SETTLEMENTS and ALTERNATE SOLUTIONS

Capt Myron Papadakis ©

RULES:

1. Settlements are the best way of doing business when a good settlement is better than a risky trial.
2. All trials in front of a jury entail some risk.
3. The client's welfare is the most important factor.

RULES OF NEGOTIATION IN MOST CASES:

1. As plaintiff always initiates a demand for full value of possible damages. If it is an F.T.C.A. case, the damages must be included on the original administrative form.
2. Remember that a defense return offer is usually not their top dollar offer.
3. Remember that an offer made is usually never withdrawn, unless the situations change dramatically.
4. Defense attorneys evaluate many aspects to determine "fair settlement value"
    a. The probability of a plaintiff verdict.
    b. The damage history of the local jurisdiction.
    c. The verdict history of the plaintiff attorney.
    d. The verdict history of the plaintiff attorney in aviation.
    e. The provable damages.
    f. Punitive aspects
    g. The policy holders wishes (manufacturer)
    h. The cost of defending.

In following the guidelines of doing business efficiently in Aviation cases I always approach the Insurer before filing. (Time permitting)

1. I will have investigated the case thoroughly, and I will know with a degree of certainty what I will and can prove if I have to.
2. I will know who the defendant is.

Remember that the Law Firms that represent the Insurer or the insurer themselves are specialists in Aviation and Aviation Law. They have staffed themselves with attorney's who are pilots and engineers, and they have access to the very best technical help from the manufacturer and on staff. Unlike local counsel these people do not need time to evaluate your proposal through discovery and legal means. If your settlement proposal tells them your theory and your status of preparedness they will not need to " run their billing meter " to determine whether you are correct. The people they have are fully versed in Air Law and Aviation Accidents. They do nothing else except handle about 200 aviation claims apiece for their Insurance Company.

They know from the outset that a full-blown defense of a case will cost the insurer at least $200,000 to $500,000 for the simple ones. I have been told that a

certain F-16 case cost $ 2,000,000 to defend.

My first settlement attempt will go to the insurer after a thorough investigation. It will include the following elements:

PART I NARRATIVE.

In this I describe briefly the circumstances that lead up to the accident. I usually quote from the accident report for a portion of this material.

PART II CAUSE

In this portion I name the defendant, and the product or person that caused the accident. With great specificity, I attempt to convey what about the product was defective and how it caused or contributed to the accident. When it is a person I talk about how the person breached a non delegable duty negligently causing the mishap.

Part III INVESTIGATION STATUS

This section deals with most aspects of my investigation and includes witness statements and disclosure of some experts and their opinions. I always chose well-known and respected experts or feared experts that the defense has knowledge of their capabilities and that the insurer has used or been up against before. I usually offer to open my file as to those portions that would normally be discoverable anyway. I send pertinent photos and offer all others if requested.

In a separate portion I offer my opinions, since I have some expertise in aviation and engineering. I am clear that I have separated my beliefs from those of the expert witnesses that I have disclosed. I disclose knowledge of similar accidents, notice of defect, and aspects that may support egregious conduct claims.

PART IV THE FORUM AND THE LAW

I usually state that I have not yet determined the forum that we intend to bring the lawsuit in. I then outline the laws of several possible jurisdictions. I include the damages allowed by each such jurisdiction (to include such items ,as tests for product defectiveness, punitive damage tests and damages to include items such as survival statutes ,the intangibles and hedonistic value of life considerations.)

Being vague here has a few advantages:

1. He cannot mentally choose a particular local defense attorney.
2. He has to do more research. (All of these defense Insurance firms monitor jury awards by local courtroom. They also are familiar with all awards and their settlements with plaintiffs' attorneys, by name in aviation cases. They tend to assume that an attorney who has no aviation trial experience can be discounted.)

