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**1. What is the main difference between the Two-Track Model and the traditional way of suing someone to get relief?**

While both models view the courts as the final authority (judge or jury, including appeals), and while both models resolve almost all cases by settlement (98% of all litigation is never tried in court), the difference is that the Two-Track Model achieves settlement earlier than traditional litigation, and with fewer attorney costs.

**2. Why are attorney's fees so high—over 50% of the total award—in litigation?**

Traditional dispute resolution is litigation driven, and litigation is the most expensive form of dispute resolution. In litigation, attorney billable hours increase because the parties typically do not cooperate with each other in discussions, and it takes a lot of attorney time to prepare for trial, even if the trial never happens, as it does not in 98% of the cases.

**3. How does the Two-Track Model change this?**

- a. First, as a matter of business policy, the model saves litigation for a separate track (Track 2), with its own specialists, and uses them only if collaborative attempts at resolution fail. An analogy would be the U.S. government positioning aircraft carriers and battleships (with Marines ready to land) off the shore of an enemy country, with the Army and Air Force ready to join the battle, while the diplomats for both sides attempt to negotiate a peaceful solution. The warriors stand ready to fight and are not required to do the “negotiation” part.
- b. Track 1 is the diplomatic route, and it creates a forum for negotiation or mediation to be used first. These procedures take less time from attorneys, and hence fewer billable hours. If they fail, either party can launch Track 2 litigation, just as in the analogy above, where the government can send warriors into battle if needed.

**4. What are the benefits of litigation in Track 2?**

Litigation is the only way to establish case law, and if a party wishes to establish legal precedent, then litigation is a way to do this. Litigation is also especially effective when the other side will not cooperate in the dispute resolution process. Litigation provides the strong arm of the law to compel submission in providing documents (when a party is hiding information), and the adversary process of depositions and court interrogation provides the opportunity to expose contradictions and wrongdoing. Finally, litigation is well suited to providing a public airing of a dispute, since the court records are open to all, and will frequently appear in the newspapers. A party wishing to honor any of these interests—case law contribution, dealing with a non-cooperative wrongdoer, or the desire for public exposure—might choose litigation.

**5. What are the advantages of Track 1, which is settlement through negotiation or mediation?**

Track 1 allows the parties to keep their resolution discussions, and even the outcome, private. Conversations between attorneys and their parties are protected as settlement talks, and they cannot be subpoenaed into subsequent litigation. (Although the parties may discover this same information in some other way, the other side cannot compel a party or an attorney to disclose something said in settlement talks.) Track 1 methods allow for earlier resolution, which saves time and money, and reduces stress. Track 1 methods draw from all four standard solutions (acknowledgement/apology, restitution, plan for the future, and continued). While litigation focuses primarily on restitution/punishment, it can sometimes compel through the courts new “plans for the future,” though litigation cannot achieve the voluntary cooperation of both sides in carrying out plans for the future, as can be achieved in Track 1. Finally, Track 1 is especially suited to preserving business relationships, such as those between business partners, customers and the organizations with whom they do business, including patients and physicians. The private resolution, allowing for non-adversarial discussion, collaboration, and negotiation to understand what happened and then to create remedies, allows the parties the opportunity to save time and money, achieve the same remedies they could have received in court, and get some other remedies that they could not achieve in court.

**6. Are there rules for Track 1?**

- a. The main rule for Track 1 is that the attorney who represents the party in Track 1 disqualifies him/herself from Track 2 activity (litigation or arbitration), so he/she will have an exclusive focus on exhausting all of the settlement options before a client decides to go to Track 2. The Track 1 attorney will have no financial interest in Track 2 billable or contingency work.
- b. All of the guidelines for the two-track approach are listed on this web site so that any injured patient or insurance carrier can learn about the opportunity, and apply it to an individual case.

**7. Why is arbitration in Track 2?**

Like litigation, arbitration is an adversary process, with a win/lose outcome, where advocates seek a ruling from a third party. One feature of the two-track model is that Track 1 attorneys can achieve resolution on most issues and refer one or more others to mutually agreeable arbitration, with Track 2 attorneys representing the parties, thereby reducing more of the costs if a case must go to Track 2.

