How To Screw Up A Settlement

By **Cara Salvatore** **Share us on:**

Law360, New York (July 21, 2015, 6:25 PM ET) -- Even when two parties in a legal fight are sitting at the negotiation table with pens in hand, staring at blank signature boxes, the settlement can still be in danger of going down in flames — and sometimes it's the lawyers who unwittingly destroyed it. Other times, the match was lit long before the parties ever sat down.

Here are the danger signs you should watch out for during negotiations, and some tips for avoiding a nasty surprise.

Negotiating Missteps

Both sides can be guilty of being inflexible, being unreasonable or asking for too much. Sometimes it can happen because the client demands too much, while other times the attorneys themselves are overreaching. Either way, be very clear on what your client feels they absolutely must have and what would simply be nice to have.

“From both sides, overnegotiating and unreasonable negotiating are dangerous — and unavoidable at times, because obviously … you’ve got to honor your clients’ demands,” Jason Bonk, a commercial litigation partner with Cozen O’Connor LLP, said. “If you lose sight of your client’s best interests, then you've lost sight of your role as an advocate.”

That means that, even though you should be a pit bull, you need to do it in a gentle way, and don’t drive the other side away by being rigid. It also means being willing to walk away strategically and wait to see what happens.

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Similarly, don't erase your good work by revising or renegotiating after a tentative deal has been reached. You'll lose your credibility and possibly your deal.

"Renegotiating as you go after a preliminary agreement is reached is a pitfall. One side will view this as nothing more than gamesmanship," Peter Berlin, a civil and criminal lawyer in Los Angeles, said.

Mismanaging Client Expectations

A huge and easily made mistake is to fail to manage your client's expectations, and there are myriad ways to do this. Perhaps your client has tentatively agreed to something, and then you hear from the other side that they're OK with that term, too. It's essential for you to take that item back to your client and double-check it with them, Berlin says. The client's thinking may have shifted slightly in the meantime.

Other times, a client may be involved in the dispute just to prove a point, not because they could actually be made whole by a settlement. Cases like that are dangerous, and a client may need some talking down.

You may also find yourself in a situation where another lawyer has already gotten in the client's ear, says Sarah Worley, a mediation and arbitration specialist in Massachusetts with two decades' worth of experience. Even if that professional relationship with the previous counsel is over, the client is now going to have an anchor point in their head that may end up hurting them.

"When we have attorneys who make promises they can't keep, it creates problems for everybody else. I have had cases in which a claimant has come in, they're now working with their second attorney, and the first attorney had promised them their case is worth a million dollars and then either [the attorney] is unavailable or there's a falling out," Worley said.

"So they go to the second attorney who looks at the same case and says, actually, there are some significant problems, and if we can resolve it, it will be for significantly less than promised," she said. "I end up [telling] claimants, if we look around the room together, we will notice the first lawyer isn't here and didn't do anything for you except promise

you something which he did not produce."

Getting Ahead of Yourself

Many times lawyers take for granted certain terms that may come as a surprise to clients toward the end of a negotiation. These can frequently include the confidentiality clause, where parties agree not to talk about the settlement in any way, and the nondisparagement clause, which requires parties not to speak ill of each other afterwards. But both Berlin and Worley said that though lawyers take these two clauses for granted in most settlements, clients may not.

“I’ve seen cases where that has become a sticking point right at the end,” Worley said. “At the end of a negotiated settlement, one attorney will say to the other, ‘So I assume that we’re going to agree to confidentiality.’ And the other will say, ‘Well, no, we never discussed that.’”

According to Berlin, if clients end up seeing these clauses only at the end of the deal, “They say, ‘I’ve been screwed over and now I can’t talk to anybody about this?’” Berlin said.

You can also unwittingly send a settlement to the grave by failing to talk real dollars with your clients. You have a benefit in the negotiating room that you won’t have if you go in front of a jury: the ability to add up all the liens that may be on the settlement, all the taxes that the plaintiff will owe afterwards, and the knock-on financial effects of vaulting into a new tax bracket or becoming ineligible for Medicaid, Social Security, or other programs.

It most likely that you wouldn’t get to talk about that math with a jury. But in the negotiating room, you can crunch every single number and show your clients that the settlement still constitutes a win for them.

“Because our benefits laws in the U.S. are so complicated, sometimes attorneys will advise clients to settle without understanding properly the impact that will have on benefits they had or may have in the future,” Worley said.

Going for the Kill

Some lawyers make the mistake of getting the baseline concessions — their “musts” — and then thinking they see vulnerability just because the other side has been reasonable. The kill is exactly what you don’t want. Don’t mistake concessions for vulnerability and decide to go for that one last thing.

“If you’re inching close to a settlement and you smell one coming and you feel like you’ve gotten a lot of gives from the other side, there can be a tendency to make too many demands before you sign, because you think you can get that extra inch," Bonk said. "And they may be things your client doesn't care about. And that’s the lawyer getting too personally competitive, in a sense."

With tensions and adrenaline running high for both clients and lawyers, someone may feel impelled to go beyond that middle ground that the parties worked so hard to find, “thinking that because an olive branch was extended they can get so much more,” Berlin said.

Getting Emotionally Embroiled

And that leads to another point. It’s understandable when clients get overly emotional — their business is on the line. But sometimes lawyers join them.

As counsel, leave your emotions at the door. It’s your job to advocate for your client’s interest on a cost-benefit basis, not to seek your own glory. You’re not there as a lawyer to prove something or teach anyone a lesson. This goes double when there’s significant bad blood between your clients. You must remain levelheaded.

“Some clients sue on principle and some clients sue on cost-benefit analysis, and there’s a huge difference between the two,” Berlin said. If there is “a lot of animosity, that’s when emotion dictates matters rather than cost-benefit. Even if you win, you lose.”

Don’t let context, like the deep pockets of an adversary, blur your vision.

“There should be a collegiality between adversaries. I don’t believe in sort of the lawyers fighting lawyers because that’s not our job. … It’s almost a disservice to any client when a lawyer does that,” Bonk said.

Client Confabs

Everyone loves to gossip, and a legal dispute is a big deal. But if you have two tracks of negotiation going on — one between the lawyers and one between the clients — the lines of communication are bound to get tangled.

“Parties are generally not prohibited from speaking to one another; sometimes in certain respects it can help," Berlin said. "Oftentimes, though, it’s a broken telephone: While the lawyers are discussing, the clients meet and talk, and everything goes awry."

Similarly, clients may turn to trusted outsiders who unfortunately have no legal grounding. They’ve known those people for possibly decades, and you for a much shorter time, so it's understandable. But these people inevitably give terrible legal advice. And that may leave your client with nothing.

“I had a case involving a lovely claimant, and she was represented by extremely good counsel,” Worley said. “And then when it came time to sign the settlement agreement, she declined to do so. And she explained that she had talked to her son on the phone, and he told her that, based on his conversations with his neighbors, the case was worth a million dollars.

“She knew her son. She knew him for 60 years, and she knew me for three hours and her attorney for three years. And then, as unfortunately often happens, she tried the case and got nothing.”

Outsiders simply don’t have the tools to give good legal advice, no matter how much horse sense they’ve been blessed with.

This leaves it to you to communicate the realities of their legal position.

“Most of these problems, they can be resolved if attorneys communicate properly with their clients throughout the settlement process,” Worley said.

“If you communicate and take the time to explain exactly what is going

on, strategically, tactically, and in settlement negotiations, a lot of these problems can be avoided."

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