RESOLVING THE CASE, SETTLEMENT/ MEDIATION-
WHEN, WHY AND HOW TO GET THERE?

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I. MAKING THE DECISION TO SETTLE

Determining whether to settle involves many complex factors. However, regardless of when the decision to settle a dispute is made, there are some fundamental questions and considerations that typically need to be addressed by lawyers and clients alike during all stages of the dispute. Because these are not always known at the outset, this analysis should be periodically updated as relevant information becomes available or circumstances materially change.

1. What is the goal of the litigation?

   -It is crucial to understand what issues need to be resolved and what objectives you want to accomplish in connection with your claims or defenses.

2. What is your financial condition compared to the financial condition of the opposing side?

   -If your opponent has limited financial resources and you are seeking monetary damages, it makes sense to discuss and evaluate a settlement at the outset of the dispute. This will allow you to avoid a

situation where you obtain a judgment at considerable cost and expense, with the end result being that your opponent is not able to respond to the judgment.

-By the same token, if your financial resources are limited and your opponent's are not, it may make sense to pursue a settlement at the outset of the dispute at a discount so that all available resources are not used in litigation.

-Whether or not your opponent has insurance coverage related to the dispute is also a major factor in this analysis.

3. What are the merits of the case?

-In order to put yourself in a position to make a decision regarding a proposed settlement, it is necessary to make an informed decision and evaluate the positive and negative aspects of your case and your opponent's case.

-This is an evolving concept and will generally involve information gained through the discovery process. Discovery is the pre-trial phase in litigation where each party can obtain evidence from the opposing party by means of certain devices including: (i) requests for answers to interrogatories; (ii) requests for production of documents; (iii)

requests for admissions; and (iv) depositions. Discovery can also be obtained from non-parties by using the subpoena process.

-The discovery process allows you to identify what legal and factual issues are in dispute, and, just as importantly, what legal and factual issues are not in dispute.

-The discovery process also allows you to identify certain evidentiary and legal problems in your case and your opponent's case, and the extent to which you believe these problems can be overcome. This will obviously play a role in your decision of whether to settle, when to settle, and for what amount.

4. <u>What are the anticipated costs of litigation at all key points throughout the case</u>?

-Relevant considerations include costs and fees relating to: (i) pre-trial motion practice; (ii) the discovery process; (iii) the retention of experts; (iv) trial; and (v) appeal. These costs can be significant, especially in complex litigation involving multiple claims and parties.

5. <u>What is the potential risk versus the potential reward</u>?

-In order to make this assessment, it is necessary to analyze your "best case scenario" and your "worst case scenario", balanced against what you believe you can achieve in settlement, and the costs and fees involved to reach that settlement point.

6. How long will it take to bring the case judgment?

-Although all courts have different timelines, litigation is oftentimes a lengthy process that can go on for years. This is especially true in complex litigation involving multiple claims and parties, where there will be significant amounts of time spent on the discovery process and other pre-trial matters.

-If there is an appeal, it is important to factor in how long an appeal could take.

7. How long could it take to recover on a judgment?

-Even if you go to trial and win, this is certainly not a guarantee that the judgment will be voluntarily satisfied by the opposing side. Your opponent could throw up significant roadblocks to your recovery.

-For example, your opponent could refuse to pay and make you engage in post-trial legal proceedings to identify and seize assets.

-Your opponent could also file for bankruptcy after a significant judgment is entered in your favor.

8. Are there possibilities for a creative solution?

-Because all parties must agree to a settlement, they are able to control the terms of any resolution that is reached. Parties can devise creative solutions that are not available to a judge or a jury.

-For example, the parties could reach an agreement to transfer assets in settlement of a dispute that may not be directly involved in the litigation. The parties could also agree to concessions in a business venture not directly involved in the litigation.

9. Are there opportunity costs and other business considerations?

-Opportunity costs could include employees devoting substantial time to the litigation which could impact business productivity.

-There could be negative publicity associated with the litigation.

-You may have an ongoing business relationship with your opponent that you wish to maintain in the future.

-You may have other business relationships with non-parties that could be impacted by the dispute.

10. Is there a value to certainty in the process and your piece of mind?

-In a trial, the parties lose all control over the outcome because the decision is in the hands of a judge or a jury. Regardless of how good a case you believe you have, the outcome is never certain.

- Parties can make sure any settlement is workable for them and accomplishes what they consider to be an acceptable result.

-Settlement ends the dispute and provides a measure of certainty for the parties.