**8. How does a party engage a Track 1 and Track 2 attorney?**

- a. The answer is different for defendants and plaintiffs. Defendants (physicians, hospitals, insurance carriers, and others) who face the prospect of litigation in the course of their business can present the Two-Track Model to their outside attorneys and specify that those attorneys may play either one role or the other (Track 1 or Track 2), but not both.
- b. Potential plaintiffs, such as patients who believe they have been damaged through malpractice, or any person who wishes to achieve resolution of a wrong done in a civil case, can present the Track 1 model to an attorney of their choosing (referring the attorney to the web site for the Track 1 rules), or the plaintiffs can access a list of attorneys on this web site who are familiar with the model and available to serve in the Track 1 or Track 2 role.

**9. I can see how this model is advantageous for the defendants (physicians, hospitals, insurance companies), since if they resolve most cases through Track 1, they will pay less money in attorney's fees. You mentioned that approximately 25% of the money paid out by defendants goes to defense fees alone, so, is this the 25% that will be reduced on the defendants side by using the Two-Track Model?**

Yes. By using the model unilaterally (i.e., with no requirement that the plaintiff's side use the Two-Track Model), defendants such as physicians, hospitals, and insurance carriers can reduce their litigation expenses by approximately half. Based on precedents in other industries, this translates to approximately 12.5% savings in the total allocation by the hospital to the insurance carrier. Another 12.5% savings (half of the plaintiff's attorneys fees) can be achieved if the model is adopted by the plaintiff (patient, family, etc.) as discussed below.

**10. How does this translate to insurance savings for physicians and hospitals?**

- a. When legal expenses are reduced, an insured hospital, in consultation with its actuary and auditor, can reduce the amount of money allocated on the annual financial statement for insurance self-reserves. This is based on the correlation between defense expenses and insurance: if less is spent each year on defense, then less needs to be set aside for self-insurance. This is "found money" that can be used for other purposes, and accrues directly to the bottom line for the CFO of the physician's practice, the hospital, or the HMO.
- b. Similarly, umbrella insurance premiums can go down as legal expenses go down, since the losses in each year from the insurance company will be less. This can result in reduced insurance premiums.
- c. Finally, some physicians and hospitals that have been unable to get insurance because it is so costly will now be able to achieve insurability.

**11. What is the advantage for a plaintiff, such as an injured patient, in using this model?**

- a. Track 1 resolutions allow the plaintiff to get money earlier (within weeks to months, instead of years).
- b. If the amount of money achieved through Track 1 is not satisfactory to the patient, the patient can stop the process and proceed with litigation, losing no rights or privileges.
- c. In addition, the patient has the opportunity to see if, in fact, there is a case worth pursuing through litigation. The patient's Track 1 attorney will be able to generate information that will help the patient make an informed decision on whether or not to (a) drop the matter, (b) negotiate a cash settlement now through Track 1, or (c) proceed with litigation, aiming to get more money than offered through (b), though with less certainty, and much later.

**12. How about the plaintiff's attorney? Are there any advantages in the two-track method for the attorney representing the injured party?**

- a. Plaintiffs' attorneys already settle many cases through direct negotiations and through mediation, and the advantages in these cases—money received earlier with less expense and risk on their part to get the settlement—apply to Track 1 settlements.
- b. The difference in the Two-Track Model is that the plaintiff's attorney signs on for only one track: the settlement track or the litigation track, but not both, hence the question: Why would an attorney give up the opportunity of a big win and a big pay day in court for a large case that might get before a jury?
- c. The answer is that some plaintiff's attorneys will want to have nothing to do with the two-track method, for the very reason that they wish to devote their practice to winning the "big case."
- d. On the other hand, as indicated on the two-track web site, there are many highly skilled attorneys with extensive plaintiff's experience who are willing to take on Track 1 cases and work for an hourly rate. These attorneys can concentrate exclusively on negotiation and "working things out" collaboratively. Likewise, Track 2 attorneys would focus exclusively on the "win" in court.
- e. Furthermore, there is the possibility of Track 1 plaintiff's attorneys having their hourly fees reimbursed at the time of Track 1 negotiations, without having to wait for a final resolution that is based exclusively on win/lose in litigation.

