Mediation Strategies

What Plaintiffs Really Want

By James F. Bleeke

Factors that can induce settlement decisions may have far less to do with the advocacy by the defense than with psychological reasons influencing the person who initiated the lawsuit.

As defense attorneys, we often focus most of our efforts on assembling the most crucial facts and the strongest legal arguments to build defense themes for our clients. We hope that the strength of our thoroughly analyzed positions and our resolve to fight for our clients ultimately will prevail either by persuading plaintiffs to capitulate or at least settle cases for amounts that our clients deem reasonable. In the absence of settlement, we rely upon judges and juries to recognize the justice embodied by our well constructed defense themes.

However, the reality is that the vast majority of our cases settle for reasons that may not hinge upon the strength of our legal or factual arguments. For those of us defense attorneys who have also handled the occasional large plaintiff's case, the factors that influence settlement decisions by the person bringing the lawsuit often become more apparent. Those factors may have far less to do with advocacy by the defense than with

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psychological reasons influencing the person who initiated the lawsuit. Therefore, as defense lawyers, we should all be equipped with an understanding of those psychological and emotional factors that often are crucial to prompting a case to settle. This article attempts to analyze some of those key factors.

Key Motivating Factors for Plaintiffs

Money!

Of course, money is the first motivating factor that cynical defense lawyers think of when determining the reason behind a lawsuit. And in the end, money will be a crucial factor in settling any case. However, it would be short-sighted to think that money is always the most crucial factor to whether a case will or will not settle. How important money will be to resolving a case hinges upon the individual plaintiff's attitude toward the other motivating factors that are discussed below. Only when those factors have been explored and properly assessed is a defendant likely to achieve the optimum financial resolution of a case.

Being Heard

When cases do not settle prior to trial, one of the more common reasons is that a plaintiff really wants to have his or her "day in court." While that phrase may mean different things to different plaintiffs, it often means that the plaintiff really wants someone else to truly hear his or her story. Because "being heard" can be such a large motivating factor driving a lawsuit, it is wise for the defense to seek every opportunity to allow the plaintiff to feel heard during the litigation process.

One key opportunity for allowing plaintiffs to feel heard is during their deposition. Certainly, the defense wants to confront plaintiffs with the weakness of their case and ask the tough questions that will give them second thoughts about taking the case to trial. However, to position a case for an optimum settlement, it is equally important to allow plaintiffs an opportunity to "tell their story" and explain why they brought the lawsuit. That objective can be accomplished by simply asking the plaintiff what it was that prompted him or her to bring the lawsuit or to visit an attorney in the first instance. To re-emphasize the point that the defense truly wants to hear what the plaintiff has to say, it can be helpful to close the deposition by asking the plaintiff whether there are any other facts or issues that the plaintiff wants the defendant to consider in evaluating this case. Even if such a broad question draws an objection from plaintiff's counsel, it shows the plaintiff that the defense really wants to hear what the plaintiff has to say and does not want to overlook any issue that the plaintiff feels is important.

At mediation, the objective of allowing a plaintiff to feel heard often is best accomplished by the defendant beginning the presentation in the joint session by stating what the defense truly sees as the plaintiff's strengths. This approach, which is discussed in more detail below, frequently softens the plaintiff's adversarial attitude and decreases the desire to "have their day in court," because someone has already heard and identified the strengths of plaintiff's case.

Getting an Explanation of What Happened and Why

Many lawsuits result from the feeling by a plaintiff that something unfair happened to him or her and that no one took the time to explain why and how this injustice occurred. Consequently, an important element in moving many cases towards settlement is to actually explain (but not simply rationalize in a defensive way) how the incident in question happened. To offer another perspective and explain to the plaintiff that what happened to him or her was not a result of an intentional act or callous disregard for the plaintiff can go a long way toward soothing the negative feelings that drive the litigation.

