

'Be creative' and other settlement advice

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"Don't take a form document, change the names of the parties, insert the amount and think you're done." — Eden Prairie attorney Shannon McDonough

Your client, an employer who was sued by a former employee alleging sex discrimination, has made a generous settlement offer to resolve the case, but the plaintiff won't budge. What do you do?

According to Eden Prairie attorney Shannon McDonough, you need to get creative. Offer nonmonetary items such as a letter of reference, an apology or a nondisparagement clause.

"There are a lot of different things that should be considered, especially when trying to close the gap when you're at a standstill with the money," she said.

By far the vast majority of cases settle before going to trial. That means attorneys have to be skilled both in the art of negotiation and in the practice of drafting settlement agreements. In fact, there a number of "best practices" attorneys should employ when entering into settlement agreements on behalf of their clients. Some

considerations depend on the type of lawsuit being resolved, while others apply across the board.

Template trouble

The most important thing, practitioners say, is to tailor every aspect of the settlement agreement to the particular matter before you.

"A settlement agreement is simply a contract," said Minneapolis commercial litigation attorney Seth Levanthal. "So to have in mind a settlement agreement template is as unrealistic as thinking you can have a contract template."

McDonough agreed. Take the time to consider what's important in this case and to this client and whether any points are missing and need to be included, she said. "Don't take a form document, change the names of the parties, insert the amount and think you're done."

Similarly, McDonough said not to assume that you need to include all the standard provisions you normally do in a settlement agreement. For example, even though you typically include an integration clause, if your client is the employer in a case where an employee covered by a noncompete agreement is agreeing to leave the company, you don't want to include such a clause. "You don't want to supercede that noncompete agreement," she said.

McDonough also advised against waiting to consider nonmonetary settlement suggestions - the timing of the payment, confidentiality, mutual releases - until drafting the agreement.

Opposing counsel may consider these new terms and want more money to include them, or they could jeopardize the entire settlement because they were not raised up front, said McDonough.

"Attorneys should consider sending the settlement in principle as to the material terms in advance of drafting the agreement," she said, adding that even if the exact language is not agreed to, identification of the material terms will have been discussed and agreed to up front.

Releases

Attorneys should also tread carefully when it comes to the releases found in settlement agreements.

Minneapolis attorney John Dornik, who represents plaintiffs, said that his main concern when it comes to settlement is the type of release to include in the agreement.

If there are numerous parties involved in the incident leading to the litigation but the plaintiff is settling with only one of them, don't agree to a general release, he warned. Instead, get a Pierringer release, which will allow the plaintiff to sue other potential tortfeasors, he explained.

If the plaintiff is injured in a car accident and the doctor commits malpractice while treating her, she may want to settle the personal injury case while preserving the medical malpractice case. A general release in the personal injury settlement may eliminate the plaintiff's ability to pursue a claim against the doctor, Dornik said.

Dornik added that plaintiffs should request a Pierringer release in the settlement of any multiparty accident, even if they don't have immediate plans to sue someone else.

"I do Pierringers all the time, or ask for a Pierringer, even if I don't have a plan or recommendation that a claimant pursue the other party," he said. "Why preclude the ability to change your mind later?"

Dornik said it's also important to discern all the coverages available to the plaintiff so you don't inadvertently release a tortfeasor who may be able to provide excess coverage.

Craft the agreement so you are releasing insurer A and the tortfeasor only to the extent of the exposure they have, and preserve the client's ability to pursue other

insurers, he suggested.

Similarly, Minneapolis personal injury lawyer Elliot Olsen warned against unintentionally settling an injured employee's work comp claim when resolving a personal injury matter.

The employee should enter into a "Naig settlement," which would include all damages except those recoverable under workers' compensation, he said.

Sophisticated clients

According to Leventhal, a settlement agreement in a standard business litigation case is often simpler than in other cases. But because the disputing parties may want to work together again in the future, it's important to take that into consideration when drafting the agreement.

"It can be subtle and challenging to make sure that certain agreements stay preserved and certain agreements don't," he said.

Attorneys also advised caution when dealing with unsophisticated parties.

Lawyers tend to take things for granted when negotiating a settlement on behalf of more sophisticated clients, such as business owners or managers, said Levanthal. A confidentiality clause is so common that attorneys may not even think to discuss it with them. But for unsophisticated clients who don't expect it, a clause like that can really "put a wrench in things," he said.

"Make sure you discuss all aspects of settlement as you negotiate from the get-go," Levanthal advised.

Finally, practitioners advise not being afraid to ask for help if you have questions or consult with an attorney who specializes in a particular practice area.

"Even if it's just a few minutes of advice on the major points, it could help avoid catastrophic mistakes," said McDonough.