IMPROVING SETTLEMENT SAVVY

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In these difficult economic times, parties may be looking to reduce litigation costs – and risk – by settling cases earlier in the life of the lawsuit. While there's never a perfect crystal ball to aid in making good settlement decisions and recommendations, it's even more difficult early on when so much is uncertain. A fascinating study of 2,054 California civil cases decided between 2002 and 2005 provides a sobering report about the quality of settlement decision making[1]. The study, which also reviewed other studies in multiple jurisdictions and found consistent results, raises provocative questions about how lawyers and clients make decisions about settling versus going to trial.

Results of Study about Settlement Decision-Making

In only 15% of cases did both parties better their last settlement positions by going to trial. For example, assume the last offer from the defendant was $400,000 and the lowest demand from plaintiff $1,000,000. The jury returns with a verdict of $650,000. Setting aside costs and fees for the moment, the defendant bettered its last settlement opportunity by $350,000 and plaintiff by $250,000. Assuming monetary and non-monetary transactional costs – costs, fees, value of time related to trial and appeal – did not wipe out the benefit, both sides were better off with the trial outcome than if they had taken the last deal on the table.

Overall, plaintiffs made a decision error in 61.2% of cases at an average cost of $43,000. Defendants fared better at trial more often than plaintiffs -with decision error only 24.3% of the time - but the cost of being wrong was much greater, averaging at $1.14 million.

The study reveals a number of factors indicating when error is more frequent or costly. These suggest more savvy settlement strategies aimed at improving confidence that the last settlement proposal from the other side is the best deal possible.

[1] "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations" by Randall L. Kiser, Martin A. Asher and Blakeley B. McShane, Journal of Empirical Studies, Volume 5, Issue 3, 551-591, September 2008.

Offers of Judgment. The factor which showed the greatest impact on decision error was the use of offers of judgment. When a plaintiff or defendant made an offer of judgment, that party's decision error rate and cost went down with a corresponding increase in both for the non-offering party. When both parties made offers of judgment, there is less deviation from the "no offer" decision error rate.

Type of Case, Fee Arrangements & Insurance. Cases were categorized as contract (including real estate), employment, fraud, intentional tort, medical malpractice, personal injury, premises liability, eminent domain, product liability, and negligence (other than personal injury). The table at the end of these materials summarizes some of the researchers' findings by type of case.

The researchers observed that plaintiffs had higher decision error rates where contingency fee arrangements are common, such as product liability, premises liability and medical malpractice cases. On the defense side, decision error rates were highest in cases where insurance coverage is generally not available, such as contract or fraud. They noted an inverse relationship between plaintiff error and win rates; that is, high decision error in cases with historically low win rates such as medical malpractice and product liability. The opposite was true for defendants who demonstrated their highest error rates in cases with high win rates for plaintiffs, e.g. contract and fraud.

Who's Your Lawyer? The study tracked attorneys representing the parties by gender, firm size, years of experience, the academic and diversity rank of their law school, and whether or not the attorney was trained as a mediator. The only significant factor was the attorney-mediator. Both plaintiffs and defendants represented by an attorney with mediation training had somewhat lower decision error rates.

Type of Damages. Cases were also classified by types of damages claimed: current (injuries and damages already sustained); future (prospective losses); and punitive. The most interesting conclusion was that decision error rates were significantly affected by the presence of a punitive damages claim with defendant error increasing and plaintiff error decreasing.

We're Getting Worse! With the increasing emphasis on sophisticated risk analysis, litigants should be getting better at deciding when to hold and

when to fold. But comparison of these results to other studies suggests that parties are making increasingly worse decisions about when to go to trial rather than settle. Both frequency and cost of decision error was greater in 2004 than in 1964, despite vastly greater resources and data to evaluate.

Improving Settlement Evaluation

Consider the Bad News With the Good. Some clients send a message – either directly or indirectly – that they expect their lawyer to win the case. Realistic assessment of bad facts or risk of liability leads to doubts about whether the lawyer is any good or is aggressive enough. Attorneys should avoid falling into that trap and make sure the client is fully aware of risks as well as opportunities.

Seek Different Viewpoints. Most successful lawyers vet their case with seasoned practitioners in order to get a balanced view. When counsel seek out only like-thinking colleagues, they tend to get an overly optimistic view. It may be comforting in the short run but ultimately not helpful. In cases with a lot at stake, it may be cost effective to retain trial or jury consultants to run a mock trial or focus group or provide other expert advice on the facts, witnesses and other evidence. However, even a small investment such as hiring an attorney who typically practices on the other side of an issue to review documents or listen to a summary presentation can pay off in the long run.

