot settle without consent.

Both plaintiff and defendant should keep these considerations in mind in the settlement mediation. Either the lawyer must drop the counterclaim in order to settle the malpractice case or both plaintiff and defendant should agree to sever the counterclaim and settle the malpractice claim. If the malpractice claim cannot be settled, at least plaintiff and lawyer defendant will have preserved an argument that the insurer is responsible for a judgment in excess of limits.

These issues may be difficult to explore and flesh out in a mediation if the lawyer defendant does not have counsel independent of defense counsel. Appointed defense counsel is not in a position to counsel her lawyer client on these issues as she has a joint client relationship with the client and the insurer. The mediator, however, needs to be sensitive to these issues and make an effort to explain the consequences of the parties positions on the consent and coverage issues.

Bruce A. Friedman is a mediator with a national practice. With years of litigation experience behind him, he understands the goals of the mediation process and will do his best to ensure that the needs of both parties are met, justly and efficiently. For more information on the mediation services that Bruce A. Friedman provides, check out his website at

<http://www.FriedmanMediation.com>, his profile at ADRServices.org, or call him at (310) 201-0010.