CHAPTER 4

TIPS, TRAPS, AND TOOLS FOR SUCCESSFULLY NAVIGATING NEGOTIATIONS AND PROFESSIONAL RELATIONSHIPS

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NEGOTIATION STRATEGIES

By Jane Clark

Timing of Negotiations

There is no right or wrong time to negotiate. Much will depend on the nature, strengths and weaknesses of the case, the attitudes of the parties and or/insurance adjusters and the preferences and personalities of the attorneys. One thing is sure however - there will never be a settlement without at least some disclosure and exchange of information. Cases can potentially settle at any time in the litigation or pre litigation process. The advantages and disadvantages of settling at different points in the life of a case are set out below.

Pre litigation settlements

Cases will only likely settle pre litigation where the plaintiff has a strong case on liability, can demonstrate this and the defendant is motivated to avoid a lawsuit. Oftentimes plaintiff's counsel will send a Demand Letter before filing a lawsuit offering the defense an opportunity to evaluate the case and make an offer. In order to evaluate the case, the defense will need information about the plaintiff's case and usually details of the supporting evidence. One disincentive to early settlement is that often, plaintiff's counsel will not have all this evidential information without formal discovery in the case. However, if it appears relatively straightforward in terms of liability e.g. a rear end collision with a police report available, and plaintiff can provide documentation e.g. through medical and employment records of the injuries sustained, the economic loss claims and the current status re both, it should not be too difficult to prepare a formal and detailed demand letter. In clear cut cases of liability, car accident cases are one of the more likely types of cases where pre suit settlement is possible and this often does occur. Oftentimes however, pre suit offers are so low, it is necessary to file the case to pressurize the defense into increasing the offer. Many times these cases will proceed to a trial on damages only, unless information has come to light during discovery that causes either or both parties to change their view of the case.

If however you have a strong case there are clearly advantages to settling pre litigation - the most significant of which is the saving in time and money of having to litigate and possibly try the case. In cases where the expenses will be significant, e.g. medical malpractice cases or other complex cases involving costly experts and requiring more extensive discovery, the cost of litigating can be substantial.

With saving in cost and time being the primary advantage of early settlement, what are the disadvantages? Often in a case, discovery is needed to fully evaluate the strengths and weaknesses and only limited information may be available before litigation - in particular the testimony of opposing witnesses. Sometimes the plaintiff feels strongly that he or she wants their day in court - and this desire may change only after they have been through deposition with a fast approaching trial date and a sense of the risk of loss. Without knowledge of the opposition's case, the attorneys will likely have a one sided and maybe unrealistic view of the case, making it more difficult to settle due to unrealistic expectations.

Another disincentive to settle is a fear of "showing your hand" to your opponent. Oftentimes to obtain a settlement, the defense will need information. Oftentimes the information you have may not be discoverable in litigation before trial e.g. the opinion of a supportive expert. Some attorneys worry that if they reveal key information about their case too early, their opponent will use it against them and they will lose the element of surprise. This is particularly so in states such as OR where there is generally not disclosure of experts. If however you are litigating in Washington, federal courts or a state where there is disclosure of experts, you will have to assess whether tactically it is to your client's advantage or disadvantage to reveal information such as expert opinions too early in the case.

In a clear cut case of liability and damages, early settlement should at least be considered. Whether you achieve a settlement at this stage will depend on the nature and value of the case and the personalities of the parties and attorneys involved. Often you will work with the same opposing attorneys and oftentimes the same insurance adjusters on multiple cases. If you are viewed by your opponent as being reasonable and fair with integrity, and if your credibility is maintained, the likelihood of early settlements will increase.

Settlement during the course of the case

Of course, settlement can occur at any point during the progression of a case. Oftentimes, as discussed above, the parties simply need information that can be obtained from the discovery process to allow them to evaluate the strengths, weaknesses and potential value of the case. Litigation can be a costly business and you should bear this in mind when you develop your discovery and settlement strategies. It can be tempting to take the deposition of everybody even remotely involved in the case and hire multiple experts to testify. This is entirely appropriate and reasonable if the case so justifies You should always bear in mind the potential value of the case when considering what costs should be incurred and be strategic about the timing of discovery. Are you positioning a case for trial or settlement? How you proceed with discovery and even the questions you ask during the discovery process may be influenced by this decision. For example, if you know the case is unlikely to settle, you may want to save those "killer" cross examination questions for trial and not alert or rehearse the witness during the deposition process.

