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MEDIATION FROM A PLAINTIFF'S PERSPECTIVE

INTRODUCTION

This paper is divided into four sections. The first deals with the psychology of the participants. In the second I discuss my negotiating philosophy. The third involves the general civil litigation process, including the structural attributes that favor each side when negotiating. The fourth section offers specific practical "dos and don'ts." This handout is designed for use in conjunction with a lecture. Some of the points are well developed within the written material, while others are no more than ideas that may either be self-evident, or need some elaboration during the lecture. It is presented in the general casualty context, with the plaintiff represented by counsel, claiming against one or more insured defendants. The material herein is unapologetically offered from the perspective of a plaintiff's lawyer. If a different viewpoint is desired, then someone else will have to speak for it.[1]

I. PSYCHOLOGY

1. People negotiate for two primary reasons. The first reason is to gain the satisfaction of a presently unsatisfied need. The second reason is fear of losing a presently satisfied need. Regardless of which is your motivator, the result sought is always the same, each party is seeking

[1] All quotes in this handout are from seminar material authored by Richard G. Halpern, published by Professional Education Systems, Inc., a.k.a., PESI. The handout is titled "Plaintiff's Personal Injury Negotiation Strategies," copyright 1988. The Halpern Group is a plaintiff's consulting group, and can currently be reached at 1-800-542-1631. The quoted material is now more than fifteen years old and is primarily geared towards non-mediated, face-to-face negotiations, however, it remains timely when discussing psychology.

to fulfill their objective. Halpern, pages 1-2.

2. The plaintiff seeks to gain financial compensation for a loss that has already been incurred. The defendant carrier's motivation is the possible future loss of a present status. Specifically, the defendant carrier now begins with a certain financial position. The litigation may reduce that present financial position; hence, the defendant carrier is negotiating to ameliorate its risk exposure, thereby protecting its current position. We can see that the negotiation process always comes down to the present satisfaction of the parties' needs. Ibid., page 3.

3. People do things for their reasons - not yours. Earnestly try to understand and appreciate the opponent's perspective. Insurance companies have all the money. Your job is to motivate them to give you and your client some of it. Before launching into a diatribe about why you think they should settle, reflect upon the primary reasons why are they even considering bargaining. Listen carefully as the negotiations progress. What are the key features of the case that appear to concern them? Is there anything that is going unsaid that should be worrying them?

4. There are some truisms of human behavior that operate in all negotiations. The first is that **people who are about to receive money are risk-averse, meaning they are reluctant to gamble. People who are about to pay money are risk-accepting, meaning they are more willing to gamble.**

5. Let's explore this idea in some depth. The following nicely illustrates the psychological differences between the plaintiff and defense perspectives.

If I were to say to you I would like you to take a quarter out of your pocket [bear in mind

it is your quarter and your pocket], and I would like you to flip that quarter in the air and call whether it would be heads or tails while in the air, and I then told you that this was the wager. Assume for the moment that you are confident that I could financially back up this wager. Now I say to you that, if you call the coin flip correctly, I will pay you five million in cash in 24 hours, however if you call it incorrectly, then you must pay me one tenth of that sum, or five hundred thousand dollars cash within 24 hours. Would you accept the offer? Think about my offer for a moment. You know that this is an even money wager. It is your quarter, you are flipping, and you are calling the toss. The odds of a head or a tail are exactly 50-50; however I have come along and now offered you ten to one payment on the 50-50 bet. Would you take the bet? Richard G. Halpern says in his polling of people when presented with this hypothetical bet, less than 1% of the people polled would take the bet. The reason they decline the offered bet has nothing to do with whether or not it is a fair bet, because it is certainly an excellent wager. The primary reason 99% of the people say no to this excellent offer is that there is a 50% probability that within 24 hours that they are going to be $500,000 poorer, and the vast majority of individuals simply cannot afford a loss of that magnitude. They therefore do not accept the offer, or take the bet.

Now, let's now change the bet slightly. Everything I said previously would still be true, except that now I am saying that we will sit here all day, and you will flip your quarter one thousand consecutive times. We will keep score, the same ten to one payment ratio per coin flip still applies, and we will settle up at the completion of the thousandth flip. Now would you take the bet? You quickly take out your calculator and start making projections. You realize that if you win ninety-one times out of the thousand, I owe you $455,000,000. But out of the thousand

tosses, if you lost nine hundred nine times, you will owe me $454,500,000. Therefore, by winning ninety-one out of the thousand tosses of the coin, you will be owed $500,000 plus another $5,500,000 for each winning flip above the ninety-first. Therefore, based on the law of large numbers or averages, even though neither of us could ever afford this bet, it is almost a lock guarantee that you would accept my second offer. Remember that the only change between the two offers is that we have increased the number of coin flips from one, to one thousand. You will accept the second offer because now the probability of you having to part with any money is in the range of trillions to one.

This example can be compared to the positions of the adversaries in tort negotiations. The one flip example represents the typical plaintiff's position. This case, this trial, this negotiation, is the only shot the plaintiff is going to receive in order to be compensated. The thousand flips are analogous to the insurance company's position. They can afford to lose this one, or the next dozen, they will make it up down the line. The insurance company is in a position of basing much of what they do on statistics. It is my judgment that the plaintiff automatically starts the negotiation at a disadvantage.

