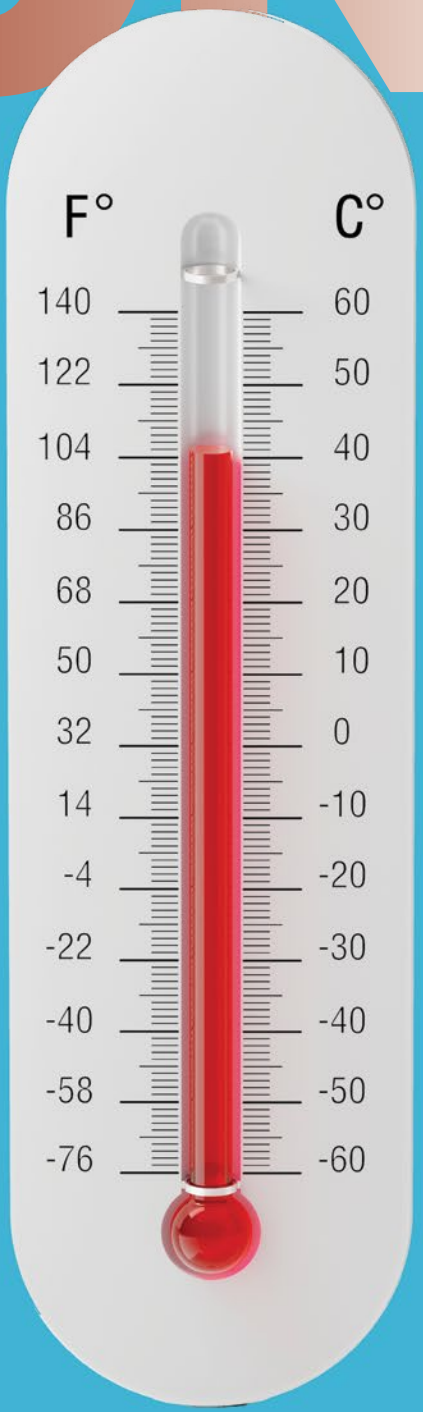
CONT

When working to resolve a drug or device case, determine the optimal outcome up front, attempt to remove obstacles to resolution, and turn up the heat only when necessary.



ROL THE TEMPERATURE

By || **Robert E. Price**

As plaintiff lawyers, we take on significant risk in handling cases. This is especially true in drug or device cases when a single decision can have widespread ramifications that impact hundreds or even thousands of people. Every resource and every minute spent on a case must be carefully measured to ensure the best outcome for our clients. This creates internal pressure, and from that pressure can emerge the inclination to turn up the heat on the other side. But snap decisions based on emotion and anger are ill advised.

Psychologists have noted that anger can impact one's intelligence, and differing hypotheses exist on how and why.[1] One hypothesis is that a person loses 10 to 15 IQ points when angry due to chemical changes in the brain's prefrontal cortex.[2] Another hypothesis is that intelligence does not necessarily drop, but rather that people grossly overestimate their own abilities and intelligence during fits of anger.[3] This body of literature is particularly pertinent in our practices, when a fit of anger can quickly lead to an ill-calculated threat or instruction to rain fire on your opponent.

As plaintiff lawyers, we must keep in mind that intelligence and efficiency in our cases are key. Here are some tips for getting things done deftly and efficiently while keeping emotions at bay—and in the presence of what appears to be a relentless opponent.

Resolution Obstacles

Early on I learned to spend time determining what is most important

in a case versus what can be given up or saved for another day—what carpenters refer to as "measure twice, cut once." For example, lawyers who work on large multidistrict or multi-county litigations tend to become attuned to a typical order of operations and "playbook" that, if applied to a much smaller litigation, may be time consuming and impractical to implement.

An orthopedic device case involving 5,000 claims should be analyzed and approached very differently from a litigation involving 50 to 100 claims surrounding a virtually identical device. In the former, launching large-scale corporate discovery immediately and managing bellwether pools may take priority. However, in the smaller litigation, implementing more limited and targeted corporate discovery while visiting resolution more frequently may be a wiser and more effective strategy.

Most cases are resolved through settlement, and the key to resolving a case is to help solve the defendant's problems for them. Signaling openness to resolution early in the case is critical. This openness is not an indicator of weakness, nor should the focus be on throwing out early settlement numbers. Rather, early resolution tactics should be aimed at understanding the defendant's position and the obstacles to resolution.

