

**“The Big Nuisance: A Not So Radical Proposal
For Mediating Nuisance Value Conflicts”**

By

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Is There A Problem?

Is there a flood of nuisance value lawsuits jamming up our court system? Are mediators handling large numbers of cases with little value? An informal survey of Michigan mediators has turned up no such evidence.

A review of the literature, however, suggests there are some who believe there is. Several commentators have gone so far as to offer radical solutions to combat a perceived “pervasive phenomenon”. One such solution is *mandatory* summary judgment. See, “Solving the Nuisance Value Settlement Problem: Mandatory Summary Judgment” by Randy J. Kozal and David Rosenberg³ and “A Model in Which Suits are Brought for Their Nuisance Value,” by David Rosenberg and S. Shavell.⁴ In “A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement”⁵ by David Rosenberg and Steven Shavell, the authors argue courts should be given the power to *bar* settlements duly negotiated between the parties where the case has only nuisance value. Others argue that judges should be empowered to stay proceedings for an “expedited” claim validity phase. See, “Nuisance Value Patent Suits: An Economic Model and Proposal” by Ranganath Sudarshan,⁶ and “Agency Costs & The False Claims Act,” by David Farber.⁷ In our view, radical changes to the civil justice system are not necessary. We believe these commentators are offering to fix something that is not broken. We offer instead classic, proven mediator techniques to manage “nuisance value” cases.

“Nuisance Value” defined

What is a nuisance? What is nuisance value? These words are typically meant to suggest that plaintiff’s claims lack merit. “Nuisance value” is a term typically used by claims adjusters to describe the small amount of compensation the carrier is willing to pay to make an “iffy” personal injury or wrongful discharge claim go away.

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³*Virginia Law Review*, Vol. 90, p. 1849, 2004

⁴ Available at http://www.law.harvard.edu/programs/olin_center/

⁵ *International Review of Law and Economics* 26 (2006) 42–51

⁶Ranganath Sudarshan, *Nuisance-Value Patent Suits: An Economic Model and Proposal*, 25 *Santa Clara High Tech. L.J.* 159 (2008)

⁷David Farber, *Agency Costs and the False Claims Act*, 83 *FORDHAM L. REV.* 219 (2014).

A nuisance settlement is usually a nominal amount, offered when their insured's liability is unproven, or when the adjuster believes the victim's damages are minimal.

Merriam-Webster defines nuisance as "a person, thing, or situation that is annoying or that causes trouble or problems." The Oxford Dictionary defines "nuisance value" as "the significance of a person or thing arising from their capacity to cause inconvenience or annoyance." A Harvard Law School paper from 2004 defines a nuisance suit as "...a legal action in which the plaintiff's case is sufficiently weak that he would be unwilling to pursue it to trial."⁸ Black's Law Dictionary (Abridged Ninth Edition) defines "nuisance settlement" as follows:

A settlement in which the defendant pays the plaintiff purely for economic reasons – as opposed to any notion of responsibility – because without the settlement the defendant would spend more money in legal fees and expenses caused by protracted litigation than in paying the settlement amount.

Typically, the defense characterizes plaintiff's claims as "nuisance" for one of the following reasons: 1) there is no liability; 2) plaintiff has an untenable theory; 3) defendant did nothing wrong to the plaintiff; 4) plaintiff has not suffered harm or has failed to mitigate damages; or 5) there is no evidentiary basis to support the claim.

Nuisance Value in Mediation

If the word "nuisance" comes up in mediation, it is generally early on. Sometimes plaintiff's counsel is the first to raise it in the form of a complaint: "The defense isn't taking this case as seriously as they should. They're treating it like a nuisance." Most often, it is defense counsel explaining why the claim has little value in their analysis and hasn't settled earlier. "We see this as no more than a nuisance case." Or, "From our perspective, this case has little more than nuisance value." Or, "We're willing to make an offer to get rid of it, but the numbers are nominal." Plaintiff counsel often reacts with indignation or outrage. When they hear, "nuisance value," it signals to their ears that the mediation process is heading in an unproductive direction. "This is *not* a nuisance case," they angrily reply, or "They're not here in good faith." If and when defendants persist, frustrated, plaintiff counsel may add: "We're out of here." Accordingly, mediators must tread carefully when they hear the words "nuisance" or "nuisance value."

How does "nuisance value" translate into dollars? A nuisance value offer may start anywhere from \$1,500, \$2,500, \$3,500, even \$5,000. However, in a tort case involving death or an employment case for a high salaried executive, nuisance value

⁸ The Harvard John M. Olin Discussion Paper Series: available at http://www.law.harvard.edu/programs/olin_center/

can also mean six figures. “Nuisance value” is therefore a matter of perspective and context. That said, of course, there are sometimes cases properly characterized as “nuisance”. As will be discussed below, there are techniques available for mediators to assist parties in analyzing their risk and exposure to help assess whether a nuisance settlement is appropriate.

