PERSONAL INJURY SETTLEMENTS

Negotiating Techniques

Settling cases and winning jury verdicts is the lifeblood of any successful plaintiff's law practice. So how do you turn a case into a settlement check? The methods of negotiating and settling cases are largely the same as preparing a good jury trial. If the case is not prepared, it is very hard to accurately evaluate what its settlement value or persuade the other side that they should settle for top dollar. Your negotiation strategy should be based on an assessment of the time of the case, the strengths and weaknesses of the case and the damages available in the case.

Time of the case

A good settlement rarely comes out of the blue. Instead, it normally takes some time to achieve. The trick is keeping the amount of time to a minimum.

Most settlements occur when a deadline to act is imminent. The best deadline in any case is the trial setting. For this reason, strong negotiation posture begins with promptly obtaining the closest trial setting and drafting of a scheduling order. The trial setting keeps everyone focused on the ultimate resolution of the case. The scheduling order builds in deadlines that may help trigger settlements before the trial occurs.

Once you have secured a trial date, do everything you can to keep it. This means promptly conducting discovery and pushing the case forward without making requests for continuances or extending deadlines. The more you push off a case's early deadlines, the easier it is for the opposing side to move for a continuance later on. You also want to keep to the deadlines as much as possible to help you be prepared for the trial if it does come. In other words, leaving the defendant till the last minute to produce opposing experts for deposition or reveal their supporting evidence only works against you.

The timing of the settlement demands also can be important. I find that most defendants ignore initial settlement demands so I have stopped making them at the beginning of the case. Instead, I usually look for some development in the litigation to tie the time to make the demand to it. For example, if your depositions of witnesses have gone particularly well and your grasp on the rest of the case is strong, it can be a good time to begin settlement demands.

Waiting too long to make a demand can also raise a problem. For example, if you fail to make the demand until trial begins, you never know whether the defendant might have paid it earlier. I suggest setting a mediation deadline as part of your scheduling order. This provides a natural trigger date to make your demands. You also have to watch as the case evolves for other opportunities. With respect to mediations, I prefer – but do not always – try to make a demand

some time before the mediation. This allows the other side to evaluate their own position and attend the mediation with some idea of where they will have to go to settle the case.

Assessing Strength and Weaknesses in the Case

Assessing the strengths of a case can be one of the hardest things to do. Many lawyers, myself included, sometimes become so enthralled with their own work and the vastness of their intellect that they begin to believe that they can overcome any problem in a case. I find it best to discuss the case issues with experts to get a sense of just how strong or weak a particular fact might be. I have found that every case – even the best ones – has some weakness or issue that will provide fodder for the other side to argue about.

The assessment begins with a review of the basic facts. First, how difficult is it going to be to prove each element of your case. I.e. are there numerous witnesses that support your position or strong documentary evidence that will overwhelm the other side. Second, how sympathetic is your client and their story likely to be to a jury. Third, how hard or expensive will it be for the other side to develop their case at trial. Take into consideration how juries in your venue have treated similar cases. This can be checked informally by asking other lawyers in the area or run by various verdict search services. If possible, run a verdict and settlement search and evaluate the range of results. Your case facts will usually fall somewhere along this range.

If the case is large enough to warrant the cost, consider hiring a mock jury specialist to review your facts. These focus groups can provide an insight into what an impartial group of people might do. They can also help educate you on themes to weave into your case or issues to avoid or improve if you have time. In my experience, these focus groups are sometimes a bit hit and miss on being an accurate predictor of the actual case verdict. While the advice has to be considered in this light, I have always found preparing and arguing the case to a focus group beneficial. There is nothing like getting the case ready for trial, rather than just thinking about it, to uncover problems and force you to hone down your arguments.

There are other methods to help evaluate the case if you do not have the time or money for a mock jury. I would suggest taking the jury charge you anticipate using in the trial and listing all the facts that support each element. Do the same for each affirmative defense asserted by the other side. Then, make a comparison of the evidence point by point to identify what the challenges will be in the case. For each element you think is in your favor, give yourself a point, for each against you, give one to the other side. Then tally things up and see where the balance lies. Be sure to do the same for your damages proof. Take into consideration how demonstrative the damages evidence will be, what the evidence the defense will use to challenge them is and how large the future and past expenses are. Obviously, all this calls for a lot of estimation and guess work and there is no right answer to this endeavor.

Mediation as a Settlement Tool

For some reason, mediation is often the first time effective settlement negotiations occur in a case. This is the part of the paper where I begin to feel old, but I remember a time when I used to discuss the case value with the opposing lawyer and work out a settlement without ever scheduling a mediation. Over time, however, things changed and mediations are now a required step in the path to trial. As a result, many cases languish until mediation is scheduled. For whatever reason, mediation has now become a settlement tool.

