Best's Insurance Law Podcast

The Importance of Early Case Management in the Litigation Process – Episode #197

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John Czuba: Welcome to Best's Insurance Law Podcast, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, *managing editor of Best's Insurance Professional Resources.*

We're pleased to have with us today Dr. Steve Wood. Steve is a litigation consultant at Courtroom Sciences, Inc.., a national litigation consulting and litigation support firm based in Irving, Texas.

Dr. Wood uses his social psychological expertise to help clients understand the juror decision-making process and maximize the likelihood of favorable case outcomes.

He also assists clients with case-related activities, including pretrial research, witness effectiveness training, case theme development, supplemental juror, juror questionnaires, and jury selection.

His work has also been published in various peer-reviewed academic journals, as well as several scholarly magazines. Steve, thanks so much for joining us today.

Steve Wood: Thanks, John, for having me.

John: Today's discussion will be on the advantages of early case management. Steve, for our first question, what is early case management?

Steve: When I talk about, or at least when I reference early case management, what I'm referring to is this idea of getting out ahead of things on the plaintiff's bar and developing your themes early on in the case, assessing the aspects, the strengths, the weaknesses of your case early on rather than waiting right to the eve of trial.

Also, making sure that you properly prepare your witnesses for depositions. Those are the key things that I think of when I talk about early case management.

John: Why is early case management so important in cases?

Steve: The reason why we talk about it, to use a boxing analogy, is that you can't wait till the sixth round to start throwing punches. You can't play defense for five rounds, and then all of a sudden, in the sixth round, say, "OK, now I'm going to come out, now I'm going to start going on the offensive."

When you start doing that you've already been behind the eight-ball for so long that your opponent has the advantage over you and has started ahead of you and you're trying to play catch-up. The plaintiff's bar is very, very good at doing this. They're using early case management often.

I hear and talk to plaintiff attorneys, and they talk about how they've focus grouped certain cases four, five, six times. Sometimes, they'll even be doing this before they even go into depositions with experts. They go in knowing, what are the key aspects?

What are the key admissions that they need to get? What are the key themes? What are the key pieces of evidence that they need to pull out of those witnesses? They're going in much more informed into even the deposition.

The other reason why early case management is so important, from a defense side, is that when you have time, when you have had the ability to look at cases early, is that you have time to adjust your case theory. You have time to create new exhibits.

What we often find when we're doing focus groups or when we're doing mock trials is that jurors will bring up certain aspects and say, "I would like to know more about a certain topic. I'd like to hear from a certain witness. Has anybody looked at this? Has a demonstrative been made for this certain aspect?"

When discovery is closed, a lot of times, we know we have to talk with clients and say, "Hey, these are all the things that jurors wanted to see," and then we get, "That's great, but discovery is closed."

You missed the opportunity to beef up certain things that could be beneficial to your case because you didn't realize those were aspects that jurors found to be so important.

Like I said, it puts you behind the eight-ball, but if you can do that up front, it gives you so much time, so much flexibility to be able to tweak things and create things that give you the strongest case to put forth at trial.

John: Steve, what prevents insurance companies and their insureds from performing early case management?

Steve: A lot of it ends up coming down to a lack of information or a lack of education around the importance of it, which is why this podcast is great in getting out there, in that having your listeners get a sense for understanding, this is what it is. This is why it's so important.

Right now, it's just people don't understand the value of it or haven't been able to experience to that level the value of early case management. One of the other things we see, too, is I often hear from attorneys or insurance companies is, "We have attorneys and they prepare our witnesses. "Why do we need to hire someone to come in who's not an attorney and come in and prepare the witnesses? That's what my attorneys do. Can't my attorneys do that?" The short answer is no.

The reason why I say that is not because of any deficiencies on the part of the attorneys. We work with some world-class attorneys. They have a different skill set. That's where we come in. Like I said, I'm not an attorney, I'm a psychologist.

I come in and bring my social psychological expertise to the deposition training process. What I always talk about is it's a partnership between the attorneys and me, where they focus on the legal stuff.

I don't talk about anything from the legal aspects, or any sort of motion *in limine* topics, or whether they should or shouldn't answer certain questions because it's privileged, or any of those types of things.

