

Tips from the Bench Case Evaluation for Settlement

By Judge Jerome LaBarre, Multnomah County Circuit Court.

The chorus of a great song says it all: "You've got to know when to hold 'em - know when to fold 'em - know when to walk away - know when to run...."^{*}

So it is with making important decisions about cases in litigation. At every stage the case needs to be sized up and pivotal decisions made. The big one is: "Do we settle now and for how much?"



But first evaluation must occur. Since the late 1990s, I have had the best view in my courtroom looking at cases that are winners and losers. Before that, for many years I had the more limited view from counsel table. Out of all of this involvement in cases, I have created my own personal list of the sequence of steps I believe are best to evaluate a tort case. Sometimes the evaluation is right at the front end. Sometimes it is on the eve of trial. These are the first questions I ask myself:

1. How Serious is the Injury and what are the Provable Damages?

At first it seemed counterintuitive to start with damages. After all, liability is the big emphasis in law school. And most of the early work on a case in litigation focuses on the whether or not you can prove liability. But if a plaintiff's attorney has a case with big damages then frequently even a weak liability case can have significant value. Again and again in trial I see attorneys who forget that it is the amount of damages that the jury must enter on the verdict form that really decides if it is a win or a loss. Too often the damages proof is the poor cousin of the trial presentation.

2. Who is the Plaintiff?

Two of the great moments of truth in a jury trial are: 1) when the plaintiff and defendant are introduced to the venire along with their attorneys at the start of jury selection; and 2) when the plaintiff gets on the witness stand and tells the jury about herself. The jury is always watching very carefully at these times. And they should. After all, the plaintiff's side of the case is trying to convince

12 citizens from our community of the righteousness of the cause and sell them on awarding a large amount of damages. It is always surprising to me how intimate this process becomes. If the plaintiff is deserving and sincere, that comes across and is powerful. If it's the opposite, then the defendant has a serious advantage.

3. Who is the Defendant?

Drama takes place inside of courtrooms. True, the jury is given an instruction of law not to let bias, sympathy or prejudice enter into their deliberations and verdict. Still, we all have human emotions, just as it matters whether or not the plaintiff is sympathetic. It also matters how appealing or unappealing is the defendant. I have seen this translate onto the verdict form in significant ways.

4. Where is the Liability?

Obviously liability matters. This is the field on which most of the action in litigation plays out. Even if all of the other factors are strongly present there still must be a case that can survive summary judgment and a motion for a directed verdict. By all means a plaintiff's lawyer should drill down deeply on liability. But also make sure that the other components of the case are in place when you are evaluating winners and losers.

Oh yes. The chorus of the song also ends: "...You never count your money when you're sitting at the table. There'll be time enough for countin' when the dealin's done."

^{*} From "The Gambler" written by Don Schlitz.

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By Shawn Lillegren, Cosgrave Vergeer Kester and Court Liaison Committee member.

Presiding Judge's Report and Courthouse Update

Judge Kantor appeared for Presiding Judge Maurer.

Budget

The budget for the next biennium is extremely uncertain. Presently, court staff is required to handle more work than in the past. Judicial assistant time is increasingly devoted to out-of-office needs. Calls to judicial assistants are frequently not returned for a day or two. Future cuts in the budget will most certainly require more layoffs of referees.

Complex Civil Cases

The process for transferring complex civil cases to other jurisdictions is being worked on. The Multnomah County Courthouse will likely continue to handle the complex cases without any changes; in effect, our court will be helping out other counties more frequently.

One of the criteria requires presiding judges from the counties in which the case was filed and transferred to agree that the transfer is appropriate.

New East County Courthouse

Groundbreaking was held for on the new east county courthouse. Expected completion date is March, 2012.

Expedited Jury Trial System

The court has not received a single case for the expedited jury trial system. The program was created due to the concern about the vanishing jury trial. Judge Kantor commented that the bench listened and acted but so far there has been no response.

Attorney Feedback to the Bench

MBA members are asked to provide constructive feedback to the court.

It is difficult for lawyers to provide feedback. Nobody knows for sure whether a comment would result in the "kiss of death." If the MBA

received individual feedback, the MBA could consolidate the individual comments into more general comments for the bench.

Judge Kantor invited the committee to explore the idea of consolidated comments through the MBA. He serves on committees regarding judicial complaints and the bench truly appreciates constructive criticism.

Most judicial complaints are about demeanor and courtroom presentation - not communicating effectively or appearing to not allow a litigant his or her day in court.

Settlement Conferences

Judge Kantor explained that attorneys are free to call the judge's staff directly. The court does not have the resources to provide a formal procedure. The court would welcome financial resources to implement a centralized administrative system for settlement conferences. Some judges, including Judge Kantor, generally do not schedule civil settlement conferences due to the heavy docket. Looking forward, the anticipated loss of additional referees will affect the court's ability to provide available judges for settlement conferences - at least to the extent we did in the past.

Member Questions for the Court

The MBA has received the following questions.

- (1) Has the court considered summary judgments being heard by the court if filed before the case goes into mandatory arbitration? Would speed up (potentially) resolution of the case.
- (2) Has anyone challenged the new fee schedule on grounds that it chills plaintiff's constitutional access to justice? What's the status, if so?
- (3) Assuming otherwise relevant, are deposition transcripts from prior cases involving similar witnesses/facts/claims discoverable?
- (4) Are transcripts in the physical custody or lawyers in the control of the client for production purposes?

(5) Under what circumstances will the court stay a civil case if there is a criminal case involving one or more of the parties pending?

Judge Kantor responded as follows:

- (1) The court is looking at how civil cases are being initially processed to identify different tracks. Judge Wilson and Judge Kantor are looking at the possibility of pre-trial conferences. The pre-trial conference would occur four months after a complaint is filed and the court would seek to identify, among other things, interest in the expedited jury trial program or an early motion for summary judgment.
- (2) The new fee schedule has not been challenged by way of a lawsuit but it has been subject to many complaints.
- (3) Since this is a substantive rather than an administrative question, no comment was made.
- (4) Same as number three.
- (5) Not sure - depends upon the circumstances.

Judge Kantor will forward the questions to the Motions Panel for review. It meets each month.

Martha Strawn Morris: Gateway Center for Domestic Violence Services

Morris is the Director of the Gateway Center. It is a collaborative program with Multnomah County and the City of Portland. They specialize in "intimate partner" domestic violence. They are navigators, not an overnight shelter, who direct people to social service providers. They operate Monday through Friday from 9:00 am to 4:00 pm on a drop-in basis. Their location is publically known and located on the MAX line, just one stop east of the Gateway Transit Center. The program is quite new, having opened in September.

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