**13. Wait a minute. How can the plaintiff's attorney, in Track 1, get attorney's fees paid? Aren't their fees typically associated with the winning or losing of the case through litigation?**

- a. In traditional litigation, plaintiffs' attorneys do not get fees paid unless they win the case, hence their taking such a large percentage (30-40% or more) of the award to compensate for the expenses they incur and the risk of no payment at the end.
- b. In the Two-Track Model, the plaintiff's attorney can either bill the plaintiff directly or in certain cases can ask the defendant to reimburse agreed upon attorney's fees, up to a specific limit, for a Track 1 resolution process.
- c. To see how this works, picture the case from the point of view of the hospital or insurance company. The hospital or insurance company wants to be rid of frivolous cases, and give out as little money as possible. Other interests include doing the right thing by patients (if a physician makes a mistake, the interest is in resolving the matter as equitably as possible, though not being "taken to the cleaners" financially when no wrong was done, or losing a reputation due to wrong facts, or in some cases, an honest mistake). Hospitals and insurance companies have an interest in not being viewed as an easy mark for plaintiffs/plaintiff's attorneys who wish to "get rich quick" over a mistake or perceived mistake.
- d. In honoring these interests, the hospital, HMO, and/or insurance company can do the following:
  - i. Review any potential claim that comes to its attention, e.g., by a patient, or a plaintiff's attorney, to see if it is frivolous or not. If it is frivolous, the hospital will likely say: "While we adhere to the Two-Track Model, this case is so frivolous that we will dispense with the Track 1 and hand it to our Track 2 litigator. We will see you in court."
  - ii. For all non-frivolous cases (where a case might be made that there was a mistake or even a misunderstanding, a gray area, or where there needs to be further discovery to determine whether it is frivolous or not [very important consideration]), the defendant can say: "We will use a Track 1 attorney in this case, and if you will use a Track 1 attorney as well, we will reimburse the hourly legal fees of your chosen Track 1 attorney up to a certain amount. If we reach agreement, then our investment in legal fees is well spent, and you (plaintiff) and I are both satisfied. Also, the attorneys are paid their hourly fees. If we fail to achieve a settlement, then we lose the money we spent on the attorney's fees, though we believe it will be money well spent, because overall this approach will allow us to resolve almost all cases through direct collaboration, without the increased expense of the adversary process (litigators involved in negotiation, mediation, or arbitration)."

The hospital or insurance company can put aside a certain amount of money into a “Legal Consultation Plan” that would be available for such purposes.

**14. Do you really believe plaintiffs’ attorneys will go for this?**

See the registry on this web site for attorneys who are willing to represent plaintiffs in Track 1, or in Track 2. Other plaintiff’s attorneys may choose not to participate in this process, and there is no requirement for them to do so.

**15. So, whether to use the Two-Track Model is really a market decision—parties and attorneys can use the traditional method or the two-track method?**

Yes.

**16. How about a really large case, where the damages are huge, such as in the injury at birth of a baby that will require life long care due to clear negligence? How can a case like that be resolved in Track 1, since the amount of money involved is so large?**

- a. Remember that 98% of all cases will settle before reaching trial, so settlement is not the question. The real question is: How can the parties achieve a settlement earlier and, by cooperating in Track 1 “discovery,” less expensively, than through the adversary process?
- b. Note that this process can still result in a large settlement, though the amount of time (in attorney’s fees) to reach that number is far less. It is the savings in the 50% of claim dollars that goes to attorneys’ fees that is the focus of the Two-Track Model, not the amount of money that goes to the patient. That number will be determined in the Track 1 negotiations. If the parties do not reach an agreement on the amount of money (large or small), then they can stop the process unilaterally and proceed with litigation.

**17. But isn’t “settlement” the job of every good claims manager and every good in-house counsel in a hospital?**

Yes, it is. The Two-Track Model does not change or interfere with their work. The model does, however, give them more effective tools to include in their settlement activity, such as rules to hire a Track 1 attorney on their side to keep the case from “escalating” and thereby becoming more expensive when there is a threat of litigation. In addition, it gives them a way, via the neutral two-track web site of outside attorneys and via the the option of Track 1 fee reimbursement—to encourage the use of a settlement attorney by the plaintiff.

**18. But what if a hospital or HMO actually settles 90% of the cases, and in most cases (I've heard 80%) they pay no money at all to the alleged "injured" party? Why use two-track when nothing here is broken?**

Here is the diagnostic question about whether or not something is broken: How much does the hospital, HMO, or insurance carrier pay in legal expenses to achieve these results? If they still pay 50% of each claim dollar to attorney's fees (as studies indicate), they are paying too much to get this result. The achievable target for attorney's fees (defense and plaintiff) is a claim dollar should be 25% of the total, not 50% or more of the total. Paying too much results in financial waste, and is directly related to increased insurance premiums, higher reserves (money the company could use elsewhere), and, in some cases, uninsurability.

