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Settlement Strategy, Evaluation, and Brochures Lawyer's Forum - Settlements - New Perspectives.

James L. Branton

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SETTLEMENT STRATEGY, EVALUATION, AND BROCHURES

JAMES L. BRANTON*

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I. INTRODUCTION

Certain types of cases tend to settle at certain stages of their development and progress. There are some excellent techniques available to aid in identifying the optimum time for settlement evaluation and to further the likelihood of settlement.

The purpose of this article is to determine which cases should be filed in court without preliminary negotiation; to examine why they should be promptly filed; to identify what typical issues need to be disposed of so as to ultimately put the case into a settlement posture; and to discuss the preparation and use of such devices as settlement brochures and video films to enhance settlement possibilities. The scope of this article is limited to personal injury and workers' compensation cases. Most of the principles enunciated, however, would be equally applicable to any area of dispute.

An analysis of the art of settlement, various tactics and strategies of settlement, and settlement aids such as brochures, settlement letters, and video tapes presuppose an underlying skill in the trial of a lawsuit. To begin the settlement process you must be able to evaluate the case, and to evaluate the case you must have some

* B.A., University of Texas, L.L.B., University of Texas. Partner, Branton and Mendelsohn, Inc., San Antonio, Texas.

experience in the courtroom or have access to those who do. Such an evaluation is nothing more than an estimate of the case's worth predicated on how a jury might ultimately evaluate the case. Predicting how a jury will evaluate your client, your witnesses, and the facts of your case is a skill which can only be developed through actual experience in the trial of jury cases and thorough knowledge and understanding of the facts of your case and your witnesses.

II. SETTLEMENT STRATEGY: THE NECESSITY OF FILING SUIT

There are certain well-recognized categories of cases that simply do not lend themselves to settlement without a suit being filed and pre-trial discovery being accomplished, either completely or in part. An attorney when confronted with these cases is best afforded the opportunity for settlement after he has taken the initial step of filing suit.

Unusual Cases. The vast body of experience of any adjuster will be either in auto accidents or workers' compensation claims. The majority of "unusual" cases and complex claims, therefore, are difficult if not impossible to settle with the typical adjuster. Examples of cases falling in this category include dog bite cases, sporting accidents, and bizarre or unusual accidents of any kind. As a general rule, no time should be wasted in dealing with an adjuster on such a case, especially if you size him up early in the case as having no experience with this type of claim.

Major Cases. Generally any major case involving catastrophic injuries, whether liability is clear or not, should be promptly filed. The limitation period is running and damages will not be fully determined for a long period. Since pre-judgment interest is not allowed in Texas on this type of case, wherein the damages are not liquidated, filing early expedites judgment.¹

Complex Cases. Complex cases such as products liability and medical malpractice cases are usually not going to settle without a suit being filed and substantial, if not all, pre-trial discovery and preparation completed. The defendants in these cases are not as experienced in being sued, and therefore, they do not lend them-

1. See, e.g., *McDaniel v. Tucker*, 520 S.W.2d 543, 549 (Tex. Civ. App.—Corpus Christi 1975, no writ); *Metal Structures Corp. v. Plains Textiles, Inc.*, 470 S.W.2d 93, 103 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); *Reed v. Fulton*, 384 S.W.2d 173, 179 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.).

selves to early, realistic evaluation and settlement discussion. Moreover, these defendants have other influences at work such as a concern over professional reputation or the sanctity of the company's product that cloud their judgment, at least until judgment day. Another factor contributing to the unlikelihood of early evaluation and settlement of a complex case is that generally there has been no early investigation which would have "built a file" for an adjuster to use in evaluating the case, because the event is usually unnoticed at the time it occurs.

Emotional Cases. When emotion clouds the issue, whether because of the nature of the case, e.g., medical malpractice, or because of self-help or verbal retaliation which might have been employed by the victim or his representatives against the defendant, or for some other reason, the adjuster will be closely involved and influenced by this emotion. The case, therefore, should be removed from this emotional context as quickly as possible by filing a suit, thereby putting it into the hands of an attorney.

