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5 Tips for Successful Settlements

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Focus on these 5 tips to make your negotiations and mediations successful:

1. Keep your Eye on the Prize

Whether you are negotiating a lease, drafting a demand letter, engaging in discovery or preparing for mediation or trial, stay focused on the desired and achievable end result for your clients. Lawyers and their clients are sometimes overly focused on the strategy to get someone else to do something, which often results in losing sight of the end goal. Write down the end goals and include such things as money in your client's pocket, injunctive relief, return of property and the soft outcomes (e.g., closure, emotional healing, reduction of stress, time freed up to make widgets instead of preparing testimony). Then itemize the transactional costs on the road to get there (including your fee), as well as who is advancing fees and costs for depositions, experts and the like. Adjust the end goals appropriately, and keep your client's eye on the prize.

2. Focus on Problem Solving

Rather than spend the majority of your focus and efforts on discovery and other litigation procedures, always keep problem solving within your line of sight. Consider the following:

- What will it take to obtain the desired result for your client?
- What information is essential for the client to make an informed decision between risky and costly litigation and a possible settlement?
- What information is needed to persuade the other side that a settlement discussion is a good idea for their client?
- What alternative strategies are available?
- Might a carefully constructed friendly demand letter with an invitation to a mediation or a neutral evaluation be in order?
- How can the facts of the case be packaged and presented in an easy to understand format to help your client and the other side get an overall idea of the merits, risks and possible resolutions of the matter?

- Can you identify the few key depositions, documents and other information that will reveal 95% of the facts and law in dispute?

Continue to balance the time and efforts needed to keep a good position on the litigation track, and also put attention on problem solving.

3. Talk Settlement with the Other Side Early and Often

There are many ways to resolve a dispute, trial being only one of them. Trial is a costly and risky method of dispute resolution, requiring an extraordinary expenditure of attorney fees, costs, time and emotional energy. Since more than 95% of cases settle before trial, the earlier the focus on settlement discussions, the better the opportunity to obtain a net positive result for the client (or reduce the maximum exposure and expense, if your client is going to be paying). Maximize the desired result by going to mediation or a neutral evaluation early and often. A third party neutral can help both sides focus upon the information required to address the merits, risks and damages of the case, as well as develop other information which may be useful to resolving more complex cases, such as a joint accounting or discussing the division of major assets and liabilities in a business dissolution. Don't fall prey to the myth that you will look weak by trying to find a settlement that works; tell your clients and the other side that settlement exploration is a routine part of your litigation strategy.

4. Create and Implement a Negotiation Plan

Know what you want and have a plan to get there. Review the risks and costs of proceeding with discovery and trial, the range of likely outcomes at trial and the client's out of pocket and likely recoverable damages. What are the needs and interests of your client, and of the other side? In light of this information, what is the reasonable range of the settlement value of the case? Negotiation plans that involve asking for something in the neighborhood of the higher end of the range, and suggesting that your client might accept something within the range, get excellent results more quickly than plans that are based upon reactions to the opponent's moves. Resist the urge to simply mirror a small move. Instead, make one of these moves:

- A move coupled with a bracketed move (my client moves to X, and will move to Y if you move to Z);

- A suggested range of settlement numbers (we are willing to discuss settlement numbers between X and Z); or

- A move that suggests the amount of further movement that is possible (we have room to move if you make a significant move; we have a little more room to move, but not a lot of room; we are here to negotiate, but we are not paying more than 6 figures).

Telling the other side what you are thinking and where you are headed (while leaving a little fudge room) is forward-going, informative and productive. Even when the case does not yet settle, you, your client and the other side are able to make a more informed decision about next steps, because you each have a better idea of where you are headed for settlement and what is possible. Of course, remain flexible and adjust your plan as time goes on.

5. Document your Mediated Settlement Agreements Carefully

If in a mediation, or if settling as a result of a mediation, be mindful of the requirements of Evidence Code Section 1123 in order for your agreement to be admissible, and therefore enforceable:

- Remember to provide that the settlement agreement is "admissible or subject to disclosure," or that it is "binding or enforceable," or words to that effect.
- Make sure the settling parties sign the agreement.
- Remember that standard releases are often one way agreements, and are probably not admissible if not signed by all the settling parties.
- Consider putting language into all of your standard releases and settlement agreements compliant with Evidence Code Section 1123 so that in the event your settlement occurs in the course of a mediation (which could be 10 days after the last mediated communication), your agreement will be enforceable.

To see Caroline's newsletter and article link on creating admissible settlement agreements, click here.

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