6. Given the above insights into human nature, it is important that the plaintiff's counsel, and his or her client, get into a proper mind set. When you cut through the rhetoric, most plaintiffs' counsel wonder how much of the defendant carrier's money they are going to get. Yes, I know it is only natural to wonder what the final outcome might be. The problem with this is it fosters a weakened mind-set. It is a perspective that both has, and creates, its own emotional inertia. It is a mind set with fear and vulnerability at its core. These unspoken feelings and resulting attitudes compromise your ability to effectively negotiate.

7. How does one avoid this kind of negative thinking? By changing the question(s). **The focal point of the negotiation should not be the defendant carrier's money, and how much they might be willing to pay your client. Instead, the focus should be the plaintiff's release. The proper question therefore is "How much is the insurance company willing to bid in exchange for a release from your client?"** When going into a negotiation, don't be worrying about how much of the insurance company's money you are going to get. Know that either you are going to get X amount in settlement or you are going to try the case. The mind-set therefore is one that could best be described as "Release for sale, what am I bid?" Ibid., page 15.

Another way to frame this process is to think of the settlement amount the carrier offers as one bid within the context of a bidding war. The amount the carrier offers, or bids, always is done within the backdrop of a possible future jury verdict. Think of the future jury verdict as a sealed bid, a bid that has yet to be written by the jury foreperson and opened in court. The present threat of what this future verdict will be is the primary determinant of the settlement offer the insurance company makes you today. Their current offer is their present bid.

8. First off, remember that the only purchaser of a release is the insurance company. They are the only ones who want it. The value of that release is directly proportional to their potential loss in a later trial. Therefore, if they don't really believe that a trial will ensue, the present value of the release goes down. If they are convinced that this matter will be litigated, and it will be well prepared and tried, then the value of that release goes up. Ibid., page 18

9. Attitude is everything. If you are confident, it shows. If you are fearful, it shows. Display confidence, control, serenity, patience and interest. Ibid., page 33. To draw upon a boxing metaphor, "Don't look for a place to fall when stepping into the ring." Confidence is the

product of thorough preparation and careful analysis. Confidence is not cockiness. It is an effect, not a cause.

10. The next two comments could probably be listed in the "Clinical" section, however, I preferred it up front, within the domain of psychology.

You have many choices in how you react to the other side's arguments. These include an inert silence, a more active, listening, questioning, and of course affirmatively stating your case strengths. Consider listening very attentively. I call this aggressive listening. Ibid., page 114.

In non-mediated, old-fashioned face to face negotiations, silence is still the strongest tool available to you. Silence makes your adversary uneasy. They will feel a compulsion to speak. When the two of you are disagreeing, generally neither of you are really listening to the other. Suppose you simply attentively listen and do not verbally respond. Maintain eye contact, but don't nod or speak. Your opponent is expecting a response, any response! When one isn't forth coming, their natural reaction is to elaborate. Why? Because few people can stand to be in silence. In the face of your silence, the adversary will likely continue telling you all of the areas in which he or she thinks you have problems. This only helps your situation. First, apart from whether or not you really do have any problems, your adversary will detail them *ad nauseam*. This often provides you with another viewpoint or insight into your own case; something you may have overlooked, or not taken as seriously as you should have. Bear in mind that you cannot embarrass yourself by being both silent and listening attentively. This approach reduces the spread of hoof and mouth disease. Intently listening usually impresses the other side that you are genuinely interested and concerned. Ibid., pages 115-116. Silence is truly amazing. Don't take my word for it. Try it. Advantage to the silent one.

11. Another alternative is rather than responding with your pat arguments, which will usually be rejected out of hand, ask yourself if you can make the same points by asking carefully crafted questions. Ask "I wonder if . . . ?" and "Is it possible that . . . ?" or "Have you considered . . . ?" Before the negotiation, draft a list of specific questions organized around the key topics you want to focus on.

12. Negotiate on your terms. Always be pleasant and professional. Try and be the kind of person your opponent can concurrently like and respect; while sensing at a deeper level that the polite lawyer who is confidently opposing them has an itchy trigger finger. This means not just a willingness to go to court, but a real desire to go to court. Willingness and desire are not the same thing. In the words of Clint Eastwood in the movie *Dirty Harry*, "You've got to ask yourself one question 'Do I feel lucky?' . . ." Above all don't say anything you can't and won't back up. To me this is best communicated from a lawyer who loves trying cases and the excitement of the courtroom.

II. PHILOSOPHY

1. Times are changing. Twenty years ago there was virtually no alternative dispute resolution. Now it is common, and often court ordered. In the olde days, negotiating on your own required different skills because most of the negotiating was done directly with your opponent, without the assistance of a third party. Now there is a highly trained professional assisting all sides. These professionals often achieve settlement rates of 85% and more.

2. The private practice of law is a business. This means you must finance your inventory of cases, with all the attendant pre and post trial appeal costs. Remember that Oregon doesn't have prejudgment interest, and while generally a favorable 9% on appeals, is no more than 5% on

medical negligence claims. A threshold capacity question is "Can I feed my family, pay my bills and still fully bankroll all of the out-of-pocket costs necessary to both prepare and try the case through a lengthy appeal?"

It is the harsh economic reality that serious litigation is not cheap. My view is, if you want a million-dollar verdict, you have to try a million-dollar case. So much for the romanticism of law school. The market is very Darwinian, with contingency fees guaranteeing that if you don't win, then you don't get paid, and if you don't get paid, then you don't eat.

