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How to Successfully Settle a Condemnation Case

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Introduction

It is no secret to those involved in the court system that approximately 95% of all cases filed in court, including condemnation actions, settle without a trial. The reasons for this statistic vary from case to case. Often it is simply that the cost of litigating erodes the economic benefit of continued litigation. But, more substantively, through the pretrial discovery and negotiation process, each party comes to learn more about its own case, as well as the opponent's, and the probable outcome of a contested trial becomes easier to accurately handicap. Once both parties appreciate the likely outcome of a trial it is easier for them to reach agreement on a resolution. Therefore, quality representation requires a complete understanding of, and an ability to effectively manage and use, the pretrial preparation and negotiation process to obtain the most favorable result possible for your client. And, because approximately 95% of cases will settle without a trial, you will be doing 95% of your clients a disservice if you fail to effectively manage their cases to this conclusion.

Before we move forward to discuss how to successfully settle a condemnation case we should discuss what we mean by "successful settlement." To many attorneys and clients, "settlement" is synonymous with "compromise" and "compromise" means less than full recovery. Indeed, a common saying heard in the hallways and offices of mediators is that "a good settlement is where both sides go away unhappy." We do not endorse that mindset. Rather, from an outside perspective, a good settlement is a settlement where the condemnor pays what it believes is just compensation and the property owner receives what the owner believes is just compensation. When that happens neither side should walkaway unhappy.

A successful settlement does not always require compromise. Rather, it requires convincing your opponent that your view of the case is correct. Then, if your opponent settles based on that understanding, both parties should be satisfied. On rare occasions, youmay come to understand that your opponent's view of the case is correct and you will, then, modify your settlement position accordingly. Thus, a fully successful settlement is a settlement that achieves a fair recovery for your client without a trial. And, if the cost savings of a trial are considered, a fully successful settlement should actually provide a greater economic return for your client than a fully successful trial.

This idea of a full recovery through settlement is not merely aspirational. It can be achieved. Indeed, for reasons discussed below, a fully successful settlement is easier to achieve in a condemnation case than in other civil actions.

I. The Foundation of a Successful Settlement.

A. Hard work and preparation. Period.

There is no short cut to maximizing a settlement. It is easy to settle a case – just givein and take what the opponent offers. But if you want to maximize the settlement value of a case, i.e. if you want to achieve a "successful settlement," you need to do the work necessary to convince the other side that the position you have taken is correct and that if the case goes to trial your position will prevail. Then, the other side will move toward you and make a successful settlement possible.

The 95% figure noted above not only reflects the approximate percentage of cases that settle without trial, it also reflects, of those cases that are tried, how many are won or lost before the trial even begins. Another way to say the same thing is that 95% of the work required to effectively try a case occurs before the trial starts. The trial is just the culmination of your pretrial preparation. It is difficult to make up for a lack of preparationonce the trial begins.

And just as preparation is critical to successfully trying a case, both preparation - and demonstrating to the opposition that you are prepared - is critical to successfully settlingthe case without a trial. All trial attorneys know that it is necessary to be prepared if theyexpect to try a case well. But this applies to everyone. If they know *they* cannot try the case well if *they* are not prepared, they also know that *you* will not be able to try the casewell if *you* are not prepared. And if they know you are not prepared they will not be motivated to offer you maximum value to settle. Consequently, in order to maximize the settlement value of a case, you need to demonstrate to your opponent that you are, or surely will be, prepared to try the case if necessary.

These rules are simple. But they are honored more in the breach than followed, because many attorneys look at a case from the wrong perspective. Many attorneys consider these statistics and ask, “If there is a 95% chance that this case will settle without a trial, why should I do all the work necessary to prepare it for trial? Why not procrastinateand wait and see if this case will be one of the 5% that must be tried?” If both parties engage in this practice, which is common, it will lead to either an unnecessary trial, or, more likely, guessing and more compromise than may be necessary, because a clear handicapping of a trial is not possible. This, frankly, is where the vast majority of settled cases fall. And this is the origin of the comforting incantation of professional mediators that “a good settlement is one where both sides walk away unhappy.”

If you have not analyzed and prepared your case well enough to have confidence in the outcome of a trial, you will compromise and accept less than that which would otherwise be satisfactory, in order to avoid the risk and uncertainty – in order to avoid losing. In such a case you will leave the settlement table unhappy with the agreement you have reached. But the mediator will sooth your wounds and tell you that the fact you are dissatisfied proves that the settlement was “a good one.” On the other hand, if you prepare and your opponent does not, you have the upper hand and it will likely be your opponent who will compromise greatly to avoid the risk and uncertainty of going forward, and settle on terms that are, in fact, satisfactory to you. And you and your client will then leave the settlement “fully satisfied.”

An important facet of preparation is pre-condemnation planning. This is the first essential step in your preparation process. Attached as exhibit 1 to this paper is a pre-condemnation planning analysis that we presented at the Lorman seminar in January 2006.It provides some helpful suggestions for property owners, appraisers and right of way personnel in the early stages of planning and case preparation.

