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The mind of the advocate in a product-liability mediation

Resolving a products-liability case involves the skillful handling of numerous constituencies, all of whom have an interest in determining whether your case gets settled or tried. These constituencies include not just the client(s), but the defense lawyers, the court, the mediator, your partner(s) and anyone else who has an interest in the outcome.

On the one hand, you have the awesome responsibility of managing the expectations of a person who has gone through a catastrophic, life-changing event, and whose future you hold in a delicate balance for what could be a lengthy period of time. You then walk the tightrope of navigating a court system that has let people like your client down in other similar circumstances, while concurrently keeping aggressive manu facturer's lawyers in a frame of mind to recommend a reasonable settlement to your client. Understanding what is important to your constituency is the first step in settling the case, and occurs as soon as the client walks in the door. It continues through every phase of the litigation leading up to the mediation session and involves the same analysis a defendant goes through in managing the risk.

Putting a value on the case

The negotiation of a products case begins the moment you put a price tag on its value. This usually occurs the day you meet the client, but it is a fluid concept and must be reevaluated at every step of the litigation. The price tag will be your compass for how you invest in the case, and often becomes an unre alistic goal of what you should achieve on the case. This is where trial lawyers create their first obstacle to settlement.

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The value you place on the case and the ultimate settlement number are often very different, and the reason for that difference will usually unfold as the evidence in the case develops. This "ideal" value is tantamount to having a best case scenario driving your every move. It's like looking out at the horizon. You can look out forever and never see the end. It is impossible to reach, generally exists only in your mind and becomes a mental construct for the ultimate negotiation in the case. When you, as a trial lawyer, send a signal to the other side that you are looking out at the horizon on this case, the settlement result is often failure, frustration, disappointment, predictability, depression and impasse. Before you have even come to the negotiating table, you might have developed a huge "gap" between what is a fair and actual result and the ideal outcome that has been delivered in your messages to the other side.

When the defendants see the plaintiffs as trying to achieve their ideal result, they have no choice but to commit substantial resources toward defending the case in order to prove you cannot achieve your ideal. A negative cycle begins to occur as you continue to invest resources to justify your decision to seek your ideal outcome and the costs of failure rise. You can't change strategies at that point because it would be a sign of weakness. Both sides are now involved in a cycle of taking irrational risks by investing more financial resources into a case in which risk could have been managed far better. That is not to say that putting a value on the case is not a good idea. We do it on every case. The key is to do it in a way that sends clear messages to the other side that an ideal value will not trump a realistic or fair outcome.

Send clear messages

Sending clear messages about the value of your case that are not susceptible to multiple meanings will lay a strong foundation for future negotiations. That is a complex task, particularly when it is coupled with the numerous constituencies that have to be managed. It might be harder than trying a case, which is structured, organized and fairly easy to implement. The objective of the advocate in mediation is to balance all the messages that are being sent so that you have a shot at a sizable outcome while preventing the defendants from escalating their commitment to proving you are wrong. Here are some strategies on how to do it.

Setting the settlement stage early

Each piece of information that you disseminate reflects upon the anticipated result and will be critical in managing the gap between the ideal result and a fair outcome. Every communication with opposing counsel sets the expectations and lays a foundation for the negotiation. The defense will no doubt document in their evaluation of the file every statement, inference or reference you make that bears on an assessment of the case. In order to manage the gap correctly, it is necessary to engineer the negotiation in advance of the mediation session. An engineer applies technical and scientific knowledge to design and implement processes that achieve a desired outcome or find solutions to problems. Before laying the concrete on the foundation, the engineer uses physics and mathematics to analyze the situation and test potential solutions. The process takes place at the beginning of the project and is part of a complex planning scheme that is organized in a disciplined way toward finding suitable solutions to problems. In a products-liability case, this requires providing information about your client's story well in advance of the mediation, not surprising the defendant with a last minute medical report or life-care plan on the evening before the formal negotiation is to take place, and then making a policy-limits demand.

