

# Legal Briefs

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## Negotiations & Settlement

Leonard L. Loeb explains that, *like preparing a gourmet meal, reaching a settlement requires assembling the finest ingredients, timing, and a hearty appetite. For dessert, lawyers can use the initiative to help their clients attain win-win settlements.*

### I. Negotiating from Easy to Difficult:

A. How often do lawyers sit in front of the judge at pretrial conferences and say, "Your honor, my opposing counsel and I agree that if we can resolve the issue of \_\_\_\_\_, then everything else will fall into place? Once we crack that nut, the remaining issues will settle quickly?"

So, we settle the major issue. Then what happens? The remaining issues do not settle quickly. In fact, they become more difficult to settle than the original "nut" we had to crack. This happens because one party was a winner and the other a loser. The loser now wants to be a winner and digs in on the next issue.

B. **Remedy:** Negotiate from easy issues to difficult issues. In settlement, something must be given up, and compromises must be made. In determining which compromises to make, the lawyer needs to identify his/her priorities. Have the lawyers rank order the issues from one being the easiest to 10 being the most difficult. Without disclosing the list to the opposing side, engage opposing counsel in discussions to determine how his/her client views the degree of difficulty of each issue. Parties usually agree on the degree of difficulty of each issue. Purposely steer the negotiations by working on the easiest issue first and progressing to the most difficult. The result is that both parties feel they are making progress because they are negotiating positively and obtaining results. By the time we get to the most difficult issue, a pattern or style of successful negotiation has formed and the difficult issue is relatively easy to settle. (Terrence Kapp, *The Joy of Settlement* by Gregg Herman, 1997, p.93.)

### II. Settlement Negotiations: Getting Past the Posturing Counsel to the Reasonable Client

A. It is not uncommon to enter into settlement negotiations and to find that the opposing client is far more reasonable than his/her lawyer. Sometimes the client has submissively

delegated authority to the lawyer and sometimes the client simply does not realize what his/her lawyer is doing to prevent the case from being settled. Because you can't contact the opposing party directly, how do we get the opposing client to rein in the lawyer?

1. Many times there are two negotiating groups and you are separated by a mediator that moves back and forth between both groups. This model creates the problems of not being sure that your position is being represented accurately and not being sure that you know what the real objections are to your position. The old saying something gets lost in the translation applies here. You may be more successful when everyone is face to face but opponents may not allow this type of access to their client. It is easier for them to tell you that your client is being totally unreasonable, and that there is no point of negotiations.

B. How do you arrange to make your presentation to the opposing client? Here are a few suggestions:

1. When it appears that negotiations are ending in a deadlock-suggest that both sides convene for the purpose of summarizing their positions "just so we are all clear on where we stand right now, and there are no misunderstandings"

a. Suggest that you and your client would like to hear the other side's position directly to "clear up any misunderstandings of positions that exist".

b. Enlist the aid of the mediator: "We have worked so hard and for so long in trying to reach settlement today, I think it would be helpful if we could all come together for a short period to review where we are." Most mediators would like nothing better than a settlement to be reached, and will encourage a few more efforts.

c. Make sure that you do not make the meeting sound as if it will be further long hours or heated debate. (Dee Samuels, *The Joy of Settlement*, 1997, .45.)

### **III. Dealing with the Difficult Lawyer During Negotiations**

A. This is a topic familiar to all of us. One natural reaction is to be difficult in return or to refuse to negotiate all. This often leads to trial, which ill suits the needs of most clients.

B. Remedy- Your reaction to opposing counsel during settlement will change the dynamics between the two of you and help to make this process more bearable. Opposing counsel may raise his/her voice, use an offensive tone, or convey his/her

message using inappropriate language. Opposing counsel often uses such tactics to intimidate you and to gain control over the session.

1. If you respond by tolerating this inappropriate behavior the settlement process may become so unpleasant for you that you might, consciously or not, desire to end it as quickly as you can. This may cause you to make concessions on behalf of your client that you otherwise would not make. Simply reiterate your position; showing that you will negotiate the merits of the issues pointing out that opponent's attitude is not useful in negotiations.

a. Discuss ground rules for negotiation sessions.

b. Make it clear to your opponent that you are interested in negotiating in a way that will produce positive results for the parties.

c. Terminating negotiations should be your last resort. Although this may force opponent to be more productive the second time around.

C. Some of your opponents will simply create a situation during negotiations designed to make you uncomfortable in ways that are more subtle. For example, opposing counsel may not pay attention to you when you are speaking, turn his/her attention on the desk, or by not making eye contact with you. These actions are designed to cause you to question whether your position has the validity you thought it did

1. Remedy: Pause....until you have secured your opponent's attention this will reassert your position in the balance of power.