If the claim is truly limited to nuisance value, defendants may or may not be interested in paying a small amount to save on “defense costs.” Sometimes claims adjustors and risk managers choose to fight. “Millions for defense but not one penny for tribute” is their mantra. This is more likely to arise in a court ordered mediation. Rarely will the defense agree to the cost of mediation if they are unwilling to settle at some level. The choice to fight or pay are both reasonable business judgments but each carries a level of risk. Neither strategy works every time. Mediation is a voluntary process. The final decision belongs to the parties. A mediator can examine the costs of proceeding and explore the risks and potential verdict range but a party is well within its rights if a roll of the dice is preferred.

A realistic plaintiff may well be interested in a nuisance value settlement but needs the help or cover of a mediator before agreeing to accept. Finding the “sweet spot” where - in the words of Winston Churchill “each party walks away equally unhappy” - is not always easy. If the defense chooses to pay but not enough to keep plaintiff and counsel in the process, what’s a mediator to do? Mediation offers the parties an opportunity to brainstorm creative, outside-the-box resolutions – resolutions that would not be available if the case proceeded to trial. As an example, a young woman brought a claim against a hotel over alleged unacceptable service. The hotel saw the dispute as a nuisance. A resolution acceptable to both parties was a fully paid vacation for the charging party at another hotel in the chain. This met the needs of both parties: the hotel managed its risk, gave up only one empty room and avoided damaging its reputation by a negative review while the claimant managed her risk, and enjoyed an unblemished time away to replace the vacation lost.

Where’s the Incentive?

As noted, nuisance cases are relatively rare in mediation. Accordingly, when mediators hear “nuisance,” the authors suggest keeping an open mind. Perhaps it is; perhaps it is not. To paraphrase Mark Twain, in our experience, the alleged flood of nuisance value suits is greatly exaggerated. Indeed, nuisance characterizations should be carefully examined as there is little incentive for a plaintiff’s lawyer to pursue nuisance litigation.⁹

⁹ On the other hand, the authors did find a website blog titled, “The Insurance Adjustor’s ‘Nuisance’ Value of Your Claim,” which advises “Even if the insurance company is right in claiming no liability for your injury, you may be able to get a ‘nuisance settlement.’”

In the first place, most plaintiff lawyers are paid on a contingency fee basis: no payment unless there is a settlement. One third of a nuisance value is one third of very little. Where's the incentive to bring a nuisance suit? Absent unusual circumstances, few plaintiff lawyers will knowingly accept nuisance value cases to litigate. Contingency fee lawyers cannot earn a living that way. Moreover, to reach a point where the other side is willing to talk settlement or offer to engage in a mediation process, plaintiff's counsel may be forced to make a significant investment in court costs for filing fees, deposition transcripts, expert witness evaluations and reports, etc. etc. A garden-variety case may cost \$5-10,000 of the lawyer's capital—well in excess of most nuisance value settlements.¹⁰ Because many in the insurance world have made a policy decision to limit nuisance settlements, relying on their stronger bargaining position and the lawsuit's lack of merit, any claim pursued for nuisance value is a risky venture indeed. This is no mystery to the average plaintiff lawyer. Who would want to invest effort and resources in such a high risk/low value dispute? Who has TIME to process a nuisance suit? It's simply bad for business. Therefore, the mediator's first reaction to charges of "nuisance value" should be "tell me why you think so."

Second, a lawyer who brings nuisance value cases quickly earns a poor reputation. Lawyers talk about each other all the time. It's part of the litigator's life. We rely on our reputations. We rise and fall with them. The reputation we earn has a huge impact on how satisfied we are with our practices. Lawyers with a good reputation are treated with respect and given credibility by the courts and opposing counsel. Lawyers with good reputations are taken seriously by the other side. "If *you* brought this case, I better take a close look at it." Word that someone brings nuisance cases will quickly spread throughout the Bar. A reputation for bringing bad cases - either out of ignorance, poor judgment or simple callous indifference to the Rules of Professional Responsibility (which discourages bringing non-meritorious law suits¹¹) - undermines the credibility and reputation of that lawyer. What's more, a lawyer's poor reputation undermines the value of the good cases he/she might bring. "Why should I believe this is a good case when the last three you brought were not worth my time or yours?" That kind of reputation hurts a lawyer's personal credibility in general, and his/her ability to persuade a court or fact finder that the claim has true merit. Their claims are viewed with considerable skepticism and rarely are given the benefit of any doubt.