These are some of the most important things to understand about a case as early as possible:

- Does the defendant have financial issues?
- Are there other similar cases that the defendant is facing? If so, what is the potential global extent of its liability and where does your client and firm fit in the equation?
- Does the defendant see your client's case the way you do? If not, what are the fundamental differences?
- What is the defendant's position on causation?
- What is the defendant's position on other parties and potential actors or contributors to the incident?
- What are your client's own contributions to the incident?

Obtain answers to these questions at the outset of the case through a combination of discovery mechanisms and frank meet-and-confers.

Meet-and-Confers

In litigation, particularly in complex cases, meet-and-confers are the bread and butter of conflict resolution and compromise. However, meet-and-confers can either be a waste of time or a vital component of successful litigation. Approaching each one as an opportunity can make all the difference.

First, decide what agenda to advance and where to spend resources. For example, in almost every litigation I have been in, both large and small, someone shouts out at an initial plaintiff's steering committee or discovery committee meeting, "Well, the first thing we need to do is attack their privilege log and start sending out third-party subpoenas to anyone that had involvement."

In some scenarios, that tactic has paid off with good returns—but in other litigations, that tactic consumed countless hours of skilled lawyer time and resulted in virtually nothing. The bottom line is that your approach needs to be customized to the priority of what is most important, not in accordance with a typical playbook.

Another common mistake is approaching a meet-and-confer without first laying out the optimal results of a compromise. With this mentality, you'll easily get frustrated. Most successful negotiators make a list of "must have" items and "don't really need" or "willing to let go of" items. Then, during the negotiations, you can systematically relent on the "don't really need" items. This conveys good faith and maintains traction during the negotiations.

For example, when negotiating a plaintiff fact sheet in a multidistrict or multi-county litigation, the plaintiff negotiator's primary goal is to alleviate and minimize trapdoor questions that may subject a plaintiff to dispositive motion practice before the plaintiff's deposition even takes place.

A secondary goal is to reduce the overall volume and burden associated with responding. One successful tactic is to give in and allow your opponent to ask a higher volume of less critical questions while holding firm at limiting more critical trapdoor questions (for example, questions oriented on statute of limitations triggers).

An advanced negotiator knows when to let go of an item that is considered a "must have" if that item is not as high priority as other "must have" items—and if they can get something particularly valuable from their opponent in return. Often, this controlled negotiation ends up with a better result than what would be handed down by a court following intense and costly motion practice.

Turning Up the Heat

If your sincere endeavors to remove resolution obstacles are ineffective at the outset, then turning up the heat might be necessary. First, do this through actions, not words. For example, teeing up multiple depositions should be done by issuing notices, particularly if settlement negotiations are going stale. When faced with a recalcitrant defendant who will not compromise or who plays discovery games, filing a motion to compel after minimal meet-and-confer is often a far better tactic than engaging in numerous

PREVIOUS SPREAD: MICROSTOCKHUB/GETTY IMAGES

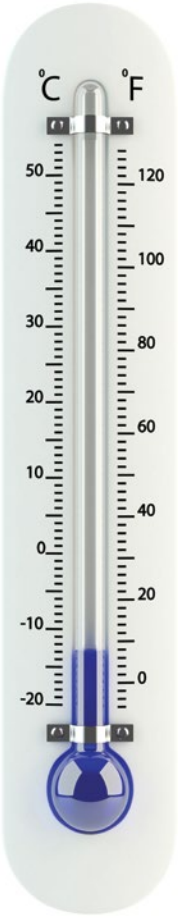
overheated meet-and-confers.

Rarely should you ever need to verbalize your actions to your opponent when you are cranking up the litigation heat. In fact, announcing your strategy is akin to handing the other team your playbook in the middle of a game.

Second, realize that once you turn up the heat, you are going to have to bring it back down at some point. I suggest having a sounding board (preferably another lawyer close to the case) to help you think about when and how to do that. For written correspondence, it is advisable to email a draft to a colleague for feedback if you feel the tone or content is potentially too aggressive (or not aggressive enough).