Cases Involving Multiple Defendants. It is almost impossible to get adjusters together and have them iron out their differences when there are multiple defendants. Defense attorneys are much more capable in this respect, so time should not be wasted by a delay in filing a suit.

Suits Against Government Entities. With rare exceptions on the federal level, and almost none on the state or city level, suits should be initiated immediately so that a trial date can be reached as quickly as possible. The bureaucratic or committee system in such government entities impairs the decision-making process, and therefore, the prompt filing of a suit will hasten the time when the government entity *must* come to a decision or else relinquish its decision making authority to a jury or judge.

III. SETTLEMENT EVALUATION: THE NECESSITY OF IDENTIFYING THE PIVOTAL ISSUES

Needless to say, in all cases when there are pivotal disputed fact issues the resolution of which is bound to affect greatly the probability of winning or losing, or the amount of damages, suit should be filed early, since the development of such facts is greatly facilitated by use of the discovery procedures available only as an adjunct to pending litigation. All efforts should be spent on resolving those issues which have been identified as pivotal to the claim.

Settlement endeavors should be temporarily laid aside. Examples of pivotal issues include: whether a traffic light was or was not working properly; whether an overhead street illuminating light was out at the time of the accident thereby affecting the defendant driver's view of a pedestrian; whether an expert witness in a particular field can be secured to get the case to a jury; or whether wind was blowing when gas vapors were being released into the atmosphere in an area where workers were located, in a case in which it is highly dangerous for such vapors to be released when there is no wind to carry the vapors away.²

It is extremely unwise to communicate to the opposing side any idea of the value of the case until these pivotal issues are resolved to the general satisfaction of all the investigators, or at least until every available piece of evidence has been identified and evaluated. The resolution of such pivotal issues through discovery will enormously affect the value of the case. There is no way to adequately evaluate the case until these pivotal issues are resolved.

IV. PREPARATION OF THE SETTLEMENT BROCHURE

A. *The Written Brochure*

A settlement brochure is a composite of narrative summary together with pertinent exhibits that "tell the story" to the other side as to why the case should be settled and for how much it should be settled. It can be a persuasive tool in the settlement of a case if the favorable facts are forcefully presented. A settlement brochure should contain, as a minimum, the following:

1. A preface, setting out the conditions under which the brochure is being submitted. For example, submission should be conditioned upon the contents and the exhibits being returned to the plaintiff in the event no settlement is reached by a given date. Submission should be predicated upon no

2. Additional pivotal issues include the following:

- (a) A man is working on a roof and comes in contact with a high voltage power line, sustaining injuries. The power line installer says the building was erected after the line was installed; the building owner, however, says the building was there first.
- (b) The existence of an alternative design within the state of the art in a products liability design defect case.
- (c) The length of a rope or a cable when such an instrumentality is involved in an accident and its length affects the relative culpability of the parties.

part of the brochure being reproduced or used for any other purpose. The brochure should contain a proviso that nothing in the brochure should be construed as an admission for any purpose whatsoever by any of the parties to the lawsuit and that no part of the brochure or the exhibits would be rendered admissible in evidence in a trial if the evidence would not otherwise be admissible.³ Finally, a provision in the cover letter should state that an examination and evaluation of the material contained in the brochure constitutes an express agreement that these conditions are acceptable.

2. A summary of the liability facts. This could be very detailed, constituting several pages of narrative, in a complex case. On the other hand, it could be relatively short in an effort to stress the simplicity of the liability factors.

3. A summary of the injuries and a compilation of special damages.⁴

4. Projected future damages and losses. This should be documented and corroborated by such exhibits as an economist's report, a report from a doctor setting out expected future medical care which will be necessary for the care and treatment of the plaintiff, and other pertinent cost data.

