# Taking Control Of The Outcome To Turn A Settlement Into A Win

*By Andrew P. Schriever, Esq.**

When a client comes searching in need a litigator, it is usually a foregone conclusion that something has gone, or is about to go, wrong. It is therefore to be expected that any client attending an intake meeting with a litigator is going to be angry and is going to want not just to win the case, but to teach the other side a lesson. Many good litigators will often provide initial advice that demonstrates to the client how he or she can be vindicated. The lawyer will gather as many details as possible during the initial meeting, and try to then present a game plan for victory – explaining the offensive or defensive strategy and how, by employing vigorous discovery techniques and overwhelming motion practice, the lawyer can effectively gut the other side's case with an eye toward delivering the final, and decisive, blow at trial (to the extent the job is not finished by a summary judgment motion). This is what the client expects, and has a right to expect, from a good litigator, and the client needs to see from the first meeting not only that the lawyer understands the problem, but also knows how to most effectively navigate the legal system to bring about the "bad guys'" defeat.

However, a litigator who stops the intake meeting after outlining that game plan without going further may be missing an important opportunity – to help the client understand that often a win, after a case is tried and appeals are finally exhausted, can wind up being a far less preferable alternative than a negotiated resolution which allows the client (not the judge or jury) to take full control over the outcome of the case. What many clients may not at first understand is that they will often get a better, faster and less expensive result by putting as much energy into structuring a resolution as the client and the lawyer need to put into the strategy for structuring a win. And what a good litigator understands is that a well-negotiated resolution, where the client controls the outcome, will often produce the same or better result as that win, and, ultimately, a more satisfied client.

This article explores, through illustrations based upon cases negotiated by the author, the application of some basic and well established principles of negotiating technique that demonstrate how to help a client transform from the angry person who comes into the office in need of vindication to an empowered and contented

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person who is able to structure a strong resolution to the dispute and who can then move forward with his or her life or business venture unencumbered by the prospect, risk and expense of what could turn out to be a long and bitter litigation.

At the outset, one of the first questions a good negotiator should ask is:

## Are We Ready To Negotiate?

For example, did the client come into the office with a case where all the leverage is already in place to negotiate a "win" without having to litigate? A good illustration of this scenario is where a commercial landlord comes into the office complaining of a commercial tenant who abandoned the premises without proper notice, with seven years left on the lease term, and where the lease has an acceleration clause that allows the commercial landlord to immediately demand and collect all rent due for the remainder of the lease period. In this situation, the client gives the lawyer facts that position the case extremely well for an early settlement, possibly without ever even having to file a complaint. This is because, assuming the tenant does not have any significant, colorable defense to the breach, New York case law in such a situation is so well-settled that the lawyer can counsel the client with a good measure of confidence that most judges who apply the letter of the law will ultimately rule in the commercial landlord's favor. Since the application of the law to these facts is so straightforward, the landlord's lawyer has all the leverage he or she needs to pick up the phone, call the adversary and lay out the undisputed facts together with an explanation of the probability that the landlord will win based on the well-settled law. The easy message to convey to the tenant is that the dispute can be resolved the "easy way" — by agreeing to a deal which is highly favorable to the landlord, but which nevertheless gives the tenant more savings than the tenant would have had after spending attorneys' fees only to then lose — as an alternative to the "hard way" where the tenant spends an unpredictable, but large, amount of money to mount a losing defense resulting in a judgment for the full accelerated lease payments due.[1]

The foregoing scenario may lead one to ask: If the commercial landlord's litigation prospects were so good, what incentive would the landlord have to settle early — why not just litigate to a point where the commercial landlord procures a judgment larger than any amount a collectible settlement might produce? The answer is summarized by three basic factors that should be a part of every lawyer's settlement calculus: time, money and risk. It is true that the commercial landlord would likely win on the facts discussed above. However, if the matter were litigated through trial, followed by a likely appeal, "winning" could be a matter of years. The expense of prosecuting such a case could be substantial. And, at the "end of the road," there are always two substantial risks. First, there is always the very real risk that a judge, no matter how good a jurist, could simply get it wrong on the law, or, in some cases, may pick up on some legal basis to rule in the tenant's favor. The risk of a legally incorrect result could also increase exponentially if the case goes to a jury. Second, there is the risk of a pyrrhic victory, classically illustrated in cases where a plaintiff obtains a multi-million

dollar judgment and the defendant turns out to be judgment proof, or files for bankruptcy to avoid judgment enforcement.

The foregoing scenario clearly demonstrates a situation where a lawyer should seriously consider starting the negotiations early. In contrast, there are often good reasons why the lawyer should advise waiting before starting negotiations, particularly when the facts or the law are not so strongly in the client's favor. In that situation, it may be a better strategy to develop the case in litigation with the goal of generating additional leverage.