II. Some Discovery "Lessons."

Lesson One: Prepare thoroughly and prepare early.

Inertia is a wonderful tool if used effectively. If you convince your opponent "right out of the box" that you have correctly analyzed the case, that you are prepared, and you are ready and willing to try the case, and the opponent has barely opened a file, it is likely that you will be able to convince your opponent to settle on favorable terms quickly, rather than expend the effort necessary to consider, examine, research and try to refute your arguments. At a minimum, early analysis and preparation will let you "frame the debate" and control the critical issues in the case.

Lesson Two: Prepare Thyself.

The same inertia that may persuade your opponent not to get started if you convince them at the outset that it would be futile, may work against you if you unnecessarily instigate formal discovery. Counsel may delay discovery to save litigation costs in an effort to achieve a successful settlement without "formal discovery." This may be an effective strategy, if the reason you do so is to save costs *and* it does not deny you the information you need to convince your opponent you will prevail at trial.

A reality of litigation practice is that your opponent will invariably duplicate your discovery requests. If you send your opponent interrogatories, your opponent will send you interrogatories. If you demand production of documents, your opponent will do the same. If you note a deposition of your opponent's client or expert, your opponent will return the volley. Many attorneys practice CYA litigation. They automatically send out interrogatories and document requests and take depositions of every possible witness in every case, because they are afraid of losing and they don't want their client or others to allege they failed to fully prepare. But consider the consequences of such a routine practice. Not only does such a practice automatically drive up and front load the costs of the litigation, but because of the above-noted tit-for-tat reality, your formal discovery requests will break your opponent's inertia – which is at a standstill – and cause your opponent to engage in reciprocal discovery. You, then, unwittingly will have broken your opponent's natural inclination to procrastinate and caused your opponent to start moving and prepare.

It is *not* against the rules to prepare your case outside the formal discovery process. You do not have to wait until your opponent sends you discovery requests to analyze and prepare your case. You do not need to take your opponent's expert's deposition to analyze their report and identify the errors in their logic, analysis, factual basis and conclusion. The vast majority of the preparation you need to complete to get ready for trial may be accomplished without any formal discovery from your opponent. You can investigate, analyze and prepare your affirmative case, including a critical consideration of possible weak points. And you can analyze much of your opponent's case without ever asking your opponent's witnesses a single question before trial. Then, if you engage in settlement discussions you will be able to effectively, and persuasively, respond to every argument your opponent makes in negotiation and your opponent may very likely not have the substantive ability to counter your arguments. In short, you will, again, have the upper hand in the negotiation.

More importantly, your case may get weaker as your opponent prepares and identifies issues. Consider, for example, the condemnation of a parcel of undeveloped property. Both parties may acknowledge that its highest and best use may be for development consistent with its present zoning, and the condemnor's appraiser may have "assumed" a basic development under the applicable zone. But the parties disagree on the number of units that may be achieved and/or value per unit, which causes a disparity in value. The owner's case may lose value if the development issues are examined closely. From the owner's perspective, counsel should carefully consider all of the details that come into play in the development process to determine whether they will enhance or detract from the case before spurring the condemnor to question the basic assumptions of its appraiser. Keeping the discussions "at 30,000 feet," rather, than forcing extensive discovery and causing the condemnor to start identifying all the obstacles to development that may depreciate the market value of the property and reduce its development potential may result in a more favorable settlement.

If you have laid the foundation with a considered analysis, investigation and preparation of your case and a successful settlement is not achieved, you will be in a position to proceed with strategically focused formal discovery, including succinct depositions designed to obtain the information you need to effectively cross-examine the witness at trial, rather than a long-winded exploratory deposition that more often educates your opponent than advances your strategic position.

Lesson Three: A Condemnation Action is a Unique Civil Action for Purposes of Settlement.

Condemnor's counsel occupy a position that is in some ways similar to criminal prosecutors. Prosecutors are charged to achieve justice. Prosecutors should not prosecute a criminal defendant they know is innocent, simply because they may be able to win at trial. Nor should a prosecutor over charge a defendant, or seek excessive punishment, if a lesser-included offense or sentence would be just. Likewise, condemnors' counsel should not payless than what they are convinced is just compensation, merely because they may be able to convince a jury to award a lesser amount at trial.

Condemnor's counsel's righteous goal is not to pay as little compensation to owners as possible, but to pay *just compensation*. Just compensation is a constitutional obligation. Condemnor's counsel's objective is not to violate the constitution; it is to abide the constitutional obligations of the governmental authority they represent and pay just, but not excessive, compensation. This obligation alters the usual positions in a civil case and makes it easier to achieve a fully successful settlement in a condemnation case than in other civil actions.

The question to be weighed in most civil actions is simply whether the settlement demand, or offer, is more or less than the party will likely achieve at trial. But, in a condemnation case the question is different. The proper question in a condemnation case is "What is the amount of just compensation to which the owner is constitutionally entitled to receive?" When the settlement question is properly framed in that manner the perspective of the parties and the issues to be discussed are altered. The condemnor should consider whether the settlement demand is just, not simply whether it may achieve a lower inquisition at trial. Of course, this does not resolve all issues. There may be a wide range of "just values." It is not improper for a condemnor to hold out for a settlement at the lower end of the range, if it is confident in its position and evaluation of the case.

