Five Practical Tips for Successful Settlement Negotiations

Karen E. Ross, Esq.
Tucker Ellis LLP

Unlike fictional civil litigation, the majority of our cases end settlement. This means that all attorneys – regardless of their level of experience – should be well versed in settlement strategy. Personally, I love settlement negotiations because they involve knowing your case inside and out; being able to understand and anticipate your opposing counsel's position; understanding the law, jurisdiction, and court in play; arguing the strengths of your case while also recognizing the weaknesses; seeing the case through from start to finish; and substantively engaging with opposing counsel. Frequent settlement negotiations also allow you to build professional relationships that will help you and your clients down the road. While everyone has different styles, there are five practice tips that apply equally to every settlement negotiation.

1. Think about settlement early and often.

Settlement considerations start with the complaint, as they should be on the mind of the attorney preparing a complaint and the attorney answering the complaint. For the plaintiff, counsel should consider if there are any viable claims that should be included to get a defendant's attention and/or hit areas of concern as both relate to ultimate settlement value. As a defendant, one should consider whether certain motion practice will drive down settlement value, such as a motion to dismiss (for lack of personal jurisdiction, failure to state a claim, etc.) or a *forum non conveniens* motion. Additionally, defense counsel should consider if there are grounds for counterclaims or filing a third party complaint that could influence settlement opportunities/value.

Further, settlement should always be an option and you need to know your client's opinions on it from the start of the case and as the case progresses as these opinions often change. Keeping settlement top of mind also helps remind you to consider the full picture throughout the life of your case.

2. Know your client's goals.

Each client and each case are different. Even experienced attorneys and attorneys litigating similar claims must remember to keep track of their client's goals for each case throughout the life of the case. Most importantly, your client should be the one to define what a "successful settlement" is. So be sure to ask them their goals and ensure you are on the same page. What matters to your client? Do they want their day in court to prosecute/defend the case? Are the interested in obtaining the best settlement amount early? Something else? How far are they willing to prosecute/defend the case? Do you know and understand the implications/factors outside the specific case? Is publicity an issue? As a plaintiff, "punishment" is not always a viable option and it is counsel's role to educate their client so they can work to achieve an obtainable goal. As a defendant, what will discovery establish? Is the defendant still in business/own the property/make the product at issue? Is the defendant worried about copycat claims and/or setting a settlement record? Does one party want the case to end in/avoid legal precedent?

Since civil litigation can last several years absent settlement, parties without litigation experience must be educated on the realities of the timing so they can make informed decisions about their goals. Also, the life of a

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case often varies by jurisdiction, especially as courts work to reopen post-COVID shutdowns, so knowing how long your client is willing to litigate a case must be balanced with their goals. Does the client want to get out of a case as fast as possible? Do they want to wait to engage in discovery or avoid depositions? Do they understand the costs as the case proceeds, including expert retention/discovery, motion practice, etc.? Are there any other issues or concerns your client has about litigating the case? Often attorneys are afraid of open-ended questions, but attorneys must ask them when learning about their client's goals.

3. Attract attention without being over-eager.

Getting the attention of your opposing side can often prove difficult…even if you are the one offering money. In fact, sometimes your client wants you to settle fast and cannot understand why the opposing side is not responding. This requires one to meet the client's needs without looking desperate. Indeed, until you have strong relationships with opposing counsel getting a call back can take longer than your client likes. So be creative. Here are some ideas:

- Gently poke the bear. I was once engaged in negotiations with an attorney who was not responding to my last offer. My client wanted the case resolved and I wanted to avoid my client paying the costs/fees of my appearance at an upcoming settlement conference out of state. Therefore, I sent opposing counsel an email saying: "Having not heard back from you after my last offer, I take your silence as acceptance." He called me within minutes of receiving the email exclaiming: "Silence is not acceptance-that is crazy. I do not accept." I replied (with a light tone): "I knew your silence was not acceptance, but I also knew that email would get you to call me and it was cheaper than me sending a supermodel to your office to get your attention." He literally laughed out loud and that was the start of a great professional relationship with him. While that example may not work for you, think about what would "gently poke" your opposing counsel into responding. Also, never be afraid to ask someone else for ideas. Do not forget that chances are someone you know has dealt with your opposing counsel before and may know how to get their attention.

- Seek court assistance. While courts vary on their pre-trial involvement, the majority of judges want their dockets deceased. If direct outreach is not viable, or you have other reasons to inform the court of your client's willingness to resolve the case, then do not hesitate to inquire about the court's ability to facilitate discussion amongst the parties. You can start by including/requesting a settlement conference in the case management order/case schedule. While such a deadline can be overlooked, having it provides a good opportunity for resolution discussion without appearing worried about your case as you are just adhering to the court's schedule; it also provides an opportunity to evaluate your opposition's evidence. Thereafter, depending on your specific case and circumstances you can contact the court, with opposing counsel included, to request appropriate assistance.

- Paper the file. While it may seem obvious for a lawyer to keep good records, attempts to contact opposing counsel to discuss resolution often occur via telephone or otherwise do not become part of the case "file." To avoid unfavorable claims/arguments by opposing counsel and to show your client's willingness to discuss resolution, be sure to document all telephone calls with a follow-up email or use email instead of voicemail. Of course, the content of the email should be written in a way that it could be submitted to the court if needed (also keep in mind that anything you write in email or a text or say in a voicemail could be used by your opposition).

