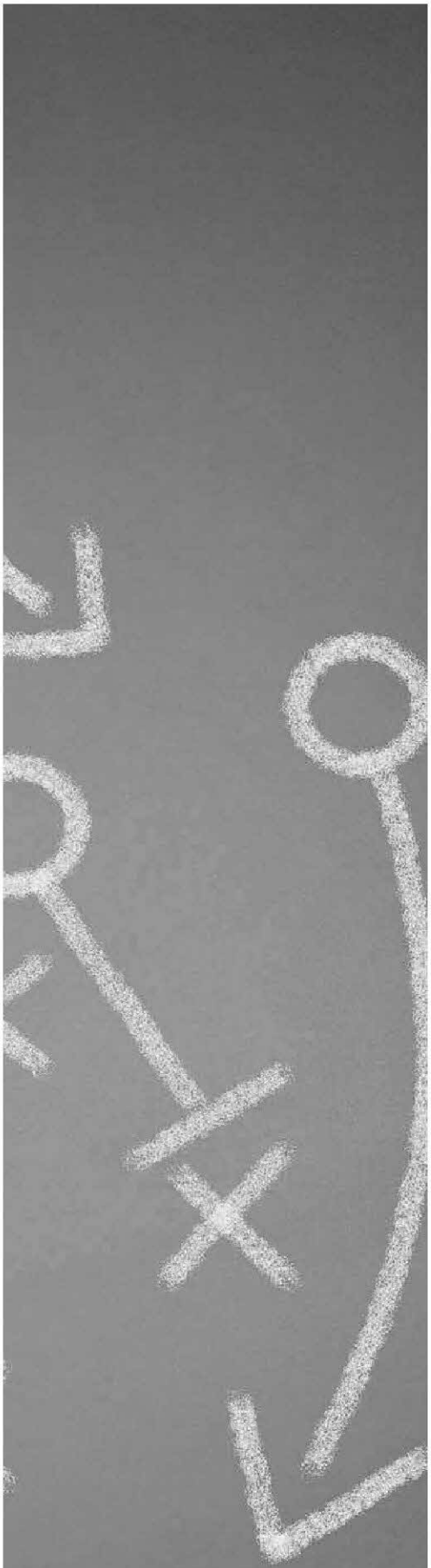

THE When & How OF A SETTLEMENT DEMAND

Our profession is one of words. We complain, allege, answer, respond, and submit when others merely make statements. We request, plea, and demand when others merely ask. And, as plaintiff lawyers, we can get so caught up in the language, the facts, or, even worse, the principle of a case that we forget our ultimate goal—to obtain a just financial recovery for our injured clients.

Clients often ask how long their case will take to resolve and whether a settlement can be reached. We should be forthright with clients and explain that every case is different and that we must prepare for trial even as we seek a settlement. We also should explain that every case has a rhythm and that—as Ecclesiastes reminds us—there is a time to build, a time to be silent, and a time to speak. Plaintiff attorneys must pay attention to many moving pieces to determine when to make a demand. Settlement often is possible when your best arguments are intact, your client is engaged, and you can fairly evaluate your strengths and weaknesses.

Plaintiff attorneys usually begin the settlement conversation. For young and seasoned lawyers, it is tempting to start discussions too soon, which can devalue your client's case. Similarly, busy lawyers with too many cases may miss the window to make a fair demand and find themselves preparing for a trial that could have been settled. There is no secret formula for when, where, and how to make a demand to maximize the value of your client's case, but a thoughtful plaintiff lawyer should always consider certain factors.

