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# When Settlement Is The Best Option

## *The Product Liability Defendant's Five Stages of Grief*

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For many product liability defense attorneys, the last time they considered the significance of basic psychological principles was their Psychology 101 course in college. Most lawyers, unfortunately, do not appreciate the importance of adapting and applying those basic psychological concepts to their day-to-day practices. For example, if defense lawyers took the time to study the behavioral patterns of their clients closely — from the date of filing the lawsuit to its ultimate resolution — they would find that in almost every instance their clients' reaction to a lawsuit, from beginning to end, follows a very specific and predictable pattern.

An analysis of these patterns reveals that they substantially mirror those explored in depth by Elisabeth Kübler-Ross in her landmark 1969 book, On Death and Dying. In that book, Ms. Kübler-Ross introduced the Five Stages of Grief. The five stages are known by the acronym DABDA — Denial; Anger; Bargaining; Depression; and finally, Acceptance. The five stages describe the process by which individuals cope with grief and tragedy. Breaking the grieving process down into these stages provides an individual with the framework to understand his or her mental state, and eventually emerge from the process with at least a bit of self-awareness.

### Client Reactions

Defendants in a product liability action tend to traverse these same stages as they journey through the litigation landscape. Unfortunately, and perhaps unsurprisingly, considering that litigation is circumscribed by a set of rules that do not provide much time for self-reflection, defendants typically do not do so with sufficient self-awareness to make the process beneficial or efficient. For the human being, the ultimate outcome is a given — death. For a lawsuit, while there is not the same predictability, it is close. We know that, for better or worse, 95% of all cases settle. Armed with that knowledge, defense counsel should be able to do a better job in guiding their clients through these stages, and reaching a settlement more quickly and efficiently, if it is truly inevitable.

Unfortunately, too many defense counsel and their clients fixate on two of the early stages of the client's reaction to a product liability lawsuit — denial or anger. They do so almost instinctively, without evaluating the final stage — acceptance — at the commencement of the engagement. In one study of more than 5,000 civil litigation cases in which there were pre-trial settlement offers that were rejected and the cases proceeded to trial, 60% of plaintiffs and 25% of defendants failed to obtain a better financial outcome at trial. While the percentage of defendants' unfavorable trial outcomes was less than the percentage of those of the plaintiffs, the financial impact on the defendants was significantly higher than on the plaintiffs. The average decision error cost for defendants exceeded $1 million, on average. (Randall Kiser, Beyond Right and Wrong, The Power of Effective Decision Making for Attorneys and Clients 85 (2010).)

### Alternative Courses of Action

This article is not for a moment advocating "throwing in the towel" every time a product liability complaint comes in the door. A hard-fought defense may be just what the doctor ordered, and the claim may ultimately be defeated. But, in addition to prescribing a strong defense, it is essential and ethically sound that the

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defense attorney evaluate all alternate courses of action at the very outset of the litigation, and prepare the client (especially one who is a litigation novice) for the fact that settlement, like death, may be the inevitable outcome. The only question may well be: Now or later?

Being by nature combative, defense attorneys often have difficulty discussing both "the good fight" and "the settlement" early on. That failure can lead to increased litigation costs, unrealistic expectations, anger and frustration. The failure to conduct these discussions may inevitably result in too much time being spent at the denial/anger and bargaining stages. Precious time, money and opportunity will be lost before depression and acceptance set in, and a settlement is ultimately reached.

Encouraging a careful analysis of the stages of "grief" may well speed up the entire litigation process, help settle the case and minimize the public relations issues and heavy costs faced by a company embroiled in years and years of litigation. In navigating the client's passage through the Five Stages, it is helpful to be able to recognize them and to identify the common myths which accompany them.

## 1. Denial

At the first stage in the process — denial — product liability defendants may want to assert positions that will not carry the day and will not insulate them from liability. It is incumbent upon defense counsel to debunk these theories quickly, and to explain to the client how clinging to these erroneous ways of thinking is not only ineffective, it is sometimes detrimental.

- *We did not do anything wrong and we will fight*. Virtually 100% of the time that is the company's reaction to being served with a product liability complaint. While "We did not do anything wrong" may be true from the company's perspective, what the company needs to understand is that its sense of "wrong" is different from the plaintiff's lawyer's sense of "wrong," from the court's sense of "wrong," and from the public's sense of "wrong." Even if the company does not think it did anything wrong, it has still been served with a lawsuit, which is just not going to disappear.
- *We complied with the government or industry rules and regulations, so we are not going to be liable*. Except in limited circumstances, courts may find that compliance with government or industry rules and regulations does not preempt a plaintiff's state law claims against a company.
- *We relied on clinical/scientific studies, so we will not be liable*. The company's clinical studies will be attacked, and reliance on a third party may not insulate the company from liability.
- *If our product is not dangerous (does not cause physical harm), we will not be liable*. The client must understand that it still has exposure.
- *The average person knows the truth*. That does not necessarily mean that the company is protected from a lawsuit or liability.

