HOW TO SETTLE A CASE:
TOP 10 THINGS TO LOOK FOR IN SETTLEMENT NEGOTIATIONS

1. When is the right time to begin negotiations?

- **It is never too early to start negotiations.**

  - *Don't be afraid to TALK with opposing counsel. It is in your client's best interests, and it shows confidence, not weakness.*

    - Plaintiff's goal is to get a remedy; Defendant's goal is to get resolution as quickly and inexpensively as possible.

    - Early settlement discussion avoids "entrenchment" of the parties, which often occurs during the discovery process.

    - Cost of settlement increases as case goes on.

      - *Plaintiff's demand may increase as discovery yields additional evidence and dispositive motions are denied.*

      - *Defendant's offer may decrease as well.*

      - *Both sides incur time, attorney's fees and costs as case continues.*

      - *Once defense has litigated most of the case anyway, they often want to see it through, especially on summary judgment*

    - Publicity: Early settlement may avoid negative publicity associated with a lawsuit & mitigate reputational damage if an individual manager/employee is named as a co-defendant. Consider alternatively whether settlement creates publicity harm?

    - Consider value to litigants, particularly Plaintiff, of resolving case early rather than enduring possibly years of adversarial litigation.

    - Early settlement mitigates damage to the workplace environment if the plaintiff is still employed by the defendant.

  - *Don't be afraid to engage in pre-mediation discussions with the mediator. It helps to flag issues that might snarl negotiations and to brief the mediator in an informal, "off the record" manner*

    When you have a case with a magistrate judge, this may also be a means to jumpstart a settlement conference by having the judge initiate the process so that

you don't show "weakness" by being the first to suggest settlement (remember, settlement is inherently an *ex parte* process, so this type of phone call or meeting is not unethical)

Also, while the Ethical Guidelines for Settlement Negotiations have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, the ABA recommends the Ethical Guidelines for Settlement Negotiations as a resource designed to facilitate and promote ethical conduct in settlement negotiations. Rule 3.1.1 (Prompt Discussion of Possibility of Settlement) provides "A lawyer should consider and should discuss with the client, promptly after retention in a dispute, and thereafter, possible alternatives to conventional litigation, including settlement."

2. <u>What is the best negotiation format for your case?</u>

- Facilitated mediation (with a magistrate judge or private mediator) vs. discussions between counsel
  - Benefits of discussions between counsel:
    - Discussions between counsel are certainly cheaper, but will they be fruitful?
    - Obviously, some initial settlement discussions are required by the federal and local rules, and this may be an opening for at least priming the pump
  - Benefits of facilitated mediation:
    - Creates a venue for resolution of case.
    - Provides your client with the sense of having had their "day in court," without the real risks associated with trial.
    - Allows counsel to select a person who will be well received by their respective clients, and by the opposing party.
    - Provides an "expert opinion" on what it will take to settle the case reinforcing the advice you have given your client
    - Some parties are often more willing to listen to and follow the advice of a third party mediator.
    - Provides an opportunity to learn the other side's version of the case, and educate them about yours.

- Costs of paying a mediator are significantly less than the costs/fees associated with litigation (average cost of mediation is perhaps $4-5,000 and is generally split between the parties).

3. <u>What information needs to be exchanged *before* a fruitful negotiation can take place?</u>

- ❖ Consider providing your mediation materials to the other side, not just the mediator
  - ➢ Remember – your goal is to persuade the other side
  - ➢ This can be a tool to communicate with your party opponent
- ❖ Exchange settlement materials before the mediation, including:
  - ➢ key facts (sometimes a deposition or other exchange of information may be necessary)
  - ➢ applicable law
  - ➢ weaknesses in your case (every case has them, the mediator will know it, and you should demonstrate forthrightness which will only endear you to the mediator)
  - ➢ prior settlement negotiations
  - ➢ verdicts and settlements in similar cases (but they must be *truly* comparator cases, otherwise they can be a hindrance to negotiation)
  - ➢ calculation of damages (economic, non-economic, punitive, etc.)
  - ➢ anticipated attorney's fees and costs
  - ➢ most mediators want to know ballpark monetary ranges for settlement and also any nonmonetary elements of an agreement that you might be requesting
- ❖ Circulate a form agreement before the mediation (see point #9, below for details on what to include)
  - ➢ Allows parties to finalize settlement at the mediation.
  - ➢ Avoids unnecessary conflict when one side presumes that certain provisions will be included, and the other side doesn't.
  - ➢ Don't be too aggressive in asking for certain provisions prior to the mediation; some can wait until the mediation

4. <u>Who should be present for the negotiation?</u>

- ❖ Make sure the appropriate decision makers – with *actual* authority to negotiate – are present IN PERSON.

- ❖ Does the insurance rep need to be there? What is covered by insurance? What isn't?

- ❖ Defendant: Consider whether it is beneficial or detrimental to the settlement process to have low-level managers present who were involved in the adverse employment action

    - ➢ Will they provide valuable information, or are they too emotionally invested in their conduct to provide productive feedback

- ❖ Plaintiff: Consider whether a spouse will be supportive, or just feed the fire

- ❖ Ultimately, if unsure, contact the mediator and discuss who attendees will be, especially if the presence of a certain person for your adversary will be incendiary to your client

5. <u>Have you adequately prepared your client?</u>

- ❖ What are your client's real chances of success?

    - ➢ It is your obligation to tell your clients what they *need* to hear, not what they *want* to hear.

- ❖ What is a realistic value of your best day in court AND your worst day in court?