To make mediation work to resolve your case, treat it like a trial setting. Secure a mediation date as soon as possible but make sure it is scheduled at a time when enough of the case can be developed. I have agreed to mediations early in the case but have almost always found that the other side has low or unrealistic expectations for the settlement amount. I think the most effective mediations occur when both sides have a complete understanding of what the strengths and weaknesses are.

If you do have an early mediation scheduled, beware how the other side may use it. I tend to approach early mediations with a healthy dose of skepticism, waiting to see if the other side is serious about resolving the case before revealing how I plan to argue it. This reluctance may be a reason why I have been unsuccessful in making an early settlement, but I tend to believe that unless the money is right the other side is usually just fishing for information. I try to be careful about what information or evidence I reveal in an early mediation until it becomes clear that the other side is really there to play.

Early mediations can be successful at identifying the strengths or weaknesses in a case that block settlement. Once you have identified the problem, you can work to educate the other side about how they are wrong about their analysis or change your own position to improve your posture. Take careful notes about how the other side argues its case through the mediator, what evidence are they focusing one, what witness' testimony do they trumpet against you and what law are they proud of. Then, if the case does not settle, take that list as a work sheet to address in your upcoming trial preparation. See if there is a way to mitigate the evidence the other side used against you at mediation, other witnesses who will counter their arguments or motions you can file to attack the legal arguments. Sometimes, the case develops around the problems and your settlement position can improve.

Settlement Brochures

Preparing a strong settlement brochure can improve your chances when you do decide the time is right for mediation. A settlement brochure is a document, video or computer presentation that summarizes the case for the other side. I have done a wide variety of brochures over the years ranging from simple printed documents to more complex video and computer presentations. The essential element in any is a concise and compelling description of the case highlighting the evidence or testimony that you think will persuade the jury.

To prepare a settlement brochure, first evaluate whether the other side is likely to be serious about settling the case. As discussed above, this will help control how much of your case you reveal to the other side. If the case is well-developed, i.e. shortly before trial and the other side is serious about trying to resolve the case, hit them with your best shots. After all, if you want to settle, there is little point holding back your best arguments and if the case is well-developed, the other side probably already knows most of them.

I start most of my brochures looking for visual elements that will help illustrate the case. For example, are there persuasive deposition clips that will be shown to the jury? If so, edit them into a short DVD that you can play at the mediation. Are there few important documents that prove an issue? If so, prepare a copy of them for the meeting and highlight the most relevant sections. The jury tends to retain more information if it is accompanied by visual cues, so demonstrate that you have thought about this when preparing the brochure. Of course, not every case is large enough to warrant video or computer presentations. But, you can still achieve impressive results using basic word processing and power point software.

After preparing the visual elements, I draft a short chronology of the facts involved in the case. I find the timeline usually helps structure my legal arguments. From there, I work on the themes of the particular case and try to write a "power statement," a short line or two that neatly sums up the argument. I then draft a section that describes how the case will unfold, including the witnesses likely testimony, the evidence and the arguments. I tend to avoid too much hyperbole in this section and try to let the actual facts do the work. I do this for two reasons, first I find the other side usually winnows out what the lawyers say anyways and second, just revealing the facts that the other side probably already knows preserves your ability to surprise them with something at trial.

Preparing Written Brochures

Written brochures are within reach of almost every case, regardless of size. The costs can be kept to a minimum by preparing them using basic word processing software that you probably already have on your computer. Most programs allow you to import photographs and do basic manipulation of the type. The trick, especially if you are not an expert in page layout and design, is to keep it simple and cohesive. Do this by avoiding tricks, for example using large text, lots of color or pictures or extensive graphs. Avoid cluttering the brochure with things that just take up space. When trying to decide what goes in or what stays out, ask yourself whether the material will really be something that will persuade a jury and is something that will be admissible at trial. If it isn't don't put it into the brochure just to fill out space.

Edit your work. Effective settlement brochures, like informative continuing legal education papers, benefit from editing your copy. Few of us can make the first draft of a document sing. And nothing erodes confidence in your work like typographical errors or the use of poor English. Have your assistants read the document to see if it makes sense. Having a fresh

perspective will help you identify areas that need more work or are difficult to understand. The process also sometimes acts like a mock jury trial review. The additional perspectives usually help hone the process. Be sure to ask those reading the document to be critical and unafraid to share their opinions.