3. I submit that when you settle for amounts that do not truly represent the market value of the claim, not only are you doing your client a disservice, but it is the most expensive money you will ever touch. When I say market value here, I am saying the reasonable settlement value factoring in all the attendant transactional costs, including the attorneys' fees and expenses of litigation. The aspect that is not sufficiently considered is the defendant's composite or total exposure. While this starts with the amount of money they will have to ultimately pay in order to obtain a release or satisfaction, there are often other nonfiscal costs, including the attendant adverse publicity that flows from resolution of disputes in the public arena. Think about it, that's the reason defendants always want every settlement confidential or sealed. Risk managers and policy directors for businesses and institutions are ever mindful of these components to a dispute.

With every claim, you are acquiring a reputation as a negotiator. This happens quickly, and without your permission. Your reputation, with its many facets, soon becomes a tangible reality.

4. Demonizing the defendant or the insurance company makes no sense. They have all the money. Frame the negotiation process so the opponent is viewed as a potential ally, with

your job being to motivate and assist the carrier to pay your client full market value. The proper question is how? Start by documenting every aspect of your claim. Write soon and often to the carrier. Setting the reserves high and early helps them to help you. This makes it a shorter step for them to later write you a large check.

5. Be respectful of your opponent and your shared profession. The byproduct of this attitude, with its attendant conduct, is at the heart of your evolving professional reputation.

6. When it comes to settlement, it seems to me that every plaintiff's lawyer has just a little different philosophy. With differences and some overlap acknowledged, they appear to fall into two camps. One camp is humanistic and client-centered, while the other focuses on pure economics. Which camp a particular attorney subscribes to foreshadows a host of beliefs with predictable consequences. These include how the lawyer views the role of settlement within the civil litigation process continuum, what they view their duty to their client to be, and ultimately what their proper role as a lawyer and advocate is within that entire process.

7. It's my opinion that with the declining number of trials, and thus the dearth of experienced younger plaintiffs' lawyers coming up through the ranks, that the skills of the high-end mediators have overtaken the skills of most of the plaintiffs' bar. This means most plaintiffs' lawyers can get more money for their clients by mediating rather than going to court. Meanwhile, the few cases that do get tried are almost always defended by the same high profile defense firms, thereby maintaining and enhancing their trial skills. The converging vectors of an increasingly skilled pool of mediators, an older plaintiffs' bar going to seed, younger plaintiffs' lawyers with little or no serious civil trial experience, and, finally, a small number of very skilled defense attorneys available to defend, all bode poorly for the public's future right to a civil jury

trial.

8. Once you have settled a case, don't second guess yourself later with "buyer's remorse." Speaking for myself, I am rarely satisfied with a settlement. A very real part of me wants to go to court, and my ego is so large I really believe I can beat the otherwise reasonable settlement offer which my client has accepted. An example of this attitude is the vicious rumor about me currently spreading within the legal community. The story goes that last summer, while standing in front of Mo's Restaurant on the Newport waterfront, I found a $10 bill. After exercising due diligence and thoroughly inquiring who may have lost it, and no one claiming it, I became obviously furious - as I was stuffing the money into my pocket. A bystander asked why I was so upset at my fortuitous windfall? The scurrilous rumor goes that I was mad because it wasn't a $100 dollar bill. I guess I'm just never happy. This shouldn't be your fate.

Analytically, I note that it really shouldn't be buyer's remorse, but should instead be seller's remorse, after all, we sold them a release!

9. When you reject low-end offers and later competently try the case, you are winning credibility for future cases, even if you lose the case. Negotiate with a career perspective.

10. Contrary to the opinions of some judges I know and respect, I don't believe the system fails when a dispute cannot be negotiated and therefore ends up in court. Civil rights cases are a good example of claims where there is a public dimension to a private dispute. In our tripartite form of representative democracy, a citizen's vote in the jury box can be just as important as an individual's vote in the ballot box. Most lawyers aren't familiar with the Oregon Rules of Professional Conduct, 2.1 Advisor, which provides that:

> In representing a client, a lawyer shall exercise independent professional

> judgement and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

11. I recommend that you submit every case to mediation, particularly those cases you don't think will settle. Why? Apart from the fact that you may surprise yourself, and settle cases you never thought you would, you can't settle every case you mediate and then later have anyone take your [negotiating] threat of going to trial seriously. The threat is just that - words - and everyone knows it. You have no credibility. When you leave a mediation headed for the courtroom, I submit it creates an enhanced value for every future case you mediate. I must add that as bold as this statement is, it really doesn't mean much unless you not only go to court, but more important, that you win a few verdicts for significantly more than the carrier's last offer. Your future opponents will take you seriously when you tell them their offer is insufficient when measured against what a jury is likely to do.

12. Some judges get upset when I tell them I really don't plan on settling a particular case they have been asked to mediate. The judge says, "You're wasting my time showing up with that kind of an attitude. If you aren't here in good faith attempting to settle this case, then just tell me. I have better things to do with my time than play your games. The courtrooms of this state aren't your sandbox or play pen, etc., etc.," When this is one of those cases you really don't expect, nor really want to settle, then hire a private mediator the other side likes, pay half of the mediation costs, go through the process, and then move on.

13. A few plaintiffs' lawyers insist the opposing side/insurance company pay for all the costs of the mediation. They require this as proof that the insurance company is really serious

about wanting to settle. I don't share this perspective. I have always been happy to pay half of the cost of a private mediator, even when the other side wants to pay for all of it. I believe this distinguishes me from the crowd, and sends the message that I am not worried about nickels and dimes.