- ❖ Have you advised client of the always present possibility of something unforeseeable, even random, occurring at trial?

- ❖ What are your client's anticipated costs – whether or not they prevail?
    - ➢ Financial costs
    - ➢ Emotional costs
    - ➢ Reputational costs
    - ➢ Business interruption costs

- ❖ What does your client really need to achieve in the negotiation?

6. <u>Who are the key witnesses going to support?</u>

- ❖ Are the key witnesses still employed?

    - ➢ Can plaintiff's counsel ethically contact them?

        - ♦ *See* Colo. RPC 4.2, cmt. [7]; Ethics Committee of the Colorado Bar Association, Formal Opinions 69 and 93.

- ❖ Are the employer's clients potential witnesses?
- ❖ Will some of the employer's current or ex-employees support the plaintiff's position?
- ❖ Consider gathering witness statements before the mediation.

7. <u>Are the any unusual financial considerations?</u>

- ❖ Plaintiffs:
  - ➢ Will Defendants use your need for money to force a low settlement?
  - ➢ Does the Defendant have the resources to pay a potential judgment or is there a risk of bankruptcy?
- ❖ Defendants:
  - ➢ If you are going to claim you don't have the money to settle at the level Plaintiff demands, be prepared to prove it with sworn financial documents.
  - ➢ Will there need to be term payments? Also, if it's an end-of-the-year settlement, consider straddling the payments over two tax years

8. <u>What negotiation techniques are available when the negotiation has hit a dead end?</u>

- "Last, best, final offer"
- "Splitting the baby"
- "Bracketing"
- "Mediator's number"

➢ STAY FLEXIBLE

9. <u>What to include in your settlement agreement</u>?

- ❖ Prepare a draft settlement agreement to be finalized during the mediation/settlement conference.
  - ➢ Common practice is to sign a MOU w/ essential points (which then may (or may not) be enforceable CRS 13-22-308(1); *Yaekle v. Andrews*, 195 P.3d 1101, 1108 (Colo. 2008)), but better to have a full agreement with release available, if feasible, while everyone is ready to compromise/
- ❖ Payment
  - ➢ Amount

- Tax Treatment (consult an expert)

    - Wage loss
    - Non-wages
    - Damages for Physical Injury, if any
    - Note: Confidential sexual harassment settlements cannot be deducted by employer (Section 13307 of the Tax Cuts and Jobs Act).
        - Query: Does a *retaliation* claim that originated with a complaint of sexual harassment trigger the Act?
        - Query: Can the parties apportion a dollar amount to be not-confidential/sexual harassment, but remainder to other unrelated claims that is then confidential?

- Timing of payment

    - Reminder to consult with an ERISA expert, especially if payment will be delayed into the following calendar year.

❖ Mutuality

- Mutual Release
- Non-disparagement

❖ Non monetary consideration - some examples:

- Recharachterization of departure
- Positive letter of reference
- Outplacement services
- Retention of Company Property
- Contract or Consulting Work
- Employer's Commitment Not to Contest Unemployment

    - Reminder: Employers are not able to agree that an individual will obtain unemployment.

- Diversity Training for Current Employees and Supervisors
- Joint Press Release
- Charitable Donations
- COBRA

    - Tip: Consider paying more money instead of promising to pay some for settlement and some for COBRA.

- HSA Contributions
- Vesting of equity interests

- Payment of the Mediator's Fees
- Nondisparagement
  - Tip: Consider for employers whether the employer is actually able to promise not to disparage? Can it promise to instruct certain individuals not to disparage? If so, is it willing to be liable if they do?

❖ Confidentiality

- Don't assume a settlement is confidential unless the parties have agreed to it

- Confidential sexual harassment settlements cannot be deducted by employer
  - *See* Section 13307 of the Tax Cuts and Jobs Act

- Terms of confidentiality must be clear

  - Confidentiality as to terms of settlement

  - Exclusions from confidentiality:

    - immediate family
    - accountants/tax advisors
    - attorneys
    - spiritual advisors
    - counselors/therapists

- Special confidentiality issues for large corporations or government entities

❖ Consequences for breach of settlement agreement

- Any consequences should be mutual
- Excessive liquidated damages are an unenforceable penalty
- Must PROVE breach
- Fees and costs to prevailing party
- Convenient venue & law

❖ Avoid Prohibited terms

- *Statutorily Protected Worker's Right*

  - *EEOC and other government agencies, to include SEC*
    - *Restrictions on Cooperation*
  - *Workers Comp*
  - *Unemployment*
  - *Unpaid wages*
  - *Tip: Consider including a Defend Trade Secrets Act (DTSA) disclaimer*

- In employment cases, read *McLaren Macomb*, 372 NLRB No. 58 (2023), which overturned previously accepted confidentiality provisions

- Restrictions on Representation (Ethics Committee of the Colorado Bar Association, Formal Opinions 92).

10. <u>When is it time to end settlement negotiations?</u>

- ❖ A settlement has been reached, and all necessary paperwork has been signed by all parties (execute the final agreement, whenever possible).

- ❖ The appropriate decision makers with full authority are not present.

- ❖ One party becomes too emotional and needs to "cool off."

- ❖ Mediator is not pushing the parties or is otherwise ineffective.

- ❖ New information is discovered that changes your client's position/leverage.

- ❖ Tenor of the communications between the parties reflects that the parties are not committed to or ready to reach a settlement.

- ❖ A continuance is necessary to consider or "flesh out" the viability of options for settlement raised for the first time during negotiations.