For example, in many cases, a lawyer playing defense will respond to a complaint with a motion to dismiss. Given that such motions are very difficult to win, because Courts will typically not dismiss a case without at least giving the plaintiff another opportunity to file a new complaint, the plaintiff's lawyer in that situation may want to seize upon a quick and relatively good opportunity to achieve an early win in the case. A defeat on a motion to dismiss not only sends the message to the other side that the "slam dunk" they thought they had does not exist, but it also helps increase a plaintiff's momentum because it reflects the Court's agreement, based on the Court's first look at the case, that the case "has legs" and will not so easily be disposed of as a matter of law.

Another illustration of when it pays to wait before discussing settlement is when the theory of the case first needs to be developed, frequently based on facts that need to be adduced through discovery or through the assistance of an expert who first needs to analyze the facts in order to develop the strongest possible theory to present to the other side.

In one case litigated by the author, the client sold a New York City high rise building to a developer that planned to demolish the existing structure and replace it with a large commercial/residential complex on the client's site as well as on an adjoining parcel. The sale transaction was structured such that the client agreed to accept a payment for the building at a price which was slightly lower than market value, and the buyer agreed that the client would then be paid a percentage of revenues from the development project once the project achieved a specified rate of return. The client sued, claiming a right to the revenues after the other side suggested that no money was due because the project had not realized the rate of return that would trigger the payment obligation. It was necessary to compel the production of project documents through motion practice, and then to have our client's accounting expert analyze the data, before we were ready and able to prove that the rate of return which would have triggered the payment obligation to the client had not been realized because the other side was employing accounting mechanisms to ensure that the rate of return would never be realized. It was only after we brought our accountant to the negotiating table to demonstrate to the other side how we figured out the "creative" accounting practices being employed and how this knowledge would enhance the prospects of our case that the other side was willing to seriously negotiate. Having shifted the leverage in our favor by developing the case to a point where we picked up the information we needed, we were able to reach a seven-figure settlement that matched the client's (and our accountant's) reasonable expectations.

The practical lesson of the above illustrations is that the amount of leverage the lawyer has will serve as a guide as to when the case is ripe for settlement, and sometimes it is necessary to create additional leverage through litigation practice in order to make the other side clearly understand the significance of their exposure if they choose to keep the fight going as an alternative to engaging in serious settlement discussions.

One other consideration in terms of the timing of settlement discussions is the personal context of the case. Types of cases that are usually ripe for settlement from the outset are fights between family members (such as contests over how a will should be administered, particularly when there is not much to dispute over the nature of the bequests) and partnership/corporate dissolutions of closely held companies. Often in such cases, the facts are not necessarily disputed and the law is usually fairly clear. What is driving the dispute in large part is often the raw emotions involved between people fighting each other who at one time were very close. The goal in these situations is to help the client understand that he or she can likely negotiate early to realize the same economic outcome that the client might get at the end of a litigation (particularly where a 50/50 partnership is being split) if the client can find some way to either satisfy the emotional element of the case, such as through face-to-face meetings with the other side to work through the personal issues, or put the emotional element aside (without belittling its significance) so that the client can focus on what he or she really needs and try to negotiate an outcome that extricates the players from each other's lives as quickly as possible.

In addition to tactically outlining the proper timing for a settlement discussion, another question a good negotiator should ask is:

## Are There Non-Monetary Elements At Play Here, And If So, How Can I Exploit Them To My Client's Advantage?

Often, there are non-economic interests at play that can be just as, and sometimes more, important for the client than the monetary aspects of settlement. The illustrations noted above, such as in partnership and family dispute contexts, present exactly the type of case where great strides can be made to help the client maximize the negotiated resolution through non-monetary concessions.

For example, when close partnerships dissolve, the situation frequently arises where one partner has "muscled" into the business operations to a point where the other partner is effectively shut out from co-running the company, or frequently one partner may be retiring and the company will be continuing as an ongoing concern, in which case the partners need to figure out a cash value representing the departing partner's interest. Often the departing partner will view this calculation not only according to a prescribed partnership valuation formula, but also as an evaluation of the partner's self-worth as an individual and as a professional. Needless to say, emotions run raw in these situations, and this is exactly where the parties can create settlement opportunities that in some ways can give the parties more than they would get in Court.

Consider the outcome of a typical partnership dissolution dispute that has gone

the distance in litigation. The Court will weigh the partners' competing accountants' analyses of the worth of the business for purposes of valuing the parties' interest and the Court will determine what each partners' interest is worth. While a retiring partner may procure a win if the Court adopts his or her accountant's position, the Court will likely not do anything in its ruling to compensate for the departing partner's feeling of loss of self-worth as a result of being shut out or forced to retire. This is because the Court's job is usually limited solely to the determination of the financial issue. A negotiated resolution can not only give the departing partner an equitable financial result, but it can also allow for the partner to be recognized for his or her role in building the business.

