

LAWYERS WEEKLY USA IN PRACTICE

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Innovative Ways to Settle a Case

Ideas That Can Help Your Clients

By Leigh R. Perkins

New trends in settlement are helping lawyers persuade opponents to settle cases sooner. They include:

Settlement Brochures

Settlement brochures are a simple, inexpensive way to present the strengths of your case to defense counsel. With little more effort than it takes to draft a demand letter, you can produce a brochure that may persuade defendants to settle. And if settlement falls through, you have the basis for your trial notebook.

"Brochures are an incredible tool to get a case settled," says Jeff E. Rusk of Shields & Rusk in Austin, Texas, who settles 90 percent of his cases in written form which demonstrate the strength of your position in such a way that an insurance company or defendant can appreciate it without having to go to trial.

The primary reason that cases of clear liability go to trial is that plaintiffs don't give enough information to defendants, says defense lawyer Cynthia Satter of Devine, Millimet & Branch in Manchester, N.H. Therefore, it benefits plaintiffs to provide information in a coherent form to accelerate settlement, she says.

A good settlement brochure also shows you are meticulous and well-prepared, and indicates that you will not be an easy adversary.

"It really shows your opponent you're organized, you have all your ducks lined up and you're ready to go," says Patrick E. Maloney, president-elect of the Chicago-based Defense Research Institute, an organization of defense lawyers.

"It's an effective way to show exhibits and it gives the impression you've done your homework," he says.

But when a defendant requests a brochure, Johnny Edwards of Edwards & Kirby in Raleigh, N.C., hears alarm bells. "If the defense wants to see the claim in that much detail, they're focusing on minutiae and negotiations won't be fruitful," warns Edwards, a plaintiffs' lawyer.

Experienced litigators give this advice for successful case settlement:

◆ **Prove your case before you start settlement negotiations.**

"Sophisticated defense lawyers can tell when someone is prepared or just bluffing," says Mark Mandell of Mandell, DeLuca & Schwartz in Providence, R.I. By laying out each element of your case during negotiations, you "show them they have something to be concerned about," he says.

◆ **Don't fear giving away too much of your hand.**

"More often than not, when you've done your work you're better off not playing it close to the other side, your weaknesses and how you plan to deal with them."

Remember, your opponent probably already knows what your plan is. "If your goal is to settle the case, you're not giving away your weaknesses, you're giving away your strong cards. You're not saying, 'This is my strategy.' Your strategy is clear all the way through," says defense

Settlement Tips

lawyer Cynthia Satter of Devine, Millimet & Branch in Manchester, N.H.

◆ **Avoid the "aim high/settle low" tactic.**

Erode defendants' trust by developing a reputation for making settlement demands near your perceived value of a case. This is a "much more straightforward" way to negotiate, says Mandell.

"Maintaining a large demand to try and scare" the defense is not effective, agrees Patrick E. Maloney, president-elect of the Chicago-based Defense Research Institute, an organization of defense attorneys.

◆ **Some people are very good and I'm not going to change. You earn a good reputation [among the defense bar] because maybe you do change, but not that much,"** he says.

◆ **Always reserve a few surprises.**

Although providing more information is best, there is the risk that negotiations will fall through. Keep a couple of cards up your sleeve, "So you still have the possibility of

popping them at trial," recommends Jeff Rusk of six-lawyer Shields & Rusk in Austin, Texas.

◆ **Don't make it personal.**

Refrain from making personal attacks on adjusters or defense counsel — it can only hurt your client.

"Insurance companies are in the business of settling cases; it's not personal with them. Too many of the adjusters I work with don't have good working relationships with attorneys because they feel their personal integrity is being attacked," says defense lawyer Satter.

◆ **Understand a defendant's tiers of authority.**

"Settle up to \$100,000, adjuster B up to \$500,000, and so on," says Rusk. "They have to have the facts to back up their decision," so that when superiors question them at the end of the year they have back-up, he says. Understanding this ahead of time will help you recognize, and explain to your client, what an adjuster must do to get authorization for large settlements.

