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Los Angeles Superior Court

The settlement choice: “Deal or *ordeal*”

Ladies and gentleman, here’s the scenario:

- You have a case pending trial.
- You and your client have a choice.
- You cannot choose to win or lose.

That is in the hands of the jury, the judge, the appellate court, and, if you so believe, God.

- Your choice is simpler and much more difficult.
- Settlement or Trial?
- Deal or *Ordeal*?

Best deal for both sides

The mission of a neutral mediator or settlement judge is to get the best deal on the table for both sides. Here is how it happens.

The first question is: Do you want to settle? Not every case should settle. Sometimes one side is right, one side is wrong, one side is reasonable, one side is not, and reasonable people can reasonably disagree about the value of a lawsuit. Sometimes people just want their day in court.

But they all deserve a choice, and the legal system functions better when they have that choice.

We all know the reasons for settlement. Here is how I express them.

A good, fair settlement can avoid some bad things and get you some good things. It can *save* time, money, risk, dignity, stress and even save relationships

But a settlement is not just about avoiding bad consequences. It is, just as importantly, about giving you and your clients values that cannot be achieved at trial. You can *get* control, certainty, confidentiality, creativity and even get closure.

A closer look

• *Save Time.* If you do not settle your case, it will take up a big chunk of your life. You will have to endure the time to trial, the time of trial plus the time for appeal. Do you want it over now

or over in another two years? And time may not be on your side. Making a deal is often harder as time wears on. One of the most frequent comments I hear is: “Why didn’t we have this conversation two years ago?”

• *Save Money.* Litigation is expensive, regardless of outcome. Do you want to spend money on funding the fight or on funding the fix? Would you rather invest in *war* or invest in *peace*? Sometimes parties think that the longer they wait, the better the deal will be. But consider the fact that the longer the litigation process grinds on, the more money the plaintiff is spending, and therefore the more money the plaintiff “needs” to be able to settle. At the same time, the more money the defendant is spending, and therefore the less money, theoretically, the defendant “has” to settle. This is not always the case, but it is worth considering.

• *Save Risk.* Litigation is legalized gambling. You face risk from your jury, your judge and the appellate court. A little decision tree analysis can help you figure the odds.

What about the jury?

Let’s talk about juries. I believe in the jury system. I believe that twelve of them are smarter than one of me. (My daughters would probably add that any one of them is probably smarter than one of me!)

If you walk into any courtroom in any courthouse any place in the world except the United States, what are you *not* going to see in that court room? A jury box.

Even in the UK, where criminal jury trials are common, civil jury trials are a legal rarity. No other country trusts its people to make decisions in its legal system like our country does. I am very proud of that.

I have dealt with downtown Los Angeles jurors as a Superior Court

judge since 1984. I have also served as a juror, rendering a verdict in a civil case along with eleven other citizens in 2003. While I think juries tend to get it right, some realities must be considered.

How many of your trial jurors will want to be there? None! ...But wait, there’s more!

Thanks to “One Day/One Trial,” we now have many more jurors summoned in, including a much higher percentage of people who have never served before. The jurors of the ‘90s no longer dominate the pool. So we have a lot more folks that do not want to be there than we used to have. ... But wait, there’s more!

We used to excuse jurors who were not being paid by their employers for jury service. But guess what employers stopped doing when they realized that the Superior Court would excuse jurors who were not receiving juror pay. They stopped paying for juror service. Today, less than 50 percent of summoned jurors receive any pay from their employers for juror service. As a result, if we want to get a critical mass of jurors, we can no longer routinely excuse jurors who are not getting paid.

So your jury will be made up of an unprecedented percentage of really unhappy people, many of whom will be forced to lose money to serve on your case. The word I hear most used to describe jurors today: *Angry!*

The real question

So what do you think is the first question jurors ask? Most people guess that it is “how long will it last.” But the judge will tell them that up front. The real (and really scary) first question jurors ask is:

“Who do we blame for being here?”

Is it the plaintiff, for bringing the case, or the defendant, for doing something to cause the case to be filed?

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And how will the jurors make that fateful determination? Will they do as our system dictates, by passively receiving information day after day, without processing or discussing it, only calling it up for consideration at the time we argue and instruct? Not likely. They tend to make such decisions during jury selection or, if you are lucky, at opening statement.

Rule One: Jurors judge people. They do not judge theories, or positions, or laws, or even lawyers. They judge people. If this case goes to trial, it will be excruciatingly about your client and about the defendant.

So, in evaluating risk, you have to ask yourself: Is my case one designed to tug at the heartstrings of America? A post 9/11 America which has seen such tragic horror in the past few years? (I am a Virginian; I have a Virginia Tech hat in chambers as a reminder of the uncertainty of life and the magnitude of tragedy in our present world.)