**19. But, what if the claims manager ends up paying more to settle these cases, thereby jeopardizing the 80% "no payment" track record?**

- a. There is no requirement to "settle" anything in the Two-Track Model. If the claims manager determines that the best deal on the table in Track 1 is not good enough, then he/she (and the same is true of the plaintiff's attorney), can reject the deal, stop the process, and transfer the case to Track 2.
- b. The difference lies in the amount of time taken to achieve the "no money paid" status.

**20. You must be living in a dream world if you think attorneys will cooperate with each other in resolving a case.**

- a. You are right about one thing: this is not the way it usually happens now. Indeed, litigation driven negotiations are just the opposite of what is listed above in "How Does Track 1 Work?". These traditional negotiations are adversarial and filled with suspicion and distrust, because the other side is typically viewed as either a "big bad corporation" that is trying to hide something, or "a greedy plaintiff/plaintiff's attorney" who wants to get rich quick off some perceived error or mistake. Litigators use all legal remedies (and a full range of adversarial tactics) to defeat the other side and win for one's own side.
- b. However, if the forum changes from litigation to cooperation (Track 1), and the financial incentives are shifted from Track 1 to Track 2, then the steps in Table 1 work very well. Indeed, they represent best practice in low cost dispute resolution (Slaikeu, 1996; Slaikeu and Hasson, 1998; Slaikeu and Slaikeu, 2002).
- c. The steps for Track 1 in "How Does Track 1 Work?" are well suited to attorneys whose stated goal, and whose hourly compensation, is based on their ability to efficiently unbundle a problem, create solutions, and negotiate so that both sides will voluntarily walk down a newly fashioned common path to eventual

agreement. The steps in “How Does Track 1 Work?” then become a road map for the attorneys to use to achieve this.

- d. When the two sides are cooperating (which is the main criterion for continuing Track 1 work) these steps serve as a common framework for both sides. If either side falls off into non-cooperative behavior, the attorneys will discuss this, and then each attorney with his or her own client will make a judgment as to whether or not to continue. Sometimes there is a misunderstanding; in the heat of Track 1 negotiations, there will be anger or other flare ups, but the difference is that these emotions, misunderstandings, or flashes of adversarial behavior by one side will not be allowed to “carry the day” by stopping the negotiations, and proceeding to court precipitously. Indeed, the skilled Track 1 negotiating attorneys are quite accustomed to this mix of facts and emotions, and use their analytic tools to build bridges of understanding, taking a time out when needed, and using a mix of joint and private meetings to get the job done. Also, their compensation is based on their ability to do this well. In so far as they develop a track record of creating solid negotiated settlements for their parties (whether injured persons or large corporations), they are rewarded in the marketplace by getting more referrals. No patient or organization, however, will fault their Track 1 attorney for failing to reach agreement if all good settlement options have been explored through negotiation or mediation. Indeed, the plaintiff or defendant will know that if the case goes to litigation, it likely belongs there, instead of wondering, as they do now, that the case may be in litigation because it creates a larger pay day for one or both attorneys (either through billable hours for the defense attorney, or through a large award for the plaintiff’s attorney).
- e. In all cases, plaintiffs and defendants will “follow the money” by comparing the amount they would receive through a Track 1 settlement, with the amount they might eventually receive through a Track 2 award. They will also look at the total package available (apology/acknowledgement, money, future enforceable change, and forgiveness/new relationship, or “getting on with life”). They have the benefit of input from their Track 1 attorneys (who run the case in the beginning), and input from their Track 2 attorneys in making their decision.

**21. Tell me again who loses and who gains with this model.**

- a. Plaintiffs (such as injured patients) and defendants (physicians, hospitals, insurance companies) gain, since they pay less money to attorney’s fees in Track 1. And, if they do not achieve a settlement that they like, then they can move directly to Track 2, with no loss of rights. [During Track 1 negotiations, the Track 1 attorney can invite the Track 2 litigator to provide input to the party on what the chances would be if the case went to litigation, so that the party can make an informed decision.] Plaintiffs and defendants gain because they have the chance for a settlement as large as they can get in court (though it may be less since the money arriving earlier would be smaller than the money that would arrive many years into the future), and they spend less on attorney’s fees to get it

(plaintiff), or to deliver it (defendant). And, as above, plaintiffs and defendants have access to a far wider array of standard solutions to settle the case than just money.

- b. As the Two-Track Model is increasingly used, more cases will be resolved in Track 1, and hence there will be fewer cases for litigation, hence full-time litigators may have less work.
- c. On the other hand, plaintiff's attorneys and defense attorneys who are specialists in settlement, excellent negotiators, and outstanding advocates for parties in mediation and arbitration, will increase their business.

