WHETHER TO PROCEED OR NOT WITH AN ADVERSE PANEL OPINION

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You know that the panel opinion is admissible as evidence but it is not conclusive. I.C. 34-18-10-23. There are many reasons, some good and some bad, for proceeding despite an adverse decision.

The decision to proceed is part science, part art, and part the facts of life in the real world. The science is getting the right information to consider. Some of the right type of information to consider follows, in no particular order. Take it for whatever you believe it is worth.

Then there is the art of deciding how much weight to give each of the pieces of information in light of the whole. Finally, the facts of life are that sometimes you have no choice because either your client or your client's insurer will not settle.

Your case evaluation fundamentals are otherwise good

An adverse panel opinion is just another type of evidence in favor of plaintiff and against your client, although admittedly it is significant. But almost all cases have some negative baggage. The senior litigation partner in my firm says that if you win every case you try you are either being too selective or you are paying more than some are worth to get them settled. Putting the panel decision on the negative side, the question is still whether the positive considerations outweigh the negative considerations enough for your client or your client's insurer to want to go forward.

Other considerations include the following. Plaintiff does not really want to go to court or does not make a good witness. Your client can take going to court if necessary and makes a

very good or excellent witness. There is no ancillary claim giving your client any personal exposure. Your expert witness or witnesses are already lined up and excellent. Other witness for you are good while other witnesses for plaintiff are weak. Plaintiff does not have an expert other than a panelist.

Your defense will make sense to a lay person. The plaintiff's injuries and/or damages are not that bad. If they are bad, you have bifurcated liability and damages. Perhaps you have been or have reason to believe you will be able to exclude a severely injured plaintiff from the view of the jury during the liability phase of a bifurcated trial.

Your client's good reputation is well known in a smaller venue. You are in a conservative county. The judge on the case is a favorable choice for you.

There is no other defendant pointing the finger at your client. There is another defendant that appears more directly responsible for what the plaintiff is claiming.

The panel did not find that the conduct was a factor or, if they did, it will be difficult for the plaintiff to prove causation-in-fact.

The plaintiff's lawyer does not know what they are doing. The plaintiff's lawyer does not want to go to court. Maybe you have tried many medical malpractice cases. Maybe you have a lot of experience with the specific medical issues involved in this case.

Obviously, an adverse panel decision is significant evidence against you. But it is only one consideration that must be weighed in light of all the circumstances of your case.

This professional judgment is similar to the process you go through when you are putting a value on a case. Please see the recent attached article which discusses that process.

The adverse panelist can be discredited well on cross

You also need to weigh just how effective the panel opinion will be. Like favorable panel opinions, adverse panel opinions are not all created equal. Perhaps the panel is split and the adverse panelist is in the minority.

Beyond the obvious split, you also need to know as much as you can about each panel member and why each decided the way they did. Of course, you cannot communicate with a health care provider member of the panel before the panel gives its expert opinion. I.C. 34-18-10-18. So you may need to proceed despite an adverse panel decision, at least until you can find out about the panel member and the reasons for their decision.

Some of the things you should ordinarily find out about the adverse panelist and consider are the following. Do they make a good witness? If the panel was split, does the favorable panelist make a better witnesses than the adverse panelist? Is the adverse panelist in the same specialty as your client? Are they as qualified as your client or your expert? Will plaintiff's counsel be able to get the panelist to appear at trial? Can plaintiff get their video-taped deposition, or even their regular deposition? Is the only evidence from an adverse panelist the simple conclusory panel opinion? Did the adverse panelist base their decision on incomplete information? Perhaps they never got or saw your panel submission. It has happened to me. Perhaps they relied on literature published after the occurrence. Perhaps they are basing their decision not on what was known at the time, but on what was discovered afterwards, such as at autopsy.

Did the panelist base their decision on the wrong standards? Did they apply the standard of reasonable care, by those in the same class, under the circumstances as required by *Vergara v. Doan*, 593 N.E.2d 185, 187 (Ind. 1992). Or did they instead base their decision on what they would have done, on what would have been the best care, on the "gold standard," or on what would be required on the exam for board certification.

Did they find the conduct was a factor just because there was a breach? Some think this is automatic if there is a breach with a bad outcome.