Third, a lawyer who brings nuisance cases is more likely to run into discipline trouble and complaints against his/her license with the State Bar. Why? Clients conclude their case must have merit because the lawyer agreed to take it. Most clients – even those with strong cases – have expectations, often unreasonable,

¹⁰ At a seminar sponsored by ICLE, the Institute of Continuing Legal Education, several years ago, a lawyer representing the insurance carriers in medical malpractice cases described his instructions to make certain plaintiff's counsel has invested over \$75,000.00 before engaging in settlement negotiations.

¹¹Michigan Rules of Professional Responsibility, Rule 3.1.

about the value of their case. They read about similar (or not) cases in the paper and say, "My case is even stronger than that!" When the lawyer communicates the nuisance value offer and recommends the client accept, those expectations are shattered. How can this be? "The lawyer has sold me out. The lawyer is in the pocket of the insurance company. The lawyer is incompetent." There's an old saying: "Expectations are resentments under construction." A resentful client is likely to bring charges of some kind against the offending lawyer. Just what that lawyer needs: a low value case that results in threats to his license.

More likely than not, therefore, when the mediator hears that the plaintiff's claim is a "nuisance," the odds are that something else may be going on. Our best advice to mediators: "trust but verify."

Has the Defense Engaged in Realistic Risk Assessment?

Sometimes defense counsel doesn't truly believe the case lacks value. There's another old saying, "The best defense is a good offense." Sometimes charging that a claim has "nuisance value" is a technique to rock plaintiff and her lawyer back on their heels and lower their hopes for a good financial settlement. A good mediator needs to explore this possibility by asking good risk questions. Sometimes it may turn out the defense is *sincere*, but for whatever reason, they have failed to engage in realistic risk assessment. The claim may not be a "nuisance" at all.

Whether the defense is sincere, mistaken or on the mark can only be answered as the mediation process unfolds. Was defense counsel too close to the situation to be objective and give good advice? Did the party representative make the decision that resulted in litigation? Perhaps it was defense counsel who advised the actions leading to litigation. Perhaps the client did not adequately investigate the claim. Perhaps a key participant on the defense side has been less than honest. Is the litigator outside his or her area of expertise? Mediators need to understand the basis for defendant's position at the table. Have they realistically assessed the problems and shortcomings? *Is there a legal basis for the claim? Is the claim solidly based upon case law? What do the cases hold? Is the law unsettled? What are the elements of the claim and will there be evidence to support every element? Has the plaintiff presented evidence the defense has not considered, undervalued or given insufficient attention? Is the defense in denial? Risk assessment and reality testing often reveal whether the nuisance characterization is sincere, mistaken, the result of inexperience or a negotiation ploy*¹².

¹² Perhaps it is plaintiff and plaintiff's counsel who are unrealistic or mistaken. The same questions and techniques can be used to explore risk and realistic analysis with them. Are they over-valuing the claim? Have they missed something important? Are they sweeping their weaknesses and risks under the rug?

Was Discovery Unproductive?

Sometimes responsible plaintiff counsel accepts a case for representation believing the facts will develop in discovery in a certain way. When they start digging, however, the evidence may not turn out to be that way at all. Plaintiff's counsel is sometimes forced to admit he couldn't find persuasive, admissible evidence of wrongdoing. They may or may not be willing to acknowledge that "the case went south," or, turned out to be "a dry well." That can happen. Such cases may nonetheless have SOME settlement value - especially as plaintiff's lawyer has invested time and money and is unlikely to dismiss the case voluntarily. As a result, plaintiff may be willing to accept significantly less than was initially anticipated. As many mediations focus on risk assessment, a claim that didn't pan out in an evidentiary sense may still pose a risk worth managing by seeking an amicable resolution.¹³

Cases that did not develop as expected provide ample questions to explore. *Why* did the case turn out to be weaker than expected? If the discussion is candid and plaintiff concedes the obvious, negotiations may be more productive. Perhaps plaintiff's initial demand would have been reasonable if the case had panned out; but it did not. Perhaps a lower number that factors in risk will result in a better response from defendant. Sometimes no money need change hands. In a recent mediation between two physicians who worked together in one practice, for example, one of them concluded he wasn't being paid in accordance with his contract. He believed he'd been cheated out of substantial dollars. Just before reaching the mediation table, however, all of the billings - which had been handled by a third party, not the defendant or his staff - were produced. Plaintiff's counsel examined them and realized proving substantial unpaid fees was unrealistic. Fortunately, there were many non-economic issues to be horse-traded. The case settled. Both sides were happy - and no money changed hands.

