Shame and game that may be unsettling cases in the hospitality space

Kendall Kelly Hayden, Cozen O'Connor

The Hospitality Law Conference: Houston 2022

What do hospitality establishments face when settlement is attempted? This paper and presentation focuses on present day sins that lead to unsettlement based on the last two years in a pandemic and the games that parties seem to play to continue this trend.

A. Seven deadly ~~trends~~ sins in hospitality since 2020

I interviewed coworkers, mediators and hospitality clients across the United States to inquire about the trends they are seeing in challenges settling hospitality cases in the height of and after the pandemic. I received such a dark response that instead of referring to these obstacles as 'trends,' I renamed them 'sins.' Herein are some direct quotes from industry colleagues about the sins that create problems in settlement. We then turn to the games lawyers and parties seem to be playing, and end with best practices to avoid any shame in your (settlement) game.

1. Sin #1: Pride

In interviewing a long time client, a seasoned claims manager for an international hotel, about why cases aren't settling as easily as they once did, she responded, "Cases don't settle because people are stupid." This was perhaps the funniest response I received and it made me laugh out loud. Reading between the lines, however, it seems to me that perhaps parties could be labeled "stupid" because they are too prideful to understand or admit what their case is actually worth. In speaking to her supervisor, a regional claims manager for an international hotel, he seemed to similarly acknowledge the pride in guests that create an adversarial environment. In his words, "Guests are highly unreasonable, and they also seem quite well informed and proud that they know the right things to say and ask."

As part of my interview process, I asked whether joint sessions during mediations presented any added value. Christine Johnson, Chief Operating Officer and General Counsel for Le Duff America opined that they seem to be a "thing of the past" and commented that perhaps Zoom has mooted the need for same. In my own recent experience, presenting an opening statement during a joint session in a hospitality mediation seemed maybe less effective than I planned. After I concluded, my client was very pleased, but the plaintiffs were not. They were visibly disgusted and in hindsight, perhaps I wanted to present an opening for my own pride and to appease my client, without thinking of the effect it may have on settlement negotiations. Jeff Abrams, a Houston mediator, said an insurance adjuster once admonished him, ""You Texans are the only ones who do opening sessions." In my experience, unless warranted for a specific reason, opening sessions are potentially more trouble, could take more time away from valuable negotiation time, and may create more problems than they are worth.

2. Sin #2: Greed

A long time mediator I have used blatantly stated: "We thought COVID would make people more conservative but it didn't." My interviews dovetailed with this

statement, showing the unrealistic expectations of hospitality guests. As one of my clients shared, "The hotels seem scared of the guests, maybe because of the fear of the business they lost to the pandemic, but this causes more problems because they bend over backwards for them, but it's never enough." As a hospitality lawyer, oftentimes the thing I see missing from settlement discussions if what was *not* done in the beginning—i.e., at the time the incident occurred, if more customer service was implemented, perhaps we would not be in the middle of a claim or a lawsuit. But how much is enough? This is the question that seems to befuddle hospitality establishments, preventing them from offering even a small overture, for fear that they will be taken advantage of.

3. Sin #3: Lust

"The things people do in hotel rooms are things they would never do at home…prostitution…because they don't want to do it at home," says Erik Antons, former Chief Security Officer of a major international hotel chain and a former Chair of the Hotel Security Working Group under the U.S. Department of State Overseas Security Advisory Council. Ond of my more memorable cases was when a hotel guest going through a divorce decided to live long term at the hotel, effectively turning him into a tenant. The law treats situations involving tenants differently from situations involving transient hotel guests. Scott Joslove, *Short Course Handout – Scott Joslove's Hotel Law* at p. 8 (2017). Under Texas law, tenants are given considerably more rights than transient guests. *Id*. Our tenant had prostitutes frequenting his room, and claimed his privacy was breached because a worker at the hotel, the best friend of his soon-to-be-ex-wife, disclosed this to his her in an attempt to skew the divorce proceedings.

The claims director for this hotel weighed in on this topic, also noting that sexual claims are at a high: "On average, I believe our Spas pose our biggest risk and maybe a byproduct of the #MeToo movement, but a lot more salacious allegations against our massage therapists [are occurring]."

4. Sin #4: Envy

I have been labeled a lot of things, but jealous has never been one of them. Therefore, the concept of envy is somewhat hard for me to digest. My interest was piqued to learn that research shows guest relationships in hotels are affected when hotel employees envy the relationships co-workers have with their bosses. *Envious employees can turn hospitality industry hostile*, PENN STATE, SCIENCE DAILY, September 28, 2010.