- Take advantage of pre-trial practice procedures. Without overstepping any ethical boundaries, consider if there are any pre-trial activities you could implement to get the opposing sides' attention. Some parties want to avoid litigation costs and/or disclosing

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information, so determine if serving discovery, requesting depositions, etc., is an appropriate step to get your opposing side's attention. Be careful, however, as turnabout is fair play.

4. Think outside the box

Taking into account what you learn about the goals of your client and adding what you have learned about the opposing side, you need to think outside the box during negotiations. Settlement is not always about money- either getting the most or spending the least. Money matters of course, but it is not always about money. Parties often concede on the settlement amount if they get something else in return that is more important to them than money. You need to learn what matters to the other side and work from there, while protecting your client's interests and goals. The key to thinking outside the box is paying attention to what is said and not said during the course of a case (by counsel and the parties) and communicating with opposing counsel about what matters to their client.

In addition to asking your opposing counsel what is important to their client (honesty and boldness often pay off), being observant and making suggestions can help you identify non-monetary settlement elements. During one mediation, I noticed the deceased plaintiff's family waiting in the hall with several poster boards of photos. When I was in the Judge's chambers with my local counsel talking about case value, the Judge commented on plaintiff's value being too high, but they were very upset about what happened. I asked if he thought it would help if they were given the opportunity to present their photos and tell us about their husband/father. At first the Judge was shocked that I was willing to do that, but as we discussed it he realized it likely would help them and he was happy to have the suggestion and offer. The Judge took my suggestion to the other side and the plaintiff's lawyer was beyond grateful for this opportunity. Thereafter, we all went into the courtroom and listened to the family tell us about their deceased love one. As my client's representative, I let them blame me for what happened, which allowed them to shed some of their pain. After that, we were able to resolve the case. I was surprised that neither the plaintiff's counsel or the Judge had thought of this option to move settlement negotiations along because, as a product and mass tort defense attorney, I have been to many settlement conferences and mediations where the plaintiff just wants to yell at someone and blame them for what happened. Those acts provide them closure they need on a personal/emotional level. It also provides an opportunity for plaintiff's counsel to utilize a settlement/mediation presentation as their client's "day in court" and then direct their clients back to reality on settlement monetary values.

Other case specific ways to think outside the box include "wishes" that could be included as part of the settlement; for example, in employment matters some settlements include insurance coverage/payments for a set period. Put another way, be sure to consider what could make your opposing side accept your offer/pay your demand. If you are defense counsel, also consider if there is anything you can offer to reduce costs for the plaintiff; this could include paying court costs, preparing closing documents, participating in probate hearings, etc. In sum, thinking beyond the settlement amount, and not being afraid to talk about it with opposing counsel and/or the court, often results in a better result for your client.

5. Discuss Release Terms During Negotiations.

Often issues come up when negotiating counsel do not discuss all of the terms of the settlement agreement, so be sure to do have those discussions to avoid problems on the back end. The following issues should always be discussed as part of settlement negotiations:

1. Timing of payment. This is not only necessary to avoid claims of failure to timely pay the settlement, but it can also be a negotiating tool.

2. Full or partial release? Making clear if the release includes all potential injuries/damages (when allowed by state law), is a key to case value.

3. Who is signing? Depending on state law/procedures, considering if non-parties can also sign the release to avoid future litigation for the same injury should be done before final agreement.

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4. Minors involved? Guardians appointed? Will settlement amount be made public?

5. Confidentiality clauses (including who is bound and penalties for breach).

6. Attorney approval of certain terms – ensure that plaintiff's counsel will agree to form and any applicable Medicare/Medicaid sections.

7. Court costs.

8. Impact on other defendants. If a multi-defendant case, how does one defendant settling impact your case- who controls experts, joint motions, who can go on the verdict form, etc.?

9. Notary requirements and issues. While this issue has always been important, COVID 19 has created additional considerations given state/ local restrictions, work situations, and personal preference.

10. When is the dismissal filed?

11. Cross-claims against your client? Ones you need to dismiss?

12. Medicare/Medicaid and liens?

13. If participating in a mediation/settlement conference, consider taking a release with you or having the ability to print one at the end of the session to ensure the agreement is confirmed in writing by all parties.

14. Always paper any settlement agreement (even just to an amount) with opposing counsel immediately after reaching an agreement.

Karen E. Ross, Esq., is Counsel at Tucker Ellis LLP. As local and national counsel in premises, asbestos, silica, coal mine dust, and other toxic exposure litigation in Ohio and across the United States, Karen develops and executes targeted strategies to address client needs. Her ability to identify key issues, understand all sides of a matter, and appreciate clients' interests allows her to achieve each client's objectives in an efficient manner, while minimizing litigation risks. She received her B.A. from Kenyon College and her J. .D. from Case Western Reserve University School of Law. She is also dedicated to community service, including as a mock trial coach for Cleveland Early College High School and serving on the Board of The May Dugan Center.