14. My friend Eldon Rosenthal of Portland has publically stated that he will attend a mediation for a maximum of three hours. When three hours is up, he walks out the door. The idea is that if the other side is serious about negotiating, it can be done quickly and efficiently. When everyone knows what the time limitations are, everyone negotiates accordingly. Eldon's view is that mediations are like gases. They inevitably expand to fill their [time] containers.

Whatever merit Eldon's position has, I would add that in some cases, some clients simply need a little more time to emotionally acclimate to the final number the case settles for. It is tough to come down from the clouds of an opening seven figure demand and settle for something less without an appropriate amount of time, which varies with clients.

15. I don't believe that mediation with a skilled "facilitator" is ever a waste of my time - irrespective of whether or not the case settles. I always learn important things about my case, particularly its weaknesses. The mediation process can also be a good trial preparation. Your client has probably already given a deposition. This is the next stage. Prepare them carefully prior to the mediation. Explain your game plan and strategies. Now is the time to reinforce your client's confidence in you. Mediation assists in narrowing the issues, and therefore shortens the trial. Just because the case doesn't settle pretrial doesn't mean it won't settle during the trial. The pretrial negotiations can be valuable predicates to later settlement discussions that occur, perhaps even during the appeal process. I note that there are now mandatory settlement

procedures even during the appellate process. Besides, by not settling every case I mediate I preserve my credibility and create value for all future cases.

16. Negotiating a case is like a baseball game with many innings. The formal pretrial mediation portion is simply one inning, perhaps inning three, four or five. Rarely does anyone say that if you don't accept the offer today, it is withdrawn. If the mediation breaks down, after a couple more depositions, both sides may mutually agree to pick it up again.

17. I even go so far as to think, and believe, that **every case in my office is in some mystical way connected like a web with every other case I have ever, or will ever, handle.** This model or fiction operates as if there is one large insurance company, say the Holy Grail Insurance Company, that insures every defendant our office is suing. Under this view, my last offer in case "A" becomes the backdrop for my first offer in case "B" and so on. Everything I do, at all times, always occurs in the context of something else.

There is incredible value to embracing this artificial construct. The implications of this belief system include:

a. While I may be immersed in the specifics of today's case, I am always operating out of a specific set of values and style that is congruent from case to case.

b. "Sharp tactics" that may gain an immediate advantage in any one particular case, at the ultimate expense of my reputation, are out. A philosopher called this "enlightened self-interest."

c. Credibility is always the key to everything. Under this "unitary" model you never get a second "first chance" at anything. This is because a unitary opponent always knows what you are doing in all your other cases.

By now you should have a pretty good idea how you acquire a legal reputation.

III. STRUCTURAL

1. There are a number of systemic features to the civil litigation system that favor the defense. First there is no prejudgment interest. This means that from the time of injury until a judgment or settlement, the insurance company can simply stall and hold onto the injured person's money. Next, ORS 19.160 which provides a penalty of 10% of the amount of the judgment for frivolous appeals has no teeth. Shepardize it. You will find that the penalty is rarely imposed. Oregon's Unfair Claim Settlements Practices Law, ORS 746.230, does not provide for a private right of action. This essentially means complaints are investigated by the Insurance Commissioner's office, the same political office that is underfunded. Good luck.

2. Offers of judgment under state practice aren't used much because they really don't have much in the way of consequences if a party doesn't "beat the offer." ORCP 54[E]. ". . . if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer."

3. Until payment it is the individual plaintiff who bears the entire financial loss. The plaintiff isn't a large business that can amortize any particular loss by spreading it over a large company, or perhaps move it into next year's statistics. The defendant knows this only too well. This places the plaintiff at an obvious negotiating disadvantage, particularly with a trial six months to a year away, followed by the threat of a two to three year appeal. This places

incredible economic pressure on the plaintiff who may suffer from depleted financial resources. A plaintiff who is advanced in age may not live to see the completion of a lengthy appeal process. If they choose, the Holy Grail Insurance Company can simply hold onto the plaintiff's money, invest it, and later make a "reasonable" offer on the court house steps without the threat of prejudgment interest. Generally the only interim costs to the insurance company are attorneys' fees, which is simply a cost of business.

4. Let's also remember the insurance company has both time and statistics on its side. If they don't prevail on this case, they probably will on the next one. Plaintiffs and their counsel are emotionally and financially involved on a personal level in the outcome of this particular case. Defense counsel and the insurance adjusters are not. Once more, advantage to the defense.

5. There are also various "tort reform" remedies that favor the defense. These include:

a. "Caps" on public bodies, which are a maximum of $100,000 for non-economic losses, and an additional $100,000 for all economic damages. ORS 30.260. The primary vice is that these caps are a ceiling with which the risk management people negotiate as a back drop. They know that the plaintiff attorney's fees and trial costs both increase if the matter is tried. A $75,000 pretrial settlement may therefore actually mean more in the client's pocket than a $100,000 judgment.

b. Oregon's modified joint and several liability is now best characterized as "Several and Reallocation," see ORS 31.610. There are threshold minimums of 26% before there is the possibility of petitioning the court after one year to have a solvent defendant become jointly responsible for any noneconomic amounts that cannot be collected from other co-defendants.

c. There is a $500,000 cap on noneconomic damages, meaning pain and suffering, that flows from a statutory remedy, ORS 31.710. See *Greist v. Phillips*, 322 Or 281 (1995). This is now on review with the Oregon Supreme Court,

6. It is the defense that decides, by the settlement offers they make, which cases settle and which ones go to court. A review of verdicts does not necessarily include all those cases that settled prior to trial, or during trial, and prior to verdict. As a generalization therefore, it is the weaker cases from the plaintiff's perspective that end up actually being tried to verdict. This is the reason Doctors win five out of six medical negligence cases that are actually tried. We can therefore generalize that the cases that actually end up being litigated to verdict tend to be weaker cases, and therefore do not represent the value of the broader spectrum of similar cases, including those that settle for significant dollars. The stronger plaintiff's cases should therefore settle for more than the historical verdict range of similar cases that were tried to verdict. Ibid., page 82. Again, advantage to the defense.