5. A demand, setting out the method for arriving at that figure. It may be helpful to list the prospective special issues which will be submitted on the damage issues and to make an estimate as to a probable jury verdict range as to each element of damage.⁵

Optional matters which may be included are: photographs of injured victims; photographs of the scene of the accident if liability is in issue; hospital records or excerpts therefrom which are particularly descriptive of the nature and extent of the injuries; legal authorities when novel issues of law may be applicable; any official reports of the accident such as a police report, OSHA investiga-

3. A settlement brochure is considered the work product of the attorney and is not admissible at trial. *See Vincent v. Lemaire*, 370 So. 2d 190, 193 (La. 1979).

4. Special damages are liquidated damages such as medical expenses, lost earnings, and property damages.

5. These issues include the loss of earnings and earning capacity in the past and the future, physical pain and mental anguish, permanent physical impairment, and past and future medical expenses.

tion, or fire department investigation; and the Curriculum Vitae of any special doctor or expert whose testimony is critical to the case and who has extraordinarily good credentials.

Such a settlement brochure can be attractively bound, helpfully tabbed so as to separate the various items within the brochure, and even indexed. Work that goes into the preparation of a settlement brochure is excellent preparation for trial, especially as to the damages phase of the case which is often overlooked in favor of the liability features of the case.

B. *An Effective Alternative to the Written Brochure: The Video Tape Presentation.*

In a catastrophic injury case it is wise to consider the preparation of a video film of "A Day in the Life of . . . [the injured victim] . . ."⁶ A professional crew can be hired to do almost all of the planning as well as the filming or video technicians can be hired to simply carry out the detailed instructions of the attorney as to how to put the film together.⁷ Several hours of film can be expected to be used in order to have an end product of perhaps twenty minutes in length. A great deal of editing will have to be done; however, the original tape should be preserved in its original form for use in trial if the case is not settled.⁸ You can splice and assemble a settlement brochure film without altering any of the original tapes by reproducing parts on a second tape using modern editing equipment. Care should be taken to avoid too much talking, explaining, or emphasizing. There should be an equal amount of time for silent portrayal of the dramatic facts which can speak for themselves. Audio is good, and explanatory material can be

6. See Begam & Begam, *A Day in the Life of a Quadriplegic*, 14 TRIAL 25, 25-27 (March 1978). As well as being useful settlement tools, video tape presentations are also strong persuaders, as "Day in a Life" films have been ruled admissible at trial. See *Volkswagenwerk, A.G. v. Klippan*, 611 P.2d 498, 500-02 (Alaska 1980); *Munnis v. Vaughlin*, 20 ATLA L. REP. 128, 129 (1977). For an example of the effectiveness of video in settlement negotiations, see *Cyester v. Gregoris*, 15 ATLA NEWS L. 218 (1972) (brain damage; \$1,000,000 settlement after film shown to defense attorneys prior to trial).

7. See Thornton, *Expanding Video Tape Techniques in Pretrial and Trial Advocacy*, 9 THE FORUM 105, 117 (1973). See generally Kornblum, *Videotape in Civil Cases*, 24 HASTINGS L. REV. 9 (1972).

8. See *Mahar v. General Motors Corp.*, No. 14-1660 (10th Cir., July 1975), also printed in 19 ATLA NEWS L. 59-60 (1976); Begam & Begam, *A Day in the Life of A Quadriplegic*, 14 TRIAL 25, 26 (March 1978).

helpful, but do not overlook the value of silence for certain aspects of your client's injury and loss.

V. CONCLUSION

There are, of course, no ironclad rules in this artful area of settlement strategy techniques, and hopefully, the foregoing does not read like immutable laws of nature. These techniques are only guidelines, generally reflecting this author's experience. As learned in school, public policy favors settlement of disputes without trial. We should, therefore, make our best effort at settlement. Just as preparation for trial aids settlement, good preparation for settlement will aid you in trial should settlement efforts prove unsuccessful.