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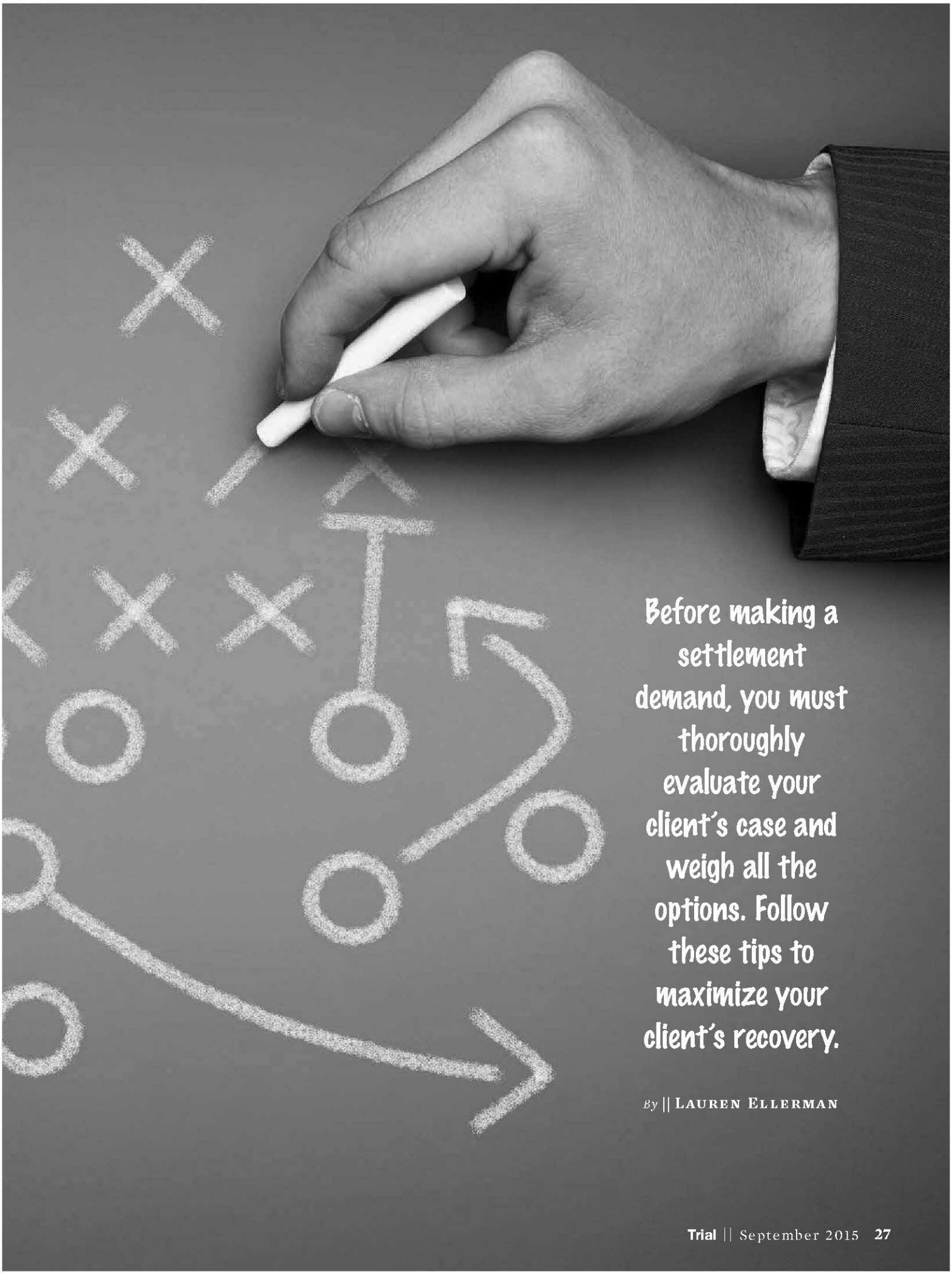


Before making a settlement demand, you must thoroughly evaluate your client's case and weigh all the options. Follow these tips to maximize your client's recovery.

By || LAUREN ELLERMAN

Know the Case

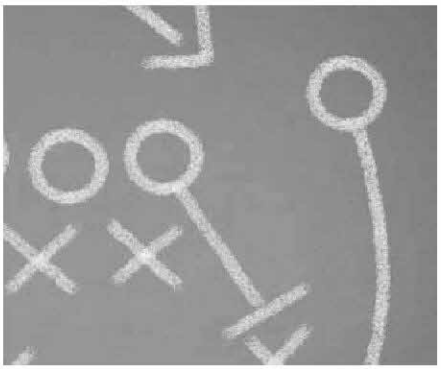
Be selective and engaged in each case you investigate, so you're aware of challenges early on and can decide how they can help your case theory. That means asking clients hard questions from the beginning.

You generally need to know the following about the case and client before drafting a complaint:

- existence of liens and estimated lien amounts
- family dynamics in wrongful death cases. For example, how often did family members visit, speak to, or see the decedent? Were there any affairs, separations, missing or estranged relationships, addiction issues, or criminal history?
- past medical conditions
- past lawsuits and statements made under oath
- damages related to the case or injury
- possible defenses

The right emphasis on the right elements can go a long way. Take, for example, a wrongful death case in which the couple was separated. Can you frame that as a lost chance to get back together? Other examples of issues to consider: Is there a reason the son didn't visit his mother in the nursing home for over a year? Did your client state that he had back pain in a workers' compensation case two years ago, making his current complaints of back pain unrelated? Is there a significant Medicaid lien that will take the entire settlement from the family, leaving nothing for the victim?

You need the answers to these questions before you agree to accept a case so you can assess its strengths, weaknesses, timing, and rhythm. I can think of two cases I accepted that, had I done my job in the beginning, I should have realized were complicated and not worth the time and effort for my clients. Sloppy investigation and not asking clients hard questions early on meant I missed obvious problems. Although both cases were settled—providing some minimal recovery for the families—there is no doubt the clients were disappointed and my reputation was affected.



Settlement often is possible when your best arguments are intact, your client is engaged, and you can fairly evaluate your strengths and weaknesses.

Timing Matters

Until a case is fully developed, defense attorneys and insurance carriers rarely place appropriate settlement value on it. Sure, we have all had that outlying case where a presuit demand makes sense—one of those rare cases where liability is so obvious, the only remaining issue is damages. Or we have had the client who can't wait a year for compensation for his injuries. But for most complicated injury cases, you need the pressure of discovery, deadlines, and a trial date to force a reasonable offer.