What to Include In a Brochure

◆ A typical brochure contains summaries of the facts and a statement of injuries and actual damages. It addresses possible defenses such as contributory negligence, and explains the demand amount, says Rusk. (See sidebar, "The Anatomy of a Settlement Brochure.")

◆ Including photographs can be powerful, Rusk says. In a motorcycle crash case where the main issue was which party was on the wrong side of the road, Rusk sent a close-up color photo of his client's demolished motorcycle crankcase, which had a yellow paint stain on it.

"That made it clear that the bike had been on its side when it slid across the yellow line and ended up on the wrong side of the road," just as the plaintiff contended, he says. When defendants saw the photo,



Videos are a very persuasive settlement aid, says Mark Mandell, a plaintiffs' attorney in Providence, Rhode Island.

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Innovative Ways to Settle a Case

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to, they essentially conceded liability.

◆ **The tone of the brochure should be very low-key.** "Don't write one saying, 'I'm going to kick your butt,'" says Rusk. The approach should be conciliatory, not challenging.

◆ **Keep it short.** "The best ones are three- or four-page summaries. They're well organized, with attachments," Satter says.

"You want it to be something [the recipient] can work with without having to put it aside and say, 'When I get a day I'll do it.'"

Defense Lawyers Also Use Brochures

Defense lawyers also use brochures, but much less frequently, Satter and Maloney note. For example, a defense may prepare a brochure that shows why they think an injury is phoney or the case is full of holes, Maloney says.

But Satter leans away from it, believing the risk of exposure is greater for defendants.

"The classic example is a 'disabled' man caught building an addition to his house," she says. If that comes out early and the case doesn't settle, his testimony at trial will account for the slip, saying that he has "good days and bad days," Satter says.

Settlement Videos

Using videotapes to present your case and your demand can be highly persuasive during settlement negotiations. "From the defense perspective, [a video]

can be devastating, if done professionally," says Maloney of Chicago.

A settlement video is "something a defense lawyer can evaluate and can also show to his corporate decision-maker. Even though they might talk tough in a settlement conference, behind closed doors they look at [the video] and say, 'Wow, the jury is going to eat this up,'" he says.

A typical video introduces the plaintiff and has him or her talk about how the injury has changed his or her life; interviews an expert about the injury and/or the defendant's exposure; may show family members or co-workers discussing the changes in the plaintiff; and may show evidence such as the accident scene or key documents, says Mark Mandell, a plaintiffs' attorney in Providence, R.I.

A plaintiff who presented his settlement video in the form of a 60 Minutes-type report changed the defense position in a wrongful death and serious

injury case recently, Satter recalls.

"It started out on the courthouse steps, introduced the players and had them talking about their lives," she says of the propane-gas leak case. "There were interviews with the plaintiff and the experts on liability. They put charts up, worked with graphics and pointed out the defects and what went wrong."

"They interviewed the fire marshal and police investigator, and put in some photos that were taken at the scene as

at the back of the brochure in an appendix. By doing so, the summary remains brief and to the point, which defendants appreciate, he says.

◆ **Statement of injuries.** This should include all medical reports substantiating injury claims, says Patrick E. Maloney, president-elect of the Defense Research Institute in Chicago. Rusk supplies photos of the injuries where appropriate.

◆ **Include case law that supports your position; it makes the defendants' job easier, and they'll look more favorably on your demand.**

◆ **Graphic evidence.** This evidence can be advantageously displayed in a settlement brochure.

"Throughout the material, if you need to put a picture or a pain summary chart, do it," says Rusk, although he usually prefers to present them as exhibits in an appendix. For example, use a xeroxed calendar with red marks indicating complaints of pain for a simple and inexpensive pain summary chart, he suggests.

◆ **Liability synopsis.** State the law supporting your claim. It should be a simple synopsis, says Rusk, such as, "Article 233 says you're supposed to stay on your side of the road."