Vindication

One of the greatest driving forces for a lawsuit is a plaintiff's need for vindication of his or her cause. Often, one of the strongest needs of a plaintiff is an acknowledgment by the defendant that what happened was simply wrong and that the plaintiff had a legitimate reason for bringing a lawsuit. Of course, most settlement agreements specifically deny any admission of liability on the part of the defendant. However, that does not prevent defense counsel from artfully assuaging a plaintiff's need for vindication during the litigation process. For example, even during the plaintiff's deposition, defense counsel can acknowledge that he or she understands where a plaintiff is coming from in his or her claim. This often can simply be made a part of a question by stating, "I understand how difficult it may have been for you to be in this situation, can you please tell me about your feelings during the incident or immediately thereafter." Similarly, at mediation, defense counsel can quite honestly state that "we regret the circumstances that brought us to this point." (Of course, nearly everyone can agree on that, because very few people would prefer spending their time fighting a lawsuit when they could be spending their time on more productive or enjoyable pursuits.) In addition, if there are specific events that occurred that a defendant agrees really should not have happened, mediation is an ideal time to acknowledge those issues and explain that the defendant does not want the same events to occur again.

One of the more difficult obstacles to overcome in settling a case is when a plaintiff has a strong motivation to seek revenge or punish the defendant.

Helping Future Individuals Avoid the Same Fate

Many plaintiffs find a purpose in their lawsuit by repeatedly stating that they want to help other people avoid the same fate that they experienced. For some plaintiffs, this is simply a rationalization to justify the lawsuit or assuage guilt feelings associated with asking for money from someone else in a lawsuit. However, for other plaintiffs, the altruistic purpose of preventing future harm is, in fact, the driving force behind the lawsuit. In either event, a defendant can help eliminate one of the stated reasons for going to trial by acknowledging the circumstances that produced the lawsuit and

stating a desire to prevent those circumstances from occurring again. (Again, this can be stated quite sincerely, because no defendant really wants to spend more time in litigation.)

Punishment/Revenge

One of the more difficult obstacles to overcome in settling a case is when a plaintiff has a strong motivation to seek revenge or punish the defendant for whatever gave rise to the lawsuit. Anger and the desire for revenge often can only be addressed by explaining the limitations of the legal environment to exact punishment in the form a plaintiff might prefer. Ultimately, civil cases only result in a money damage award and only rarely result in punitive damages. It can be helpful to explain during the mediation process that even if the case goes all the way to trial and the plaintiff obtains a substantial damage award, that award will not alter whatever injustice the plaintiff may feel he or she has suffered. That reality, coupled with an adequate opportunity for the plaintiff to express anger or grief during a deposition or even during mediation, may help to reduce revenge or punishment as a barrier to settlement.

Teaching the Defendant a Lesson

Closely associated with the desire for punishment or the motivation to prevent a similar incident for future plaintiffs is the goal of forcing a defendant to learn from past mistakes. Again, the best approach to a plaintiff who has a strong desire to teach the defendant a lesson is to express regret over the situation and explain what the defendant has learned from this incident that might impact future individual or corporate behavior. Frequently, the mere acknowledgment of the strengths of certain factual or legal arguments from the plaintiff's perspective can go a long way toward suggesting to a plaintiff that a defendant has learned something from this incident.

Assuaging Personal Guilt

In personal injury cases brought on behalf of an injured family member (*e.g.*, a child or an elderly parent), a strong sense of guilt by the person bringing the lawsuit may be a driving force for the lawsuit. Offering large sums of money frequently does not really address the issues of guilt by a person bringing a lawsuit on behalf of an injured or deceased loved one. Instead, an empathetic approach in which the defense lawyer demonstrates an understanding of the emotions that the plaintiff must be feeling as a result of the incident can help to relieve strong feelings of guilt that may otherwise prevent a plaintiff from resolving a case short of trial. Again, it may also be useful to point out the limitations of the civil justice system in undoing a severe injury or death of a family member. Where the defense lawyer senses that guilt is a strong motivating factor, it may be helpful to advise the mediator of that obstacle prior to mediation so that the mediator can be prepared to be empathetic and help the plaintiff work through those feelings.

Wanting the Whole Thing to Be Over!