Insurance companies further skew this background through sealed settlements. They do this by insisting upon nondisclosure by the parties and attorneys involved of the dollars paid to settle the case.

7. From the plaintiff's perspective there are some commendable aspects of Oregon's civil justice system. Oregon's trial dockets generally ensure a trial within a year of filing, and that's good when you look around the country. There are a number of skilled mediators available, including both sitting and retired judges, and others available in the private sector who are equally well respected by both the insurance industry and the plaintiffs' bar. Most insurance companies really do prefer to settle cases early rather than pay money to their defense attorneys

to simply carry the files. Finally, given the state of the economy, the 9% interest rate on appeals is excellent. Remember the exception of 5% or less for appeals from medical negligence judgments.

8. **Try your good cases and settle your bad ones. In the real world, without careful thought and real discipline, exactly the opposite happens.** If you settle every smaller case for bottom dollar, where are you going to get the requisite experience that will allow you to confidently negotiate or try your first six figure case?

I write this emphasizing that everything herein must be processed in accord with the lawyer's duty to provide informed consent as discussed in this paper under section IV, no. 16.

9. **How do you get the necessary experience?** My advice for sole practitioners is to attempt to litigate at least four jury trials during your first two years of practice. It's o.k. to turn down a few nominal offers on soft tissue cases. That is all the insurance company should, and will, offer you. Your first case should have good liability, such as a rear-ender. Don't worry about making it too easy by choosing a case with good liability. You will have enough problems avoiding a defense verdict with your chiropractor, and a client who called their lawyer within a day of the low impact collision, long before they ever called their doctor. Select cases in which you really like and believe in your clients. Go ahead, try a few of these cases. Once you get the mechanics down, your comfort level will quickly increase, and the rest will start to fall into place. Call my office if you want some help. I have a good handout that the Young Lawyers' Section of the Bar has printed. It will spare you making a lot of errors. I have already done it for you. Don't worry so much about winning the case. Focus on winning credibility. Everyone is nervous and scared at first; you will get the hang of it.

10. When there are multiple defendants, consider settling out one, and then using the money from that settlement to bankroll the lawsuit against the remaining defendant[s]. Beware, this tactic allows the remaining defendant to argue all sorts of "empty chair" defenses pointing blaming fingers at the defendant you have already settled out.

11. Distinguish between the exposure the insurance company is negotiating to avoid, and your client's financial needs. In the larger cases, a technique occasionally used by some mediators is to reason with the plaintiff by asking them, "What is your economic wish list?" In other words, "If you had a bundle of money what would you do with it?" The client's answers are usually along these lines: "Well, I hadn't thought about it, but I'd like to pay for all my past and future health care needs, educate my children, and perhaps pay off my house and car." After that beginning, most clients' lists thin out pretty quickly. Here the mediator comments that the amount the insurance company is offering will address everything on the client's list, so maybe what the client really wants isn't just compensation, but revenge. Now, rather than talking about the honest economic needs the plaintiff admittedly has, the negotiations are more about greed than need!

My response is that insurance companies are in the business of loss distribution. They pay to avoid exposure, nothing more and nothing less. The carrier will make a settlement offer based upon their assessment of their exposure. Maybe my injured client is a millionaire with no financial need, but that doesn't mean the carrier has no exposure for a significant verdict. In a fit of opportunism, the insurance company is quick to take full advantage of my client's economic vulnerability and negotiate tough when it is to their advantage. Yes, my client's financial needs are a factor, but are not outcome determinative.

Also, a huge philosophical point here is where are you going to place the accent? Is it on the plaintiff's losses and have they been addressed, or on the defendant's exposure.

12. In a case with large exposure and a relatively inexperienced plaintiff's counsel, the defense is saying to themselves "This lawyer has never tried a really big or complicated case." They know that neither the lawyer nor their client is in a position to properly bankroll the case, and further, that this economic reality places great pressure upon the plaintiff and their lawyer to settle.

IV. CLINICAL

1. Do not even consider negotiating until your client has reached maximum medical improvement. MMI is a plateau of stability for a sufficient time such that the doctors can reasonably forecast your client's future.

2. I think it was Emerson who said, "The vitality of most organizations is usually the length of one person's shadow." So it is with mediation. The process is only as effective as the mediator.

3. Negotiations are a waste of time unless you are talking with someone who has the authority to write the check. Cut out all of the middle people. Only a person with authority can make it happen.

4. You are never "off the record." This means that the rituals and dance of negotiation are always going on, whether formally commenced or not.

5. When negotiating prior to filing, or discovery, there is no reason to withhold any information before filing suit that a defendant can later obtain during discovery. Remember my unitary view of The Holy Grail Insurance Co. That means you can't be misrepresenting

anything.