Were they biased in favor of the plaintiff or their counsel, or were they prejudiced against you or your client. It is disturbing that according to the Supreme Court an attorney representing a party before the panel is not required to disclose a personal and professional relationship with a panel member, although it would be "prudent and fair" to do so. *Matter of La Cava*, 615 N.E.2d

93, 96 (Ind. 1993). Did the adverse panel member know plaintiff or plaintiff's counsel, or you or your client? If so, do the circumstances call the impartiality or objectiveness of the panel into question? Were any panel members contacted "off the record" regarding the case before their panel meeting or after their meeting but before their written decision. *Id*.

Did any panel member incorrectly believe that the panel decision had to be unanimous? Did they decide a material issue of fact not requiring expert opinion? For instance, did they take the position that their decision had to be based on the medical record made at the time and could not include other information from affidavits, depositions, answers to interrogatories, etc.

Did any panel member incorrectly put the burden on your client to prove that there was no malpractice, for instance where there was a misdiagnosis or particularly bad outcome? Or did any mistakenly believe an improper allegation of *res ipsa loquitur* applied? Did they base their decision on what was possible instead of what was more likely than not?

Did they lump your client together with a culpable defendant when the two should have been judged separately? Did they think consent for a particular procedure had to be in writing? Were they swayed by sympathy?

You must find out these types of things and make a professional judgment regarding how effective you believe the adverse panel opinion will be for the plaintiff.

Your client health care provider will not consent

Even if the case can be and should be settled in your judgment, your client may not agree and ultimately you must abide by their decision. In addition, almost all professional liability insurance policies require the consent of the insured before any settlement can be made.

Why would a health care provider not want to follow a recommendation to settle the case? Here are some reasons that alone or in combination have prevented settlements.

Your client has never had a successful claim against them and cannot psychologically accept the first. Or, your client is looking to relocate and apply for new hospital privileges soon and does not want the first, or another, claim paid on his behalf before then.

Perhaps you client is simply adamant that they did nothing wrong and no one is ever going to convince them otherwise.

Depending on what they have been heard or read about it, they may have a phobia about having to report a claim to the National Practitioner Data Bank. They have also heard of "investigations," more likely inquiries, by the consumer protection division of the attorney general's office and they want to avoid theat.

Sometimes they fear it will affect their license to practice. They may think that it will hurt their ability to get insurance or make their insurance more expense. For whatever reason, bad publicity on this claim either does not bother them or will not affect their practice.

Your client may not like the plaintiff. Your client may feel betrayed by the patient. Your client may not feel sorry for the patient.

The above are some of the considerations that can keep a case that should be settled from being settled. And there is at least one more, the decision of the insurer.

The insurer for your client health care provider will not settle

As discussed above, almost all professional liability insurance policies require the consent of the insured before any settlement can be made. However, those same policies do not require

the insurer to settle the claim when the insured, your client, wants it settled. Even if your client has consented to settlement, the insurer may not be willing to settle or may not be willing to settle for the amount demanded.

Why would the insurer not want to settle if you think they should and your client, their insured, thinks they should? First of all, they may believe that they have as much or more experience with these types of claims than you do and they may simply disagree with your assessment. They may feel that the fundamentals are better than you think. Maybe the insurer has successfully defended similar situations in the past. The particular person at the insurer handling this claim has not lost one recently. They may feel that the opinion of any adverse panelist will have less effect on the jury than you think.

The claim also may fit within certain inflexible guidelines under which that insurer will not settle. Perhaps the insurer no longer covers your client and is less sensitive to the wishes of your client.

Sometimes the insurer has more cases like yours, but without much verdict experience. They want to see what a few juries will do with them.

Maybe the insurer does not like plaintiff's counsel or has other cases with plaintiff's counsel and wants to send them a message.

Another consideration may be cost. The majority of the discovery and expert witness expense may have been incurred before the panel rendered its decision.

Conclusion

An adverse panel opinion is just another type of evidence in favor of plaintiff and against your client. The question is still whether the positive considerations outweigh this and any other

negative considerations enough for your client or your client's insurer to want to go forward. These considerations include the evaluation fundamentals and the strength or weakness of the adverse panelist's opinion.

The decision to proceed is part science, part art, and part the facts of life in the real world. The science is getting the right information to consider. The art is deciding how much weight to give each of the pieces of information. And finally, the facts of life are that sometimes you have no choice because either your client or your client's insurer will not settle. In that case all you can do is the best that you can with whatever you have.

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