Either here or in a separate section, you should address potentially sticky defenses such as contributory negligence, he says, and explain why you don't think they will sink your case.

◆ **Damages summary.** Set out how you arrived at your demand figure. Include actual damages such as past

and future medicals and lost wages. Include copies of supporting bills, which Rusk prefers to include in an attached appendix.

Also, set out general damages such as disability, pain and suffering and mental anguish, Rusk says.

◆ **Discovery chronology.** Provide the defendant with a summary of discovery efforts to date, Maloney suggests. "Set out what has been completed, what depositions have been taken — what witnesses, manufacturers and experts have been deposed," he says; this gives your opponent a complete update without requiring further effort on his part to determine the posture of the case.

◆ **Case evaluation.** Use this section to provide defendants with an explanation of the formulas you used to calculate your demand offer. Setting out the case law that validates your formulas saves defendants research time; it makes their job easier, so they'll look more favorably on your demand. It also offers legal back-up for your demand, Rusk has found.

◆ **Other tips**

Punctuate summaries with quotes from statutes, depositions or other authorities to support your liability claims. Rusk either provides pertinent deposition testimony in the brochure or actually copies the transcript page and inserts it.

You may also want to include specific documentation to rebut defendant's position. "I'll write, 'Your client says it was raining. Here is a certified copy of the National Weather Service report for that day, and it shows that it was dry and sunny,'" he says.

"You're showing a secret, and giving up a little, but what can they do?"

on the sophistication of the production. But, "You can usually do it for under \$5,000," Mandell says. Videos offer plenty of creative license in presenting your case, but experts recommend avoiding overt emotion.

It can be devastatingly effective to include clips from videotaped depositions of defendant's employees giving damning testimony, Rusk adds.

In a case in which four teenage

Continued on the following page

Anatomy of a Brochure

A simple, well-written and persuasive settlement brochure makes defense counsels' job easier; if you lay your case out clearly, they have the information they need to settle quickly.

Settlement brochures can take a variety of forms, but should include the following components:

◆ **Introduction.** Use the introduction to set the tone for the brochure. Rather than using brash demand language, Jeff E. Rusk of Shields & Rusk in Austin favors "helpful" language. For example:

"I wanted to share this with you, along with the materials identified above, because I believe that it will assist you in fully evaluating this case from a settlement standpoint. I consider it extremely important to share this information with you at this stage of the proceedings because the facts appear to indicate a case of clear liability and substantial damages."

Some lawyers put the demand in the introduction in order to get to the point quickly. "My wording is usually, 'Based on settling the case now and avoiding a prolonged trial, I would recommend to my client that she settle for \$500,000 today,'" says Rusk. He also reiterates the demand in the "Case evaluation" section (described below).

As with all settlement negotiations, it is also important to specify up front that the information provided is for settlement purposes only and not to be used at trial or for any other purpose, as provided in the Rules of Civil Procedure.

◆ **Factual summary.** Summarize the facts in a clear, concise and non-inflammatory way, says Rusk. Throughout the summary he refers to attached photos and other exhibits, which are

well as some touching family photos.

"Within 45 minutes you had their case pretty well summarized and had a good opportunity to evaluate the effect of their main witnesses. It caught the attention of the defense attorney and the in-house counsel. Previously their position was that it was a no-liability case—that has changed their view of it," Satter says.

It can cost between \$1,000 and \$10,000 to produce a video, depending



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 future reference the easy way

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workers were killed during a late-night yogurt store robbery, "I had clips from the corporate executives' depositions saying the key points in my case," he says. "A narrator said, 'The defendants knew that this yogurt store had been robbed before,' and [the video] cut to a clip of the CEO saying, 'We knew it had been robbed but didn't think it was a big deal.'"

Rusk settled the premises liability case for \$12 million.

In complex cases lawyers may use videos in addition to brochures. In the yogurt store case, Rusk mailed defendants a written settlement brochure, which "laid out a lot of teaser facts," then invited defendants to his office. "I showed them the model of the store, as well as video clips from the surveillance cameras," he says.

