EFFECTIVE NEGOTIATION AND SETTLEMENT TECHNIQUES
Presented by John A. Lassey, January 31, 2008

Introduction

The following discussion presents some tips and techniques I have found useful in settling tort cases on behalf of liability insurance companies and their insureds. This material is supplemented by two articles on the subject written by me and published in the New Hampshire Trial Bar News within the last couple of years. The first is entitled “Dealing with Insurance Company Claims Representatives.” It is addressed primarily to plaintiff’s counsel; however, I believe it can provide some useful insight for defense counsel as well. The other is “Of Potted Plants and Personal Injury: A Contrarian View of Mediation.” In it, I discuss my philosophy regarding the mediation process and the importance of the role of counsel for both the plaintiff and defendant.

Appraisal of Insurance Claims

Arguably, the most important point in the life of a tort case, from the standpoint of the defense, is when a new file assigned by the liability carrier comes into the office. Most insurance companies and their claim representatives will want to know fairly quickly how defense counsel views the case. They will wish to know his or her opinion on liability and damages and recommendations for an appropriate plan of action. If there are blank spots in the investigation file, they will expect the attorney to identify them and to suggest appropriate methods of filling them in. They will want to know whether further investigation is necessary or whether the “holes” are best filled through the discovery process.

With regard to damages, they will want your assessment of exposure. If not enough information is known about the plaintiff’s injuries, they will expect defense counsel to suggest a means of getting the information necessary to provide that estimate.

In most cases, the claims representative will have been provided with copies of medical records and bills, by or through the plaintiff’s attorney, so much of this information will already be available when the file comes in. Medical records and bills, however, do not always easily translate into a range of expected jury verdicts or settlement values. For this you are probably going to have to do some research in all but the most straightforward cases.

In my view, the best way to start researching this question usually is to talk to the plaintiff’s attorney. Make arrangements to meet with the plaintiff’s attorney at an early date, shortly after filing your appearance. Get the company’s permission to take him or her out to lunch, for example, and determine how forthcoming he or she is going to be throughout the litigation. Obviously, the plaintiff’s attorney was engaged by the plaintiff to make the best case possible, so everything that passes between you in this early meeting will have to be taken with a large grain of salt; however, it is amazing how much one can learn in such a meeting.

Once you feel you have a reasonable amount of data on the plaintiff’s injuries and the facts of the occurrence giving rise to those injuries, there are a number of sources available today which

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will assist you in valuing the case. The first thing you can do is “Google” the plaintiff. Learn as much as you can about the person at the center of the case. While you are at it, it doesn’t hurt you to Google your own insured client as well! You have to figure that the plaintiff’s attorney will be doing the same. Don’t be like the defense counsel in a recent med mal case in Boston, who learned about his own client’s rather revealing blog for the first time when the doctor was being cross examined at trial by the plaintiff’s attorney!

There are many databases out on the Internet that, for a price, report verdicts and settlements from around the country. These can be included in packages from Westlaw or Lexis-Nexis. In New Hampshire, members of the New Hampshire Trial Lawyers Association have access to the organization’s Verdicts and Settlement database, which is searchable through its website.

While this research can be time consuming, it is well worth the effort and is part of the “due diligence” that defense counsel must go through in this day and age. Of course, if you are a member of the Trial Lawyers Association, you should regularly be reading the print version of Verdicts & Settlements in the quarterly N.H. Trial Bar News. Some people might argue that they are primarily “puff pieces,” but that would be short sighted, as you can learn a lot about what certain types of cases are going for.

Of course, as new information is learned through discovery, your initial opinion on value should be revised accordingly.

**Strategies of Negotiating with All Parties:**

The best advice I can give on developing a strategy for negotiating in a given case is to get all of your “ducks in a row” as early as possible and keep the pressure on other parties to do the same. If there are other defendants, do not rely on them to get the information that you know that you and your clients will need to be ready for either negotiation or trial. Try to set the disclosure deadlines (particularly expert’s disclosure) at a relatively early date. It is rare to have a case where the plaintiff will not need to procure the services of an expert, whether that expert be a treating doctor, a mechanical engineer or accident reconstructionist. There may be occasions when testimony of a doctor is not necessary to establish a causal relationship between the plaintiff’s injuries and the occurrence he or she claims gives rise to those injuries, but in almost thirty years of practice, I have never seen it. In all but the most obvious cases, defendants are not ready to negotiate until they have been provided with some form of expert disclosure, especially on damages.