6. I try to remember the words from the Kenny Rogers country and western song "The Gambler." "You've got to know when to hold 'em, know when to fold 'em." I ask myself, "Is this really a good case to try?" If not, then it's probably better to settle, move on and live to fight another day.

7. If you are a new lawyer and you want an accurate assessment of the value of your case, ask a trial lawyer known to be experienced for their work in that particular area. Tell them you are a new lawyer and would appreciate their help in evaluating the case. This is a profession. You will be pleased with the prompt assistance you are likely to receive. I want to explicitly acknowledge my retired friend and mentor Bob Ringo of Corvallis, who set the standard high when it came to selfless assistance to younger lawyers, myself included. May I be as willing to share with those less experienced, as he shared with me when I first started.

I hasten to add that, with all due respect, having inexperienced peers evaluate your case may not reflect the "market" value of your particular case.

Here I would submit that my defense attorney friends confide in me that they think mediation helps the plaintiffs' bar, and does nothing for the defense attorneys. I generally agree. They say good mediators usually get at or near market for inexperienced lawyers who could never get these amounts from a jury. They add that the insurance companies are serious when they say they would rather get rid of cases early by giving the money to the plaintiff that they otherwise would pay to their defense counsel.

8. Consider checking for comparable verdicts in the Northwest with Jury Verdicts Northwest at P. O. Box 1165, Seattle, WA, 98111, phone 425-774-0530. For comparables

across the country call ATLA, 1-800-424- 2725.

9. When considering mediation, invite the opposing side to suggest the names of mediators in whom they have confidence. In tough cases, it is to your obvious advantage when the opposing side recommends a mediator who is later impressed with your case.

10. Don't overrate the technical challenges of the case at the expense of your case's emotional appeal. Juries will generally find ways to do what they think is right. Ibid., page 21.

11. When you reject an offer, carefully think about how you are going to say "No." Both content and timing are implicated. There are messages within answers, whether intended or not.

12. After years of negotiating I have come to believe there is a rule. I call it the negotiation "Rule of Halves." Essentially all you are doing is graphing the time and dollar amount of each side's offer as a way of predicting future offers.

Think of an "X." Then divide the X into an upper and lower half, which makes two opposing "V's." Each "V" represents one of the two opposing sides in a negotiation. One side or leg of each "V" is for time. The other is for money. In a more analytic model we would call each side or leg of the "V" a vector. The point of where the opposing "V's" meet, or converge to make an "X," is the time when settlement has occurred.

To illustrate with an oversimplified and symmetrical example:

a. [1:00 p.m.] party "A" opens the negotiations with an initial offer of $10,000; then,

b. [2:00 p.m.] party "B" responds with its first offer being $4,000; then,

c. [2:30 p.m.] party "A" then counteroffers with $8,000; then,

d. [3:00 p.m.] party "B" responds with its second offer of $6,000.

I submit that from the above you can predict the case will settle in fifteen minutes for $7,000. By calling the two halves an "X" I don't mean to suggest the angles of each "V" will symmetrically converge, such as in my example, but there generally will be some slope or pattern. One thing I do know is that if the case doesn't settle, then the bases of two "V's" did not meet.

Using the "Rules of Halves" forces you to always think ahead of the next offer by asking yourself "Where do you really want to be at the end of the day?" Said a different way, if you want to settle for a certain amount prior to beginning negotiations, ask yourself, "What should my opening offer be?" "What will they likely respond with?" "What should my initial counteroffer be?" "Are these numbers good predicates that will presage my ultimate number?" By the amount of your first and second counter offers, you are signaling the final domain you are willing to negotiate on. This kind of pre-negotiation strategizing reduces the chances that you will end up bidding against yourself during the negotiating process, meaning making two offers in a row without an intervening counteroffer from the opponent. Always be thinking at least two steps ahead of the moment.

This means, not only are the dollar amounts each side offers important, but so is the amount of time your response takes, and the tenor of the response. There are many ways to say no. Two obvious ones are "Hell no!" and "No, but thank you, and here is my counteroffer."

The larger point here is human behavior tends to express itself in patterns. Don't take my word for this idea of "halves," test it yourself. The patterns won't necessarily be symmetrical or perfect "V's," and they will vary from one insurance carrier to the next. No matter how inexact the"V" ends up looking, it is still a valuable tool to aid you in thinking about where you

want to end up, and how to get there.

13. Finally, just because the formal negotiations have "broken down" doesn't necessarily mean the negotiations are over. For that reason, think of your last offer, which the other side rejected in the formal negotiation, as simply the prologue to the next offer and counteroffer, which may occur during the later trial.

14. Confirm all settlement offers in writing. Consider using the court reporter if tendered during the trial. If you fail to confirm that you communicated the offer, and the matter then proceeds to trial and produces a defense verdict; be assured that the client will have long forgotten your verbal communication of the offer. The same client is now adamant that if you had only told them of the offer they certainly would have accepted it! Your next step will be a telephone call to your professional liability insurance carrier, which in Oregon will be the PLF, asking them to assign an attorney to defend you.

Verbal agreements between counsel should always be honored. On this note, it shows no disrespect to promptly put your understanding of any agreements in writing, with an invitation for them to correct you if you are mistaken. That is the way to do business.

15. Seek, obtain, and maintain client control. This begins with the first interview, and implicates concepts of informed consent.

