NUCLEAR DETERRENCE

LEVERAGING THE NUCLEAR VERDICT DEFENSE METHODS DURING MEDIATION

BY JENNIFER AKRE AND LEA KAPRAL

Trial attorneys prepare every case as though it is going to trial, but we know 95% of cases settle before then. While insurance professionals and their counsel agree there are certain cases that must be tried, it is our obligation to recognize risk and effectively employ resolution tools such as mediation through the life of a claim. So, the question is: Are we preparing for mediation with the same level of focused strategy we use in trial?

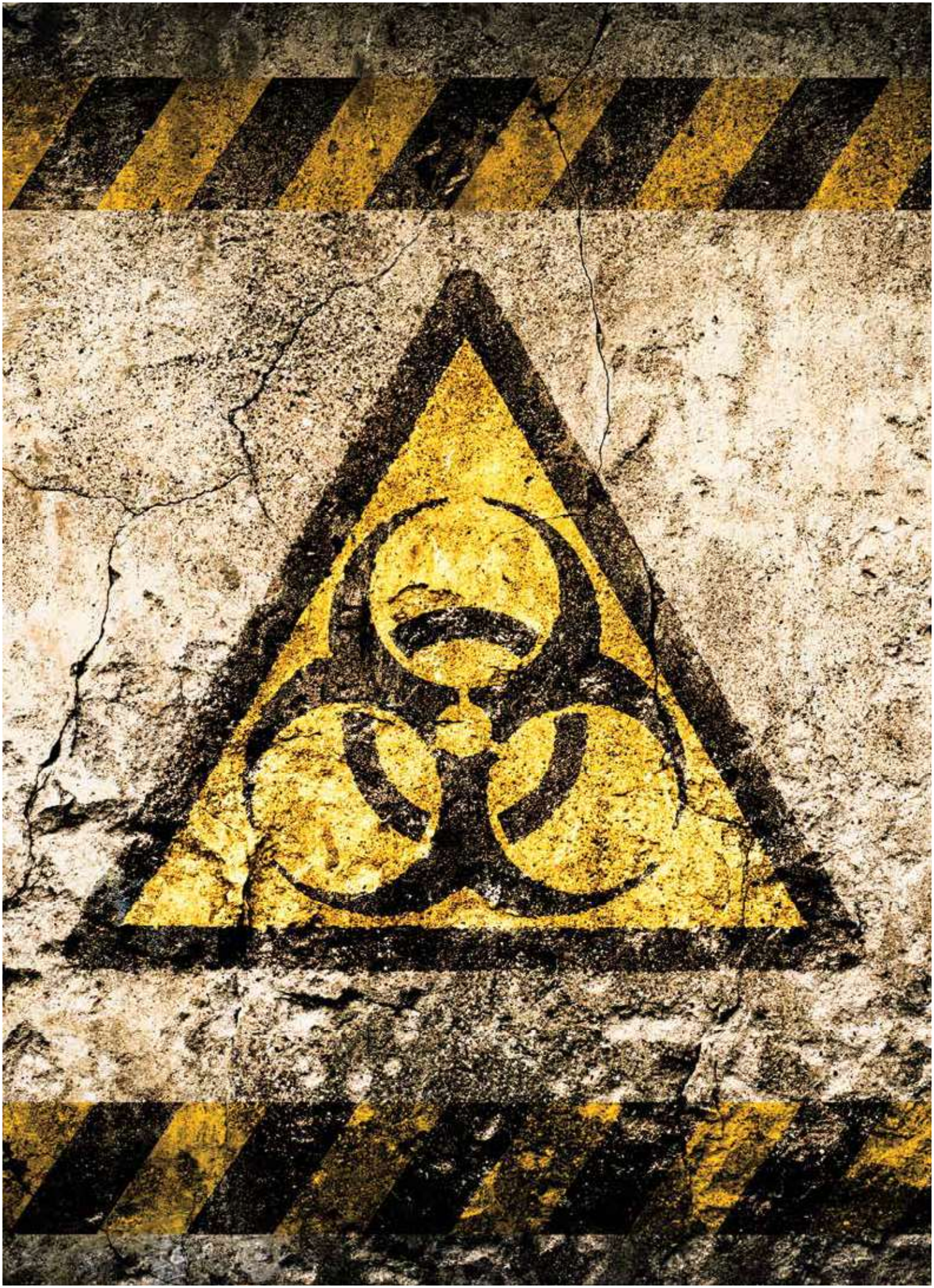
There are a few critical components for a successful mediation. The first of these is communication. While lawsuits and mediations are the normal course for insurance professionals and attorneys, they represent unknown territory for the insured. Mediations can be unsettling, if not downright scary, for our mutual client. It is important to establish open communication and build trust from the beginning. Explaining the process to insureds is imperative so they can understand and participate in their defense. More specifically, their confidence and level of participation at mediation is bolstered when they understand what will happen and feel included in the development and execution of a strategy. As a team (insurer, counsel, and insured), we must create a plan, and then execute it together. There are proven strategies and tools at our disposal, if only we will use them.

