

Litigating towards settlement

By Gerard Mullins



A good settlement without the stress and expense of a trial is the best result for any client. But ensuring a good result often goes beyond the negotiations at a mediation or settlement conference.

Donna R Davis is an experienced and successful trial lawyer from Butler, Vines & Babb in Knoxville, Tennessee. At the American Association for Justice 2007 Annual Convention¹ in Chicago, she suggested six rules for achieving a good settlement, summarised below:

RULE 1: NEVER ACCEPT A CASE YOU ARE NOT WILLING TO TAKE TO TRIAL – THE DEFENCE CAN SMELL FEAR AND WILL USE IT AGAINST YOU.

Smart lawyers know how to evaluate a case beyond the liability issue and select their cases not only on liability, but also by looking at the following factors:

- What are the injuries?
- What will it cost to pursue this action?
- What is the value range if the case goes to trial?
- What problems are associated with the jurisdiction in which the case will be tried?
- Who will be defending the case?
- What is the value range for settling the case?
- What type of witness will the client make?
- What are the probabilities that the case is one that would favour settlement?

The list goes on. If the negatives outweigh the positives in answering these questions, the probability of settling a good liability case narrows.

RULE 2: NEVER PLACE A VALUE ON A CASE IN THE INITIAL INTERVIEW.

Clients do not forget statements dealing with money. If the initial figure you mention is too high to be supported by the facts as they develop, you will have a difficult time later when you try to satisfy the client with a lesser amount. If the initial figure is too low, the client may suspect you are not taking his or her case seriously. Explain that the value of a case depends on medical expenses, lost wages, permanent impairment and so on and that until you have compiled and reviewed all the information about the case, you will not be in a position to discuss its value. Be frank in advising the client of the positives and negatives in his or her case. Familiarise yourself with Law Society recommendations regarding methods of managing your clients' expectations.

RULE 3: PREPARE YOUR CASE FOR SETTLEMENT WHILE YOU ARE PREPARING IT FOR TRIAL.

Preparing for settlement begins with the initial client interview. You are evaluating the facts, the client and the jurisdiction to determine the trial value of the client's case. As you gather all of the information relevant for a trial, begin to develop a settlement strategy that will support your demands. The more information you give to the defendant, the more important you can make the case to them.

RULE 4: HAVE A CLEAR PLAN OF ACTION BEFORE YOU INITIATE OR RESPOND TO A REQUEST FOR SETTLEMENT NEGOTIATIONS.

Before entering into settlement discussions, carefully organise and review the client's essential components of damages. Have the facts of the case clear in your mind. Know your strengths and weaknesses in the area in which you can and cannot make concessions. Establish a value range for the case and discuss that range with your client. A settlement negotiation is successful only if the client is satisfied with the result.

RULE 5: YOU WILL CATCH MORE FLIES WITH HONEY THAN WITH VINEGAR.

Regardless of how you proceed with settlement negotiations, always remember that there is no room in negotiations for rudeness, demeaning comments, or personal attacks. Do not argue your case as if before a jury.

RULE 6: ALWAYS RECORD DEMANDS AND OFFERS IN THE CLIENT'S FILE, AND NOTES OF ALL YOUR DISCUSSIONS WITH YOUR CLIENT.

Always keep a clear record of all discussions in relation to settlement and all figures discussed. Regardless of the value of the case, all offers to settle or demands made should be recorded in the client's file, along with a memorandum of your discussions with the client regarding those demands or offers. Your notes will provide a good history for anyone who picks up the file and demonstrate that you carefully considered each offer and made a decision based upon the instructions from your client. ■

Note: 1 *Negotiation and Settlement Techniques*, Donna R Davis, AAJ Annual Convention 2007, Chicago, 14/15 July 2007.

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