Find your settlement champion

Consider the role and responsibility of the other players to this drama. The defense lawyer must ultimately use his or her skills of persuasion to help bridge the gap between what you want on the case and the price their principal put on the file. Usually the defense lawyer is your champion in the other room and cannot be made to look bad in front of his principal or you will lose your biggest advocate. The principal will want to know that their file is complete before jumping into settlement negotiations or run the risk of criticism by their superior. The wind-up that comes before the pitch requires the plaintiff's counsel to make the job of defense counsel as seamless and easy as possible.

Find the key decision makers

Next, use every opportunity you have to identify key decision makers and their role in their assessment of the case. In large product-liability cases, there is usually a significant self-insured retention which is managed in-house by the manufacturer. Once a decision is made to spend the retention on settlement, it is unlikely that information will be revealed to the plaintiff's lawyer. However, the defense lawyer is likely to send indirect signals to you about who is making the decision on the retention and how that is progressing. This information will lead to further discussions on whether there is insurance and to what extent the insurer has been fully informed about the exposure on the file. Usually you can unlock this information through the first set of interrogatories which will open the door to a discussion on the availability of insurance and identify who needs to participate in the settlement discussions. These discussions should take place early on in the case and well before the matter is set for mediation.

One simple way to get a better understanding about the decision-making process is to schedule a Person Most Knowledgeable (PMK) deposition early in the case. While the PMK deposition will give you a quick assessment on liability, the underlying clues that are revealed from the deposition will give you a sense of the world view of the defendant. For example, is this a company who has taken hard-line stances on other cases as a matter of principle, so

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that they do not draw additional lawsuits? Learning the number of claims that have been filed against the company involving the product in question will lead to a better understanding of the defendant's worldview on settlement. This requires reading between the lines and looking for information that is not necessarily apparent from the surface. A computer bulletin board or Listserv search will provide further understanding about the way this company views settlement.

The pre-mediation conference

Jumping directly into a full-blown negotiation is not always the best approach in a products-liability case. There are a few key things that you can do to create a productive negotiation:

•Steer the case to a mediator who is accustomed to dealing with large numbers

These types of mediators are in high demand by both the plaintiff and the defense because they are able to identify where the minefields are in a negotiation and direct the parties around those obstacles even when it appears that the mediation is hopeless. Mediators who are exceptional at settling large cases create value for both sides through providing leadership. Parties walk into the mediation room often confused about which approach would be helpful in their negotiation. Sometimes they don't have a clear sense of how the other side views a fair outcome and they are looking for the mediator to provide direction. Leadership is the capacity and the skill of giving other people direction so they can start moving in a particular way. The way good mediators provide leadership is by showing the parties where the opportunity is that is better than trying the case.

An example of providing leadership in a products-liability case is when the mediator suggests a pre-mediation conference with each side separately in order to help discern what the potential barriers are toward settlement before the parties invest huge resources in simply showing up to the mediation hearing. This involves providing each side with a certainty in the process and generating confidence about going in the direction the mediator is suggesting. The mediator is actually developing trust and rapport with the parties in order to give them a sense of certainty. Doing this before the mediation occurs in a products-liability case is critical to success.

Finally, selecting a mediator who understands how to show parties new tools for problem solving and new ways to think will add to the productivity of the session. Before stepping into the mediation room, the mediator will help design a structure for dealing with the future by anticipating some of the barriers that occur in a typical negotiation. For example, if a layer of settlement authority resides on the East Coast and the mediation is going to occur on the West Coast, the mediator can frontload the possibility of having someone available in an after-hours discussion in the event the case justifies such an effort. Waiting for the mediation to occur before making such a determination will definitely result in failure.

•Does the mediator have style?