**22. I am the Chief Financial Officer of a hospital, and I've got two questions. First, when can I achieve the dollars savings that this model promises to provide? Second, if I endorse this model, aren't I in effect criticizing the performance of our claims manager and our general counsel, who I think have been doing a fine job?**

- a. Let's take the question about money first. The Track 2 model can become a part of a comprehensive Early Resolution System™. If you institute two-track and other prevention systems, you might be able to negotiate a prospective reduction in your insurance premiums (umbrella coverage), and you might be able to set aside fewer dollars for reserves as soon as you put the model in place. This translates to dollars savings immediately. As you measure results (litigation expenses and indemnity) from year to year, you will be able to further lock in these insurance savings. In the meantime, you can track your own savings in attorneys' fees (request ROI analysis templates available from [kslaikeu@chorda.com](mailto:kslaikeu@chorda.com)).
- b. On the second question, good for you in caring about what a new approach implies about current risk management, and the work of your in-house attorneys. The two-track model passes no judgment on their ability to settle cases. Rather, as indicated above, it puts new tools in their hands. The two-track method will enhance their effectiveness by allowing them to spend less money on expenses in settling cases.
- c. Savings of 50% in legal expenses is no small number (do your own calculations for the last several years to see what you might have saved, and then run the numbers for the next five to see what you can save). Credit for this savings should go directly to those who make it possible: the claims manager, the general counsel, and the CFO.

**23. Would the Two-Track Model apply to homeowner issues, property disputes, employment disputes? Does it work in other industries such as high tech, oil and gas, and others?**

Yes. While the model has dramatic application in the area of medical malpractice and personal injury, every one of these other areas of dispute also involves a dispute resolution process and, if litigation is the main event, then expenses will be high. It is the litigation driven model, we believe, that is a measurable hidden culprit in high and rising insurance costs that hurt consumers in all of these areas. Applying the Two-Track Model is one part of the solution.

**24. What's the rest of the solution?**

The sponsor of the two-track method is Chorda Conflict Management, Inc., an organization that is a leader in providing comprehensive systems for the early resolution of conflict in organizations. Chorda encourages the two-track method, but Chorda also uses four other tools: collaborative procedures (written into all operations), skills training, call center (confidential coaching, referral, convening, and follow-up on cases), and metrics to evaluate results. The two-track model is one of five components in Chorda's method for not only controlling costs, but also bringing other benefits to patients, consumers, employees, managers, and companies. Chorda's work with large companies over the past 15 years indicates that early resolution saves litigation expenses, reduces turnover, increases employee and customer satisfaction, and protects shareholder value.

**25. How about class action lawsuits? Can the Two-Track Model apply to these situations that involve many plaintiffs and a lot of money?**

- a. Track 1 attorneys, linked to a group of plaintiffs, can offer the "class" of plaintiffs an alternative model that might bring the clients more money, and bring it more quickly. In addition, the Track 1 attorneys can get legal fees paid from the beginning of the case, on through until it is concluded, with either a final settlement, or, if necessary, no agreement, after which the case is transferred to a Track 2 attorney who will handle the case through litigation.
- b. Here is how it can work:
  - Scenario 1: A large company learns that a defective product has caused monetary damages to a large class of people. Company knows it has liability and speaks to one or more plaintiffs and suggests a Track 1 approach. Plaintiffs go to web site to select Track 1 attorney. Track 1 attorney(s), representing these plaintiffs, and equipped to identify the entire class, begins negotiations with the company Track 1 defense counsel. As a part of the first negotiations, the Track 1 attorney asks for attorney's fees to be reimbursed for Track 1. Defense Track 1 attorney reviews this with the corporate client, and agrees to set aside a portion of what they believe might be the ultimate damages to them and put it into a Legal Consultation Plan, covering hourly attorney's fees up to a particular amount, for a specific period of time (e.g., attorney's fees for initial discovery, first round of negotiations, etc.). Track 1 attorneys settle the case (using the methods in "How Does Track 1 Work?" though applied to

the volume of cases), with a settlement amount for all in the class, plus the attorney's fees. Or, if the case is not settled, plaintiff's Track 1 attorney transfers the case to Track 2 litigation attorney, who pursues the case in the traditional method, keeping a contingency fee of 40% or more.