After a case has been filed, give early thought to what discovery is required to give both parties the information they need to at least consider settlement. Identify the key witnesses that need to be deposed and the key documents that need to be obtained and reviewed through discovery to allow that evaluation to occur. After that "key discovery stage" has been concluded, evaluate the case and explore the possibility of a settlement. If attempts are made at settlement and fail, you know that you are in "trial mode" and can prepare the rest of the case accordingly.

When to consider making a demand or offer

Consider doing so when your case it at its strongest and before the weaknesses in your case become apparent during the discovery process. If you have a particularly good

witness or a document that strongly supports your case, following disclosure of that document or deposition of that witness may be a good time to consider trying to engage in settlement negotiations. Similarly if you know you have a witness about to be deposed who will harm your case consider trying to settle before that deposition takes place.

Settlement negotiations will often start after the parties have completed the discovery stage of the case and before trial preparation starts. If you have not already considered settlement or started negotiations by this point in the case, you should consider doing so before you spend the hours needed to prepare for trial.

Settlement before or during trial

Some cases are settled at the door of the courtroom or even during trial. There are many reasons for this. Oftentimes discovery is not completed until shortly before trial and parties therefore do not have the information they need prior to this to engage in meaningful negotiations. In other cases, attorneys for the parties are not fully engaged and realistically evaluating the strengths and weaknesses of the case until they start to prepare it for trial. In other cases, the procedures of the insurer may delay settlement until close to the trial date.

Of course settlement can and often does occur during trial as counsel continue to assess the strengths and weaknesses of each side of the case as the trial progresses. Cases even settle while the jury if out - a time when parties and their attorneys become anxious and may second guess their earlier evaluation of the case. Even after a verdict and pending appeal cases may settle. Better the certainty of a settlement than the uncertainty and possibility of an adverse ruing on appeal and possible retrial.

Negotiation tips and tactics

Credibility and Integrity

The first rule in negotiation is maintain your credibility and integrity. Aa soon as you lose your credibility you lose your ability to negotiate effectively from a position of strength. Therefore throughout the case and even before you reach the point of starting negotiations, do not make promises or threats you cannot follow through on. Of course it can and does sometimes happen that witnesses do not testify as you expect them to testify and the face of your case can change during the litigation process. However, if you make representations to your opponent that you cannot fulfil they will not trust you in negotiations and any information you communicate as part of the negotiation process will be regarded with suspicion. This makes it very difficult to argue a strong case and maximize your client's position in settlement negotiations. Cases are far more likely to settle when the opposing attorneys trust and respect each other and are willing to listen to each other's positions.

Listen and advocate

The key to successful negotiations is listening and advocating. You must listen to what your opponent is saying about his case, evaluate that information and then advocate your client's position. Your opposing attorney may give you information during settlement

negotiations that could impact your view of the case and its settlement value. Therefore hear what he is saying and acknowledge that you have done so. If your opponent believes that you have heard and understood his position and you have maintained your credibility during the case in terms of exchange of information and representations of facts and evidence, he is more likely to listen to and understand your position when you advocate for your client. The more credible you have been during the case, the more credible will be your arguments supporting your offer or demand.

You must also be prepared to advocate your client's position - in much the same way as you would do during a closing argument. If you represent a plaintiff and want the defendants to increase their offer, you have to be able to explain and justify why you believe the case has a higher value with reference to the facts and the evidence.

Sometimes attorneys are unprepared for settlement negotiations. If you are not prepared, do not be afraid to delay discussions until you are. If for example you get a call out of the blue one day from your opposing counsel wanting to discuss settlement and making a demand or an offer and asking for your evaluation of the case and reaction to the offer, do not be afraid to put off such a discussion until you have had time to formulate a response. Of course, you generally cannot respond to any demand immediately without consulting with your client (unless you already have authority to settle up to a certain amount). However, without giving the matter some thought, you likely will not do your case justice. Before calling your opponent back, consider making a list of all the points you want to make regarding your case and your response to the points he made to ensure that you do not forget anything.

When making your counter demand or offer - be prepared to justify your response by reference to your evaluation of the strengths and weaknesses of the case.

Disclosure of authority

The defense will typically have a limit of authority placed on the case by the insurer. Oftentimes the insurer will give the attorney authority to negotiate a settlement up to a certain amount. Sometimes additional funds are available in addition to that authority or the adjuster may need to seek an increase in the authority. If you are defense counsel and are asked the limit of your authority -how do you respond? Oftentimes you will not want to give this away early in the settlement negotiations. Just because you have authority up to a certain amount does not mean that you have to offer the complete amount of your authority. However, you cannot lie to your opponent and advise that you have authority less than you do - this would be wrong ethically and goes to the issue of credibility discussed earlier. Be prepared for this question and know how you will respond. An answer such as "I am not at liberty to disclose that at this time" or " that information is confidential at this stage of the negotiation" will usually suffice. Your opponent cannot force you to disclose your authority.