Defense lawyers who have not handled their own cases on behalf of a plaintiff may drastically underestimate the desire during a case by many plaintiffs to simply end the process and move on with their life. While many plaintiffs are strongly motivated at the beginning of a lawsuit to be vindicated, exact revenge or recover large sums of money, the litigation process can be so emotionally overwhelming that plaintiffs may at several stages of litigation simply want the case to be over. Often just before or just after the plaintiff's deposition, the previously enthusiastic plaintiff may be so afraid or so beaten down by the process that he or she simply wants to end the case without regard to the amount of the settlement. Of course, most plaintiffs' attorneys are skilled at rehabilitating their clients and restoring their desire to proceed in "the pursuit of justice." An understanding of what motivated the plaintiff to bring the lawsuit initially allows the plaintiff's attorney to remind the client of why he or she brought the case and why he or she needs to press forward despite the emotional toll exacted by the litigation process. However, as defense lawyers, we need to be keenly aware of signs that a plaintiff may be tiring of the litigation process and looking for a way out.

Avoiding Trial

As a case reaches the courthouse steps, defense attorneys need to be aware that many plaintiffs become extremely scared about what may happen at trial. The risk of losing the case and having a jury tell them that they were wrong can be as strong of a motivating force as the chance that they may not recover any monetary damages. Lay people who are not used to the litigation process often find it very difficult to handle the ups and downs of jury selection, direct examination and cross-examination of witnesses and adverse rulings from a judge. A defense attorney who has not had the experience of handling plaintiffs' cases may never fully understand the amount of hand holding and counseling that is required to keep a plaintiff from folding and demanding that a case settle as the trial progresses. A defense lawyer who can subtly explain during mediation the emotional roller coaster and loss of control that occurs when settlement negotiations break down and the case is forced to trial can greatly increase the chances of successful resolution of a case at mediation.

Mediation Strategies to Address Plaintiffs' Motivating Factors

What Does Not Work: "I'm Right"—"No, I'm Right!"

Our clients, just like most human beings, generally believe that they are justified in the positions they are taking in litigation. As we zealously advocate for our clients, we attorneys often identify with the righteousness of our clients' causes and legal positions. As plaintiffs and defendants stake out and become more entrenched in their respective positions in each case, the exchange of arguments at times can sound like two children arguing over who is "right."

One exercise utilized to help train people in more effectively handling relationships asks two individuals to stand face to face holding one of their arms in front of them and clasping hands with their "adversary" as if they were going to arm wrestle. The first individual is then asked to forcefully say, "I'm right!," while pushing the hand of his or her adversary down like the victor in the arm wrestling contest. In response, the other person, while staring straight in the eyes of his or her "adversary," then states back even more firmly, "I'm right!!," while completely shifting the arm wrestling pose to the opposite side where the responder is victorious. This process is repeated

over and over for about two minutes, with each person stating more firmly and more intensely each time, "I'm right!!!," followed by the other person responding more firmly and vehemently, "I'm right!!!!."

At the end of this exercise, the parties are asked to comment on how they felt during the exercise. Most individuals quickly recognize that they feel foolish and that the entire exercise is pointless because no one is persuading the other person of anything. Of course, that is the point of the exercise. Neither person feels heard or acknowledged when the other person is simply focused on stating his or her position louder and more fervently.

As part of their relationship training, the scenario is then switched so that the parties assume the same position but when the first individual strongly states "I'm right!" and presses the other person's arm into the victorious arm wrestling position, the adversary changes the response. Instead of simply stating more strongly, "I'm right!!," the adversary instead calmly states, "I understand your position, but this is my position," while firmly, but unemotionally moving the other person's arm in hand to the opposite position. The participants again do this exercise for two minutes and then discuss how it felt for each individual. In most instances, the person was assigned the task of repeatedly saying, "I'm right," again felt stupid and in this case even more foolish. On the other hand, the individual who acknowledged the first person's position, but then firmly and calmly stated that he or she had a different position, felt calm, reasonable and in control. This exercise contains lessons that can be very important in attempting to reach agreement at mediation. Parties are very unlikely to reach agreement if they simply go back and forth stating "I'm right!" "No, I'm right!!" Instead, the goal early on in mediation should be to allow the plaintiff to feel acknowledged and heard.