In the study of front-line hotel employees -- desk staff, food and beverage workers, housekeepers -- workers who have poor relationships with their bosses were more likely to envy co-workers with better relationships with supervisors, said John O'Neill, associate professor, School of Hospitality Management at Penn State. The study showed that the envious workers were also less likely to help co-workers or to volunteer for additional duties. "People who are less envious often go above and beyond their normal job duties to do things like cover for an employee who has gone home to help a sick family member," said O'Neill. "Conversely workers who are more envious are less willing to perform these additional duties."

Front-line employees are typically hourly employees who interact directly with guests. Since these employees have personal contact with guests, people staying at hotels become the unintended victims of on-the-job envy, according to O'Neill, who worked with Soo Kim, assistant professor, management and information systems at Montclair State University, and Hyun-Min Cho, tourism policy research division, Culture Contents Center, Republic of Korea. "Guests often need hotel workers to go above and beyond their normal job duties, even if it's just making a cup of coffee when the restaurant is closed," said O'Neill. "Performing these extra duties for guests, in turn, creates guests who are loyal to the hotel." O'Neill said that the study established a path linking workplace envy with hotel success.

5. Sin #5: Gluttony

Clients shared with me that perhaps because of economy, they have seen people rack up the charges from lavish dinners and spa treatments. Then, the customer will allege some mishap and not necessarily want a settlement but want all the charges for their stay forgiven. Additionally, hotels are seeing that because they dropped our rates to boost occupancy, they have seen a different clientele at their high end properties. My clients compared this to "Somewhat akin to airline deregulation."

6. Sin #6: Wrath

I personally have a vested interest in this topic given the unnecessary incivility with which I have been met in my opposing counsel over the last few year. One of my clients agreed, stating, without any prompt from me, that "Ever since the pandemic, people have been uncivil. [People are] [c]limbing the corporate ladder to get what they want."

This statement inspired me to research the notion of civility. I was pleasantly surprised upon finding an article that one of my law partners, Gary Gassman, had written on this very topic. See Gary Gassman, *Defining Civility as an Attorney*, 55 TORT & INS. L.J. 557 (Fall 2020). As Gary explains, "As early as law school, law students are taught to follow the ABA's Model Rules of Professional Conduct and the ethical obligations that come with taking the oath of professionalism as an attorney. Yet, the term civility is not defined within any legal statutes or guidelines." Gary's article addresses what civility means within the legal profession and the fine line between zealous advocacy and acting without civility. His article—worth reading in its entirety—discusses specific examples of incivility within the legal profession and provides guidance on how best to handle disagreements or aggressive communications with clients, opposing counsel, and outside parties. He specifically examines incivility in email communications and how the shift toward remote proceedings during the COVID-19 pandemic has created new potential pitfalls of which attorneys should be aware to ensure civility while practicing.

A coworker of mine who represents an international hotel shared that she sees wrath in the form of increased threats of social media backlash for a perceived wrong by hotel guests. My client has had a similar experience, noting that ". . . on questionable to doubtful claim . . . the plaintiff's attorney takes on a scotched earth policy in discovery hoping to bleed us into submission." Perhaps one of the least civil acts of which I was made aware during my interview

process was learning of guests who lodge terroristic threats, and the difficulty the hotel has in evicting theses guests. Generally a hotel or motel can force a guest to leave if the hotel or motel guest does not pay for the room or breaks the hotel or motel rules. However, if the guest has stayed in the hotel or motel long enough to become a tenant, the guest cannot be put out unless the motel or hotel files an eviction case against you. Although some of these eviction laws were lifted during COVID, those exceptions have since been dropped, and hotels are faced with the eviction process once again. Hoteliers should remember that the terms of the landlord-tenant relationship are governed by both the lease agreement and by Texas statute and that eviction is a different process than removing a guest. For example, evicting a tenant requires a judicial process involving a judge, while removing a transient guest can often be accomplished through criminal trespass procedures. Joslove, *supra*.

7. Sin #7: Sloth

One of the settlement negotiations I once failed at was being sloth-like in requesting confidentiality until the end of negotiations. As we had signed our interim settlement agreement and were finalizing the formal agreement, I requested the plaintiff agree to confidentiality. Plaintiff refused; my client and I were both surprised. I learned the hard way to demand confidentiality in the very first negotiation. The General Counsel for Le Duff America agreed: "Don't wait until the end to bring it up because it causes leverage in settlement negotiations."

In negotiating confidentiality, consider what it is that you are really concerned about—is it exposure to the media, is it a post on the plaintiff's counsel's website, and would a confidentiality clause also be able to include a non-disparagement clause, killing two concerns with one provision?

