



# When It's All Over but the Shouting:

How to identify and avoid ethical pitfalls during settlement negotiations



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# Why settle?

- Winning is exciting.
- Losing is not exciting.
- Both are expensive.
  - But losing is much more expensive for defendants.
    - “On average, getting it wrong cost plaintiffs about \$43,000; the total could be more because information on legal costs was not available in every case. For defendants, who were less often wrong about going to trial, the cost was much greater: \$1.1 million.”
      - Jonathan D. Glater, Study Finds Settling Is Better Than Going to Trial, *N.Y. Times* (Aug. 7, 2008), <https://www.nytimes.com/2008/08/08/business/08law.html>
- The cost of trial is its own ethical quandary.

# When to settle?

- Settlement is ultimately a business decision as much as a legal strategy.
  - Right away
  - After initial motions practice
  - After discovery
    - Cases that went through discovery have been found to be more likely to go to trial.
      - John Barkai, Elizabeth Kent, and Pamela Martin, A Profile of Settlement, 42 *Court Review: The Journal of the American Judges Association* 34 (2006).
  - Prior to trial
  - After trial
- The best time to settle is when the settlement can be reached.

# How to settle?

- “A good compromise is when both parties are dissatisfied.”  
– Larry David
- **Except** maybe in the case of settlements
  - Closure
  - Finality
  - Certainty
- But it doesn’t hurt to be prepared to compromise.

# How to settle?

- Who should attend?
  - Someone with authority to bind the party.
  - Counsel?
    - Occasionally parties will attempt to resolve active disputes without counsel. This has inherent risks. Whether those risks are outweighed by the strategy/relationship advantage should be discussed with counsel.
- Court vs. private mediation
  - Separation between court overseeing case and court handling mediation
  - Private mediation costs
- Preparation
  - Brief statement

# How to settle?

- Settlement ethical pitfalls
  - Adverse counsel
    - Restraint on practice
      - Cannot require an attorney to forgo representing future plaintiffs
    - Restraint on advertising
      - Cannot require an attorney to refrain from advertising experience
    - “Legal consultant”
      - Cannot hire an adverse counsel as an consultant in order to conflict the counsel out of future cases
- Candor to the Court
- Conflicts with multiple parties/aggregate settlements

# How to settle?

- Settlement ethical pitfalls
  - Puffery
    - Fact vs. opinion
    - Deliberate misstatements of fact are not acceptable puffery.
    - Statements regarding party's goals in negotiation or willingness to compromise are acceptable puffery.
      - Formal Op. No. 2015-194, State Bar of California
        - [http://www.calbar.ca.gov/Portals/o/documents/ethics/Opinions/2015-194%20\(12-0007\)%20Puffing%20in%20Negotiations%20FINAL%2012-29-15.pdf](http://www.calbar.ca.gov/Portals/o/documents/ethics/Opinions/2015-194%20(12-0007)%20Puffing%20in%20Negotiations%20FINAL%2012-29-15.pdf)
  - Prepping
    - The same ethical requirements for prepping a witness apply when prepping a client for a settlement conference.



# How to settle?

- Settlement ethical pitfalls – class settlement
  - Fed. R. Civ. P. 23(e)
    - Certified class or proposed to be certified for settlement
    - Inform the Court
    - Approval of Court if settlement will bind the class
    - Notice to class
    - Objections
  - Attorneys' fees
    - Disclosure-only settlements
      - *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).
  - Cy pres

# How to settle?

- Settlement ethical pitfalls – class settlement
  - Pre-certification
    - Picking off plaintiffs
      - *Campbell-Ewald Company v. Gomez*, 136 S. Ct. 663 (2016)
        - TCPA case based on text messages to consumer's cellular phones
        - Held: Unaccepted offer to satisfy class representative's individual claim does not moot the claim.

# How to settle?

- **Takeaway:** Settlements can't be forced.
  - **Except:** *Franco v. Allied Interstate LLC*, No. 13-cv-4053 (KBF), 2018 U.S. Dist. LEXIS 117208, at \*13 (S.D.N.Y. July 13, 2018) (denying class certification on the basis of adequacy when the putative class representative rejected, without explanation, a Rule 68 offer of judgment):
    - “It is of course possible that plaintiff is the type of person willing to subordinate his own personal recovery for the good of the class, or, alternatively, the type of person who values trial or non-monetary vindication over individual recovery. The former might allow him to nonetheless be an adequate class representative, but the latter two would not.”
      - Notification to putative class members

# How to settle?

- Creativity
  - What are the motivations of opposing counsel?
  - What are the motivations of the plaintiff?
  - What are the pressure points?
  - What external factors and resources could be employed?

# How to settle?

- Creativity
  - Federal Rules of Evidence 408
    - **(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
      - **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
      - **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
    - **(b) “Exceptions.** The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”
  - Stick to the case and assume, whatever you do, the Court will eventually know, even if the possibility is remote.
    - No intimidation, threats, etc.

# Questions?



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# Upcoming Webinars

- **Customer Reviews: The Dos and Don'ts**, Thursday, March 26, 2020

Regardless of what you sell, as long as you sell online, you likely rely on customer reviews to promote (or protect) your brand. Maybe you actively solicit customer feedback and post reviews on the company website. Maybe your products are marketed or sold on third-party sites where customer reviews are key to how the products are ranked and displayed on the site. Or maybe your customers actively post reviews or complaints on sites like the Better Business Bureau. However you approach customer reviews, their importance in e-commerce is increasing—as is the FTC's scrutiny of how companies manage reviews. This webinar will explore what is permissible and not permissible in this area.

- **Financial Services Advertising Enforcement Update**, Thursday, April 23, 2020

Our team at Venable will discuss the more significant regulatory actions taken by financial services regulators since the end of 2019 with regard to advertising practices. These regulators include the Consumer Financial Protection Bureau, the Federal Trade Commission, and prudential banking regulators.

For more information visit: [www.Venable.com/adlaw](http://www.Venable.com/adlaw)

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