Other tips on planning settlement videos:

- ◆ Include a "man-on-the-street" segment showing community reaction to a case. When working on a case of local prominence, Raleigh attorney Edwards sends a video person into the streets and has him ask people whether they have heard of the incident. "We record public reaction to the situation," he says.

If chosen carefully, the footage can be very persuasive, as it is "totally cold — you haven't paid these people or done anything to affect them," Edwards says.

- ◆ Include videotapes of focus groups. Edwards has had good luck using focus groups (discussed below) to work through difficult issues in a case. Where a group does a particularly persuasive job attacking defendant's positions, Edwards includes clips from the session in his settlement video.

"It's especially effective where the defendant is hung up on a specific issue," he says; for example, the plaintiff's contributory negligence. "If the [mock] jury doesn't ignore it, but discusses and works their way through it, it can be very compelling."

As with brochures, the tone of the videos should remain "low-key," urges Mandell. "Don't oversell or overstate your case," he advises. "The defense won't trust you if you do, just as if you were doing it in front of a jury."

Beware of using music or garish color, he adds. "It can't look or sound like it is asking for money."

Provide Comparable Verdicts

Many lawyers are turning to jury verdict reporters to get information on the verdict or settlement value of comparable cases before they approach their opponents.

One such company is Jury Verdict Research of Horsham, Penn., which, for \$190, will provide a list of cases similar to yours and the amount of the verdict or settlement.

"A person may call and ask for all the femur fracture cases in the Houston area against hotel or motel defendants," says Brian P. Shenker, JVR's editorial director. "We can pull up from five to 100 cases like theirs."

Thousands of lawyers use these services to help assess the value of their cases and persuade opposing counsel of it, he says.

"In settlement negotiations they can say, 'Here's what these cases are settling for — my demand isn't unprecedented.'"

Attorneys can also request a case evaluation, for the same price. "We've taken all the data we have and synthesized it into a statistical methodology. You plug in the parameters of your case and the program pops out a probable jury award," based on similar cases in

your region, Shenker says.

Since insurance companies do the same thing, using their own internal data, Shenker says it is not surprising the

Jury verdict reporters help attorneys assess the value of their cases and convince opposing counsel of it.

primary reason lawyers use JVR's services is to assemble comparative information to begin settlement negotiations.

"When I'm dealing with an insurance company I put together as part of my demand package a packet of 10 to 25 similar cases with verdicts in similar jurisdictions," says Edward Bassett of Mirick, O'Connell, DeMallie & Lougee in Worcester, Mass.

"It's helpful to convince a claims rep you didn't pull the [settlement] figure out of the air — the insurance companies need to have the information in their files to justify their decisions," he says. "It's very helpful to bridge the gap," between demand and offer by demonstrating what juries in the area have done.

"In this day and age probably every time you have a PI case it's good practice to get an independent evaluation," Bassett advises.

Mediation

Mediation — in which the parties gather together, give their versions of the case, then meet with a neutral mediator to attempt to reach a solution — is very affordable and is gaining in popularity today.

"Going to a mediator fairly early in the game will give you a sense of whether the other side will eventually settle or not," notes defense lawyer Maloney. Even if you don't settle, you learn more about your opponent and the case, and all it costs is a day with a mediator, he says.

Mediation, which is non-binding, is especially good in multi-party cases such as a multiple-car accident, says Christopher P. Kauders, a Boston mediator and president of Pre-Trial Solutions, Inc., a mediation firm. The plaintiff may choose to submit the case to a mediation firm, which does not get paid unless it is able to get all parties to the negotiation table, he notes.

"They submit the case to me and if I cannot convince the opposing parties to mediate, I don't get paid. We do a hell of a lot of legwork," while there's no risk to the plaintiff, he says.

Defense lawyers often appreciate the opportunity to mediate because it lets them point out what's wrong with the plaintiff's case, says defense lawyer Satter. "It also gives me the chance to communicate directly with the plaintiff," not just the lawyer, she adds.