- Scenario 2: A traditional plaintiff's attorney identifies a problem with an individual who is harmed by a product, and has the class certified in court, though finds that the class has already been certified by a traditional plaintiff's attorney. "Too late" means that the case will proceed with traditional litigation.
- Scenario 3: Stories of experiences in scenarios 1 and 2 are published in the press, and plaintiffs, defendants, and their attorneys now know that it is possible to put a class action case into Track 1. As a case is identified (by any party, plaintiff, defendant, or anyone else) there is a race to the courthouse to have the class certified either by a Track 1 attorney who wishes to generate predictable billable work for the case in a Track 1 approach, and by traditional plaintiffs' attorneys who wish to certify the class for traditional litigation. The first to the courthouse wins.
- Scenario 4: The states pass legislation that requires attorneys to inform potential plaintiffs (individual or class) of the two-track option, along side traditional litigation (just as some states now require attorneys to notify clients of ADR). Plaintiffs, through mailings to them from Track 1 attorneys, and in advertising, are given the opportunity to choose which method they wish to use.

**26. If I send a Track 1 attorney in at the start, I think that shows weakness. In addition, a Track 1 attorney may complicate the issues so that, if we do get to litigation, the litigator has more problems than they would have had if they had been in charge from the start. Don't get me wrong, I like the idea of having a settlement track that will try to get things resolved but I don't want the settlement track in the lead. Why not give the whole matter to Track 2 at the start?**

There are actually two answers to this question. First, there is nothing in the two-track concept that prevents you from giving the matter to a Track 2 attorney at the very beginning. If you feel strongly that this is the way you wish to begin, then you could use a two-track approach, begin with a Track 2 litigator who would be "in charge" of the case, and then, most important, once a court filing has been made, give the matter to a Track 1 attorney who would do enough discovery in Track 1 to settle the case, or, if needed later on, transfer the case to Track 2. If you feel this will best honor your needs for a "strong" statement in the beginning, and protections for litigation (the Track 2 attorney will give instructions to the Track 1 attorney to be honored in the Track 1 settlement talks), then this will not violate the two-track approach, as long as the two attorneys do not have a business relationship with one another.

Therein lies the potential problem. Track 2 litigation is expensive work, and if Track 2 is in the lead role, you may face these problems:

- a. Beginning with Track 1 litigation smacks of the traditional model, and may cause the other side to be adversarial, and the settlement piece will take a second chair to the overall expensive litigation process.
- b. By leading with Track 2, Track 1 becomes “hired help” for a Track 2 litigator. The Track 2 litigators will likely take the role of managing the case (expensive, adversarial approach), and end up “hiring” as subcontractors the Track 1 settlement people, which makes the latter beholden on the former for future work. If the litigators are in the lead role, and the settlement people look to the litigators for work, then this violates the letter and spirit of separating the tracks with no business relationship between the two of them. The original two-track approach specifies that the client is in charge (for large corporations, using the general counsel to represent them as client), and they begin with a settlement person, which in the case of a large corporation might be their own in-house counsel, and they engage a Track 2 litigator to consult at the beginning in order to protect certain litigation points, though to remain in a second chair, and “used only if needed.” In sum, any variation from the concept of the client in the lead role, using a settlement attorney first (with consultation from the litigator up front), and litigation in the back seat runs the risk of losing the cost savings features of two-track.

This being said, it is conceptually possible to structure the process so that the litigator takes the lead role, opens the case, and then the settlement attorney does the primary work to settle the case, with the case going back to the litigator if, and only if, needed.

**27. What if only one side wishes to use the two-track model and the other side is represented by a traditional litigator?**

While the best approach is for all sides to have a Track 1 attorney representing them, there is nothing to prevent the process from going forward if one or more parties are represented by a Track 2 litigator. However, for several reasons, this approach runs the risk of increasing costs for the parties. First, a Track 2 attorney on the plaintiff’s side will likely be paid by a contingency fee of 35% or more of the total award, and hence the negotiation from that person’s point of view may be skewed toward the monetary settlement, with less emphasis given to the other three standard solutions: acknowledgement/apology, plan for the future (e.g., changed system in hospital), and forgiveness. While the plaintiff’s attorney may have a true interest in these dimensions of the resolution, the fact remains that there is no contingency fee gain in these three solutions. The second reason that the presence of a Track 2 litigator can increase costs is that the Track 2 litigator may be more inclined to treating the process adversarially, which may reduce cooperation in the information gathering phase, and hence increase time and related billable hours for all sides.

The Chorda recommendation is that the parties all use Track 1 attorneys if at all possible. If one side is not willing to utilize a Track 1 attorney, then the other side can make a choice based on the dimensions discussed above, along with other facts of the case.