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Risk Management During Trial, *Property Casualty 360*

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Does risk management end at the courthouse steps?

Loss control plans stand upon twin pillars: insurance protection and risk management. The first is a financial product to defray personal or business losses, the second is a managerial regimen to prevent such losses or reduce their severity. Risk management is the proverbial "stitch in time that saves nine." Does risk management end at the courthouse steps, or can it continue even after counsel for the parties stand and address the court: "Ready, Your Honor!"

Assume that all the appropriate risk management measures have been put into place, but a loss has occurred, a lawsuit has been filed, and a jury is about to be impaneled. Is the final act of the play that is about to begin in the courtroom predetermined? Not necessarily. What lies ahead is not yet set in stone, or even wet concrete. A lot of things can happen during a trial.

The steps in the risk management process are worded variously depending upon the source, but they include:

- *Identifying, analyzing and evaluating (or ranking) known risks;*
- *Treating (or responding to) them; and*
- *Monitoring the results.*

By the time trial begins, the risk has been identified, analyzed and evaluated by at least two parties duly represented by learned counsel, who have reached opposite conclusions about the risks of having 6 or 12 good citizens, sworn and true, decide their dispute for them. By the time a trial begins, it may seem that there is nothing left to manage about the risk — just wind up the lawyers, judge and witnesses, and enjoy the show. But not really.

Managing risks at trial

Risk managers are often present during high-stakes civil trials. They might be from corporate counsel's office, outside counsel acting in a monitoring or coverage role, insurance claims professionals, or someone else who is well versed about the case and can provide an independent report on the day's events.

I have been in trials in which the claims representatives outnumbered the jurors — a silent audience of anonymous note writers, intently scrutinizing each raised judicial eyebrow, each juror's yawn, each witness' jitters. Often they're at the trial to assist an insurer in making its decision about whether to let the case go to the jury or "pull the plug" by accepting the last settlement demand — assuming the start of the trial has not changed the plaintiff's mind about accepting that valuation. There are other invisible stakeholders in a trial's outcome who want an independent answer to a three-word question, "How's it going?"

As one who has tried, settled, mediated, won, lost and monitored cases, I believe the trial-monitor's prime directive is the same as the Hippocratic oath's first principle: "First, do no harm." Put another way, please don't make trial counsel's job harder than it already is. Defense counsel has prepared witnesses, written motions to be heard during trial, and done a thousand other things to steer the case toward the best result. The risk manager is there to observe, report and recommend, not to tinker with defense counsel's plan.

The earlier reference to a trial as a play is not far from the truth. Defense counsel has carefully scripted how the drama will unfold. After the curtain has risen isn't the time to tug at Shakespeare's puffy shirt to suggest that he take Hamlet out of the play and replace him with Romeo.