V. **THE CLAIMANTS and DAMAGE**

In this section, I include the family history to include dates of marriage, children, ages. I include the decedent's earnings and expectancies. I may even include

an economist's predictions. As enclosures, I submit family photos, a portrait of the deceased,W-2 forms for 5 years, letters of commendation ,promotions, citations and possibly a video " a day in the life of the deprived family " I include those documents that the defense will usually ask for such as marriage license, death certificate, hospital and funeral bills, birth certificates of children, adoption papers (where applicable) and statements of friends that might be character witnesses. In reality most insurers have some idea of this through their own investigations and handling myriads of similar damage cases. Often I include an economist's work up with inclusion of ten years tax records and other economic indicators.

VI THE DEMAND

If the case involves an insurance policy and the demand exceeds policy limits always couch the settlement demand to effectively "**satirize**" the insurer. The failure to settle may give way to bad faith claims and policy limits may be waived and full damages awarded.

In the usual case where there is sufficient insurance ask for full damage with a response in thirty days or less. Do not discourage a counter offer. Remind the insurer of Hedonistic value of life considerations and what might occur if the egregious aspects of the case are proven.

A short paragraph on the cost of money and efficiently distributing money is not inappropriate.

VII. FOLLOW ON SETTLEMENT PROPOSALS

Second stage and third stage settlement conferences are different as the evidence unfolds. In later stages the forum is decided, the applicable law is somewhat more settled. The venue is established and the evidence has been reduced to admissible format. The cost has also escalated. The plaintiff's lawyer has escalated the contingent contract after filing and has gone to considerable expense in time and out of pocket preparation expenses. When cases can not seem to be settled using ordinary means two alternative solutions that may exist are:

Trial on Damages Alone and Mediation:

Sometimes an insurer will be amenable to trying a case on damages alone. In this stipulation the insurer simply says that if you drop punitive claims we will admit liability. We will simply try the damage issues. Sometimes this can be accomplished with a side agreement with the insurer.

Suppose the insurer has offered one million dollars, and the plaintiff's demand is for two million dollars and there is an impasse with severe risks for both sides of verdict damages of in excess of 2 million or a take nothing verdict. A side settlement can be reached to try the damages issue only with the settlement that the plaintiff will take no more than two or the defendant will pay no less than one without regard to the verdict. If the verdict is between one and two that is what will change hands. The point

is that all variety of negotiations can be entered into without regard to established methodology. The variations of remedy are as great as the ingenuity of the negotiators. The inertia of history often prevents usage of newer settlement arrangements because of the untried and unknown outcome of some provisions. The area of structuring settlements provides many such variants.

The last method is to ask for alternate solution resolution. This is in the form of court sanctioned mediation. Each forum again has its approved procedures to follow. Some courts may even require some form of mediation process be attempted before the case can be tried in a court room. This alternate solution resolution usually takes the following format.

A mediator is chosen by agreement or in some instances the court orders one. The mediator is a trained professional (often a former or retired judge). The location is usually a neutral conference room. Rules of procedure are not followed and hearsay and opinions are allowed to flow. Usually the plaintiff may bring his client to at least a portion of the proceeding. Often it is the rule of the mediation that the insurer be present with authority to settle the case for as much as full amount. (It is never required that the defendant offer the amount, only that he could if he wanted to.)

Exhibits, evidence and expert opinion are allowed, although often it is the attorney expressing the opinions rather than a live witness. It is unusual to have any semblance of cross examination although the mediator often questions vigorously. Just as in trial the plaintiff goes first and the defendant follows. The closing is usually a presentation of damages and mitigating circumstances.

The mediator then expresses some of his concerns for each participant’s case, trying all the while to approach some middle ground solution. If a settlement can not be accomplished the evidence and matters discussed during mediation are not admissible in a court room.

One of the very beneficial aspects to the plaintiff of such a procedure is that he makes his presentation directly to the mediator in presence of the insurer with authority. This may be the first time he has heard the plaintiff's story as told by the plaintiff. As you realize all theories, get "spin” as they are reiterated.

A second advantage is the presence of the client at the procedure. For the first time she will hear an impartial observer (the mediator) criticize and harshly critique the shortcomings in plaintiff's case. I have been able to settle cases after such mediation because of the judge placing lower dollar value on a case.

I highly recommend the alternate solution method, and I would urge that a plaintiff prepare almost as well for mediation as trial. Remember that this is the first time the “MONEY MAN “has had an opportunity to evaluate your presentation.