Ordinarily, all defendants in a case, if there are more than one, have a common interest in the extent of the plaintiff’s injuries and the causal relationship to the occurrence which gives rise to the lawsuit. There is usually no reason not to cooperate fully with all other defense counsel in developing a damages defense. Such cooperation can also lead to some significant cost savings for all of the insurance companies involved. For example, one defense law firm can be designated as responsible for procuring a complete set of medical records and for analyzing and summarizing them. Copies of the work product can then be provided to all defense counsel and the cost of the analysis (for example, by a nurse/paralegal) can be shared equally among all

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2 Now known as the New Hampshire Association for Justice.
defense firms. If it is determined that a records review by a qualified specialist, e.g., an orthopaedic surgeon, is advisable, all defendants can share in the cost of that as well.

In short, defendants, if there are more than one, should all be on the same page regarding damages and should present a united front in negotiations on that issue.

Where multiple defendants have different exposure on liability, however, the issue presented is not so simple. Ideally, if all defendants can agree on a percentage split in advance of any settlement negotiations or alternative dispute resolution proceedings, that would be to everybody’s advantage. However, such agreement is rare. Not surprisingly, individual defendants in such situations, given the nature of our adversary system, present some of the same problems in negotiating with each other as are presented in negotiating with the plaintiff.

One technique I have seen used on occasion when multiple defendants are unable to agree on a split of liability is to agree to “cap” the liability by contributing equally in the first instance to a settlement with the plaintiff and leaving the final split to a later decision, either through arbitration or through a later trial. This can be a good technique if defendants are presented with an attractive opportunity to settle that all believe should not be passed up.

Troubleshooting Settlement Challenges:

There will be situations and times when settlement seems particularly elusive. No matter how hard you try to come to a reasonable settlement, there is just too much of a gap between the plaintiff and the defendants. Assuming all cards are on the table – that is, all discovery has been accomplished – this impasse has probably resulted from one of two things. Either the parties truly disagree on the value of the case, or one or both of the parties would like very much for the other side to think they disagree on value.

If you are fairly certain that there is a real disagreement on value, you might consider asking the court to schedule a summary jury trial. I haven’t seen one of these for a while, but they used to be fairly popular, particularly in federal court. These proceedings are not binding on the parties. However, a jury (usually a smaller jury than normal) is empanelled, but the members are not told that their decision will not be binding. No witnesses are presented; instead, each attorney is given the opportunity to present evidence by way of exhibits and argument. After the presentation, which usually lasts a couple of hours, the jury then retires, deliberates, and renders a verdict. At this point, they are told that they have just been “playing for bottle caps,” and meet in an informal session with the lawyers and judge. The lawyers are allowed to ask questions and to get some insight into why the jury decided as they did. In these proceedings, it has been my experience that one or more of the parties are “humbled” and a settlement usually follows.

The summary jury trial is a rather elaborate proceeding and usually should be reserved for the more difficult and complex cases where just about everything is out on the table and known to all parties and their counsel, but the only question remaining is what a jury is likely to do with those facts.

A more cost effective approach in appropriate cases would be either to submit the case to binding arbitration or attempt to negotiate a settlement with the assistance of a mediator before trial.
It has become less common than in prior years for parties to submit matters to arbitration unless they are required to do so by contract. Some defense counsel feel that arbitration awards tend to be higher than jury awards. Some plaintiff’s attorneys, on the other hand, are reluctant to forego the opportunity of “ringing the bell” by giving up their client’s right to have the case decided by a jury. In truth, whether arbitration is an appropriate means of resolving a dispute will depend on the facts and circumstances of each individual case and it remains one means of possibly breaking through a log jam. In my view, arbitration is more attractive when the case involves unusual questions of law and both parties feel that having a respected specialist in that area of law make the decision would be a good way to resolve the dispute.