A good mediator who shows leadership from the beginning is able to operate in a style that is reminiscent of a modern-day politician. Author George Lakoff in his book, Don't Think of an Elephant, discusses political styles in terms of a "strict father" versus a "nurturant parent" image. A simple review of the styles of former President George W. Bush (strict father) and President Barack Obama (nurturant parent) contrasts these two approaches. In the strict-father approach, the viewpoint is that there will always be winners and losers and that people are born bad and have to be made good. When someone does something wrong, he has to be disciplined and learn not to do it again. This directive type of approach has its place in mediation but never at the beginning of a session, as it will inevitably alienate one side. Judges who are required to conduct settlement conferences in court have success with this style because of the inherent pressures the court imposes on both the judges and the litigants to move a case within 12 months.

The nurturant-parent approach focuses more on empathy and responsibility and tends to provide protection to the parties so that they are not put in a vulnerable negotiation position. The focus is on trying to fulfill the objectives of each party. This approach tends to take more of a moral responsibility to ensure that even in the worst possible scenario where the parties are far apart, they don't leave the mediation session without a game plan for success. The nurturant-parent approach offers suggestions on how to proceed, while the strict father tells people what his opinions are no matter how unreasonable they might be.

The problem some trial lawyers have in setting the stage for the mediation is that they think they need a strict father mediator who can "tell the other side what the case is worth." The reality is that the two styles are not mutually exclusive. Successful mediators who handle large product liability cases move across the continuum of these styles in such a way that creates movement at every step of the negotiation. Even when it appears that everything is completely locked up, the parties will have a sense of hope.

•Do a "show and tell" on damages

Assuming you have successfully found a mediator that has handled large dollar cases and has the ability to move within the different styles described above, do not immediately schedule the mediation. While this is counterintuitive, discuss with the mediator the possibility of scheduling an abbreviated session in which the plaintiff does a "show and tell" for the decision makers. Many lawyers try to short-circuit this by jumping into the negotiation phase of a mediation and making a large demand, expecting to be reciprocated immediately. Even sophisticated defendants who are accustomed to defending large product-liability cases need to have a better sense of understanding about the value of the case before they react to a demand. The

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"show and tell" conference is helpful in that the pressure is taken off of you and the client to reach a settlement on that date, though it does give you a chance to demonstrate for both the defense and your client the nature and extent of the damages and the type of forceful commitment that you have in the case.

Remember that every negotiation is a communication process used to resolve disputes or make a deal. If you bypass this phase, you are likely to fall into a minefield right away. Even though both sides generally know what to expect from the "show and tell," it gives the defendants an opportunity to digest the case privately and in person rather than through litigation reports or by phone. This face-to-face time is important for the defense counsel in that it allows him to gauge how much room he has in articulating a value for the case such that he doesn't get resistance from his client.

David Ball, in his treatise, On Damages, discusses getting the jury committed early on in the trial to numbers that they can accept if there is liability. The same holds true for negotiating a products-liability case. If your adversary agrees with the range of your damage assessment, then it will simply be a risk analysis on liability to come up with a fair settlement amount.

The "show and tell" session also allows a mediator to diagnose where other constraints to settlement exist, such as in a multi-party case where coverage disputes exist or defendants typically point fingers at each other. If so, the mediator may take the opportunity to conduct a defense-only mediation for purposes of apportionment.

Another approach at the pre-mediation conference, or "show and tell," is to ask the defendant the question, "What do I need to provide to you to help you fully assess this case?" Following such a question, the defense lawyer will likely reveal something about his client's assessment of the case, or at minimum, a way to streamline the exchange of information so that a case value can be discussed. This leads to the next conversation, which could proceed as follows:

"My assessment of the case is that it has a verdict value of between $6 million and $8 million depending on the loss of income potential. I realize we are going to mediation and my client will be fully conditioned on the value of settling now versus wading through an appeal and the commensurate emotional challenges that go with that. I will come in with a demand below the verdict value but you need to know that my demand will not be designed to meet half way. I will do everything in my power to be as reasonable as possible with you."

You have accomplished two things with this simple question. First, you have opened the door to allowing your adversary an opportunity to reveal what his principal requires to get the case in settlement mode. Second, you have made it possible for your adversary to discuss the case value without having his principal look over his shoulders. This will likely create a more realistic assessment with less posturing. Simple questions such as this can make a big difference in how you ultimately approach the negotiation that occurs at the mediation.

