

Friends,

Here's the latest installment of my update, with my thoughts about cases that have been resolved in the last few months.

Nearly every case settles. One explanation is that litigants would rather not put a major decision in the hands of a judge, jury or arbitrator. As qualified as these decision-makers are, as integral as they are to our legal system, they are necessarily one step removed from the dispute. Further, they are generally provided with limited, zero-sum choices for reaching a result. This explanation is sound; maintaining control through settlement, even though it involves compromise, is usually preferable to the “all or nothing” result obtained by third-party decision-making.

But there is another psychological factor at work. Over time, litigants may appreciate that they share responsibility for creation of the dispute, or possibly for its intensification (of course, my job is to make sure the other side fully appreciates its potential risk). With this realization and acceptance of at least partial responsibility, they are in a better position to compromise. A mediator may be in the best position to realistically and impartially promote the concept of shared responsibility. Indeed, a well-run mediation where parties acknowledge shared responsibility often focuses on realistically measuring degrees of responsibility and translating those into terms of a settlement.

In the last three months, I've settled an unusual number of cases. In part, that's due to the fact that many of the cases just happened to be set for trial; it's not a cliché to say that cases settle on the courthouse steps, when the risk of a potentially bad result is imminent. In addition, in many of these cases, both sides realized that there was an allocation of responsibility that matched up with terms they could live with. The convergence of these two factors, often developed through mediation, led to settlement.

Here are some examples of successful half-day mediations where both parties agreed to share responsibility after previously staking out vastly different positions:

- Representing a defendant in a potentially large sex harassment case, we bridged a gap between a seven-figure demand and a five-figure offer, agreeing to make modest payments over time (an impossible result at trial). Counsel agreed to mediate right after the case was filed, to avoid expensive discovery;
- Representing a plaintiff in a case where a municipality unlawfully shut down a business, we obtained roughly three years of lost profits where the pre-mediation offer was \$15,000. This mediation took place on the eve of trial, after the municipality had tried multiple times to dismiss the case, including filing an appeal that delayed the case by five months;
- Representing a plaintiff in a wrongful termination/whistleblower's claim, we obtained a six-figure settlement where the defendant had never made an offer before mediation. Mediation was two months before trial;
- Representing an heir in a probate dispute, we split the available funds where the defendant had never made an offer before mediation. Mediation was a month before trial;
- Representing a business accused of violating a non-compete agreement and stealing trade secrets, we settled after an apparently unsuccessful mediation, when counsel for the opposing party called on the eve of a pretrial meeting to accept the terms proposed at mediation – my client paid nothing;

- Representing a software development company engaged in a mid six-figure dispute with its customer over payment and performance, we obtained a fair percentage of the outstanding balance due where the customer had made only a nominal offer previously. Counsel agreed to mediate before the discovery process started;
- Representing a real estate broker defending a seven-figure claim for theft of confidential information and trade secrets, the mediation led to a \$30,000 settlement a month before trial.

And, since not all cases settle, it's good to be able to report an outright victory. A business was improperly sued for a six-figure debt of another related business, and the circuit court ruled against our client. A year later, the court of appeals reversed the decision, ordering the case dismissed. Sometimes, it just takes longer than it should to get to the right result.

As always, please get in touch with me if I can help you or someone you know.

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