For example, in one instance, a departing partner on the other side of the case was willing to drop demands for a large and immediate payout in exchange for a promise of a modest salary going forward with access to a secretary and space in the office for the retiring partner to continue his professional practice on a part-time basis. That deal presented the client (the partner remaining) with the opportunity to realize a substantial financial benefit by not having to pay an exorbitant lump sum in exchange for the client's willingness to pay out a smaller sum over a longer period of time because the client was willing to recognize that the reason the fight was getting so acrimonious was because the retiring partner felt he was being forced to leave without his dignity intact. By structuring a settlement that preserved that dignity and gave due respect to the other side's role and accomplishments, the client stood to benefit from a result calling for the payment of less money in the long run based on the non-monetary gesture of offering the use of space and a secretary that cost the client nothing over his already-existing overhead.

Another good example of how a non-monetary interest can be used as an effective bargaining chip is in the context of construction litigation. There are a series of New York appellate level decisions that hold that an aggrieved building owner suffering from construction or design defects may in certain instances be deprived of a direct remedy from the party that caused the problem because there is a lack of privity on which to base an action for breach of contract or on which to establish a special relationship for purposes of establishing a negligence claim. This scenario presents a win/win opportunity for both the building owner who is suing and the contractor or architect being sued.

To illustrate, consider a scenario where the contractor was not the main player in causing the construction defect, but instead, a subcontractor was the major culprit. For example, in a case where a new residential building is being constructed, the contractor alleges that the subcontractor incorrectly poured the concrete for the foundation of the building, so that the concrete floors of the balconies wound up directing water into, instead of away from, the building's façade. In that instance, the building owner has a right of action against the contractor, but he may not have a direct right against the subcontractor if he did not directly contract with or have any relationship or interaction with the subcontractor. In that instance, a deal can be negotiated whereby the building owner could agree for the contractor to pay a reasonable amount to settle the case, and to assign the contractor's contract

rights with the subcontractor to allow the building owner to sue the subcontractor directly. By using a legal assignment of rights as a non-monetary tool, the contractor can avoid significant exposure while still leaving the owner in a place where he or she can be made fully whole with new rights against the subcontractor that the owner may not have had directly.

This last illustration leads to another important question that a good negotiator should ask:

## How Can We "Expand The Pie" In Order To Maximize The Potential Pool From Which A Settlement Can Be Constructed?

The concept of "expanding the pie" is very straightforward, and it boils down to looking at the problem in such a way that the parties can create additional value by exploring alternatives to simply trying to split what was on the table when the dispute arose.

A good illustration of the concept is when two parties co-own a valuable piece of real estate, but the two parties cannot get along. This situation often rises in the context of commercial condominiums and "Cond-Op" buildings which feature a residential unit consisting of apartments owned by one party and a commercial unit consisting of storefronts owned by the other party. Frequently, based on the allocation of common element ownership interests, one unit owner will have majority control over the building and thereby be able to subject the other unit owner to common charges and special assessments or usage restrictions that the minority owner deems prejudicial or unfair. Due to the parties' close proximity, these disputes can often result in years of litigation, particularly when both sides refuse to accommodate the other in attempts at settlement. This situation presents a few different ways to "expand the pie." The parties could recognize that while each unit has substantial value, the building, if packaged as a whole, could bring in even greater value from a third party buyer than either unit owner would realize from selling his own piece, with the result being that the extra value realized could create a pool of money for use in settlement of the dispute. Another possibility is that one unit owner can sell to a third party investor, subject to the investor assuming the claims involved in the litigation and with an agreement to indemnify the selling owner. The selling owner could thereby separate from the dispute while selling the unit for fair market value, or, at a minimum, at a discount which is less than the cost of likely litigation fees going forward. An incoming buyer in this situation would be more likely to be willing to settle with the remaining owner, in part because there is no personal history getting in the way of a settlement dialogue, and in part because a settlement payment to the remaining owner may make good economic sense to the incoming investor, who in the long run can recoup a settlement payment based on the rising value of the investment.