"Bottom line' representations

Attorneys commonly represent an amount as being the "bottom line" and then go beyond the bottom line. Sometimes this is not unreasonable. Bottom lines can of course change as the litigation proceeds and information comes to light that changes the evaluation of

the case. Sometimes a client will refuse to go beyond a certain figure and represent that as the bottom line but change their mind after further consideration.

Again - from a credibility perspective, be wary of consistently going beyond your bottom line - if you do this you will lose credibility in future negotiations. Your opponent may well say “Oh Jo always says $100,000 is his bottom line but always end up settling for 50% of that”. If you do so, and on the day you have that case where $1000,00 really is your bottom line, you may be unable to settle it!

Initial demands and offers - how to position them

Most cases have a settlement range. That is a figure within a range that the defense will be prepared to pay and the plaintiff will be prepared to accept to avoid the risk of trial. If the case has such a range, the case will likely settle within it irrespective of the opening demand and offer amount. However, how long it takes to reach that figure in settlement negotiations and how much credibility the attorneys maintain during the process will depend on the amounts of the opening demand and offer.

As a general rule, if the opening demand is excessively high the opening offer will be unreasonably low. That is because the defense will want to leave sufficient room to increase offers during the negotiation process but still ending up in the settlement range. For example, if the settlement range on a case is $50-$60,000, parties will likely reach that range much more quickly if the opening demands and offers are realistic and closer to that range.

However, the risk of making a demand close to that range - particularly if you have not worked previously with your opposing counsel, is that your opponent will believe that as you have made a demand of $80,000, you probably value it at around $20,000. It is only with experience and ongoing relationships with your opponent can you reach a point where you have sufficient credibility to be able to make a demand close to the settlement range and know that it will settle within this range, as your opponent knows from experience that you are credible and realistic in your negotiations. Until you reach that type of relationship, make initial demands sufficiently high to give yourself plenty of room for negotiation but not so high that the defense is not even willing to engage in discussions believing there is no possibility of settlement. You also lose credibility if you demand $500,000 and ultimately settle the case for $30,000.

On the defense side - the same rules generally apply. As the defense holds the purse strings, their position it a little easier. When you are at your authority and there is no more money, the plaintiff must then take it or leave it. If that take it or leave it offer is in the settlement range the case will likely settle. If however your opening offer is unreasonably low plaintiff may be reluctant to engage in negotiations and simply prefer to take his chances and spend his time preparing for trial.

Direct Negotiation or Mediation?

There are advantages and disadvantages to direct negotiation versus mediation. One advantage is that it is cheaper - you avoid the mediator’s fee, which is more of a factor in smaller value case. Oftentimes, defense counsel will put the authority out there on the

table and it will be a take it or leave it situation with mediation unlikely to be effective in changing what the insurer will pay. There are cases however where mediation is justified both in terms of the value of the case and efficiency of the process. Oftentimes during direct negotiation, parties will go back and forth over a number of weeks, sometimes even months. That whole process can take place with a mediator over the course of a few hours.

Another advantage of mediation is that many mediators are "evaluative" mediators. This means that they evaluate the case and give feedback to the parties during the course of the mediation process. Oftentimes, having a neutral party with experience in the relevant legal field mediate and evaluate the case can help to change the positions of the parties and reach a faster settlement. This is particularly so where the parties and/or the attorneys perhaps have an unrealistic view of the case in terms of its strengths or valuation. A mediator who has experience in handling personal injury cases either as an attorney or judge, may be useful in helping to educate a plaintiff who has unrealistic expectations regarding the value of the case and what they will likely recover at trial. The same may be true of an insurance adjuster who is taking an unrealistic position and failing to understand the issues in the case.

The parties must agree on the identity of the mediator and the personality of the mediator will often be a factor in the selection process. Some mediators are very "let's get down to it and move this forward", others like to talk about other cases and their other experiences and others are willing to listen. Many good mediators will do some or all of these things depending on the case. If however you have a case where you represent a plaintiff who really wants to tell her story and you know a particular mediator wants to get down to business- that person may not be the best mediator in the case. The case is more likely to settle if the parties trust the mediator and feel that their side of the case has been heard and communicated by the mediator to the other side.