From a claimant's perspective, one sloth-like sin that has arisen during the pandemic is the after-effects of COVID relief bills in hotels. My colleague shared with me that "We have a huge tenancy and hoarding problem. As in roaches are crawling out of the tenant's room and she refuses to leave." TO prevent getting evicted, these tenants pay their rent on time, yet create health problems because of hoarding, presenting hotels with a unique set of obstacles to resolve.

C. The impact of the 7 sins and the games that ensue

In my experience with the seven 'sins' or 'trends' of unsettling negotiations, I observed an element of gamesmanship in each that may worsen the sin. I attempt to break down the seven sins and the games that ensue, in an attempt to help you and your practice avoid both going forward. Hopefully you'll recognize a favorite game show, reality show, or board game to which you can relate an unsettling case.

1. Let's (not) make a deal

A loyal client shared with me that he "feel[s] like plaintiff attorneys are being way more unreasonable than they ever have. With almost every mediation hitting a wall and almost every case heading to trial in order to extort a bigger settlement." A south Texas mediator shared that in his mind, two mediations happen more often than not, for a number of reasons. First, some carriers

like to get their toes wet and see what the case is worth; he compared it to being no different than waiting until after the first mediation to take expert depositions." This same mediator noted that he doesn't see many attorneys take depositions of experts before mediation anymore.

2. The price is(n't) right

A client shared with me that he is frustrated with "outrageous demands by [plaintiff's attorneys] that do not lend to meaningful realistic case disposition. Houston-area mediator and former State Bar of Texas President Bob Black agreed: "Prices are higher…settlements are higher than before the pandemic. The first 6 months of the pandemic things were the same or less…but not anymore."

A Beaumont mediator disclosed that he is "seeing crazy verdicts in favor of both parties, but primarily for plaintiff." Given Beaumont is so plaintiff-oriented, I was actually surprised when he discussed a recent local verdict where several hundred thousand was offered by the defendant to the plaintiff. At trial, the jury came back in with a verdict in the teens. While I agree the trend seems to be verdicts that favor plaintiffs, this recent news is a good sign for defendants.

3. Operation

"The anklebone's connected to the knee bone!" If you've played Operation, the game requires the player to use the tweezers to wrap a rubber band around two posts to connect them without touching the metal walls. Such a skill can be compared with what Texas mediator Bob Black dubs the "medi-legal issues" that pause settlement. Bob explains the issue like this: doctors and other providers suggest that a lumbar surgery will cost $195,000.00, which is totally different as to what private insurance would pay.

Bob further defines his "medi-legal" conundrum as "the melding of medical providers and availability with the legal component on proving up paid and incurred medical." Take for example, the *In re K&L Auto Crushers, LLC*, Cause No. 19-1022, 627 S.W.3d 239 (Tex. 2021). In *K&L*, the Texas Supreme Court conditionally granted mandamus relief because the trial court erred in quashing defendant' discovery requests in a personal injury suit, which included seeking information regarding plaintiff's medical providers' negotiated rates and costs, in order to challenge same. This represents a shift in the game—defendants can now challenge plaintiffs who refuse to use insurance and thus discard the costs that insurance place on medical treatment. For those plaintiffs who refuse to use insurance and the reasonable rates that would apply, *K&L* allows defendants to avoid the game of Operation.

So, for the plaintiffs' firms in south Texas (and Dallas) that always recommend surgery—watch out! After *K&L*, the cost of the surgery will hopefully not be able to inflate the alleged losses of an allegedly injured claimant.

4. Dominoes

I taught my five year old how to play dominoes over spring break, mostly because he's good with numbers and I wanted to capitalize on that. In this example, however, I use dominoes

to demonstrate how use of the spoliation theory, coupled with the use of discovery sanctions, can achieve tactical force in settlement, creating what we all know as the "domino effect."

The Texas Supreme Court's decision in *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014) is a good starting point. In 2014, the Texas Supreme Court announced significant changes in how Texas courts address claims that evidence has been destroyed — so-called "spoliation." The trial judge is now the sole arbiter of whether spoliation occurred, and jurors cannot be told evidence was lost except in the most egregious cases.

In *Brookshire Brothers*, the plaintiff alleged he slipped near a rotisserie-chicken display at a Brookshire grocery store. When he reported his injury to the store a few days later, employees preserved eight minutes of security-camera footage showing his entry to the store and subsequent fall. The rest of the footage was routinely deleted after 30 days, so it was long gone when Aldridge's attorney filed suit and requested it a year later.

Aldridge alleged spoliation, the trial judge instructed jurors they could presume the missing video was harmful to Brookshire, and the trial focused as much on the store's video-retention policy as on the condition of its floors. The upshot was that the jury awarded Aldridge more than $1 million (a large award in a slip-and-fall case), and the Tyler Court of Appeals affirmed.