I leave that all to the attorney, but I do the psychological aspect, which most attorneys don't have the training and expertise in. Like I said, it's another thing about education to say, "Hey, it's not because your attorney is not good at prepping witnesses."

It's just the skill set that's needed nowadays in the current landscape needs to be more psychological in nature as well as legal in nature. One of the other things is that so often, we get locked into our own thoughts about our case.

This is the idea of there's a psychological term called confirmation bias. What confirmation bias is, is where you have an opinion that you believe and support, and then what ends up happening is you go out and start seeking out information that supports that belief.

What also happens is you have other information out there that might disconfirm that belief, but what you end up doing is you focus all on the positives, all on the things that support your thoughts, and basically pooh-pooh or ignore and disregard that information that doesn't support your belief.

That can become extremely dangerous in litigation because what ends up happening is you get blind to your own case, your own case strengths, and then you don't see the weaknesses.

Or, you see the weaknesses and say, "We can easily clean that up, or jurors aren't going to care about that. That's just a moot point. I'm not even going to worry about that because it's so minor."

What we end up finding out is what you believed was a minor point, what you believed was not something strong on behalf of the plaintiff, you find out later that it was. Like I said, so many times, we get blind to our own perspectives and can't think outside of the box or look at the other side of the argument.

The last one is it's a fear of spending money. Obviously, bringing in us and working with witnesses, or doing mock trials, or doing focus groups costs clients' money.

A lot of times, people don't want to spend the money because it's hard to justify, "I'm going to spend upwards maybe $100,000 to prepare for this case, to prepare my witnesses, to do a mock trial, to do a focus group. I could save the $100,000 and not do it and take this to trial and see how it goes." It's that idea of I always look at it from the insurance perspective is that the claims adjuster is the one that is spending the money and has to write the check in order to do it.

Then, they have maybe somebody higher up going, "Why are we spending so much money on this case? Why did you just spend $100,000 to do the witness training, to do the mock trial?"

For example, that might go to trial or it might go settle, and it settles for an amount less, or they go to trial and they get a defense verdict. No one comes to the claims adjuster and goes, "Hey, nice job spending $100,000, because look at the great outcome."

Patting that person on the back and essentially sharing the trophy with the claims adjuster so that the claims adjuster can say, "See, look at all the work that I did, all the things that I did helped this out."

What they end up seeing is the $100,000 check that they had to cut. It's a disconnect. That's another thing is that fear of spending money prevents people from wanting to do it.

John: For those companies that do spend the money, those insurance companies and insureds, when they do perform this early case management, what sort of benefits do they realize?

Steve: One of the biggest things, you have a better understanding of what your case weaknesses are. As I said before, so many times, we get locked into our own thoughts.

I always enjoy doing mock trials or doing focus groups and talking with the clients afterwards and having them say, "Gee, this aspect, I never had a thought about it. I thought we knew all the key points. I thought we knew all the key issues of this case, but I realize there's two or three things that we had never thought about." I always enjoy hearing them say that, because, like I said, it gets them to a different mindset and says, "Now we're going to tailor things and tweak things that we had never thought about in the first place."

One of the other things we see a lot is effective witness deposition testimony. A lot of times, I've worked with witnesses before where they might have not gone through our training system or not worked with anybody prior to a prior deposition.

They said, "I've been deposed two or three times, and all the times before, it was 30 minutes, pulled me into the room next door before I got deposed, and just did the really, really brief introduction to deposition and how to do it."

Then, they go through our training session and say, "Man, where was this at when I was being deposed before? I wish I would have had this. This is so much better. I feel so much more prepared for my deposition."

Then, you also have the people who are the first-time deponents who are going into it and they're going through the training. It helps them to alleviate some of the concern about the deposition, helps them feel more prepared as well.

Some of the times, we deal with people who are highly anxious, or highly upset, or argumentative, and they need that time to vent, and be prepared so that when they go into the deposition, all those things don't come out at the time when they're being deposed.

Like I said, a lot of that stuff we see is when it ends up being all said and done, you have a very clean deposition transcript. A lot of the tricks and traps that opposing counsel is trying to get the witnesses to fall for, they don't fall for the traps.

Opposing counsel gets frustrated, upset about it because it's not going the way that they want, but the witness is telling the truth, being effective. It's just not going the way plaintiff counsel wants it to.

