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Break Through the Barriers: The Settlement Series, Part One

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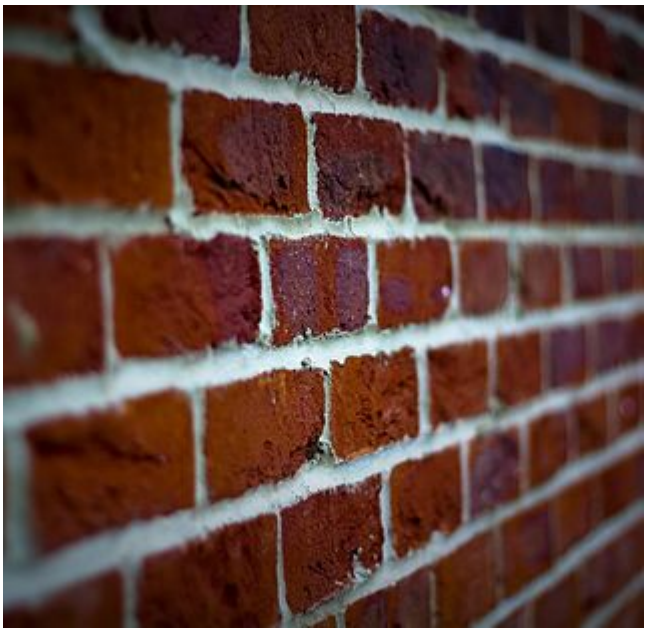

We all have an image in our heads of the way we expect cases to end: passionate presentations, gripping witness testimony, then a tense wait followed by the dramatic verdict. In the great majority of cases, however, the dispute will end not in a courtroom but in a conference room. After some awkward moments and handshakes, it will settle. Despite this, however, we all know that there are many cases that should settle but don't, and an even greater proportion of cases that only settle after far too much has been spent in time, patience, and money. Talking to the trial teams, it is clear that there is one common barrier to the timely settlement of those cases: the *other* side. Now, it may be that I'm just more likely to work for the side that is fair, reasonable, and realistic (and for any clients reading, let's assume that is the case). Or it may be that there is a large class of cases where *both sides* are saying in effect, "Believe me, we would settle this case if we could – if the other side would just see reason."

Settlement-worthy cases can end up avoiding or delaying resolution for many reasons, some good and some not so good. There can be legal barriers to settlement, or situations where settlement is not the rational option. But there are also psychological barriers: perspectives and habits that

aren't working to either sides' advantage, yet are still preventing or delaying case resolution. This is the first in a series of posts focusing on case settlement as a distinct persuasive arena. Drawing from a body of research and commentary on the psychology of Alternative Dispute Resolution, I'll be suggesting some ways of looking at the artificial barriers to settlement to see how they might be overcome.

The Common Psychological Walls:

There are probably as many reasons for denied or delayed case settlements as there are cases. At the same time, a review of the advice and commentary provided by experienced mediators points to several psychological factors that are likely to play a role in making settlement harder in nearly every case. Let's look at a few of those barriers.

1. Great Expectations.

Confidence is an adaptive trait, but beyond hoping for the best, parties in litigation can sometimes anchor on an ideal outcome and see any deviation from that outcome as a net loss. In other words, if someone tells a plaintiff, "you have a million dollar case!" that plaintiff will often see a $700,000 settlement not as a $700,000 gain, but as a $300,000 loss. This process of anchoring on a high expectation for outcome can translate into a high estimate of one's probability of winning as well. Writing a comprehensive review of the research on settlement psychology in the *Harvard Negotiation Law Review*, Richard Birke and Craig Fox (1999) observed that "if both sides overestimate their chances of prevailing in court, this bias will lead to excessive and costly discovery and litigation."

2. Partisan Distortion.

Beyond overestimating our chances, we also tend to devalue our adversary's arguments and overvalue our own: We always tend to make much more sense than the other side. This is a process that California mediator and arbitrator John McCauley (2000) refers to as "partisan distortion," while noting that it is a virtually universal phenomenon among advocates in litigation. Birke & Fox (1999) cite research confirming that, "Most negotiators believe themselves to be more flexible, more purposeful, more fair, more competent, more honest, and more cooperative than their counterparts." The arbitrator and mediator Barry Goldman (2006) describes that as the "Lake Wobegon effect," in the sense that most believe themselves to be above average and we can't all be right.