Most cases are not ripe for settlement until after suit has been filed and discovery taken. Factors that make a case not ripe for settlement can include

- complicated liability or damages
- good clients whom a potential jury or judge will like
- good experts who can be supportive in discovery and at trial
- multiple defendants who will dispute liability and blame codefendants
- clients who want answers more than a quick settlement
- a defendant with a history of negligence, which must be highlighted in discovery
- a defendant with a poor reputation in the community, so that other similar cases or helpful character witnesses are likely to present themselves later.

There are always exceptions to the rule. You should make a presuit demand when

- liability and damages are straightforward.
- your client will not be liked by a jury or judge.
- media coverage of the incident or lawsuit puts your client in a strong bargaining position.
- there are multiple plaintiffs and one insurance policy, or a wasting policy where you need to be the first in line for settlement.

Your clients may be tempted to accept something now rather than spend time developing their case. But lawsuits are like relationships—you need to spend time with people to get to know them. Defendants and insurance carriers need to fully appreciate their risks before they will offer a fair amount. If you have carefully selected the case, the more developed it is, the stronger it is.

When to Make Your Demand

For injured clients and their lawyers, costs are always an issue. We don't hire two experts when one will do, or needlessly depose useless witnesses. We

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ethically and financially cannot make choices that do not directly benefit our client. When to make a demand is often linked to the timing of costs in your client's case.

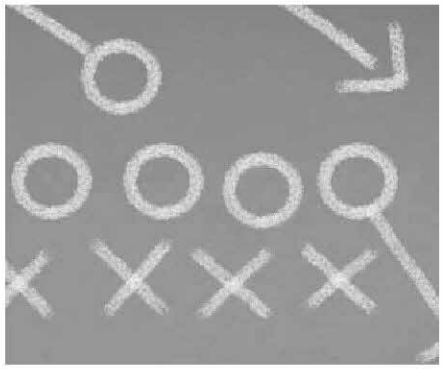
It is best to make a demand after your experts have been deposed but before deposing defense experts. Check to see whether any defense experts have given sufficient statements in other depositions. Keep an eye on costs and tell experts to stand down while negotiations are happening. Keep your clients updated on costs so they can fully appreciate the value of an offer and the expenses if a settlement can't be reached.

It may be appropriate to let defense counsel know your costs to explain why your client will not accept an offer. If the court allows it, schedule your pretrial motions months before trial so you can get the court's ruling and strengthen your case on evidentiary issues.

It's best to make a demand and settle when your case is strong and costs are low. If you miss that window and are days away from trial with experts charging full fees, the offer must be significantly higher to have the same value for your client.

How to Make a Demand

If the defense attorney is overworked and has paid little attention to the details, a formal written demand that outlines some, but not all, of the case's strengths and weaknesses may be necessary. If both plaintiff and defense attorneys want to settle the case, but the defendant and carrier are resistant, it may be helpful to make a formal demand that highlights the defendant's risk. If your value of the case and the defendant's value of the case are close enough that arguing the merits is a waste of time, communicate a number and little else. If your client needs something in addition to financial recovery, such as an apology, ask for that as well.



Know your audience. Know where you agree and disagree. Know your strengths and weaknesses.

Know your audience. Know where you agree and disagree. Know your strengths and weaknesses, and pay attention to the details before you communicate any kind of demand or settlement number. If you don't, you will not be able to settle the case, even if it is strong.

Some benefits to a formal written demand include:

- The demand will be sent to the carrier.
- The demand will become part of the formal case file for the carrier and defense, which is important if staff changes.
- Your client expects you to do this.
- It helps you organize your case's strengths.
- You may receive a reply that reveals some of the defense's arguments.

But there are also negatives to a formal written demand:

- It can give defendants a road map for trial.
- If you know your client is more flexible, you lose credibility by stating otherwise in a written demand.
- If only the numbers matter, then a written demand can detract from the issue of how much the plaintiff will accept and could give away too much information on your case theory and evidence.
- Sometimes defense attorneys are not motivated by case details, just case value.
- The most compelling statements usually come from the client, not the lawyer.
- It takes time away from useful pretrial pursuits such as motions in limine, evidentiary arguments, and witness preparation.
- It can make your client or case seem desperate, but a brief phone call with a number can appear to be a more confident communication.

Remember, sometimes less is more. A simple statement often can provide more insight than a wordy explanation on case merits. Know your own negotiation style and talents—if a phone call is better for you than an email, go for it. But don't get so locked into a routine that you miss the opportunity to tailor settlement discussions to the defendant and circumstances in your case. The easiest case to try is one where no offer has been or will be made. The hardest case is one where a reasonable offer has been made and rejected.

Always be ready for trial and work toward that goal. If you don't, defendants will sense your unwillingness to go the distance, and their value of the case will change. Know your audience, your case, and when to make a demand to serve your client's needs. ◼

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