For adversarial depositions, particularly corporate witness depositions, have a second chair. When possible, I tend to try to get both a trusted co-counsel and nonlawyer paralegal or staff member (such as a high-level document reviewer or trial paralegal) to attend the deposition and give feedback on my tone, pace, aggression, and messaging. A nonlawyer is an invaluable resource for deposition input from a more lay perspective. Moreover, even in-person depositions can be set up so other lawyers can attend virtually and give feedback remotely. With these remote options, asking for others to attend is less burdensome than it once was.

Last, notch up the degrees at a pace that is sustainable. Using the deposition example, if turning up the heat is defined as taking 10 mid- or high-level corporate witness depositions in a five-month period (at a pace of one deposition every two weeks), then that likely requires the availability of two to four skilled lawyers who are committed to working almost exclusively on the case for six months or more (considering prep time).



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Unless you are at a very large firm, allocating this time requires an extreme amount of discipline, commitment, and adjustment of resources across the firm. Thus, issuing such a threat in a fit of anger without ensuring you have the resources to follow through can spell disaster.

Confront Weaknesses

A lawyer who I admire sometimes uses the "play cards face up" strategy with his opponents.[4] In litigation, this can be an effective strategy and is the polar opposite of "hiding the ball." When facing an opponent, it can be effective and disarming to self-identify your weaknesses during the process of rebutting your opponent's defenses.

For example, in drug and device cases that involve a spectrum of injuries, it is often advantageous to signal to your opponent which injury types you concede may be tougher to prove. Often, these tougher cases are where you and your opponent will need to spend the most time sorting out issues. The issue resolution process is much more efficient if you embrace and confront (rather than hide from) weaknesses while inviting dialogue from your opponent.

You can convey confidence by identifying your own weaknesses because in the same breath you can explain how you can and will overcome them. This strategy also allows you to have an open and honest conversation about the various aspects of the case with opposing counsel—and to identify points of disagreement. In doing so, you can dispel any notion of being unreasonable and provide opposing counsel with the critical information they may need to have an honest conversation with their client. This is a much stronger strategy than hiding from your weaknesses or becoming emotional or angry when your opponent tries to point them out.

Good examples include statute of limitations or physician use issues. Often, drug and device cases are riddled with these issues, and you may be tempted to put vetting these issues on the back burner, hoping they will not

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rise to the surface. However, embracing issues early fosters solution building, such as targeted focus groups and lawyer workshopping.

For example, some early corporate admissions that the company did not publicly disseminate certain safety or use information to physicians or that the product was advertised as "unique" or different (if a product was part of a class of drugs or devices) are foundations of a liability story. These admissions can be effective antidotes when addressing these issues with your opponent or briefing dispositive motions.

Ultimately, controlling the temperature in the room can and will achieve better results—and with much more efficiency.

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Notes

1. *See, e.g.*, Marcin Zajenkowski & Anna Zajenkowska, *Intelligence and Aggression: The Role of Cognitive Control and Test Related Stress*, 81 Personality & Individual Differences 23 (2015), DOI: 10.1016/j.paid.2014.12.062 (summarizing previous research on the inverse correlation between intelligence and anger). *See also* Matthew D. Lieberman et al., *Putting Feelings Into Words: Affect Labeling Disrupts Amygdala Activity in Response to Affective Stimuli*, 18 Psychol. Sci. 421 (2007), DOI: 10.1111/j.1467-9280.2007.01916.x; J. David Creswell et al., *Neural Correlates of Dispositional Mindfulness During Affect Labeling*, 69 Psychosomatic Med. 560 (2007), DOI: 10.1097/psy.0b013e3180f6171f.
2. *See, e.g.*, Relly Nadler, *Where Did My IQ Points Go?*, Psychol. Today, Apr. 29, 2011, https://www.psychologytoday.com/us/blog/leading-emotional-intelligence/201104/where-did-my-iq-points-go.
3. *See, e.g.*, Marcin Zajenkowski & Gilles E. Gignac, *Why Do Angry People Overestimate Their Intelligence? Neuroticism As a Suppressor of the Association Between Trait-Anger and Subjectively Assessed Intelligence*, 70 Intelligence 12 (2018), DOI: 10.1016/j.intell.2018.07.003; Marcin Zajenkowski, *Hostile and Energetic: Anger Is Predicted by Low Agreeableness and High Energetic Arousal*, PLoS One, Sept. 20, 2007, DOI: 10.1371/journal.pone.0184919.
4. In the "Texas hold 'em" iteration of poker, the community cards lie "face up" for all to see, enabling all players to equally play their strategies off this set.