Another "expanding the pie" illustration is a case that the author settled for an academic institution that was involved in a joint program with an outside company that provided coursework for the institution's students. The outside company was supposed to pay the client a percentage of tuition revenues and when the company

fell behind on payment, the client wanted to sue for the money owed and to sever the relationship. The problem, which became quickly apparent after a demand letter was sent, was that the company had run into difficult financial circumstances, so it became very clear (particularly once the other side sent over its financials) that a "win" against this company would be meaningless because at the end of the process, the opposition would likely be judgment-proof. An important factor here was that, notwithstanding the financial dispute, the client did not have any specific complaints about the quality of the coursework being offered through this company's program. The only way for the client therefore to recoup its loss was to allow the company to essentially work off the debt. The solution was thus not to sever the contract and litigate the amount owed, but rather to agree to continue the contract for a time period long enough to generate projected revenues that would be sufficient to satisfy the debt, pursuant to an agreement where the client would take all the revenues for itself until the debt was paid, following which the company could then take a percentage of any revenues above that amount.

One other good illustration of the concept arises in the context of trademark and intellectual property disputes. A client may find itself in the position where it has invested heavily in developing, marketing and shipping its brand name, only to find that an unknown competitor had been working with the same brand name in another part of the country. In these situations, litigation of the dispute to the conclusion will typically result in either one side being deemed to have superior rights to the trademark (which forces the other to lose the brand and potentially have to pay substantial damages) or a situation where a court could also allow for the sides to continue with their use of the mark, but only in their geographic areas where they are already operating, which results in both sides being indefinitely restrained from growing their business. One solution that inevitably evolves from these circumstances is to see whether the clients can find a way to maximize their usage and profits from the marks as they have been developed, either by a cross-promotion (particularly if the competing brands are related and of similar quality, but not identical, such as where one side brands clothing and the other side brands accessories) or by arriving at a license agreement which could allow for both sides to share in and generate additional profits.

In addition to the principles discussed above, one core question that a good negotiator should always ask (and invite the client to explore) is:

## How Do I Know That This Is A Good Deal?

This is where the well-established concept of a "BATNA" comes in. This concept, developed by Roger Fisher, William Ury and Bruce Patton of the Harvard Negotiation Project[2] stands for Best Alternative To A Negotiated Agreement and it is a critical analysis to engage in when evaluating whether to settle. In its simplest form, the concept boils down to basic risk analysis. If the client does not settle, what are the odds that the Court will rule in the client's favor? What are the weaknesses of the case that might change the result? How much will it cost to get to the result? How much time will it take, including appeals? Does the amount at stake justify the cost?

Is there a risk that the client will not win, and if so, what is the likelihood of that risk? What are the potential rulings a Court might give? What types of evidentiary/proof problems will the client have to deal with (such as will the witnesses be sympathetic/ will we be able to get certain crucial evidence admitted . . .)? Can the client collect after a judgment is rendered? What is the best case scenario? What is the worst case scenario? What is the likely scenario based on the facts and the law? The strategy, in order to ensure that the client's expectations are realistic and to ensure that the client's decision to litigate or to settle is an informed one, is to critically evaluate all of the pros and cons and weigh the likely outcomes against the proposed settlement options that are on the table or that the lawyer can help the client to create. If, based on an objective valuation of all of these factors, the settlement presents an acceptable alternative that accomplishes the client's core goals, then the client should take a long, hard look at the settlement proposal before turning it away.

Perhaps, when all of these factors are taken into account, it becomes clear why the vast majority of cases ultimately conclude in a settlement.

Finally, from a litigator's perspective, it cannot be stressed enough that while settlement is almost always a noble and desirable goal, an effective settlement negotiation should always ensure that the client's core needs are being addressed, and the substantive points that the lawyer seeks to achieve through a negotiation should be treated with no less zealous advocacy than that which is required of attorneys in the throes of litigation. In this regard, a lawyer's willingness to approach settlement talks should never be construed as a sign of weakness, and the client should be made to understand that a willingness to talk to the other side does not translate to a willingness to concede to the other side. The principles described in this article (which represent only a small number of techniques that have been developed in the science of negotiation) are merely tools for a good lawyer to use to fashion the negotiation. When employed deliberately at the proper time and supported by the leverage that a good lawyer knows how to generate, these principles can prove highly effective in helping the lawyer to get the most for the client, with the goal being to accomplish a better result than if the case were to proceed to the end of a litigation.

## ENDNOTES

[1] The prospects of success from such an initial outreach depends largely on opposing counsel's attitude. If counsel is not the type to advise the client of the litigation risks when weighed against the benefits (and potential savings) that may attach to an early settlement, or the client on either side declines to take such advice, then the plaintiff's attorney will have to do some "convincing" by compelling the adversary to answer to aggressive litigation tactics to prove the point – in this illustration, the tactic would be a motion for summary judgment seeking to hold the tenant liable for undisputable accelerated rent damages based on an indefensible breach. A favorable court decision will then usually serve to jumpstart the negotiation.

[2] This Project has developed numerous writings on this topic as well as on some of the core principles discussed in this article, beginning with *Getting To Yes*, by Fisher, Ury and Patton (Houghton Mifflin 1981).