Regardless of the nature of a dispute, arbitration should not be approached as if it were a “short cut.” Too many people, in my experience, have approached an arbitration session without doing the preparation that they would otherwise have done for a jury trial. While it is true that an arbitration is more abbreviated than a jury trial and the rules of evidence normally do not apply, thorough preparation is still very important. For example, while it is not normally regarded as necessary to do a videotape of an expert physician, there is no rule against doing so, even if the rules allow it. In a case of “dueling experts,” it is foolish, in my view, to rely on submission of a written report. And if you would have hired an expert if the case were presented to a jury, you should expect to hire the same expert if the case goes to arbitration. Unless you are presenting the case to a panel of arbitrators who have the requisite expertise in the medical, scientific, or other field involved, they are not going to be inclined to rule in your favor if expert evidence is missing from your case. Don’t go into an arbitration as I have seen some lawyers do expecting to prevail on an argument that “everybody knows what such an expert would say.”

**Effective Negotiation and Settlement Techniques:**

Mediation has become the preferred method of resolving cases in recent years. Through the Rule 170 program and a number of private mediators, jury trials are becoming increasingly less prevalent than they used to be. Mediation has become popular, in my view, precisely because it has shown to be extremely effective. If, the theory goes, discovery has reached the stage that all essential facts have been shared and there are relatively few surprises left to discover, there is usually little reason why it is not advantageous to settle the case. The only question remaining (and it is a fairly big one) is what a jury is going to do with those facts. Even if liability is a foregone conclusion, very few plaintiff’s attorneys would believe they are guaranteed a home run regardless of how compelling their case is. It is that uncertainty that usually makes it advantageous to resolve the case short of a trial, and mediation can provide the means of doing this. The primary reason, in my view, that more cases do not settle on their own well in advance of trial is that, without the imposition of some deadlines, the parties and attorneys are simply not focused enough on individual cases at the same time to make settlement likely without some intervention. Let’s face it, we are all busy and have many things on our plates. It is difficult to focus on a case that isn’t going to come up for trial for another six months. Agreeing to a mediation will establish a discrete and specific time where all parties will (a) gather together in the same building, and (b) will have gotten up to speed on the case at the same time. If the requisite discovery has been accomplished, they will all have a pretty good idea of where they think the case should end up. The only thing left to do in order to accomplish a settlement is to see what everybody else thinks the case ought to settle for. Once that point is reached, assuming
the gap is not too big, the case will probably settle. On the other hand, if the true gap between the positions is large, it at least gives everyone some idea of where the differences are and may shed some light on where the problems leading to the differences lie. See “Of Potted Plants and Personal Injury: a Contrarian View of Mediation,” for more detailed information on mediation as a process.

**Arbitration/Mediation of Coverage Disputes:**

Although I dare say that there have been cases where liability coverage disputes have been submitted to arbitration – that is, to a single arbitrator or a panel of arbitrators whose expertise in the area of insurance coverage law is respected by all parties – I have never been involved in such a case. I will go further and say that I have never been involved in a case where anyone has even suggested the possibility of arbitrating insurance coverage questions. Theoretically, I suppose there is no legal reason why such disputes cannot be arbitrated just as any other case can be arbitrated. I suspect the difficulty lies in the fact that most lawyers who practice a lot in this area are seen as being aligned with the insurance industry. If that is true, it would certainly be understandable that parties to such a dispute would have difficulty in agreeing on an arbitrator. Another difficulty presented in arbitrating coverage disputes is that since such cases usually come down to a question of law, rather than factual disputes, parties may be reluctant to limit their right to appeal.

Another reason why coverage disputes are not typically submitted to arbitration is that it is becoming increasingly common for such disputes to be submitted on cross motions for summary judgment to the court. This process is probably cheaper than hiring an arbitrator, since a Superior Court judge is paid by the state rather than the parties, and the work necessary to prepare motions for summary judgment would not be appreciably less than the work necessary to prepare similar legal arguments for submission to a panel of arbitrators or to a single arbitrator.