## 2. Anger/Bargaining

In-house counsel and the business team are often quick to react emotionally to a lawsuit filed against their company. They tend to view any and every product liability action as an attack on the very core of their business. They are sometimes consumed with trying to understand the meaning behind each word used by a plaintiff's lawyer in drafting a complaint — when often plaintiffs' lawyers use form complaints that they have drafted for multiple uses and recycle them without giving much thought to their word choices. To the company's management, plaintiff's lawyers are often viewed as terrorists, and their complaints a ransom demand.

In defense counsel's role as a counselor guiding the client through the stages of litigation, it is important to help the defendant work past these initial reactions. While the initial emotional response is not to be discounted or disparaged, it is important to compartmentalize that reaction, see it for what it is, and move forward. Here are some of the common misconceptions that cause in-house counsel and business people to become stuck at this stage of anger/bargaining.

- We will get out of this case without paying any money.
- The lawsuit is frivolous; therefore, it will not cost us anything.
- We can make this case go away quickly.
- We will bury the plaintiff's lawyers and make them go away.

Companies can choose to look at a lawsuit as an all-out war against them. Or, the lawsuit may be a symptom that there is actually something wrong with the way the company is doing business in terms of marketing or labeling its products. The client will often need the most counseling at this stage of the process.

## 3. Depression

Having gone through months, if not years, of extraordinarily costly litigation that has not only been a huge business disruption that has diverted attention from otherwise important business goals but has also spawned negative publicity, the company finally begins to think about settlement. As the client moves through this next stage and begins to think about settling the lawsuit that has been plaguing the company for an extended

period of time, a few misconceptions may impede its progress through this stage:

- *If we settle, we will attract more plaintiffs/lawsuits*. The truth is that the longer a lawsuit is pending, the more likely similar claims will be filed. Once a suit is settled nationally, it may cut off all similar claims and the earlier the case is resolved, the less publicity and the fewer copycat lawsuits are likely to be filed.
- *Settling will cost too much*. This is not necessarily the case. It is imperative that attorney and client engage in a thorough damages valuation of the case at the very outset. For example, within days of filing the complaint, defense counsel should have a firm grasp on the amount of the product sold, the retail price and the wholesale price for which it was sold.

## 4. Acceptance

Having navigated through the first four stages of "grief," the client finally moves on to acceptance. As mentioned above, the initial reaction of companies faced with these lawsuits is often to fight the intruder at the door. They will often cry outrage and direct defense counsel to file a motion to dismiss. However, after realizing that filing the motion to dismiss will possibly prompt a 24/7 media blitz, the company may decide the fight is just not worth it. Finally accepting that settling the lawsuit is possibly the best option the company has, the client may hold its nose and try to settle.

In doing so, however, there are a few strategic considerations of which the client should be made aware. One is the use of settlement counsel as the vehicle by which to negotiate a settlement. Almost all law firms have litigation departments. Very few, however, have "settlement departments." In cases in which early "acceptance" may be warranted, a client may be better served by settlement lawyers, and not by "Rambo gun slingers." A two-track approach to litigation, with a settlement lawyer available 24/7 to discuss settlement, and whose sole charge is to try to settle a case, can be very effective. Here are some considerations relevant to deciding whether settlement counsel is appropriate for a particular matter.

Hiring settlement counsel may be appropriate if:

- The client wants to be able to control the outcome of the litigation.
- The case can be settled relatively inexpensively and the trial preparations would be costly and protracted.
- A speedy resolution is important to the company.
- The company wants to avoid publicity of the claims.
- There is a risk of a large adverse decision.
- Little discovery is required because the facts are evident.

On the other hand, hiring settlement counsel may not be a wise course of action if:

- A critical corporate interest is involved.
- The case can most probably be disposed of on a motion.
- The other side's case is frivolous.
- At least one side requires a judicial decision for its precedential value.
- A settlement would set a bad example to other potential claimants.

In exploring these questions, outside counsel, whether as a settlement counsel, or as the all-purpose litigation attorney, must help the company work through its priorities, which will inevitably include:

- Cost of defense;
- Business disruption;
- Reputation of company and its officers;
- Not encouraging more litigation; and
- Building consumer confidence in products.

## Conclusion

The defense lawyer's job is to help navigate all of these issues as the client tries to figure out what is best for the company. Unfortunately, "settlement" may be right up there along with "death and taxes" as two constants that must be faced and addressed, sooner or later. If so, better sooner, than later.