- *Save Dignity.* I am sure you have told your client that she needs to be there for the entire trial. As is noted above, jurors judge people. Twelve sets of eyes will be trained on your client for the entire trial. Like the song says... "Every breath you take, every move you make, I'll be watching you..." How does your client feel about being on display like that, and how well will he do?

- *Save Stress.* I have lived in the courtroom since 1969. I love this work. So do you. But how many times have you heard a *client* say: "Wow, that was a fun trial. I'd like to do that again!"

- *Save Relationships.* In some cases, especially business and sometimes employment cases, the parties have enjoyed a relationship in the past that might be important to them in the future. A trial will make the breach brutal and permanent. A settlement can heal.

The advantages of settlement

Now let's talk about the valuable things that a good, fair settlement can give to you and your client — things that cannot be had at trial.

- *Get Control.* Have it *your* way. A good settlement lets both sides put their fingerprints on the result. How many important decisions would you leave up to 12 angry strangers?

- *Get Certainty.* Death. Taxes. Settlement. At least one type of certainty is good. What would it be like to go home today no longer wondering about the result?

- *Get Confidentiality.* A trial is public. An appeal is public (and often published) A settlement is nobody's business but your own. The settlement conversations and the settlement results are confidential.

- *Get Creativity.* If your case goes to trial, all the legal system can do is "answer the mail" — respond to the complaint by answering three questions: Liability, Causation, Damages. The interests of and consequences to the parties are irrelevant. On the other hand, a settlement is a *deal*. Of course, it can and should resolve the case and avoid the pending trial. But that's not all. The parties can make any additional deal they want. This is especially valuable in business and employment cases. A trial cannot make further business arrangements, change employment records, provide for letters of recommendation, continue old relationships or set up new ones, or do a thousand other things that are done in settlements every day.

Try this test. Ask your client what a really good end of this dispute would look and feel like, addressing the full range of economic and personal needs. Then note how many of those concerns *cannot* be met by proceeding to trial. That is where the creative potential of settlement kicks in.

- *Get Closure.* What is a trial? A contest about history. A fight about yesterday. Who cares? You cannot change yesterday. You can only change tomorrow. That is what settlement is about today. A good, fair settlement lets you client stop fighting about yesterday and start planning for tomorrow.

How does the process work?

- *General Session.* In the initial general session introducing the process, I will not ask the parties or counsel to make presentations. This seems to be the trend in mediations, and although great value can come from open exchanges between the sides, I tend not to have the time and I do not want to run the risk of generating more heat than light. If a general session is called for, I can always re-convene it.

- *Caucusing.* I want to learn about your case from you and your client in separate sessions (caucuses).

- *Listening.* My first rule is to listen. I cannot expect you and your client to listen to me until you feel that I have listened to you. I want to hear from you and your client. How do you feel about this dispute? What's a good outcome? (I do *not* ask your "bottom line." I do not want to know it, I do not want to blow it, and I do not want you to be locked-in to the extent that you cannot be open to the mutual education about the possible that is the heart of negotiations.) What does the other side think a good result would be? Is there common ground? Can we build some?

- *Negotiating.* I want to develop reasonable demands from plaintiffs and reasonable offers from defendants. But, in order to be successful, these demands/offers have to be connected to reasons and generate hope.

- *Reasons.* I will assume that nobody in the settlement conference is stupid, and that nobody is going to buy a stupid deal. I need you to give me a reason to go with your demand/offer. Why should they pay that? Why should they accept that? Why is that a better choice for the other side than going to trial?

- *Hope.* When you negotiate, you have to generate hope in the other side that a good, fair deal can be done. If you anchor your position outside the zip code of reason, you will not attract the people on the other side, you will repel them. A party that stays outside the zone of reason forfeits the value of hope — the power of drawing the other side

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closer by the promise of a good, fair resolution.

- *Closing.* The negotiating process should lead to a deal. The neutral mediator or judge can help the process along and, if needed, employ various strategies to help avoid or bridge impasse.

- *Results.* The best result is a good, fair settlement. But, short of settlement, there are a number of benefits of the settlement process. It can narrow the issues, civilize the dialogue, and help plan a less contentious, more productive path to ultimate resolution.

- *Litigation Therapy?* Not sure what choice you want to make? Not ready to settle? How about recessing the settlement conference, re-entering the courtroom fray for a while, spending some

more money and spilling some more blood? Nothing like a little “litigation therapy” to get your mind right for settlement!

I have tried to offer thoughts that are simple and straightforward. However, just like almost every sword has two edges, almost every settlement consideration has a counter-consideration. There are many complexities that cannot be treated in an article of this length. But it is always helpful to remind ourselves of the basics. I hope this helps.

The way I see and do things is by no means the only way. The art and science of resolution is practiced many different ways by many very competent neutrals. I humbly and respectfully offer my thoughts for your consideration.

Remember, a choice not to settle is a choice to proceed along the slippery slope to trial. In the end, it is your client’s choice, with your advice and assistance. I will respect that choice.

Settlement or Trial? Deal or Ordeal?

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