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Why aren't cases settling?

By Alexander S. Polsky

A well-regarded plaintiffs' attorney asked me this question recently. Although my experience in mediations I am conducting is that the cases are settling, discussions with others suggest there are challenges afoot. Let's address ways to maximize settlements.

Interest-based negotiation is a useful tool to achieve or maximize your client's objectives in a mediated settlement conference. This is the first of a series of articles that will identify the five stages of a negotiation, and provide approaches to assist the reader in considering the interests of the folks on the other side of the table in an effort to achieve an appropriate resolution.

The techniques employed to successfully resolve personal injury matters are an art. It is not a science. There are no rules, but there are mistakes.

It may appear obvious, but the core of a personal injury claim is an injured party. That party does not stand alone: loved ones and family members are generally intimately involved. The more severe the nature of the injury, or in a death case, the more significant the human factors weigh on the mediation process.

What does this mean for the practitioner?

Let's start with the defense lawyer. The lawyer is juggling a basket of cases as well as the needs and interests of multiple clients, coupled with the policies of multiple insurers or corporate representatives. It is all too easy to categorize the case: "This is a leg-off case," "This is a high comparative case," etc. This categorization is a byproduct of an unemotional case analysis process necessary to separate the lawyer or corporate counsel from the painful nature of the case. The case, as a case, involves a human tragedy. The settlement process may represent the only opportunity the injured party or family will have, short of trial, to communicate their sense of loss. All too often they are pushed aside while the lawyers negotiate.

The defense lawyer has the ability to address these issues without doing damage to the settlement interests of the client or insurer. Start with the brief. The settlement conference brief could be written in a sensitive manner, targeted toward the claimant as well as the lawyer. It is not a sign of weakness to acknowledge pain and suffering. It is not a sign of callous disregard to express opinions as to what a jury may do with issues like comparative negligence, speculative damages or the obligation to mitigate loss — if these concepts are written with a specific effort to reach out to the client. The sensitive and informative brief need not be full of case citations for mediation. The mediator and the other lawyer know the law. But the brief should be written and submitted early — preferably a week before the settlement event and not later than the Thursday before the week of the mediation. This insures at least that the lawyer and client will have the opportunity to read it. It also insures the mediator will have the opportunity to read it and perhaps make some pre-mediation calls.

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When setting the mediation, the defense attorney should clearly indicate whether additional information is needed in order to evaluate the case. It is also helpful to confirm the persons who will be attending, and whether briefs will be exchanged (which I recommend). Surprise is never good.

Next there is the plaintiff's attorney. This person must deal with a client who likely has real economic needs; is burdened by the factual issues of the case; and has an affirmative obligation to impress upon the defense the human factors issues, economic losses and, significantly, the risks attendant to a trial.

All too often plaintiff's brief is hastily put together, submitted late, and is simply one sided. The worst thing of all is when plaintiff counsel writes the brief for the mediator rather than for the decision maker on the other side.

The plaintiff's brief is an opportunity to reach out to the decision maker and demonstrate your commitment to your client and the case. You do this by: acknowledging the risks of the case; demonstrating how these risks may be overcome; link a short dose of information to discovery documents attached to the brief; share snippets of your expert's analysis; and, where appropriate, provide an early submission of a day-in-the-life video or overview.

I cannot over-emphasize the importance of a well-written professional brief. The plaintiff's brief, if submitted early, represents the only time that you will have an opportunity to communicate directly to the decision maker in an unfiltered manner. Send defense counsel the brief electronically with a request that it be forwarded to the decision maker.

If you are dealing with an insurance carrier, there is often a need for multiple decision makers to weigh in in order to change reserves, where appropriate. If you hold back and present a surprise at mediation, there will often be no vehicle available to move the case to resolution during that session. On the other hand, if you provide a well-reasoned brief with sufficient data points to adequately express the risk and couple that with a well-reasoned settlement proposal, you will get the attention of the decision makers on the other side.

Phil Baker, principal at Baker Keener Nahra advises: "The most successful mediations really rest in preparation by both sides. For the plaintiff, turning over information early such as damage documents, accident reports, etc., quash the defense's ability to claim that a settlement is premature due to incomplete information. For the defense, issues of coverage and thorough evaluations of exposure have to be discussed before the mediation or it ends up with multiple defendants unable and possibly unwilling to realistically discuss payment options. It is those mediations where both sides are prepared on the real issues — policy limits, reservation issues, real damage analysis — where you can resolve the matter."

Brian Kabateck, managing partner of Kabateck Brown Kellner and president of Consumer Attorneys of California believes strongly that plaintiff lawyers must prepare, prepare and prepare. That they must present the relevant information to the defense, not hold back, and do it early. That said, Kabateck believes strongly that not enough cases are being tried: "Make sure the other side knows you try cases. Don't take their value as the value of a case. Insurers are more and more basing a value on what they settled the last batch of cases for, not what the verdict potential is."

On the subject of preparation, Kabateck points out that lawyers need to start talking: "People don't have any negotiation before mediation. The mediation culture has gotten so damn good that people don't even talk about settlement before mediation. There has to be a frank discussion before setting the mediation, 'look, I am making a $4.75K demand, I know it's a little high for you and have some room to move.' If you are interested in talking or mediating, let me know."

From the mediator point of view, both lawyers are suggesting that the necessary information be exchanged early, and that expectations be ferreted out prior to mediation, to narrow the range.

The takeaway here is that preparation, analysis and communication are the key to a successful settlement effort by all concerned. Without these components, the first mediation session will not be the last.

Where this is the case, the mediator should not express the following: "You are too far apart" and then send the parties home in hour three of a full day mediation. Our job is to ascertain that which is missing, try to supply it, secure telephonic participation of decision makers as needed, and keep the process alive. The one case I cannot settle is the one where the parties leave my office! If a second session is needed, the mediator should work with the parties to set an action plan and return date. Our job is to never, never, never give up. We owe it to the process and to the parties.

So prepare, share and communicate and let's meet on the settlement trail.

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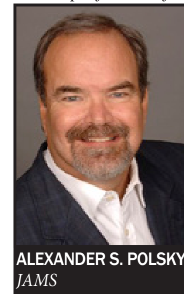

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