*Advising Clients on the Value of a Case*

# Let's *Not* Make a Deal

By Susan M. Hammer

Gettyimages

The settlement discussions concluded with plaintiff demanding $1.8 million, the defendant offering $1 million, and neither side willing to budge. The case went to trial, ending with a $1.4 million verdict and each side improving their position. According to a recent study published in the Journal of Empirical Legal Studies,[1] this was a relatively rare event.

In just 15 percent of all cases, both sides better their position at trial – that is, the plaintiff is awarded more than the defendant offered and the defendant paid less than the plaintiff demanded. In 85 percent of all cases that went to trial, one or both parties were worse off by rejecting the last settlement proposal.

This fascinating study included 2,054 California civil cases decided between 2002 and 2005. The purpose was to determine whether, and under what circumstances, the parties did better at trial than they could have with settlement. In 61 percent of all cases, plaintiffs did worse. On average, their decision error cost $43,000. The frequency of defendants' decision error rate was lower (24 percent), but the magnitude of error was greater. On average, getting it wrong cost defendants $1.1 million. These figures include awarded costs and attorneys fees.

Certain types of cases had higher settlement error rates. The researchers found that plaintiffs had higher decision error rates where contingency fee arrangements are common, such as medical malpractice cases (81 percent) and personal injury cases (53 percent). In contrast, plaintiffs' decision error rate in contract cases was 41 percent. On the defense side, decision error rates were highest in cases where insurance coverage is generally not available; for example, 44 percent in contract cases and 40 percent in fraud cases. Lower decision error rates were associated with cases where insurers were more likely to represent the defendant, such as premises liability (17.5 percent) and personal injury (26.3 percent).

Here's the kicker. The authors of this study have surveyed trial outcomes for the past 40 years. Even with availability of jury verdict information, the frequency of settlement (95 percent plus) and the attention given to risk analysis, decision error rates were *more* frequent in 2004 than in1964. Of course, this does not mean that our profession is getting it wrong in the 95 percent-plus cases that do settle. We simply have no basis for comparison in those cases.

Advising clients on the value of a case — when to hold 'em and when to fold 'em — is something lawyers do well every day. The study provides us with the opportunity to reflect on the reasons why cases do not settle and the costs and benefits associated with those decisions. Here are a few observations about how we might do better.

## The Price to Pay

In the real world, settlement decisions are based on many factors other than economic efficiency. There are extrinsic factors that cause parties to sacrifice the optimal economic outcome in favor of a compelling, non-economic need. A party may put a premium on having his or her day in court, setting a precedent, sending a market signal, punishing or needing to "bet the company."

There is nothing inherently wrong with considering extrinsic factors so long as it is clear that pursuing them may come with a substantial price tag. Attorneys may have varying degrees of influence over client decisions, but at the very least, they can advise and hope their client will listen. I'd also suggest asking your mediator to help you work with a client who is having a hard time balancing the tradeoffs.

## Manage Your Clients' Expectations

Lawyers need to work from day one on managing their clients' expectations. When plaintiff's counsel writes a demand letter that includes unrealistic theories and exaggerated numbers, and defense counsel responds, offended at the suggestion of liability and describing the claims as frivolous, there's a risk the client might take the lawyer's position literally. The client may not understand that aggressive advocacy is one thing and case evaluation another. When each side then writes a letter to the mediator giving an unrealistic settlement range, the client might come to mediation unwilling to consider a number outside it.

The plaintiff may first realize at mediation that their chance of getting a

## Decision Errors and Cost of Error

| | Percentage of Error | Mean Cost of Error |
|---|---|---|
| **Overall** | | |
| PL Error | 61.2% | $43,100 |
| DEF Error | 24.3% | $1,140,000 |
| **Eminent Domain** | | |
| PL Error | 41.7% | $72,100 |
| DEF Error | 33.3% | $523,600 |
| **Contract** | | |
| PL Error | 44.3% | $144,900 |
| DEF Error | 44.3% | $1,528,700 |
| **Fraud** | | |
| PL Error | 47.4% | $134,400 |
| DEF Error | 40.4% | $4,086,200 |
| **Personal Injury** | | |
| PL Error | 53.2% | $32,200 |
| DEF Error | 26.3% | $622,000 |
| **Employment** | | |
| PL Error | 51.1% | $64,800 |
| DEF Error | 32.4% | $1,417,700 |
| **Negligence (non-PI)** | | |
| PL Error | 66% | $82,100 |
| DEF Error | 19.1% | $1,597,000 |
| **Premises liability** | | |
| PL Error | 68.7% | $46,100 |
| DEF Error | 17.5% | $2,378,000 |
| **Intentional tort** | | |
| PL Error | 69.3% | $43,400 |
| DEF Error | 21.2% | $859,400 |
| **Products Liability** | | |
| PL Error | 71.7% | $72,600 |
| DEF Error | 17.0% | $1,327,300 |
| **Medical Malpractice** | | |
| PL Error | 80.8% | $15,200 |
| DEF Error | 15.1% | $986,200 |

Journal of Empirical Studies, Volume 5, Issue 3, 551-591,September 2008 titled "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. It can be found at http://www3.interscience.wiley.com/cgi-bin/fulltext/121400491/PDFSTART

$1million verdict is about 5 percent, and a defendant may hear, for the first time, that their chance of getting out on summary judgment is about 5 percent. The client may feel betrayed by the attorney ("whose side are you on?") and the lawyer may feel their client is being irrational. Attorneys can save their client relationships and have an easier time managing expectations if they use caution from the beginning, by talking about evidence that may surface during discovery or mediation that could change the risk assessment and by explaining the difference between an initial advocacy letter and a settlement analysis.

### Vet Your Case to Someone Who has a Different Point of View

The 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.

### Give the Same Attention to Dispute Resolution Advocacy as to Trial Advocacy

Litigators go to CLE programs 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. Some come to mediation and repeatedly present some version of their closing arguments. The best dispute resolution advocates come to mediation ready to learn something new and to thoughtfully analyze cost, risk, opportunity and non-economic factors. They are a counselor. Their clients are prepared to see their lawyers play a different role than they would at trial, and they are ready to appreciate it.

In 2014, this study will likely be done again. Will it show that, as a profession, we are helping our clients get better at knowing when and how we should "make a deal?" Time will tell. In the meantime, how can we counsel our clients to make the best decision possible?

*Susan Hammer is a Portland-based mediator, focusing on business, employment, professional liability and injury cases. She has mediated for over 20 years. She is a distinguished fellow in the International Academy of Mediators and is listed in Oregon Super Lawyers and The Best Lawyers in America for Alternative Dispute Resolution.*

#### Endnote

1. Journal of Empirical Studies, Volume 5, Issue 3, 551-591, September 2008, titled "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. It can be found at *www3.interscience.wiley.com/cgi-bin/fulltext/121400491/pdfstart.*

5:07 pm
MON, FEB 9

**rocket19:** hey, dad. i need help.

**BigJohn446:** Is everything okay?

**rocket19:** no. trouble. need a lawyer.

**BigJohn446:** Lawyer? What's going on?

**rocket19:** landlord trouble. no time. plz help me.

**BigJohn446:** You know they cut my hours. Money's tight.

**rocket19:** it's tight for me too. plz dad. i don't know what else to do.

**BigJohn446:** You'll have to handle this on your own.

**rocket19:** what am i gonna do????

**BigJohn446:** Apply for a Modest Means attorney 800-452-7636

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