To the extent that defense counsel and the defense client can persuade plaintiff that his or her position actually is well understood and acknowledged, it is much more likely that the plaintiff will then be able to hear and understand that there is another possible position that may have some merit and could result in a different outcome than the plaintiff anticipates from his or her perspective. Therefore, one of the primary goals of an opening session in mediation should be to allow the plaintiff to feel heard. This can be done first by listening very carefully and attentively (and non-defensively) as plaintiff's counsel states plaintiff's position at mediation.

However, just listening attentively seldom is enough. The most effective way to

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Most importantly, product manufacturers must ensure compliance with all product guidelines, including federal government, state and local regulations and building code provisions, industry standards, and trade association recommendations. Because green construction and green advertising rules remain in flux, a product manufacturer must commit resources to keep apprised of changes that will impact its business and risk for liability.

Conclusion: Knowing What You're Getting into Will Make It Lots Easier

The marketplace has embraced green construction. Consumers demand it. Building-product manufacturers have tremendous business opportunities to design and manufacture products for green buildings. Manufacturers must understand the nature of green certification and enhanced building performance expectations to reduce liability risks for products used in these new settings. FD

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the same time improbable scenarios at this stage; however, they become factors in determining the overall likelihood of an injury.

Injury Severity

To quantify the severity of one or several injuries identified in the injury scenarios, the new guidelines provide a standardized table on how to classify injuries into one of four categories: *slight*, *moderate*, *serious* and *very serious*. Compared to the present RAPEX risk assessment guidelines, one category has been added, and the table is much more nuanced.

Injury Probability

The new proposed guidelines distinguish between eight levels of probability of injuries from "*virtually impossible (< 1/1,000,000)*" to "*almost certain, might well be expected (> 50 percent).*"

Determination of the Risk

Once the severity and probability of an injury have been determined for each of the scenarios, the risk of each is determined by a final matrix providing the four risk levels of *low*, *significant*, *high* and *serious*, as opposed to five levels that the previous RAPEX guidelines used and that suggest an accuracy that does not exist. Finally, the proposed guidelines invite a plausibility check and recommend conducting a sensitivity analysis in the event of doubt.

Conclusions

At first glance both the GPSD Business Application and new risk assessment guidelines appear to simplify processes for businesses.

The guidelines contain a lot of common sense and best practices and should, therefore, help improve the consistency and conclusiveness of risk assessment. The level of "*low risk*" was called "*acceptable*" in previous drafts. Such a change may also help to introduce a level of risk below the level that is regarded as a substantial product hazard in the United States, a category so far nonexistent in the EU.

Apart from certain legal flaws of the GPSD Business Application, the big, practical question will be whether businesses can contact an appropriate country authority at the right time. It will be very difficult to identify the individual handling "your case," in each agency with an often decentralized administration involving localities in 27 member states. It is, however, advisable and also good practice to establish direct contact with "your case handler" prior to or at least at the time of the notification to avoid surprises.

Businesses are advised to become familiar with the GPSC Business Application and the new guidelines and to determine to what extent they offer a real option. FD

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allow a plaintiff to feel acknowledged and heard is to restate what the defense lawyer truly believes are the strengths of plaintiff's position. Thus, it can be quite effective for defense counsel to begin his or her opening mediation comments by genuinely acknowledging what the defense sees as the greatest strengths in plaintiff's case. It is important not to overstate or understate the realistic view that the defense has of the plaintiff's advantages in the case. Examples of advantages held by the plaintiff can include 1) plaintiff was severely injured or damaged; 2) plaintiff makes a good witness or is sympathetic; 3) plaintiff has an excellent (or at least zealous) attorney; 4) negative bias exists against the defense client or the industry of the defense client, etc.

Once plaintiff's strengths have been stated, while looking plaintiff directly in the eye to see whether he or she feels heard, a defense attorney can even invite plaintiff and his or her counsel to point out any additional strengths or advantages that the defendant may have overlooked and that need to be considered in carefully evaluating the case. After the defense attorney has fully stated his or her view of the plaintiff's position, the defense lawyer can then calmly and confidently state, "…but this is our position." It is much more likely plaintiffs will actually hear and acknowledge some possible merit in the opposing viewpoint when they feel that the defense has first listened and understood the plaintiff's position. FD