The Texas Supreme Court granted review and held that trial judges alone must decide whether spoliation occurred, and evidence bearing solely on that issue cannot be admitted at trial. This is a sharp departure from prior practice, which generally left the spoliation issue to jurors if the trial judge found some proof that material evidence was destroyed. The Court reasoned that letting jurors decide spoliation could unfairly skew their verdict, leading to judgments based less on how the parties acted before the incident than on how they handled the claim after the incident.

The Texas Supreme Court held that the trial judge erred by admitting evidence about the lost video and giving the jury a spoliation instruction, and Brookshire was entitled to a new trial free of those errors. Practitioners can rely on *Brookshire Brothers* to argue that if the missing evidence was not intentional and the party did not know or should not have known to preserve it, it is not deserving of a spoliation instruction.

5. Hollywood Squares

I don't know about you, but Zoom conjures up memories of the Brady Bunch and Hollywood Squares. If you have never heard of these shows, it means you weren't born in the 1970's like me. In any event, I asked some mediators how Zoom affected their ability to settle cases. Houston mediator Jeff Abrams surprised me by saying "I haven't noticed any major differences as a result of COVID." On the other hand, I was unsurprised when he shared he "want[s] to switch to 100% zoom." I don't blame him—he can mediate from anywhere and enjoys spending significant time in Mexico. ¡Salud!

Jeff shared with me that in terms of mediation participation, "There is greater attendance because of Zoom and lesser attendance because of Zoom. If someone can't attend by Zoom

sometimes they don't even ask. Plaintiff will only be available by phone and everyone still wants to go ahead with it." Out of his 400 zoom mediations during COVID, only 1 has been in person.

6. Bachelor Nation

I thought I would use the world's most famous reality show that deals with proposals to well, talk about proposals. I personally love mediator's proposals and use them frequently. During my research for this topic, I was surprised to learn from Texas mediators that " . . . those of us who didn't use mediator proposals now use them frequently like everyone else." Multiple mediators went on to say that "Mediator's proposals have become almost the norm…they occur in more than 50% of the cases." When I questioned why, one Texas mediator opined that he thinks it's because people have trouble getting to trial. Bob shared with me that he used to use proposals less than 10% of the time but now he is doing it more than 50% of the time. Bob doesn't think it's a change on the part of the mediators who used to use them; rather, it's a change for those mediators who did not previously use them.

Jeff Abrams stated that most of my proposals settle on proposal day but many of them don't; he will normally give defendants two weeks to respond. Jeff also stated that not only do lawyers on both sides not only like the proposals, "but they expect them." He went on to condie that "Some people play to the proposal and adjust their engotiations to prpare themselves or allow themselves to settle." I know I do!

7. Two truths and a lie

This is one of my most favorite games! And I'm terrible at lying. In studying why "lying" is not considered one of the seven deadly sins, I learned that deception is a consequence of deadly sins like Avarice (lying to get more than your fair share), or Wrath (lying to hurt an enemy), or Lust (lying to entice someone into fornication with you), or Sloth (lying because you just don't care whether what you say is true or not). We covered a lot of these above so consider this the kitchen sink add-on. I learned in my interviews of industry colleagues that guests of hospitality establishments aren't afraid to lie. My law partner, who represents an international hotel, shared: "It seems like when the pandemic was starting to decline in severity and people could travel again, they booked rooms but then immediately would concoct some story to try to get a refund for their stay."

On the flip side, I was very surprised when, during the height of COVID, I shared with the plaintiffs' counsel that my hospitality clients were not comfortable being deposed in person. They were elderly, vaccinated, and high risk. Plaintiffs' counsel, who I believe were unvaccinated, demanded in person depositions. I filed a motion to quash. I agreed to present them via video. I lost. My point is that both sides told the truth—and the truth does not always prevail.

D. Best practices to effectively resolve cases

At the outset, I would expect two mediations for your case to settle. Remember to prepare your mediator in advance—a report is not just a protocol that is dismissed; the mediators actually read and rely on these. As one Houston mediator advised, "the most important job of the lawyer

is to arm the mediator." If there is no report provided, the mediator is, as we say, disarmed. Another Houston-area mediator said to me: "I want the lawyer to bring the salient points – if there is a particularly important case, send me a case."

Remember that mediators are paid a flat fee. Therefore, if they ask you for five pages, don't send them 600 pages of contracts and deposition transcripts.

As one Houston mediator I interviewed stated, "If you have a difficult client, ask me to 'be the heavy.'" Rely on the mediator if your client needs it.

Finally, "Mediators need to be armed with info so they can get a shot in when needed," as my friend and southeast Texas mediator shared with me. Shots are more valuable in Texas than other places.