16. Give your client "PAR" advice. This is drawn from the medical informed consent model. Explain the Procedure, (which may be either a settlement, or a trial), Alternatives and Risks. Word your explanation so any 8th grader will understand it. Written confirmation resolves disputes if your client later claims you never communicated or explained the offer. Putting everything in writing protects everyone. It leaves no doubt about what was said, and your

explanation of what it meant. Write this letter as if it were an exhibit in a future malpractice claim by your client against you. Carefully writing PAR letters is your best assurance that you will never be sued.

In some bigger cases, I hire a second lawyer, an ethics lawyer, to review my analysis and decision making. That lawyer may recommend I hire and pay for a third lawyer who is both conservative and unquestionably competent, to persuasively disagree with me. At my request, this third lawyer writes my clients an opinion letter critiquing my analysis and valuation, and setting forth their assessment and conclusions regarding the value of the case. The work of this third lawyer usually costs me about $5,000. This process ensures that real informed consent occurs. I alone pay for bills of both the second (ethics) and third (contrary opinion) lawyers without passing the costs onto the client; and no, I don't go out looking for a fourth lawyer to agree with me. I provide my client this differing opinion for many reasons, starting with it's the moral thing to do, and finally, if we should lose the case, or the jury awards an amount less than I had recommended my clients settle for, this opinion letter is evidence that I not only met, but exceeded the standard of care in my field. Yes, I'm aware that lawyers can be sued for failing to meet the standard of care.[2]

17. Give "bottom line" numbers to your client. This means before you go into any settlement negotiations, you must know what all your costs advanced are. After subtracting attorneys' fees and costs, what will end up in your client's pocket? Is any of the recovery taxable? You must affirmatively protect your client against all liens. No surprises. Don't wait

[2] I served on the Board of Directors of the Professional Liability Fund from 1987-1992, and served as its Chairman in 1991-1992. In keeping with the size of the cases our office handles, we carry significant excess professional liability insurance.

until after you have arrived at a settlement number with the defendant's insurance carrier to approach lien holders and ask them to reduce their lien amounts. This is too late. You must do this before reaching a final settlement number. This is because then you still have the uncertainty of a disputed claim to negotiate with the lien holder. Mediators and settlement conference judges can be excellent at negotiating any outstanding liens.

18. Some creative mediation suggestions include "high-low" bracketing, and possibly shifting from mediation to an arbitration, called med-arb. This is done by both sides empowering the mediator to render a binding decision. This can be with or without any high-low brackets the parties may agree upon. Preserving the possibility of med-arb is one of the reasons why some mediators are very reluctant, at least early, to tell either side what they believe the settlement value of the case is. By focusing on process and acquiring the trust of both sides, the mediator is then in a position to shift into "med-arb" if the parties mutually consent.

19. The final word on whether to accept an opponent's offer belongs to the client. It is the client's case. However, during the first interview I explain to the prospective clients, before they ever see a fee agreement, exactly what our firm's negotiating philosophy is. We are aggressive, and if we do settle, then it is for top dollar. If the clients aren't comfortable with this philosophy, they should seek representation with another office. Tell them to go home and think on the matter. Only if they come back a second time is there a fee agreement for them to sign.

20. Sometimes people shop from one law office to another, asking if you will just write one letter threatening to sue if their demands are not met. They are willing to pay you for your time in writing this letter. I say, if you aren't prepared to follow through on the threat, then don't write it. One more time, this has to do with your reputation.

21. Structured settlements have much to commend them, particularly for minors and the financially unsophisticated. In one study group, after five years, 90% of the test group had nothing left of their settlement.

22. When considering a structured settlement, first negotiate as if everything is cash up front. Once you arrive at that number, or present value, only then move to discuss delaying payment into the future.

23. Pictures, graphics and future trial exhibits can be persuasive mediation tools.

24. You must obtain court approval for all settlements involving wrongful death, minors and anyone with a conservator.

25. Associate another lawyer when legal questions arise involving a specialty. Examples include "special needs" trusts for individuals who are receiving governmental benefits, contract questions in matters of subrogation, questions of taxability, and workers compensation issues.

26. If there is punitive damages exposure, it may not be to your client's advantage to try the case and obtain a significant award for punitives, both for taxation reasons and because ORS 18.540 mandates that 20% goes to your client, and 20% to you. The rest goes to the State of Oregon. Finally, both the state and federal government will tax your client on the 20% they do get.

Ask yourself if the terms of the settlement can be framed to shift the money to general damages, which may not be taxed by the government. I close here by first telling you I am not a tax lawyer, but we always worry that the state and federal government will attempt to tax any monies that are only for pain and suffering. *Commissioner of Internal Revenue v. Banks* and *Commissioner of Internal Revenue v. Banaitis* 543 US 426, 125 S. Ct. 826 (2005) essentially

hold that the client is going to be taxed not only on any punitive damages they received, but also on the amount of attorneys fees they are charged. This effectively means the client is taxed twice in the sense that they are taxed both for what they recover, but also any amounts their attorney receives. There maybe some exceptions possibly involving statutory rights for attorneys' fees, but I must emphasize this should be carefully analyzed with a competent tax lawyer.

27. Someone once said that it is as important to know your mediator as it is to know the pitcher you are facing when batting in a baseball game. I disagree. I think it is more important. In this spirit, may I humbly suggest that when mediating with a certain judge in the Lane County Courthouse it is wise for both you and your client to dress completely in green and yellow. Before making your opening offer, I further suggest you and your client stand in unison, and begin with a recital of the following:

Oregon, our alma Mater
We will guard thee on and on
Let us gather round and cheer her
Chant her glory Oregon
Roar the praises of her warriors
Sing the story Oregon
On to Victory urge the heroes
Of our mighty Oregon

Go Ducks Go!
Fight Ducks Fight!
Go!
Fight!
Win Ducks Win!