How to print and bind the document is your next decision once the writing is done. Again, you can use the basic office printer to do the work for most small cases. But, if the case warrants it, a more professional printing and lay out job can be made. There are many printing companies that have people who, for a price, can assist you in this effort. For example, most Kinko's copy centers have a section where professionals can lay out your documents and have them printed and bound in a myriad of ways. Most of these services do just what you tell them, i.e. they do not create the document on their own. There are several litigation support companies that employ professionals who can create the document for you, but this usually costs more. If you have a doubt, remember cleaner and more concise documents are usually more persuasive. Resist the urge to use "bells and whistles" that – while they look good – do nothing to advance your arguments or prepare your trial presentation.

Preparing the Video Brochure

If the case warrants the expense, a video or DVD brochure can be a very effective tool for mediation. The process requires a bit more lead time to prepare than a written brochure and, unless you have all the cameras and editing equipment, will require outside help. To start, you will need to prepare the script. This means lining up the visual evidence, testimony and other materials that will make up the presentation. While there are services that will help, you will need to tell them what has to go into the presentation. The writing for this is not always easy to do. You will be surprised by how just a few lines of script will take up a long time in a video presentation. For that reason, editing becomes crucial.

Once you have the script written, look for visual elements in the case to accompany the words. For example, when talking about a defendant's actions look for visuals that relate to them, i.e. photos of the crash scene, depictions of the defect, animations of the injury. I also take snap shots out of each video deposition to illustrate testimony references or lift entire clips and insert them into the piece. This can be a very time-intensive process and, unless you are experienced in preparing them, can be very challenging. Do not start working on one if you do not have enough time to finish before the mediation.

If you have thrown in the time, money and effort of preparing a video brochure pay for a proper narrator to do the voice over work. It has been my experience that this detail pays dividends in the way the presentation is perceived by others. While you can narrate the presentation yourself, the impact that a professional announcer has can be considerable. There are many ways to find someone to do this work. In almost every city, there are agencies that

provide voice talent for local radio station advertising. The rates for this work vary considerably, so you can usually find someone to fit almost any budget.

Consider placing the video presentation onto a DVD that can be played and used interactively during the mediation. With the technology advancing, this is getting easier and easier to create, although it is frankly well beyond my own capabilities.

Preparing the Client and Mediator

Do not overlook the importance of preparing the client and the mediator for the settlement conference. All your effort may be wasted if the client has an unrealistic expectation for the process or the mediator is not well-suited for the task ahead. I usually schedule a meeting with the client well before the mediation to review the process, strategy and costs in the case. I outline how the mediation process works, including the fact that the client will be in charge of making the decisions about settlement, how the strengths and weaknesses in the case effect the negotiation strategy and what the impact of my expenses, fees and potential liens will have on their ultimate recovery. I usually do not review the settlement brochure materials with the client before the mediation as I have found that it can have an unexpected impact on them. Some clients find reviewing the materials very emotional, others respond with increased anger towards the defendant. This makes it hard for the client to control their emotions and discuss the difficult business of settling the case. I always make the brochure materials available for the client after the case is resolved or after the mediation if they want it.

Preparing the mediator can also help improve your chances for settlement. While most good mediators know the basics about your case, I find it helpful to arm them with arguments to support your side. I usually outline what I consider to be my strong points, even if they mediator has already been sent the brochure. This does not leave to chance that the mediator has not had time enough to review those materials. I then try to warn the mediator about the potential obstacles to settlement, i.e. doctors who have not given consent to their insurer to discuss settlement, outstanding legal issues. This lets the mediator know where the focus of his or her work will be in finding the middle ground. I find that this helps save time in the mediation process and makes it more efficient for all involved.

Subrogation Interests

Overlooking the impact of subrogation interests can create a huge problem. Nothing is worse than settling a case for what appears to be a good result, only to find a lien exists taking it all away. Unfortunately, there is no easy way to deal with liens as our Supreme Court changes the law to protect insurer’s interests over those of the injured.

The first step is to identify the amount of the lien. I tend to be proactive and collect as much information about the amount of any medical expenses or other lien interests early in the case. Some lawyers think that this may trigger the lien holder to intervene or otherwise encumber

the process but I think ignoring the impact could be a bigger headache later on. The second step is to have a discussion with your client about the impact a lien could have on the case. Many clients do not understand that Texas laws now favor insurers over them in this regard. They need to know that, even if the defendant's available coverage is limited, a substantial portion if not all of what the client may recover may go to repay another insurance company.

While the law supporting liens is tough to overcome, many companies are willing to reduce their claims and assist you in making a settlement. But this willingness varies from insurer to insurer and, even varies with different people at the same insurer. The only way to find out is to ask, so do it and don't be afraid to challenge their demands.