Is the Principle Worth its Weight in Gold? We all know that settlement decisions are based on many factors other than pure economics. Extrinsic motivators – a sense of injustice, need for vindication, support for management decisions, fear of opening the floodgates to more claims, effects of publicity, need to send a market signal – may cause parties to sacrifice the optimal economic outcome in favor of a compelling, non-economic need.

There is nothing inherently wrong with considering factors external to the risk/costs of the particular case, so long as it is clear that pursuing them may come with a substantial price tag. That loss may be mitigated through other benefits, but it is rare that those benefits are adequately evaluated, quantified, and allocated. Counsel will have varying degrees of influence over client decisions, but at the very least, they can advise and hope their client will listen.

Expand your Horizons. The study suggests a variety of factors which may be impacting the settlement decision making process. If the company is a defendant, consider the high cost associated with making an error not to settle. Have you overlooked evidence that might turn the jury against the company? Knowing that plaintiff error is higher in contingency cases suggests focus on evaluating the interests of the opposing attorney and effect on case analysis and decision-making. While many factors may affect lower decision error rates for defendants in cases likely to have been insured – including higher settlement rates – perhaps there is an evaluative model utilized by the insurance industry that could improve decision-making. How might a punitive damages claim affect the evaluation? Defendants are more error prone in the face of a punitive damages claim - look realistically at the facts which support an award of exemplary damages.

Strategies For Obtaining More Favorable Settlements

Cultivate Dispute Resolution Skills. The one characteristic of litigators that affected the quality of settlement decision-making was whether or not the attorney had been trained as a mediator. Many attorneys approach a negotiation or mediation in full advocacy mode, present some version of their closing argument thus polarizing the opposing party, and miss an opportunity to move the case toward a reasonable settlement. Perhaps they behave this way because it's how they are trained and what they believe – rightly or wrongly – their client expects of them. But litigators go to CLEs on deposition techniques, cross-examination techniques, offering evidence, voir dire, and closing arguments. Although almost all cases will settle, attorneys generally have less training in dispute resolution advocacy, negotiation skills, and risk analysis.

The Early Bird Gets the Worm. We've all heard the inner voice saying "if only . . . " after settling a case near trial for an amount far greater than the plaintiff's original demand OR after reading the email notification that summary judgment has been granted in favor of the other party. This is not to suggest that all cases should be settled, but rather that we attempt to do a better job of utilizing resources wisely. It may be that those extrinsic factors that caused resistance to settlement early on seem much less important later – are they really worth that much money? What are the chances that your case will get better as discovery proceeds? Or are there facts or documents you will have to produce that will serve to energize the

other side? How will your witnesses hold up under the scrutiny of a deposition? Can you get the executives you need to testify to spend the time necessary to adequately prepare?

Maximizing the role of the neutral. Parties and their attorneys often miss an opportunity to get the greatest possible benefit from a mediator. Understand that the mediator's commitment is to helping the parties reach an agreement. Select a mediator with a proven track record of resolution. It may be helpful to have a mediator with knowledge of the jurisdiction, particular area of the law, and/or the attorneys involved in the case.

A good mediator will reach out to the parties in advance of the mediation and guide them through the process. Mediators often ask the parties to provide confidential statements of their positions, case history, and prior settlement discussions in advance. Go the extra step and discuss with the mediator observations about impediments to settlement, personality or other issues between the parties that might be land mines. Your mediator can help you work with an internal client who is having a hard time balancing the tradeoffs.

During the mediation, use the mediator as a sounding board, to get neutral feedback about aspects of your evidence or the case, to assess the credibility of the representative for the other party and to explore creative solutions that might even be outside the strict boundaries of the litigation.

Use Offers of Judgment Wisely. The study suggests that a party can reduce decision making error rates and costs by effectively using offers of judgment. It may be that the process of evaluating and making an offer of judgment improves a party's ability to predict the ultimate outcome at trial. The offer of judgment should be made with a clear understanding of the rules as well as the consequences, including whether the client is prepared for a judgment if the offer is accepted.

Conclusion

Given that the vast majority of cases filed do ultimately settle, it's time to improve your settlement skills. Expand your expectations of advocacy to include better settlement evaluation and negotiation techniques, invite outside counsel to provide realistic assessments and not just posturing. Place a realistic value on principle to ensure that you don't miss an opportunity to settle a case you know should be resolved early. It is also

important to educate clients about the nature of litigation and the risks and the costs of those extrinsic considerations they may value beyond a pure risk analysis.