3. Need for Judgment.

Parties enter into a dispute with not just a need for resolution, but a need for judgment as well. We don't just want the conflict to end, we want someone to step in and tell us who is right and who is wrong. A fair and definitive outcome is not nearly as strong a motivator as

vindication and a win. In Goldman's words, many clients like to see themselves as "The Avenging Sword of Justice," rather than as reasonable decision makers. "What this means to you as a lawyer," Goldman explains, "is that the person who comes into your office with a lawsuit believes he has a strong legal case; believes he is morally in the right; is willing to take plenty of risk; and believes he would be violating the laws of nature if he rolled over, caved in, wimped out, and settled."

4. Disengagement.

There is a simpler barrier – without some of the psychological nuance – that is probably more common. Many litigators delay settlement because they simply haven't yet dug into the details, and may not have a good knowledge of the strengths and weaknesses of their own case. In that condition, the sides are comfortable with broad and absolute negotiating stances ("Please give me the best result I can imagine getting and we'll settle…"), but less comfortable with the nuance and the assessment that true negotiations require. That absence of engagement can be a rationalized barrier, since it doesn't make sense to invest a lot of time preparing for a trial until we start to have a strong feeling that a trial is actually going to happen. While that rationale can make sense in some cases, in many others it doesn't. When a case drags on for years before client and trial team become fully informed and engaged, the slow drip of expenses can add up. A case-in-waiting for years can still generate some hefty bills, and these are expenses that don't necessarily improve the ultimate outcome.

Breaking Through: Moving From a "Trial Preparation" to a "Case Assessment" Mindset

Of course, settlement is a very complex calculation, and there is no one-step solution to these and the other barriers to settlement. But one strong step in the right direction is an engagement that leads to realistic assessment, and that means reorienting our thinking about many activities that have traditionally been seen as trial preparation. When we are focused on trial preparation for a trial that, at least nine times out of ten will never happen, it is easy to see the work as a waste and to avoid it or put it off. But much of the work that we tend to see as message improvement at trial, functions far better, and much more often, as case assessment and preparation for settlement.

There are a few things that trial teams could be doing to make sure that they're breaking down the barriers that would prevent a case from settling when it should.

Early Case Assessment. Before you're embroiled in discovery or putting on armor for trial, conduct a full, clear-eyed assessment of your case. Granted, you don't yet know all you would learn in discovery, but you do generally know the basic story outline from each party. And in most cases, fact finders are reacting to the story and then fitting that reaction to the evidence you discover.

Mock the Other Side's Case. As Birke and Fox note, research shows that the "egocentric bias," or the tendency to see your case through an advocate's lens "was significantly mitigated when participants were asked to explicitly list weaknesses in their own case." Nothing forces you to identify your weaknesses like the act of stepping into your adversary's shoes.

Ground Your Case Evaluation Memo in Research. When attorneys write up memoranda to support a case assessment for a client, financier, or insurance company, that assessment is often based on experience and subjective judgment. Why not add research, in the form of a focus group or a mock trial to that mix? The mock trial will not predict your trial result, but it will help inform your own judgment of the strengths, weaknesses, and probabilities that factor into your evaluation. Specifically, it can help you and your client to anchor on something other than a best case scenario.

Bring Research To The Attention of Your Mediator. We've written before that a mediator can often appreciate the perspective provided by an early mock trial or focus group, particularly when it allows you to admit to a weakness or two while still pressing your strengths. An additional opportunity is to design the research to directly serve the mediator who is working for both parties. We call that approach "Research Aided ADR" (or "RA-ADR, pronounced 'Radar' for short), and it can be a useful tool for focusing on the factual questions that most divide the parties and providing that opportunity for judgment that mediation can often lack.

One interesting dilemma is the possibility that everything that makes one a good advocate in trial — unshakable confidence, an ability to refute an adversary's every argument, and an unquenchable desire to win – can also make you a poor assessor for purposes of settlement. The trick is to develop a way to operate in both modes: the objective negotiator when you can, and the unshakable advocate when you must.

Posts in the Settlement Series:

- Break Through the Barriers: Part One (This Post)
- Don't Play Chicken With Your Case: Part Two
- Know When to Give Your Mediator a Voice: Part Three
- Don't Forget About Happiness: Part Four

Other Posts on Settlement:

- Settle Your Case Without Setting the Dominoes in Motion: Research on the Demonstration Effect
- The Jury is Out: Make the Most of Your Experience In an Era of Fewer Trials
- Predict With Care: Adapt to Overconfidence in Case Assessment

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