Mediation of coverage disputes presents some different issues. There is no reason that I can think of why a coverage dispute cannot be mediated, and since in the liability insurance context, coverage disputes normally arise in connection with an underlying tort claim, it would seem efficient to mediate all issues globally. That means that in addition to the parties to an underlying tort lawsuit, the mediation would be attended by representatives of the insurance company and probably the insured as well, together with their counsel in the declaratory judgment or coverage case. Since uncertainty in the expected outcome is what drives mediation, the more uncertainty there is, the more likely the case will be to settle if all interested parties are participating in the mediation.

I have heard the argument that there is no point in mediating the underlying case until the coverage issues have been resolved; however, I don’t share that view. Obviously, if the coverage issues are resolved against the insurance carrier, it may be more willing to pay a larger amount to settle a case. On the other hand, if the company wins on coverage, it is probably not going to be willing to pay anything beyond a token amount in order to avoid the expense of an appeal. But the same could be said about any case, including the underlying tort case. Obviously, more will be known regarding a party’s exposure after a trial than is known before the trial!

The principles that guide whether or not to submit a coverage dispute to arbitration or mediation are pretty much the same as those that would govern such decisions in any case. One big reason
why parties to a coverage dispute might wish to remove the case from the jurisdiction of the courts would be if some sort of creative solution is desired by the parties beyond the simple “yes there’s coverage” or “no there’s not” decision, which is all that a judge is empowered to render.

**How to Avoid Settlement Delays:**

This is not usually a problem for defense counsel. If the carrier that retained them wishes to settle the case expeditiously, defense counsel is not usually going to get much of an argument from the plaintiff’s attorney. The plaintiff’s attorney typically has the case on a contingency fee. The more time and effort it takes to resolve the case, the less money the plaintiff’s attorney makes. Obviously, conscientious plaintiff’s attorneys are not going to sell their client short just because they want a quick settlement; however, all things being equal, most would prefer to settle early rather than late.

There are sometimes factors beyond the control of the attorneys that can effectively delay cases that most believe should settle early. One of these I alluded to in My “Potted Plant” article and that is the case where a parent loses a child because of the alleged negligence of the defendant. Typically, it is very difficult to resolve these cases early even when the professionals involved believe that it is in everyone’s best interest to do so. This is because the parents are rarely ready to settle until after they have come to grips emotionally with their loss, and are ready to move on. This can also be an issue in other personal injury cases. There simply has to be a period while the plaintiff adjusts to his or her loss and is ready to put it behind him or her. In such cases, all defense counsel can do is wait and let things run their course.

At other times, the reason why a case doesn’t settle is that the plaintiff has simply not yet reached a medical endpoint. No doctor is willing to ascribe any permanency until more time has passed, for example. Again, there is little that a defense attorney can do in such a situation except wait for the plaintiff to reach a medical endpoint.

A special case is presented by a plaintiff’s attorney who is so busy that he or she simply cannot pay the requisite amount of attention to your case in order to value it properly. Such an attorney may in fact be “gun shy” and fear that if he recommends settlement at a figure that turns out to be inadequate because not enough had been done to adequately develop the case, the client might bring a malpractice suit. In such a case, defense counsel might consider taking a page from the plaintiff’s lawyer’s litigation manual and prepare the defense equivalent of a demand/settlement package. All defense counsel should be familiar with these packages: they are prepared to lay out the best case on the plaintiff’s behalf with all supporting documents neatly tabbed and easily reviewed and analyzed by the claims representative who controls the purse strings. In the reverse of this process, a defense counsel, aided by the insured and the insurance company representatives, would put together a package designed to show the plaintiff’s counsel why the case simply was not worth as much as he or she thought it was. If that doesn’t help to bring things to a boil in a case that is ready to settle, but for the reluctance of plaintiff’s counsel to face the question, start pushing to schedule the matter for mediation. As previously indicated, having a date certain can act on a plaintiff’s attorney the same as having a date certain for trial, particularly if the parties are paying for a mediator rather than going through a Rule 170 mediation because the court has told them to.
Settlement Offers:

As discussed in the last section, there is no reason why defense counsel cannot prepare a settlement offer with the same thoroughness as a well put together demand package by a plaintiff. Such a package should be put together in layman’s language, in addition to laying out the legal issues (assuming there are some) in language directed to the lawyer. Remember, the person you ultimately have to convince is the plaintiff, as opposed to the plaintiff’s lawyer.