This different perspective of condemnors' counsel also favorably alters the negotiation process by lowering the adversarial temperature of negotiations. In many civil actions the parties have been 'wronged." The plaintiff demands full compensation for an injury the defendant may not believe they caused. In such a situation the settlement negotiations are unavoidably adversarial and often this additional layer of dispute makes settlement difficult to achieve. And, it makes a "successful settlement," as we have defined it, i.e. a settlement where you and your client walk away happy, difficult to achieve.

In most condemnation cases, however, both parties seek the same goal, namely, to quantify the amount of just compensation that the owner is entitled to receive.[1] This common goal permits a more substantive discussion of the merits and enhances the possibility of a successful settlement – for both parties.

III. Mediation and Other Settlement Considerations.

Mediation has been proven to be an effective way to break negotiation stalemates and achieve settlement of contested actions. Again, inertia plays a powerful roll. Once the parties have prepared for mediation and convened with a quality mediator, there is inertia that helps move the discussion forward. This inertia, resulting from the parties' preparation and commitment to the process, is difficult to achieve with a telephone call to opposing counsel, or even a face-to-face negotiating session. Use this inertia to your advantage.

Prepare for the mediation and be in a position to "prove" your case and discuss each issue in detail. Know the facts. Know the law on the critical issues. If the opinion of an expert is important, bring the expert to the mediation, so they may talk to the opposing party and counsel directly.

Here are a few additional factors to consider:

1. A quality mediator is essential.

It seems everyone wants to be a mediator. Many attorneys and seemingly every retired judge aspires to a second career mediating disputes. But mediation is a skill and it requires effort and tenacity to be successful. A mediator that simply tries to make each party "compromise" or "meet in the middle" and then gives up when one, or both, refuse to do so is a waste of everyone's time and energy. Demand a quality mediator who has earned a good reputation before you schedule the mediation.

[1] In some condemnations the owner contests the condemnor's authority, or need, to take the property. In such a case, even full payment of all that the owner believes his property is worth may not satisfy the owner. These cases are more similar to the standard civil case and present similar adversarial obstacles to settlement.

2. The Decision Makers Must Be Present.

Mediation is a process. Often it is a long process. Positions are changed slowly over time as the bases and merits of the positions are stated and discussed. The person who has ultimate authority to settle the case should participate in the process, or all of the effort expended may be for naught.

3. Do not hesitate to reconvene.

As stated above, mediations are a process. They may not succeed in a single session, or two. We have successfully had successful mediations that continued over multiple sessions with substantive exchanges in between. The mediator often helps this process by refusing to concede defeat and requiring both parties to continue discussing the substantive merits of positions and not simply refuse to move for no good reason.

4. Frame the Question.

As we discussed above, the question in a condemnation case should be "What is just?" It should not be "What will a jury decide?" If the question is the latter it may lead to a lower settlement value. Owner's counsel should press for a just settlement that indemnifies their client for all the damages the owner will suffer.

5. Keep the Discussions Substantive.

Closely related to framing the question is the necessity to discuss the substantive merit of your client's position, not whether a jury will adopt it. Your goal is to convince opposing counsel that your client's position is just, not that a jury will necessarily agree. Every experienced trial lawyer knows that every jury trial is a gamble. Even if you have a "slam dunk" case, a jury may not agree. If you base your settlement discussions on "what will the jury do" you must necessarily discount the amount of just compensation you are entitled to be paid! Assume for illustration purposes, that there is little dispute after discussion that the fair and just value of your client's property is $100,000. But the condemnor's appraiser concluded that it was worth $50,000. If the settlement discussion is over what a jury might do, well, a jury might believe the condemnor's appraiser and only award $50,000, even though both counsel agree that $100,000 is a fair and just value. In such a situation the owner should argue that he is entitled to be paid what is just, not a discounted amount because a jury might not agree. A successful settlement in that situation would be $100,000, not $90,000 or some other lesser amount. And both the

owner and the condemnor should be “happy” with a $100,000settlement.

6. There are no rules of procedure or evidence in settlement discussions.

Use your imagination to present your case in the best possible light. Use exhibits, hearsay statements, videos, pictures, etc. Move from one subject to the next with persuasive organization. At trial you are restricted to putting a witness on the stand and exhausting that witness’s knowledge through questions. Then you move on to the next witness. And then the next. You are not restricted in such a fashion in settlement discussions. Put in time and effort considering these “presentation” and “persuasion” issues as you prepare to discuss settlement or mediate your case.

Conclusion

The vast majority of cases settle without trial. Counsel should strategically consider how to best present their case for settlement from the very beginning of the case. There are no rules of procedure or evidence in settlement discussions. Use your imagination and skill to marshal the evidence and law in the most persuasive presentation possible. But, above all,make this process your focus. Utilize pre-condemnation planning. Prepare to settle successfully. You can achieve a full recovery without trial.