II. DECIDING WHEN TO SETTLE

Settlements can occur at any time prior to, or during, the litigation process. In general, the optimum time to negotiate a settlement is directly after you have received some type of favorable result that you can use as leverage. It could be a favorable pre-trial court ruling, the discovery of evidence that your opponent knows is damaging, or rulings during the trial itself relating to evidence or witness testimony. While the possibility of settlement should be evaluated at all stages of a dispute, there are several important factors to consider in deciding when it may be in your best interest to settle.

1. Prior to the Filing of a Lawsuit

-Reaching a settlement prior to a lawsuit being filed can be beneficial to all parties involved because it saves legal fees incurred during the litigation process and other litigation costs.

-As stated above, because legal disputes often involve parties in a relationship (such as business partners, customer and supplier, lender

and borrower, or family members), an early resolution can also be a useful tool in helping to preserve that relationship.

-However, Settlement at this stage of the proceedings is oftentimes difficult because the claims and defenses of the parties are not known, or have not been clearly articulated. Additionally, the parties have not had an ability to weigh the relative strengths and weaknesses of the written evidence and anticipated testimony of the witnesses for the other side.

2. <u>After the Filing of a Lawsuit</u>

-While the filing of a lawsuit commits the parties to engage in the litigation process and involves legal fees and costs, it can assist in the settlement process.

-Through the filing of initial pleadings and various pre-trial motions, the parties have an opportunity to better assess the scope and strengths of the various claims and defenses asserted.

-Discovery is usually the most expensive part of litigation. However, engaging in discovery can be useful, and may be necessary to learn essential information about the merits of your opponent's case and formulate an appropriate settlement strategy. It may be helpful to

propose some form of limited discovery to your opponent with a view towards assisting in settlement negotiations.

3. During Trial

-The commencement of trial does not preclude the possibility of settlement. Once a judge or jury is involved, the strength your case, and your willingness to engage in settlement negotiations, can be affected by: (i) the makeup of the jury, (ii) evidentiary rulings by the trial judge, (iii) reactions by the judge or jury to witness testimony, and (iv) the argument of opposing counsel.

4. Post Trial

-After trial, but prior to a judgment in the case, a settlement may be reached because one or both parties may be concerned that the judge or jury may not reach a proper decision. For example, you may want to settle if there is a fear that the judge will misapply the law or there appeared to be confusion about the facts of the case.

-After judgment, but prior to an appeal or a ruling by an appellate court, you may choose to settle if you believe that the judgment is subject to being overturned. The decision to engage in settlement negotiations at this stage of the litigation is often motivated by the

quality of a trial judge's opinion or the consistency of the jury's findings.

III. VEHICLES FOR SETTLEMENT

Once you have sufficient information to make meaningful settlement discussions possible, and you decide that the timing is right to enter into settlement negotiations, there are multiple alternatives available. The concept is commonly referred to as Alternative Dispute Resolution ("ADR"). ADR is generally classified into at least four types: (i) negotiation; (ii) mediation; (iii) collaborative law; and (iv) arbitration. The focus of this presentation will be on private settlement negotiations between the parties and mediation.

1. Negotiation

-Settlement Negotiations can be verbal or in writing.

-Settlement negotiations between the parties (both in federal courts and Louisiana state courts) are not admissible at trial to prove liability.[1] The policy behind these rules is to encourage the resolution of disputes through compromise, which is favored by law.

-In entering into settlement negotiations, it is recommended that settlement demands be made in writing and that your demands should be supported with the critical evidence and facts that favor your case.

[1] *See* Federal Rule of Evidence Article 408; Louisiana Code of Evidence Article 408

-Focus on your goal in the dispute and create a clear theme that accurately reflects your claims or defenses.

2. Mediation

-Mediation may be defined most simply as a facilitated negotiation.

-Unlike litigation, mediation does not involve a decision maker, nor are there formal proofs or arguments. The goals of mediation include avoiding or breaking impasses, diffusing controversy, and encouraging parties to generate settlement options.

-The parties typically choose the mediator, when and where the mediation will take place, and how long the mediation will last. There is no settlement unless all parties agree.

-The mediator functions as a catalyst rather than a judge or jury. The mediator's most critical function is to control unreasonable expectations, and to assist the parties in determining a realistic view of their interests, legal positions, and the value of their case.

-Mediation is a favored manner of dispute resolution, and many courts have enacted local rules that require the parties to engage in settlement conferences with a magistrate judge or other judicial officer who functions as a court appointed mediator.