The other thing that it does, too, is it gives you and provides you leverage in settlement negotiations. When we talk about whether its effective witness deposition testimony or whether or not it ends up being focus group or mock trial results, you can go into mediation.

You can go into settlement negotiations with information ready to go so that when plaintiff counsel says, "I am saying this case is worth X amount of money."

Defense counsel has proof to show, "No, I myself have done focus groups. I know you've done two or three of them and you have numbers. I myself have done some, and I can show you that our numbers are a little bit different."

It provides that leverage in settlement negotiations to not go in and be bullied by opposing counsel and get them to essentially settle for an amount that's much higher than you need to.

John: I'm glad you mentioned that aspect, because I know the trend for a good number of years now has been to avoid the trial process and to go to settlement. Do you lean that way? Do you pitch that? Do you think there's an advantage to one as opposed to the other?

Steve: There's sometimes where there's some cases that should be settled. There's ones where there's some bad facts as it relates to the case and the better option is to settle.

At the same time, I've worked on several cases where I think that if they were to take it to trial, they had a good chance of getting a defense verdict. The problem with that is the defense bar is inherently risk-averse by nature.

A lot of times, it's the concern about, "I don't want to take this to trial, because if I get hit for a nuclear verdict or if I get hit for a large verdict, it's going to end up on the front page of the news."

There have been several cases where I've even heard clients say, "You know what? We're going to take this to trial. I'm tired of being the punching bag. I'm tired of being the ATM machine for the plaintiff's bar on these cases. We're going to take it to trial."

Then, you end up hearing that they ended up ultimately settling the case. There's times that I wish defense bar, I wish the defense would take cases to trial a lot more, because a lot of times, there's ways that you can position your case so that you can get a defense verdict.

What it would do is also send a message to the plaintiff's bar that, "Hey, you know what? We're willing to go to trial. We're willing to take this all the way," versus feeling like, "You know what? Let's just settle this. Here's a bunch of money to settle this and make it go away."

It depends on the case, depends on the case facts about whether or not I'm strong one way or the other.

John: Are there any particular types of cases that lend themselves best to early case management, Steve?

Steve: I would say the short answer is all of them. A lot of times, when I'm talking to attorneys or I'm talking to clients and they say, "We don't have anything right now, but we'll let you know when we have a case big enough to get you involved."

The truth of the matter is I'm not clear on what their threshold is, and I know the threshold is going to be different for each client, for each attorney and staff.

The truth of the matter is we do a lot of work in Indiana that have caps on medical malpractice cases, and we do a lot of witness training in those cases. My argument is always, I don't think that there's a case that has a certain threshold, a certain amount or damage request that would then say, this fits what we should do.

This fits what we should bring a litigation psychologist or a litigation consultant in on. Any case, and maybe you're not going to do the full-blown mock trial or the full-blown focus group.

We do probably about 50 to 60 percent of our work in witness training, which is a lot more reasonable and can be effective as far as making sure that if you do go to settlement and that's where you're looking, like you said, your settlement negotiations are in a better position when your witnesses aren't saying and doing bad things in their deposition that provides leverage and firepower for opposing counsel.

John: Steve, any final thoughts or suggestions for our listeners about managing their litigation?

Steve: First and foremost, be proactive. Be proactive, be proactive, be proactive. Like I said, that's what plaintiff counsel is doing. They're getting out in front of everything. Can't be reactive. Defense bar cannot be reactive. They have to start getting out and doing things a lot sooner, a lot quicker.

Be ready to throw the first punch, as I said. Be ready to be the one who goes on the offensive and is the one who's more aggressive in the way that they're working up a case. Be open to being wrong.

That's one of the things that so often, as I said earlier, we get locked in on our thoughts and beliefs and aren't willing to look at it from another perspective or aren't willing to give certain aspects of the case the credence that they deserve.

That's where you learn to strengthen your case by being open to being wrong, being open to seeing the other side, and being open to admit, "These are some bad facts. These are some strong facts."

Then, once you're able to do that, then hopefully you're able to take a step back and say, "OK, how do we defend against these if there's a strong defense of them?"

John: Steve, thanks very much for joining us today.

Steve: Thank you.

John: You've just listened to Dr. Steve Wood, a litigation consultant at Courtroom Sciences. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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