In Federal Court, settlement offers can also be used strategically to force the plaintiff’s hand. See, e.g., Fed R. Civ. P. 68. Under that rule, if defendant makes an offer of judgment in a specific amount, which is not accepted, the defendant would be entitled to costs incurred thereafter, if the final judgment is not greater than the offer. In New Hampshire state court actions, we do not have a similar provision. About the best that we can do along those lines to try to jar a stubborn plaintiff loose is to pay money into court pursuant to N.H. Super. Ct. R. 60. The problem with this approach, of course, is that payment of money into court is an admission of liability, so this approach cannot be used if you wish to contest liability.

Pros and Cons of Structured Settlements:

For those not familiar with structured settlements, they are means whereby a settling defendant can magnify the impact of relatively small offers with benefits to the plaintiff that would not be otherwise available. They usually involve payment of a portion of the amount agreed upon at the time of the settlement, but defer payment of most of the settlement funds to the future. As a rule, juries and judges are not empowered to impose structured settlements on non-settling parties. In other words, a verdict in a civil case will only be a lump sum amount.

Structured settlements are simply annuities, which are put together and funded by insurance companies. In appropriate cases, they can be an attractive option when the gap between parties in a mediation or settlement negotiation is relatively small. In a typical structured settlement, an amount of cash sufficient to pay a plaintiff’s attorney’s fees is part of the package, but the rest of the settlement consists of payments made over time. These payments can be made at longer intervals (every five years or so, for example) or can be designed so as to replace a monthly income stream for someone who has been rendered incapable of working at his or her full capacity by the occurrence that gave rise to the lawsuit.

Because part of the settlement is deferred, the time-value of money comes into play, and the up-front cost to the insurance company of purchasing the annuity necessary to fund the settlement is less – and sometimes considerably less – than the amount ultimately received by the plaintiff. The longer the period of payout, the less expensive the cost to the insurance company to purchase the annuity. The higher the prevailing interest rate at the time the annuity is purchased, the less the cost to the settling insurance carrier, given the same payout.

Structured settlements can be a good option if the plaintiff is relatively young and the interest rate is relatively high. Of course, there is nothing to stop a prudent plaintiff from investing a lump sum and reaping the rewards of wise investments without the intervention of and control by the insurance company in establishing an annuity. Such a scenario would give a settling plaintiff a lot more flexibility than would a structured settlement, since the plaintiff cannot alter the terms of the latter.
One advantage, however, of structured settlements in cases where the plaintiff has suffered physical injury is that the future payments will not be taxable to the same extent as would be the earnings on investments made by the plaintiff individually. As for flexibility, there are companies out there that will buy the rights to the future payments from the settling plaintiff; however, typically they will not pay anything close to what the annuity actually costs, and the plaintiff who enters into such a bargain usually comes out on the short end.

Another factor that has to be considered before entering into a structured settlement agreement is the financial stability of the company that stands behind the annuity. Only highly rated companies should even be considered, and the longer the payout period, the more risk there is that the company could become insolvent before all payments are made. Of course, a plaintiff in charge of investing his or her own money would face some of the same issues, but would have more control to change direction if problems arise with some of the investments in the future.

Despite all of the issues and concerns, there are cases where structured settlements can give tremendous value. In some cases, for example, the annuity company will, because of the perceived poor health of the injured plaintiff, be willing to rate that individual at a higher age than his or her biological age. If the structured settlement includes payments to be made over the life of the plaintiff and if the plaintiff is perceived to have a shorter expected life span than someone else of the same biological age, a relatively low initial investment by the settling insurance company can result in a much higher payout over time to the plaintiff.

There are other situations where a structured settlement presents advantages. For example, a person whose earnings have not been decreased appreciably because of injuries may not have an immediate need for a large sum of cash, and would prefer to receive the money in lump sums in the future, so as to coincide with specific events, such as when the recipient’s children are ready to go to college, for example.