

Successful Settlement Strategies

Because of the ever-increasing cost yet uncertain outcome of litigation, more plaintiffs, defendants and insurance carriers are interested in fully exploring and exhausting the possibility of settlement before they spend the money to prepare for and submit to the uncertainty of a trial.

This not only reflects their economic interests but their legal obligation to protect their clients, (be they Plaintiffs or Defendants) from an adverse result and excess exposure (which can lead to a potential malpractice claim) if the results are other than what counsel has led them to expect. Even if settlement is not possible, following these strategies can help insure that discovery is complete and that both sides are fully prepared to litigate all issues to be raised at trial.



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TSI: Tort Scene Investigation
Successful settlement strategies start shortly after the accident by ensuring that all of the potential evidence and information from the scene along with witnesses critical to a favorable settlement are identified.

This means securing copies of any tapes from red-light, traffic or security cameras and conducting a TSI (Tort Scene Investigation). Gathering this information to help your case will ultimately help you settle the case. It is important to investigate all witnesses, conditions and events when they are more readily available shortly after an accident.

Building Your Claims or Defenses

Even before litigation commences, gather all factual information and preliminary legal information concerning potential claims or defenses. Put all appropriate insurance carriers on notice to maximize the potential insurance coverage available for all potential Defendants (and ultimately for the

Plaintiff) and serve a Notice of Claim if warranted. If necessary, notify carriers directly of potential claims to prevent defenses to coverage. This also means obtaining from all potential parties (and having them preserve) all information, instrumentalities or documents which may become important later in discovery or at trial.

When the lawsuit is commenced, properly frame the pleadings along with Answers, affirmative defenses and counterclaims. Going beyond the boilerplate and properly tailoring and expanding your pleadings will help to facilitate settlement. Similarly, drafting discovery notices to request specific information applicable to the claims and demanding specifically appropriate Bills of Particulars for all claims and affirmative defenses is also important. Once demands have been made and responses received, it is important to review them to ensure that you have received sufficient appropriate discovery responses or seek the intervention of the Court to compel same.

When You Go to Court

It seems basic, but as the Honorable Denise Sher of the Nassau County Supreme Court reminds attorneys, "always be familiar with your case" rather than saying you are just appearing for the day.

At each stage of the litigation, including a routine Court conference, when important issues may arise and need to be discussed with the Court, it is very important to be prepared for and at least understand the discovery, factual and legal issues. She notes that it is also extremely important to be courteous and civil and if you expect to be late, to coordinate with your adversary the time you actually expect to arrive at the courthouse. This helps preserve good will and create a better atmosphere for later settle-

ment discussions.

Judge Sher also advises attorneys that she and many other judges are willing to hold a conference or have an intelligent discussion of discovery or settlement issues to try and resolve same by conference call or in person. At various stages of the case, she suggests that defense attorneys speak with the handling adjuster to clearly ascertain the monetary authority, and to make sure they have all of the information necessary so that they can effectively evaluate the claim to protect themselves, prevent adverse exposure, and protect the interests of their insured.

It is Better to Give Than to Receive

Be sure you exchange more than adequate discovery information, photos, expert reports and even law, especially if they are favorable to you. This may help not only to foster settlement discussions, but insure that you can introduce these documents or claims (or defenses) at the appropriate time in Court.

You should not assume that your adversaries have the same information available, so provide it to them and their principals. Give it to them earlier rather than later so they are aware of it as they evaluate the case, decide potential exposure and reserve settlement authority.

If you are aware of facts or issues they may attempt to use to counter your claims, and you can overcome them, it is usually more productive to educate them earlier especially if it will help you encourage a settlement or prevail at trial. This can include favorable facts or notice or eyewitness information or evidence proving liability, disability or damages or demonstrating aggravation of a prior injury.

Justify the Numbers

As you attempt to encourage settlement with your adversary, with the Court or with the insurance car-

SETTLEMENT ...

Continued From Page 7

rier, it is important to justify your evaluation range.

Be sure you carefully include all of the possible damages or disability, the present condition of the client, along with other factors which may increase or diminish the potential damages. Prior or other jury verdicts may also be important, as well as the potential insurance coverage and future medical needs of the client.

Of course liability and other factors need to be considered in arriving at a

"settlement range." You must use the facts and prior cases and the numbers to justify your settlement demands and offers rather than merely tossing out numbers. At some point in litigation, the Court may also be willing to provide an opinion of potential value of the case.

ADR Means All Disputes Resolved

For the reasons outlined above many plaintiffs, defendants and insurance carriers are embracing the use of ADR because it means "all disputes resolved." Many Judges are also interested in and willing to help settle cases. If this resource is not available to you, many litigants are using out-

side mediation or arbitration providers including the Nassau County Bar Association.

Under certain circumstances, binding arbitration is agreed to by the parties, sometimes with high/low parameters. ADR resolves the dispute, provides some certainty to the parties, in many cases provides a minimum recovery, and limits the risk or exposure of the defendant or insurance carrier. In short, this is a win-win resolution all parties can live with and protects them from a worst case scenario. ADR also reduces the expense of a trial for both sides.

In summary, as you litigate your tort cases you can use these ideas to

increase the possibility of settlement. If despite your best efforts the case cannot settle, these strategies will also help you to maximize your success at trial whether you are the plaintiff, defendant or insurance carrier.

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