The negotiation game plan

By now the preparation should be complete, and you should have a sense of the parameters of settlement. The mediation should be fairly straightforward as the parties' expectations have been vetted long before the formal mediation occurs. If not, you'd better hope that the mediator can pull a rabbit out of his hat. This is where having a game plan for creating movement in the negotiation is critical. That plan starts with an analysis of the other side's case in an objective way. Following that analysis, the negotiation dance will begin, but your demand will likely be less symbolic and more substantive than the usual inflated approach to beginning a negotiation.

The purpose of the traditional negotiation dance is to get to a point where decision makers can put their best settlement numbers on the table and pull the trigger one way or another. Much of the time the mediator is attempting to create simple movement in the process leading up to this moment. At this point, tension is created and both sides need to find a release valve. The turning point that will generate an outcome is what has been described by one author as the "seductive now moment." This involves the idea of "instant gratification," where litigants have the choice to seize rewards now or be patient for rewards in the future. A good mediator will bring both parties to this moment so that a bona fide opportunity for settlement can be explored.

The reason that some litigators pay more or receive less to settle a case is that people tend to spend more for what we want now ("seductive now moment") at the expense of things we want in the future. People tend to discount the future in exchange for instant gratification in the moment. While there is nothing wrong with this approach to settlement, it could lead to an inadequate result for both sides if not monitored closely. A mediator who has handled significant products' cases will pay close attention to the timing of the moves and give the parties room to go slowly or move faster in the negotiation, depending on their objectives. Negotiating slowly could result in a temporary adjournment of the case with no settlement but could also lead to a better outcome. At the same time, giving the parties this opportunity could also result in one side or the other making a determination that early settlement is worth either paying more or discounting more.

Coming in for a landing

In all likelihood, the negotiation has reached a stalemate, where either both sides have put their best numbers on the table, or at a minimum the numbers have been quantified so that the parties have a good understanding of what the other is willing to do toward settlement. The mediator has several tools available at this point to close the gap. Here are a few to consider:

•Check for higher authority

See if the defense is willing to check with their superiors to determine whether they are prepared to make one

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more concession provided the mediator can assure them it will settle the case.

•Try the "what if" approach

Float trial balloons to see if the other side will agree to a number somewhere in the gap. This is usually handled by the mediator but can be suggested by either side.

•Consider a direct conversation between decision makers

Yes, direct contact sometimes does work, particularly when the parties are close to settlement. At this point, the baggage of posturing has been placed on the shelf and there is momentum to bring the plane in for a soft landing. Having a joint meeting for this purpose is often helpful.

•Invite the mediator to make a recommendation

This approach is helpful but often misused. Parties who rely on a mediator to make a recommendation sometimes play their negotiation to that final move and ask the mediator to propose something that fits their goals. This puts the mediator in the awkward position of challenging his impartiality.

If a mediator is willing to give a recommendation, it is done with a pledge to both sides that the responses will not be revealed unless everyone says "yes" to the proposal. This pledge insures that the parties will not be penalized for revealing their willingness to follow the mediator's suggestion.

•Ask for a meeting with just the lawyers

Using the good will that you have built up over the course of the case could allow for one final move in which your counterpart agrees to find more resources from his principal. Do not underestimate the value in building bridges early in the case, because they might be used as currency during mediation.

Conclusion

Approach every products-liability case in a dual track system, organizing the case for trial and planning your settlement strategy from the beginning. This will generate the best opportunity available for your client to settle the case, while maintaining an aggressive posture on the litigation front.

Jeffrey Krivis has been a member of CAALA for over 25 years. He is the author of the award-winning book, Improvisational Negotiation: A Mediator's Stories of Conflict About Love, Money and Anger – and the Strategies that Resolved Them *(Wiley 2006). He teaches at Pepperdine Law School and mediates throughout California. He can be reached at www.firstmediation.com.*