

## **Fifty-three Settlement Strategies That Work -- Advice from a Special Master**

**Laraine Pacheco**

Every attorney with whom I deal claims to want to settle his cases. Unfortunately, not everyone behaves in a manner that is likely to lead to settlement. Those who settle cases do so routinely, and often with little intervention from me. Settlement occurs when the defendant pays more than he thinks the case is worth and the plaintiff accepts less than he thinks the case is worth. In the end, no one is happy except the Special Master and the Court. Counsel who tend to settle their cases (both for plaintiffs and defendants) tend to adhere to the following principles.

### For Plaintiffs' Counsel

1. Recognize that not all defendants and their carriers operate in the same manner – the settlement rules are different defendant by defendant.
2. Threats of going to trial have little value. The decision to go to trial is a business decision and everyone understands what is fueling the decision. Every defendant knows you can take them to trial.
3. Craft each demand carefully and be able to articulate the basis for it.
4. Be flexible. Recognize the defendant companies are looking at a larger picture than your particular case.
5. Let defendants out of cases when you know you cannot keep them in. Sign stipulations on the first request.
6. DON'T KILL THE GOLDEN GOOSE. Be flexible and accommodate defendant companies' legitimate business needs and difficulties.
7. Use creative approaches—think outside the box.

8. Don't "manufacture" or encourage manufactured product identification. It is your client's claim, not yours. Don't put your integrity on the line. It affects perception of your other clients' settlement demands.

#### For Defense Counsel

9. Keep a low profile.
10. Be familiar with the facts of the case. Read the deposition transcript yourself, not merely a digest.
11. Get your client to take things seriously – find documents, witnesses, respond to discovery.
12. Know the settlement history of your client.
13. Send a person who is fully familiar with the litigation and with the cases and with authority to a settlement conference.
14. Keep your own calendar and be available and on time for all scheduled settlement conferences.
15. Seek help from your colleagues.
16. Use creative approaches – think outside the box.
17. Settle early if possible. Defendants have a way of disappearing as time passes.
18. Don't offer to implicate other defendants in exchange for a better deal.
19. Recognize that the dynamics of settlement differ with respect to each plaintiffs' firm.
20. The term "peripheral defendant" is obsolete. Avoid using terms such as "small player." You are only a peripheral defendant in a case if there are many solvent defendants in the same case and the exposure to your client's product or services is minimal in comparison to the exposure to the other defendants.
21. Make motions wisely.

22. Familiarize yourself with the way the litigation works. Asbestos litigation is different (both procedurally and from a settlement perspective) from other types of litigation.
23. Know your client's settlement positions nationally. Plaintiffs' counsel will know.
24. Make a reasonable offer.
25. Don't build up fees by engaging in delaying tactics.
26. If more than one attorney is handling settlement, ensure continuity of negotiations by communicating with one another.
27. Step up to the plate when you know it is warranted.
28. Act quickly when an opportunity arises. Settlement opportunities do not always present themselves on a predictable timetable and you need to be ready to move quickly.

#### For All Counsel

29. Build relationships with your colleagues. Asbestos litigation is not like other litigations. You will deal with the same people over and over again for years to come.
30. Be courteous and respectful in dealing with adversaries. Return phone calls and accommodate schedules.
31. Evaluate each case honestly by looking at the critical facts. When plaintiff's counsel overstates his client's exposure to defendant's product or when defense counsel minimizes it, there is little chance of reaching common ground.
32. Be honest with your client and make sure your client is being honest with you.
33. Choose your battles wisely. You can probably bluff successfully once.
34. Avoid *ad hominen* attacks. Remember, each attorney is an advocate for his client. In most cases, plaintiff's counsel

- is not trying to bankrupt the defendant and defense counsel is not trying to deprive plaintiff of a fair recovery.
35. Be prepared at settlement conferences. Know the facts of your cases and the facts about your client.
  36. Be scrupulously honest with the Special Master or mediator.
  37. Don't wait for formal settlement conferences to try to settle cases. Continuous dialogue is essential.
  38. Work up your cases. Have admissible evidence to substantiate your position.
  39. Don't be greedy or miserly.
  40. Train young/new associates – in the law, in how to behave at a settlement conference, in the litigation, in how to deal with a discovery dispute.
  41. Communicate – with your adversaries on the phone or in person. Play golf. Have lunch. Have a drink.
  42. Keep in mind there are no secrets in asbestos. Plaintiffs' counsel talk among themselves; defense counsel talk among themselves; defendants have common carriers; carriers talk among themselves.
  43. Be willing to reconsider your position when faced with additional facts.
  44. Be familiar with and work within the framework of the judge's rules or case management order or whatever set of rules governs the case.
  45. Bring materials to the settlement table that support your position.
  46. Never make personally disparaging remarks about any participant in the litigation (including the Special Master and the Court). Word gets out.
  47. Avoid threats, blunderbuss pronouncements, declarations of victory or other verbalizations that will raise the level of the debate without accomplishing anything. Such tactics are always unproductive.

48. Don't lecture your adversary. It is insulting and demeaning and only drives a wedge between you
49. Be familiar with the judge and how she operates.
50. Utilize the services of the Special Master. Ask for help if you need it.
51. Credibility is everything. Don't lose it.
52. Keep your confidences. Trust and confidentiality is critical to settlement.
53. Keep things in perspective. It's only asbestos litigation. You need to have a life and keep your priorities straight.