

Advocate's View: Settling cases: from settlement conference to mediation

By: Daily Record Staff Thomas A. Stander August 22, 2018 0



Thomas A. Stander

As many of you know, I recently retired from the New York State Supreme Court where I served 28 years as a Supreme Court Justice, including 10 years as Presiding Judge of the Commercial Division. While I enjoyed all aspects of my work, nothing satisfied me more than helping parties reach settlements. That is why I recently became a mediator and senior counsel at Leclair Korona Cole LLP, where I will help parties manage the financial, emotional, and personal consequences of litigation.

In this article, I will provide some useful tips and observations on settling cases from my judicial experience.

Prepare yourself for settlement

I asked about settlement at every opportunity, including status conferences. Sometimes a quick resolution was warranted, especially when the costs of discovery exceeded the value of the case. Other times, discussion of settlement narrowed the issues for trial or paved the way for a future settlement.

Attorneys who knew my approach arrived at conferences fully prepared and took advantage of these early settlement opportunities. Those who were unaware of my approach often failed to bring the case file and sometimes did not know their client's age or injuries — an opportunity missed!

Know your judge and always be prepared. In some cases, educate your adversary about a judge's preferences to facilitate efficient disposition of the case.

Prepare your clients for settlement



Over 95% of all civil cases settle. Your clients should know this basic fact, and you should prepare them for the likelihood of settlement. Otherwise, you might regret it.

Years ago, I had a mid-trial conference in a personal injury case. The injuries were serious but so were the liability questions. As the jury was deliberating, I engaged the attorneys in last minute settlement discussions. The defense ultimately offered \$475,000 — not the full value of the injuries, but a significant sum given the questions on liability. The plaintiff refused to even consider the settlement offer and his attorney asked me to intervene. The plaintiff told me that he could not accept the offer because it would not solve all his financial problems. I advised the plaintiff that the case was not about solving all his financial problems; it was about fair compensation for his personal injuries. The plaintiff still refused to accept the offer. The jury returned a “no-cause” verdict and the plaintiff received nothing.

Prepare your clients for settlement and be sure they fully understand the risks of a trial.

Sometimes, numbers don't matter

In 1995, I helped start the Commercial Division of the New York State Supreme Court in Monroe County. As Presiding Judge, I enjoyed handling a variety of complex disputes and legal issues. But again, the most rewarding aspect of the job was helping the parties settle their differences at case conferences.

Unlike personal injury actions, which often took time to mature to a point where settlement could be reached, the Commercial Division cases usually required immediate court intervention. Both dispositive motions and settlement discussions had to be dealt with promptly before businesses stopped functioning, accounts were frozen, money was squandered or clients were lost. In many of these cases, settlements were not about money. Settling often hinged on coming up with a creative solution to a complex problem by viewing things differently and seeing a way out when the parties could not do so on their own.

Some time ago, I had a case involving a “land-locked” parcel. The defendant owned two parcels of land fronting a main road. The defendant lived in a house on one parcel and the other parcel was vacant. For years, the plaintiff accessed his business by using a driveway located on the defendant’s vacant parcel. One day, the defendant abruptly cut off access to the driveway and a lawsuit followed.

At a preliminary conference, the attorneys made their best legal arguments about adverse possession and prescriptive easements. I chimed in with a simple suggestion that plaintiff should buy the vacant parcel from the defendant and permanently resolve his easement problem. The plaintiff responded by stating that the defendant would “never sell” to him. To the plaintiff’s surprise, I was able to facilitate reasonable terms for the sale of the land. ^

Even the simplest solutions can be obscured by the fog of contentious litigation. An effective mediator or judge can help uncover these solutions and find a way out.

Use mediation when you can

Given the increased demands on the courts, not every judge is interested in or has the time to *actively* engage in settlement discussions. This is why mediation can play an important role in the resolution of cases.

In a mediation, you and your adversary can pick a mutually acceptable date and use the amount of time necessary for a case-specific resolution. In smaller cases, you might want to mediate before the costs of discovery become prohibitive. Otherwise, the best times to engage in mediation are usually after the completion of paper discovery but before depositions; after the plaintiff's deposition if the issue is damages only; prior to oral arguments or a decision on a dispositive motion; and, in some cases, after a verdict but before post-verdict motions or appeals.

Mediation also allows you to focus on settlement and save your trial preparation concerns for a later date. The most overlooked but perhaps most important aspect of mediation is that it gives your clients their "day in court" without the expense or stress of an actual trial, and often years earlier.

Talking settlement is never a waste of time

No matter the outcome, settlement and mediation conferences narrow the issues and provide an opportunity for you and your client to be "on the same page." Likewise, knowing that an unsuccessful effort to settle now requires the time and expense of trial can be helpful in planning a way forward.

In my time on the bench, I have settled thousands of cases large and small. It is my hope that I can add to that total as a private mediator.

Hon. Thomas A. Stander (Ret.) joined the Rochester law firm Leclair Korona Cole LLP as Senior Counsel following his June 2018 retirement from the bench. His practice focuses on the mediation of complex commercial and business disputes, breach of contract, personal injury litigation, construction, medical malpractice actions and more. Justice Stander can be reached at tstander@leclairkorona.com or a mediation can be scheduled through the firm's website at www.leclairkorona.com/thomas-stander.



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