When choosing a mediator, Kauders recommends looking for one who will provide references and who is "good on follow-up where the parties get close during the session but need help later" in closing the deal.

Recent innovations in mediation include:

- ◆ **Hosting mediations by telephone.** This method can be very convenient and effective.

"I have a plaintiff in Vermont and a claims rep in Arizona and I'm going to have a teleconference where each side will give their version of the case, and

I'll conduct the mediation telephonically by putting one line on hold and talking to the other side confidentially," says Kauders.

It is cost-effective, says Kauders, because parties simply block out three hours to sit in their respective conference rooms. He charges them his normal half-day rate of \$800, split between the parties, and settles 90 percent of the matters that come before him.

- ◆ **Discount rates for small cases**

For small cases, many mediators will give a discounted rate, Kauders says. He will mediate a matter worth less than \$10,000 for one-and-a-half hours for \$250, he says.

- ◆ **Mediated settlement days**

Many insurance companies now sponsor mediated settlement days, in which a mediator is hired to go to the insurance company's offices on a given day to meet with several plaintiffs' attorneys on different cases. A method usually reserved for smaller cases, the goal is to spend an hour per case in an attempt to resolve a number of matters at the insurer's expense.

When your opponent doesn't offer this opportunity, Kauders suggests calling an insurer against which you have several cases and arranging such a session.

Pre-suit Negotiation

- ◆ **INFORMAL**

Concord, N.H., lawyer Gary H. McKible has success with an "old-fashioned approach" that is regaining popularity.

"If you sit down with an adjuster face-to-face before you file suit, it establishes a better relationship," and may save McKible, who settles about 95 percent of his personal injury cases.

"I have settled cases I never thought I'd settle with insurance companies I hadn't talked to for years because I had a preconceived notion about them," he says.

Even if you don't settle, an early meeting with the adjuster builds a congenial relationship that may induce him to put extra effort into authorizing a higher settlement once suit is filed, he says.

- ◆ **FORMAL**

One national group hopes to give pre-suit negotiations a standard format.

A non-profit arm of the Chicago-based International Association of Defense Counsel has run pilot "pre-suit mediation" programs in Columbus, Ohio and San Antonio, Texas. The results were so good the group has had inquiries from 25 states about setting up such programs.

Insurance companies and corporations agree that "if a claimant's counsel brings them a case before a suit is filed and asks them to mediate," they will do so, and will pay three-quarters of the mediation bill, says Columbus mediator James A. Readey, director of the National Pre-Suit Mediation Program.

In the San Antonio program last year 85 to 90 percent of the 300 pre-suit mediation matters were settled; 39 companies in Columbus and 50 in San Antonio are signatories to the agreement.

"It's non-binding and they can do it in less than a day," Readey says. "The San Antonio bar won two bar association awards for its program last year."

Readey is working to set up a non-profit corporation sponsored by national bar organizations to take over the effort, because he believes that "so long as this proposition comes solely from the defense bar, it won't have the wide appeal it needs" to succeed.

Focus Groups

Using focus groups — laypeople paid to listen and discuss issues — to assess your case "can tell you when a case is ready to settle and can give you a feel for the range of the value of a case," says Mandell of Providence.

He learned the value of this approach when a case he thought was iron-clad flopped before a focus group, convincing him to start settlement negotiations.

If you have a great experience with a focus group, tape the session and show the defendant, Mandell suggests. "If they have a defense they think is insurmountable, but you have taken it before a focus group and their reaction is, 'Big deal,' show that to the insurance company," he says. "You're educating them as to how a jury will react."

Focus groups can be run inexpensively in your office or professionally at a local survey center. An average group has 12 members, and Mandell recommends keeping them single-gender. Rather than present the whole trial, Mandell recommends giving a summary of the case or the parts he is worried about. (For more information on how to plan a focus group, see, "Focus Groups are Becoming Valuable for Lawyers," November 22, 1993, 93 LWUSA 609; to search for this article on *Lawyers Weekly USA On-line*, type: mandell).

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