Why Can't We Agree?

Another line of inquiry to achieve the same goal is to ask the defense how such a capable, experienced plaintiff lawyer could be so wrong - assuming defense counsel knows and respects her opposition? Reasonable minds often differ about the value of a case. Two experienced, able and persuasive advocates can sometimes look at the same landscape and reach diametrically opposite conclusions. If the defense sincerely believes the dispute is limited to nuisance value, the mediation may not be over. There remain several techniques in the mediator tool kit.

¹³ In addition to the risk of an adverse ruling, cases may risk collateral consequences: the departure of key employees, adverse publicity, disruption of business operations, public exposure of sensitive or embarrassing information, aggravation of customer relations, impact on banking relationships, etc.

What Will the Costs Be?

One technique for moving forward is to explore "defense costs." How much money has the defense spent already in defending this "nuisance" litigation? Is there a litigation budget moving forward? How much discovery remains? How many depositions? Is plaintiff seeking or threatening to seek electronic records? How much will that cost? Will there be experts? How much time and effort will be expended to bring a motion for summary disposition? Is there a risk the motion will be denied? If denied, how much more money will be spent on a trial? Is there a risk that a defense verdict at trial might be appealed? How much more will an appeal cost in time, effort and disruption? Defense costs generally exceed "nuisance" value. In today's world, defense costs of \$20,000, \$40,000 or \$75,000 are not unusual. Many employment cases will cost over \$100,000 just to reach trial. In employment litigation, prevailing plaintiff's can recover actual attorney fees. Even if a plaintiff's verdict is modest, an award of substantial attorney fees can exceed the demand sought at the mediation table. Defendants do not always arrive at the table having considered the risk of limiting plaintiff to a small verdict but being exposed to actual attorney fees. If defendant is willing to settle for defense costs, resolution may well be possible. Plaintiff may equally recognize great risks ahead and conclude defense costs are a reasonable way to manage them.

How Big a Nuisance Are you?

Another technique is to explore the range of "nuisance value." \$5,000 might not sound like a "nuisance" in a small claims case. By contrast, \$100,000 might be nuisance value in a death case or discharge case for a highly compensated executive. While some plaintiff lawyers may be offended to hear their claims characterized as "nuisance", others could care less what it's called so long as the final offer meets their goals. "Yes," plaintiff's counsel might say, "I recognize you call this a 'nuisance' case, but I consider myself a big nuisance!" Big nuisance, indeed.

A simple technique, depending on the mediator's relationship to defense counsel, might be to ask straight out: "What is the range of nuisance value for which you'd be willing to settle this case?" If the answer is, "we'd never pay more than \$35,000", the mediator has something to work with. As this is tantamount to asking a party for its "bottom line," however, the answer may not be reliable.

A mediator might further explore defendant's range by using "what if" questions. "What if plaintiff brought her demand down to five figures? What could you offer then?" The answer, of course, might be so small an increase as to remain unproductive. Defense counsel, implementing a negotiation strategy that is not working out, might be ready to provide a constructive answer. Though not yet ready to disclose flexibility to the plaintiff, the defense may be ready to signal to the mediator that they aren't yet close to their limits of authority.

An end game variation of the mediator “what if” question is: “I don’t have authority for this, but if I could get plaintiff to walk away at \$25,000, is it possible you would pay it?” If the defense is favorably disposed, the same question could then be asked in the plaintiff’s room: “I don’t have a number yet, but if I get them up to \$25,000, is it possible you would take it?” This technique permits the lawyers to achieve a resolution or close the gap significantly without relinquishing their settlement positions should the case not settle.

Conclusion

It is not evident that a glut of nuisance value cases is interfering with the civil justice system. Accordingly, radical changes – mandatory summary judgment motions or judicial authority to reject settlements, for example – are not necessary. Despite commentary to the contrary, there are few responsible plaintiff lawyers willing to bring nuisance value cases they would never take to trial. Sometimes, however, mediators will be faced with mediating alleged nuisance value claims. There are many time-tested and effective techniques available to mediators to deal with them. Mediators may explore the sincerity of a “nuisance” characterization, focus on the costs of going forward, determine if either side is unrealistically analyzing risk, explore the range of “nuisance” settlements and brainstorm non-economic issues resulting in resolution without payment of significant dollars. Radical solutions are better left in the pages of law review articles, not adopted as new court rules.¹⁴

¹⁴ The authors wish to thank Earlene Baggett-Hayes, Shel Stark’s friend and colleague at PREMi, Professional Resolution Experts of Michigan, for her ideas, advice and suggestions.