The "Nuclear Verdicts Defense Methods" (accept responsibility, personalize the corporate defendant, give a number, and argue pain and suffering), outlined in Robert Tyson's book, "Nuclear Verdicts: Defending Justice for All," have proven to be powerful tools at trial, but they can (and should) be used at every step along the way, including mediation. If you are familiar with these methods, you know the strategies are not focused on convincing a jury to find zero liability or award zero dollars, but rather they focus on defusing juror anger to persuade the jury to find the reasonable solution. At mediation, instead of persuading a jury, we are persuading the plaintiff and the mediator to find the reasonable solution. Here are our insights into how these four methods can be used at mediation effectively.

ACCEPT RESPONSIBILITY

Being prepared to accept responsibility for something (even, or especially, something the defendant is proud of) is crucial to establishing credibility with the mediator. It signals to the mediator that you are the most reasonable party, as it undermines any assertions by plaintiff that you or your client are blind to the realities of the situation. This is of paramount importance when negotiating what a mediated resolution might be.

Defendants and their counsel often undervalue the unique opportunity to speak to a plaintiff face-to-face and show the plaintiff there are real people involved on the other side. Opening mediation by accepting responsibility has a positive psychological impact on all parties and will set the stage for a reasonable resolution. It can be helpful to begin by stating, "I'm sorry this happened to you. We're here today to help resolve your case." Follow this by



accepting responsibility for something: "We agree that we have a responsibility to put safe drivers on the road." Plaintiff will feel heard and you will set up an opportunity to present evidence that your company did, in fact, put a safe driver on the road.

Remember, accepting responsibility is not about an admission of liability; it is an honest statement of our role. One of the greatest values of mediation is the ability to make a plaintiff feel seen and heard. This is an immense gift to someone who feels she has been wronged, and it allows both parties to focus on resolving the case. For our client, understanding the purpose of accepting responsibility is necessary to move beyond emotions to facts. This is usually where the magic happens.

PERSONALIZE THE CORPORATE DEFENDANT

The presence and personalization of the client is paramount. Having the corporate representative and the claims professional present and engaged is essential. The psychological benefits of both parties seeing a real person on the other side of the lawsuit should not be undervalued.

Mediation is also a great opportunity to share the personal story of the corporate defendant. Get to know your insured: their values, their story, their culture, and their goals. Many businesses (especially small businesses) have a compelling origin story that humanizes and contextualizes what the company truly is. Share this with the mediator. Not only does it let the mediator in on how the company truly operates and the people behind it (which will only help you when it comes to reaching a reasonable resolution), but it affords you the opportunity to "test drive" the information you are considering sharing with the jury if the case proceeds to trial.

GIVE A NUMBER

At mediation, the "number" can mean many things: the number you give the carrier, the number you tell the mediator, the number you are signaling to the other side, or the real number you have not told anyone. While each of these numbers is important, let us focus on the numbers you used to get to the evaluation: the economic damages.

By the time you reach mediation, you should have completed a fair amount of discovery. If you are the attorney handling the mediation, you are now sitting in a room with your insured, your carrier, and the mediator. If you want to be effective, you must know your numbers. Be prepared. Know your plaintiff: their medical expenses, their lost wages, their experts, and their expectations of future care. Going to mediation with a complete understanding of the economic damages, outstanding liens,

and financial obligations of the plaintiff is key. Your evaluation and numbers will be evidence-based, purposeful, logical, and address the individual plaintiff's circumstances or concerns.

Do not shy away from using actual numbers at mediation. Know your numbers, communicate them early and often, and anchor your offers to the facts of the case. Discuss the number with your client and the claims professional to gain consensus on negotiation strategy and talking points. This strategy will help the claims professional, client, and plaintiff evaluate their risk and allow the mediator to engage in conversations about what a reasonable settlement looks like.

ARGUE PAIN AND SUFFERING

Most defense counsel simply do not argue pain and suffering at trial, and are nervous to engage in those discussions in mediation. However, arguing pain and suffering by providing a full picture of what your offer could actually do for the plaintiff is crucial for several reasons. First, it allows you to show the mediator and the plaintiff once again that you care and have gotten to know what the plaintiff's needs and wants are. Second, it puts your number in concrete terms for the plaintiff. Allowing a plaintiff to envision all they are walking away from if they do not accept an offer at mediation increases the likelihood they accept.

This is an opportunity to get creative. Where do plaintiff and her family gather for reunions? Why not offer to pay for plane tickets and lodging for her and her whole family for those reunions for the next 20 years? Does the plaintiff have kids in college? How much college tuition can your number cover? What about student loans? Could purchasing real estate for the plaintiff and her family to enjoy make a difference in her quality of life? These are life expenses that your number could resolve; why not share them with the mediator and offer them some fuel when they discuss with the plaintiff?

For many, mediation is a steppingstone, an item on the checklist, or an opportunity to multitask while the mediator is in the other room. But, if your case is ready and you have a focused strategy, mediation can be a day to achieve justice, a day for an injured party to feel it has been heard, and a day for a carrier or client to recognize and eliminate a risk. The Nuclear Verdicts Defense Methods are not just for trial; they are a critical tool for mediation, too. Teamwork, preparation, and leveraging these methods is the epitome of collaboration, readiness, and strategy. ■

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