D. Do not permit your opponent to change your focus on the negotiations and impair the settlement process with inappropriate outbursts and tactics designed to provoke your anger or to intimidate you. You are unlikely to change the person with whom you are negotiating. You may, however, alter the process through with the negotiations take Place by communicating to your opponent that you will not yield to offensive tactics and that you will negotiate using principles of reason, professionalism, and civility. (Lisa L. DeCecco, *The Joy of Settlement*, 1997, p. 35)

#### **IV. Keeping Book on Opposing Counsel**

A. Every lawyer should be aware of the personal style of the lawyer on the other side. The best baseball pitchers keep a book on hitters they face on a regular basis. Does a hitter like fastballs? Does he swing on three-and-one with runners on base? Human

beings are creatures of habit, and knowing the habits of those on the other side can give you the edge in settlement negotiations.

B. Keep all settlement letters you receive from the opponents you see frequently in your cases. Keep track of the offers and demands they make for their various clients by placing them in a special computer file.

C. This file offers a convenient source of information about previous letters that can be cited to the opponent during settlement conferences and in settlement letters. Although some lawyers do not care if they are caught in consistent inconsistencies, most are embarrassed sufficiently to at least temper their extreme positions. (Michael J. Albano, *The Joy of Settlement* by Gregg Herman, 1997.)

## **V. Kill Them with Courtesy-A Settlement Technique**

A. You should begin your negotiation with the intent of occupying the high ground of civility, courtesy, and reasonableness. If the opposition does not respond in kind, adopt an aggressive, businesslike demeanor.

B. Settlements are hard to reach if you are belligerent and posturing. To the extent that an atmosphere of reasonableness and good faith cannot be established, chances for settlement diminish.

C. Using the civil and courteous approach will often disarm the opposition to your benefit. For those cases where civility is not reciprocated, you must make the opposition understand that if necessary, you are prepared to use adversarial methods. Leave to the opposition the determination to proceed in an adversarial manner, with all its attendant expenses. (Samuel V. Schoonmaker *the Joy of Settlement* by Gregg Herman, 1997, p. 6)

## **VI. Client Settlement Process**

A. Figuring out what the client really wants is only the first step. The client must be prepared for the settlement process itself. Clients cannot be expected to walk into settlement conference without prior planning.

B. Tell your client how a settlement conference or mediation is conducted, how lawyers operate, and what is expected of them.

C. Not preparing your clients can lead to failed settlements, disgruntled clients, malpractice actions, or the dreaded letter from the disciplinary committee.

1. Give summary of all issues and give client a refresher course in the law.
2. Tell the client all the alternatives.

This discussion should always include a review of which contested issue

might be exchanged for another.

Discuss all of the possible benefits detriments, and ultimate consequences of various settlement scenarios.

5. Let client sleep on it.

6. Schedule follow up-meeting to come up with actual settlement position.

7. Once you have reached a position, prepare a draft of settlement proposal or response and submit it to the client for his/her review.

Never send without giving it to the client for an opportunity to review. This proposal or response must be absolutely and totally authorized by your client.

D. During this entire time the lawyer must be understanding, firm when appropriate, and able to explain to the client his/her rights and obligations in clear and understandable terms. (Samual J. Goodman, *The Joy of Settlement* by Gregg Herman, 1997, p.26.)

E. Sit your client down and discuss these five questions with your client.

1. What does the client really want to achieve?

2. What is realistically possible to achieve?

3. What does the other party really want?

4. What is the other negotiator really seeking?

5. What are the best means to influence the other party and its negotiator?

Discussing these five questions with your client keeps him/her alert and up to date in settlement negotiations.

## VII. Settlement by Ambush

A. Good settlements are born of good timing. Negotiating before the time is right can be as useless as waiting too long to negotiate. The atmosphere at a settlement conference can be critical to reaching a resolution.

B. Sometimes knowing that a settlement conference is going to take place can put people on the defense.

1. Remedy: suggest a conference that is not designated as a settlement conference. This can be an ideal way to move a case toward a conclusion.

2. Such a conference is a way that you can achieve a settlement by recognizing the point in negotiations when timing, balance of power, and the emotional readiness of the parties are amenable to settlement.

a. This is best used when parties may be ready to settle but do not realize it. This is best attempted after depositions have been taken, grievances aired, and anger and resentment are in check.

b. This makes your side look reasonable and puts pressure on the opposing side, which appears to be holding up negotiations and running up legal fees and hard feelings. (David H. Kelsey, *The Joy of Settlement* by Gregg Herman, 1997, p. 79.)

### **VIII. Patience**

A. If you act without patience it may produce a perception that the proposal's creator fears it will reveal undesirable, hidden facts. Patience can convince the other side that your position is real and not subject to change, at least without receiving a major concession.

B. Sometimes you have to wait until your client has completely healed before you can begin your settlement process. How can you begin to evaluate your client's case if he/she has not reached maximum healing. Wait until you get all the information and facts. Many lawyers "jump the gun" and their clients still may need another \$20,000 dollar surgery.

### **IX. Threat of Litigation**

A. Although your goal is settlement through negotiations, you are not going to the other side with your hand out saying "please." The best leverage for negotiating a fair deal is the threat of trial and the likelihood that you, rather than the other side, will prevail.

B. Go into the settlement like it is a trial. Prepare an organized binder with all documents related to your case and label it trial notebook. At least let your opponent believe that you are already prepared for trial if negotiations fail.

C. Your appearance should announce you are prepared for trial, should it be necessary.