

Five Strategies for Effective Settlement Negotiations

BY HON. GERALDINE SOAT BROWN (RET.)

Every litigator knows that many more cases settle than go to judgment. At some point in almost every lawsuit, the parties will discuss settlement, either on their own or with a push from the judge. During my 16 years as a United States Magistrate Judge, I conducted more than 100 settlement conferences each year. I witnessed the whole range of lawyer performance. Underprepared lawyers and their clients stumbled into settlement conferences, often resulting in a negotiation that didn't lead to settlement, or they settled on terms they found disappointing. Effective lawyers, on the other hand, approached settlement negotiations strategically and with thoughtful preparation.

Here are five strategies to maximize your clients' chances of a favorable outcome.

1. Develop a litigation strategy for each individual case.

There is a temptation, especially in high-volume practice areas like personal injury, to view a case just like any other case that has a similar fact pattern. While it's important to apply lessons from previous experiences, you should avoid a boilerplate, "this is what we always do" approach.

Discuss your client's objectives candidly at the start of the litigation and throughout.

From a defense point of view, the client usually wants to end the case as inexpensively as possible, but not always. The client may want to demonstrate its willingness to defend cases it views as meritless rather than pay a nuisance settlement.

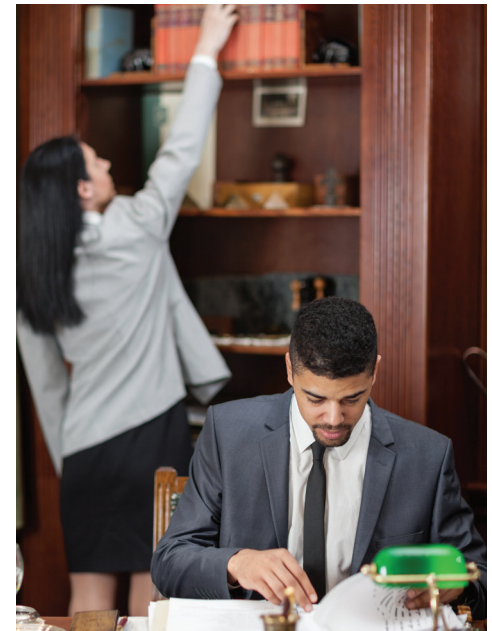
The client's view on litigation may change over time. For example, I conducted a settlement conference where the plaintiff's case was not very strong, but it received a better settlement than the facts of the case would otherwise suggest. On the day of the settlement conference, the defendant company was in the process of being sold, and the owners wanted to eliminate any contingent liabilities.

2. Identify, gather and produce the most important information early.

Settlement negotiations are most effective at the proverbial sweet spot, when each side has the information it believes it needs to make a judgment about settlement but before discovery expenses allow the sunk costs mentality to take hold.

As early as possible, identify the information that would make the most difference to both your client's and the opposing party's view of the potential risk.

If the information the other side wants most is discoverable, it's almost always in your client's interest to produce it before the settlement negotiations. A party always assumes that withheld information is favorable to its side, and it calculates its settlement position accordingly. A classic example is a defendant who argues that a judgment would be uncollectable. I have never seen a plaintiff reduce its demand on that basis without first seeing credible financial information from the defendant.



3. Look for settlement opportunities.

Windows of opportunity for settlement open at various times in a lawsuit. For a defendant, it's almost always worthwhile to ask the plaintiff's lawyer during the first phone call, "What is your client really looking for in this case?" The answer to that question will tell a lot about whether to start negotiations then or wait.

Another opportunity is when the most important information has been gathered; for example, when the key witnesses have been deposed.

Yet another opportunity is at a hearing in court. Most judges will ask at a status hearing whether the parties have talked settlement. Before appearing at the status hearing, decide with your client how you want to use this opening: to get a settlement conference with the judge, to start lawyer-to-lawyer settlement talks or to discuss the possibility of private mediation.

While you can call opposing counsel at any time, scheduling a private mediation

or judicial settlement conference requires matching the parties' schedules to the judge's or mediator's schedule. It's important to foresee and thus schedule settlement opportunities early.

Waiting until a summary judgment motion has been filed risks missing the window of opportunity. A defendant that has invested significant fees in discovery and the summary judgment motion usually wants to see if that will end the case. Plaintiffs are rarely sufficiently intimidated by a summary judgment motion to reduce the demand dramatically.

4. Consider the best context for settlement discussions.

Settlement talks can take place in a number of contexts. Direct, lawyer-to-lawyer talks can be effective when the lawyers have a good rapport and the necessary authority from their clients, and when money is the only (or primary) topic of negotiation. They are not as effective when the clients want to control the negotiation or there are many variables to the settlement.

A settlement conference with a sitting judge works well when one party wants "a day in court." Judges, however, can give only a limited amount of time to any particular case, and only when their calendars permit. Not every judge wants to conduct settlement discussions or has mediation skills. The fact that a settlement conference was held and whether it resulted in a settlement will be on the docket available to the public and media.

A private mediation is completely confidential. The parties can choose the mediator and schedule a convenient time and place. The mediator will be available for as much time as the parties need, which can be important in a business dispute with a number of aspects to work out.

5. Prepare carefully to maximize the settlement opportunities.

The choice to settle or not belongs to the client, but it is your responsibility to make sure the client makes an informed choice.

Effective lawyers inform their clients about the judge's or mediator's procedures, the schedules for exchanging written pre-mediation submissions and how the session will be conducted.

Meet in person, if possible, with the client representative who will be attending. Make sure your client understands the alternatives if an agreement is not reached, including a realistic budget and timeline for getting to a judgment and the unquantifiable costs of stress and distraction.

Your client should read the opposing party's submission as well as yours. Sometimes it's the first time the client has heard the case described directly from the other side's viewpoint.

A pre-mediation submission should read like an opening statement to a jury—concise, easy to understand and confident but not aggressively off-putting. Avoid inflammatory rhetoric and table-pounding.

The opening demand and offer should tempt the other side to continue the negotiation. A plaintiff with an unreasonable opening demand invites an unreasonably low opening offer in return. Likewise, an unreasonable opening offer can make a plaintiff think that significant movement on its part is pointless.

Consider all the material terms necessary for settlement. Think about what kind of release the client will want and whether there should be a confidentiality clause. If possible, send a draft of the standard terms your client will require to opposing counsel in advance so that those terms don't become last-minute bargaining chips.

Bring the real decision-maker to the negotiation, the one who can make a deal that you might not have anticipated back in the office. Negotiations develop a dynamic that can slip away if the mediation is adjourned to allow a party to get more authority.

Settlement discussions are almost certain to occur in every civil case. Effective lawyers work strategically to get their clients a satisfactory result. ●



Hon. Geraldine Soat Brown (Ret.), served as a U.S. Magistrate Judge for the Northern District of Illinois from 2000-2016. Prior to that, she represented a wide range of parties in litigation and arbitration of complex construction and commercial disputes for 25 years. She can be reached at gsbrown@jamsadr.com.