It's a One-Shot Deal

By Paul Walsh

Every so often in mediations, I hear one of the parties say, "I want my day in court." Having tried over 70 jury trials over 36 years, I respectfully reply, "That's the last thing you want." Undoubtedly, some cases need to go to trial, but that decision should always be balanced with the fact that this is your client's only case. That's a powerful statement. After a traumatic accident and attendant injuries, and likely at least one to two years of investigation and discovery, if a reasonable settlement is possible, it is a far better option than a roll of the dice at trial.

Consider that a jury trial in Allegheny County is before the final 12 members of a prospective jury panel responding to a notice for jury duty at an arbitrary time. They are directed to show up at court in the morning, and if selected, they likely start the trial the next day. There is no true jury selection but, rather, the opportunity to strike prospective jurors who counsel perceives as the most likely to be adverse. The jurors are the 12 left from the initial, say, 24 to 28 randomly noticed individuals who survived counsel's strikes and dismissals for cause. All of their prejudices and biases cannot possibly be completely disclosed or unveiled by the limited voir dire process. They typically have but one common thread – they don't want to be there. That's not exactly how I want a "one-shot deal" to be decided.

There is a real value to mediation after necessary discovery and before trial. A reasonable settlement is a sure thing. The best way to play your hand at mediation is to prepare and have a plan coming into it. For both plaintiff and defense counsel alike, don't fall in love with your case. Any argument you make relies upon a jury that cares, is invested and truly renders a verdict based solely upon the evidence, with a ruling that happens to be aligned with your argument, your client and their case.

Plaintiffs' counsel needs to make sure they educate their clients on the law, specifically that the mandate of the civil system is to "make one whole." If liability is proven, a monetary award is used to effect the legal mandate. Often, plaintiffs don't feel anyone understands how their accident has affected them. How a juror may value their case is not necessarily how the plaintiff does. As counsel knows, there's a real art in effectively telling your client's story. Plaintiffs who endlessly drone on in testimony at trial typically don't do well. Many jurors and their families have pain, problems, etc., and go to work regardless. They can be tight with a buck, especially if they perceive the plaintiff as a whiner. As former Notre Dame head football coach Lou Holtz once said:

"Don't ever tell anyone about your problems. 80% of the people don't care and the other 20% are glad you have them."

In sum, the benefits of a reasonable settlement are:

1. Certainty, first and foremost;

2. Typically receiving the money much sooner;
3. Not incurring trial costs for experts, trial support, etc., which will reduce their recovery dollar for dollar; and
4. Avoiding going through trial.

Defense counsel needs to prepare their clients and insurance professionals to have proper reserves in advance of mediation. There need to be honest conversations about potential exposure and the admissibility of evidence at trial. Often, a claims professional will say, "Our expert doesn't believe future treatment is necessary. Therefore, the future medical projections are inadmissible." That, of course, is incorrect. I often point out that larger special damages admitted can sway a jury to some extent, even if they split the difference.

The benefits of a reasonable settlement are:

1. Eliminating the risk and potential exposure;
2. Not incurring trial costs; and
3. Closing a file.

In closing (pun intended), a reasonable settlement versus a one-shot deal that's all or nothing is a no-brainer that beats having "your day in court."

Paul Walsh, Esq. was the founder and managing partner of Walsh Barnes PC before starting Walsh Mediation LLC.