Oregon, our alma Mater
We will guard thee on and on
Let us gather round and cheer her
Chant her glory Oregon
Roar the praises of her warriors
Sing the story Oregon
On to Victory urge the heroes
Of our mighty Oregon!

28. If your mediation bogs down, ask yourself if there is an important legal question, the answer to which may break the impasse. If so, consider submitting the question for disposition. If you are going to utilize this technique, I strongly suggest that you have an exact agreement, in writing, of what the question to be answered is. You may even want to have agreed upon numbers which both sides will be bound by, depending upon the answer. The agreement should be in writing or placed on the record with a judge or mediator specifically authorized to enforce the agreement.

The case should be all but settled once you have reached agreement on the exact question and the consequences of a yes or no answer to that question. You may even wish to agree that the mediator can provide the binding answer after briefing by all parties.

29. A good reason to admit your weaknesses right up front is more than credibility. It provides you the opportunity to frame the questions and proof in the most positive manner. This might also impress your opponents that you have recognized your problems and have already discounted them in framing your demand. Ibid., page 51.

30. Smaller cases, such as low impact soft tissue claims, present their own settlement problems. The defense counts on the fact that the probability of trial is remote because they know plaintiffs' counsel will go broke if they try all their little cases. This is where your opportunity to gain some experience comes in. There are lawyers out there that successfully try soft tissue cases and consistently get good results.

31. The larger counties have mandatory arbitration for cases in which the amount of damages prayed for in the complaint is less than $50,000. These cases are submitted to nonbinding arbitration, with attorneys' fees awarded to the plaintiff if they go to trial and beat the arbitrator's number, and to the defense if the plaintiff fails to beat the arbitrator's prediction.

32. Focus groups can be helpful in evaluating and preparing your case. For your first half dozen you should hire a professional consultant. Once you have seen a couple of focus groups, you can then try conducting one of your own. Seven mock jurors seems to be about right.

There are two different kinds of focus groups, one is inductive, or a concept focus group, the other is deductive, or structured. In the concept focus group you provide a portion of the facts to the mock jurors and then ask them what more they would like to know, and why. The jurors will tell you the case they want you to try, and why.

In the more traditional structured focus group, you videotape a summary "clopening" [a blend of an opening and a closing] that gets the key issues before the fact finder. Then you must also have someone fairly and energetically present the opposing side for an equal amount of time. The jury consultant allows the jurors to deliberate on their own for maybe 45 minutes, and then will do a "debriefing" where they plumb the jurors and question why they thought what they did. It is preferred that the attorneys watch through a one way mirror or have the deliberations and debriefing videotaped to review later.

The consultants we use tend to not give much weight to particular amounts the mock jurors may award for damages. They are much more interested in the thinking behind the jurors' conclusions.

33. When mediating catastrophic claims, consider providing video materials showing the full reality of the plaintiff's losses.

34. In larger cases, plaintiffs' lawyers look to create "bad faith" exposure for involved insurance companies. If the injuries are serious, and insurance coverage is likely, then there will probably be a settlement. This is even more true than in a smaller case, because just as strong

liability will provoke a jury to find larger damages, so it is that strong damages will provoke a finding of fault when liability is weak. It is the case in which there are good damages, weak liability, and an inadequate amount of insurance coverage where the opportunity particularly exists for plaintiffs' lawyers to create exposure for bad faith.

In larger cases, where there are multiple layers of insurance, consider finding pressure points or "seams" within the various levels of insurance where a precisely placed policy limits demand can create pressure between insurance companies. *Maine Bonding* 298 Or 514 (1985). An interesting point is if a lower level of insurance declines the opportunity to settle, and as a result there is a verdict for damages that are not otherwise covered under the policy, it may well be these otherwise uncovered damages are now consequential damages in a subsequent bad faith claim.

35. When I have a problem client, I find that having a sitting or retired judge serve as a mediator is more effective than a skilled lawyer from the private sector. It seems that the judicial robes lend a certain credibility that helps with clients who think their cases are worth more than they are.

36. Most mediators use some variation of the following three step model:

a. Avoid either side issuing early ultimatums or drawing line.

b. Gain and maintain some negotiating momentum with each side making concessions, even though modest. With the passage of time, all the parties to the negotiation become increasingly invested in the process itself.

c. The best way to get to a final number isn't to worry about getting to a final number. It's to negotiate to a final range. Once the numbers converge into an area and the parties are sufficiently invested in the process, they find a way to close their differences.

This approach works because the plaintiffs' lawyer believes their ethical responsibility is fully discharged if, and only if, they have received the other side's best number by the end of the day, leaving it to the client to accept or reject the "final" offer. Of course, the smiling mediator is all the while congratulating the plaintiffs' lawyer for having extracted the last nickel from the other side. Once a plaintiffs' lawyer categorically accepts these assumptions concerning their ethical obligations, it essentially eliminates any negotiating strategies and tactics that might prompt the defense to either walk, or even threaten to walk out of the mediation, before they choose to release or disclose their "last" number. In other words, unless and until the defense says "That's it, there isn't any more money," the plaintiffs' lawyer is ethically obliged to remain at the table negotiating. With only a moment's reflection, this presents obvious unilateral advantages for the defense.