

STRATEGY & TACTICS IN SETTLEMENT NEGOTIATIONS

Why is Negotiation Important?

- over 90% of cases settle
- predominant resolution method

1. Benefits of Settlement

- certainty of result
- prudent risk management

2. Timing of Settlement

- enough information available
- losses quantifiable
- only when fully prepared
- initiate when case has peaked
- relative striking power

3. Preparation for Settlement Negotiations

- full evaluation of case
- quantum studies
- other lawyers
- mediators
- court decisions
- resources such as ATLA or jury research
- quantum range

- liability factors determine percentage chance of success
 - probability of recovery
 - judgment value
 - style of opponent in negotiation
 - know whether will try lawsuit
4. Determine Desired Settlement Range
 - high-and bottom/line
 - overlap or gap-between plaintiff and defendants' evaluations
 5. Prepare Client for Negotiations
 - perform client needs assessment
 - costs of litigation
 - exposure to litigation
 - capacity for trial
 - capacity for adverse result
 - capacity for delay in resolution
 - expectations
 6. Theories of Negotiation
 - interest determination versus positional negotiating
 - positional negotiation dominant form
 7. Negotiation Plan
 - information will share
 - information will not share
 - how negotiations will be initiated

- structured negotiations –judge/magistrate or mediator
- assessment of opponent
- initial offer and target range for resolution
- flexible approach to process, willingness to re-evaluate position
- client preparation for negotiation
- expectation control
- be patient in process
- client with ultimate authority during negotiations
- know style of judge/mediator
- if mediator/judge – educate them – in a confidential letter always present any concern or problem with your case to show that you are being candid and not simply engaging in puffery
- candor will usually inure to your benefit and cause mediator/judge to help you settle your case favorably as a reward for fairness and candor

8. Objectives of Negotiation

- settle in desired range
- avoid continued litigation
- finality

9. Method of Negotiation

- initial offer based on rational/multiple
- reasons for offer
- show good faith in making offers
- pattern in negotiation position changes
- give signals by movement

- vary amounts to achieve negotiation objectives
- moves must be calculated to reach target position
- do not bid against self
- never go to bottom line right away
- deprives other party of bargaining satisfaction
- never go up, will kill negotiation
- exception would be if significant change in circumstances since prior negotiation
- prepare to explain what it is, show continued good faith, and desire to compromise
- problems with splitting the difference
- withdrawal of offer within time period-be prepared to try case
- judges frown on withdrawals or drop dead tactics
- never use drop dead unless mean it; use as last resort; prior to walk out
- willingness to concede
- listen to mediator if suggest particular resolution process
- study body language and nonverbal signals
- leverage through knowledge; use uncertainty for leverage; creating doubt in opponent and opponent's position
- be repetitive; give opponent time to process information
- soft persuasion; hard persuasion
- selective disclosure
- never disclose blockbuster unless sure will settle case
- can disclose to mediator or judge/magistrate who can reveal that there is significant adverse information
- reach fair settlement as stated goal

- always be aware of creating bargaining satisfaction for opponent
- determine interests of other party and whether his interest can be satisfied
- decide what can be given up
- attorney's fees, punitive damages and interest accrued
- practical considerations
- costs of litigation and delay

10. Negotiation Decorum

- do not interrupt, always listen with patience
- be patient during process
- always treat opponent with dignity
- do not make accusations of unfairness or misconduct
- no personal feelings
- do not argue

11. Ethical Considerations in Negotiation

- false representation of positions
- presenting case in best light

12. Other Considerations

- non-monetary currency in settlement negotiations
- partial settlement
- high-low agreements
- Mary Carter agreements
- group settlements – defendants reserve rights to resolve cross claims/coverage issues after settling main claim
- structured settlements
- medical liens

- outstanding medical bills
- guarantees
- written agreement to conclude negotiation