Typically the cost of mediation is split between the parties - although sometimes one party is willing to pay the cost. Sharing the cost typically engages both parties in the process - rather than just coming along for the ride because the other side is paying with no real willingness to settle the case.

Preparing your clients for settlement negotiations.

Preparing Plaintiffs

Preparing your client for settlement negotiations can be a challenging process, particularly when representing plaintiffs. On the one hand you want to maintain your role as being a strong advocate for and believing in the case. On the other hand you need to be realistic with your client regarding what the likely outcome is of the trial and what lies in store if the case does not settle. One thing that is certain is that the outcome of a trial is uncertain. Clients need to understand this and all you can do is give them your considered opinion as to the likely range of outcomes if the case does not resolve. It is then for the client to decide whether they want to "roll the dice".

Attorneys often have problems with clients who have unrealistic expectation with regard to outcome. Some clients simply do not want to accept or acknowledge that they may get

less than $200,000 on a whiplash case or that the failed root canal and need for 4 other procedures is not worth $500,000 because they could not eat for three months. All you can do is to educate and advise your client as to likely value with a plaintiff verdict at trial and represent the percentage risk of a loss at trial with no recovery, explaining that this has to be factored into the settlement process.

It is a useful tool, before discussing settlement with your client to have formed an opinion as to the likely verdict range in the event of a plaintiff verdict with an evaluation of the percentage likelihood of prevailing at trial. As a starting point, if it is a case with a likely value of $40-$50,000 with a 50/50 change of prevailing at trial, you may represent a reasonable settlement range to be $20-$25,000. Be prepared to discuss your rationale with your client.

Having discussed the acceptable settlement range, you should then discuss with your client, what demand you should make to allow sufficient room to negotiate down to your range. Oftentimes, this will depend on the nature and value of the case and the nature of your relationship and prior dealings with opposing counsel.

If you have not agreed the settlement range with your client before making a demand and explained to them the reason for making a demand higher than the settlement range you run the risk of having a client who is upset with you for having "sold them short" in settlement. You want to avoid a situation where, having achieved what you consider to be a great settlement for your client, they are unhappy because "you told the defense in the demand that my case was worth $100,000 so why did we end up settling for $50,000?". This can be avoided if you communicate your reasoning to the client ahead of time.

In situations where your valuation of the case is different to that of your client and you consider your client to have unrealistic expectations, you may want to consider brining in a mediator whose role in part will be to educate your client. An attorney with a lot of experience in the relevant field of law involved in the case or a retired judge will make excellent mediators in this kind of situation.

When you get into the negotiation process - whether it be direct negotiation or mediation - warn your client to expect low offers at the beginning and not to be offended. I will never let my client walk out of a mediation until at least 4 or 5 exchanges have taken place. Early on in the negotiations the parties are testing the waters and to disengage from the process at this stage is not to be recommended. Tell your client "you will likely be offended by the first offer". That way when they are offended they are expecting it and are not so offended by it.

Preparing Defendants and Insurers

Where there is insurance available, the defendant is often not involved or engaged in the negotiation process. Remember however that the defendant is still your client and entitled to be involved and consulted if they so wish. In some case e.g. medical malpractice cases, the defendant will have a say in whether the case settles and therefore should be involved

in the process. Of course, in cases where the restitution sought is something other than monetary compensation e.g. reinstatement in an employment case, the defendant will be very actively involved in the process as will the parties in a divorce case.

The primary rule again is to ensure that your client is educated as to what to expect, the possible outcomes at trial and the percentage chance of a favorable verdict at trial. If you are dealing primarily with an insurance company - ensure that you have followed all their procedures and provided to them the information and documentation they need to come up with appropriate authority. If you fail to provide key information and authority is granted not having taken that information into account, the case may not settle and the client and insurer may be compromised at trial.

If you are engaged in direct negotiations, consider asking the insurer to give you authority up to a certain amount so you do not have to go back to them with each offer. Whether the adjuster will do this will depend on the nature and size of the case and your previous dealings and relationship with them. Some adjusters want to take more control over the negotiations than others. Some may even prefer to do the negotiation direct with plaintiff's counsel. If the case proceeds to mediation, it is preferable that the adjuster or person with authority is present. If they are only available by phone-they are not getting the benefit of the communication of information that may impact how they view and evaluate the case.

Conclusion

Negotiation is a skill that comes with practice. Do not be afraid of it. Remember the basic rules:

1. Be prepared;
2. Have integrity and credibility
3. Listen to your opponent
4. Advocate for your client
5. Be realistic