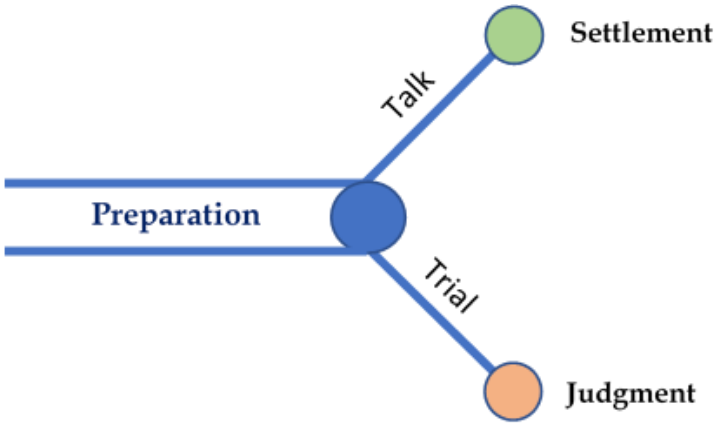
Preview of Chapters 1 & 2

WIN BEFORE TRIAL:

What Lawyers and Clients Must

Know to Get ~~Good~~ the Best Outcomes Possible

by Michael Palmer



"The best strategists win without fighting."

Sun Tzu, *The Art of War*

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SECTION IV: PARTLY CLOUDY WITH SCATTERED SHOWERS: MEASURE YOUR BATNA (AND THEIRS) BY ESTIMATING THE FINANCIAL VALUES OF THE CASE

PREFACE

The object of trial is to defeat the other side. I win; you lose.

The object of settlement is to win as well. But here "winning" means something different. It means negotiating an outcome that is *better* than the likely net result of a trial.

In settlement, to win is to satisfy your client's interests—her wants and needs, what will make her happy—better than the likely outcome of trial. Winning a settlement is not about defeating the other side. In fact, if you set out to make the other side lose, you will likely lose too. In such a setting, the other side can win as well. That is, they *too* can do better than the likely net result of a trial for them. This magical aspect of settlement is, in fact, why most cases—over 95%--settle.

But how can we know that the proposed settlement is better for our client than continuing with litigation through a final executed judgment? What are the benchmarks?

Two things are the measure of whether you've won the settlement: 1) Your client's total package of interests and 2) the financial value for your client of an executed final judgment. You can't know whether the proposed settlement is a good one for your client unless you know how well the proposed settlement satisfies her interests compared with continuing litigation through an executed judgment.

Continued litigation is usually your best alternative to settlement, what negotiators call your BATNA (Best Alternative to a Negotiated Agreement). But this

BATNA is of little use in assessing whether to settle and on what terms if you do not know what it is worth—i.e., how well it is likely to satisfy your client's package of interests. Occasionally, lawsuits fulfill non-monetary interests such as the need for vindication or the desire to set (or overturn) a legal precedent. But most lawsuits are about money. And even most non-monetary interests can be translated into financial terms. In the method presented in this book, the object is to *measure* each side's BATNA in dollars and cents. Hence, we speak of the net present financial values of the lawsuit.

When we settle cases, neither side knows the outcome of continued litigation. We must wrestle with uncertainty. But we can do better than just a hunch or wild guess—especially in complex cases involving claims for large sums.

It is possible to prevail at trial and lose at the same time. Costs are always a factor in the win/lose calculus. That is why I use the phrase *net* financial value throughout this book. It is only after plaintiffs subtract the costs from the executed final judgment and defendants add them that either can know what the true value of the lawsuit is for them.

This book is an effort to help all litigation professionals and their clients get a better grasp of the two key elements for assessing proposed settlements: The parties' Interests and their respective BATNA's, the net present financial values of a trial. Having understood those elements from both sides' perspectives, the negotiator can then calculate the Zone of Possible Agreement as a basis for reaching a settlement that leaves each side better off than with the alternative of trial.

Oh, one more thing. If you learn the strategic approach to settlement presented here, your clients will thank you, and you and your firm will be more competitive and, not insignificantly, more profitable.

SUMMARY OF THE BOOK'S ARGUMENT

To get the best settlements possible,

1. Identify and prioritize the parties' respective packages of interests—the costs and benefits to them of the litigation and its potential outcomes.

2. Estimate the net present financial value of the lawsuit for each party.

3. Determine the target settlement terms and walkaway minimum for your client using her tolerance for risk in light of her package of interests and the net present financial value of the case.

4. Create a settlement plan in the context of an overall litigation plan.

5. Make good decisions and avoid bad ones.

6. Negotiate well.

Parts 1 and 2 (interests and value) are the foundation on which the settlement objectives are determined.

Part 3 and 4 concern the settlement strategy.

Parts 5 and 6 speak to the execution of the plan.

This book addresses parts 1-4. Part 5 will be addressed in Volume 2. Part 6 (effective negotiation) has been covered in the problem-solving negotiation literature that is an outgrowth of the theory articulated in Roger Fisher, William Ury, and Bruce Patton, *Getting To Yes: Negotiating Agreement Without Giving In.*

SECTION I:

“HOUSTON, WE’VE GOT A PROBLEM . . .

CHAPTER 1:

WE'RE NOT GETTING THE SETTLEMENTS OUR CLIENTS DESERVE

On January 30, 1986, Bill Cheeseman and two of his partners, representing W.R. Grace, Jerry Facher, lead counsel for Beatrice Foods, and Jan Schlichtmann and the rest of the plaintiffs' legal team gather at the Wendell Phillips Room of the Four Seasons in Boston to negotiate a settlement of one of the largest mass tort cases in the history of Massachusetts. Cheeseman had called the meeting. He wanted Schlichtmann to give him a number. 38 minutes later, Facher walks out, quickly followed by Cheeseman and his group. The case goes to trial. The result for the plaintiffs is not good. Unkind folks have called this Schlichtman's blunder. But Facher's and Cheeseman's behavior unnecessarily put their clients at risk as well. They rolled the dice—with their clients' money.[1]

In 1993, five-year old Valerie Lakey yells out for help when she becomes trapped on the drain of a wading pool in Wake County, North Carolina. But no one can rescue her. The powerful suction of the water recirculation system pulls out most of her intestines. For the rest of her life, Valerie will be hooked up to feeding tubes for 12 hours each night and permanently tied to colostomy bags. Her medical care, including as many as a dozen surgeries and a long line of specialists, will cost millions of dollars, not to mention the loss of any chance for a normal life.

[1] This scene is described at greater length in Jonathan Harr, *A Civil Action 277-280* (New York: Vintage, 1995).

John Edwards and David Kirby represent Valerie and her parents in the suit against the owner-operator of the swimming pool and other defendants, including Sta-Rite Industries, the manufacturer of the drain cover. Shortly before trial, the plaintiffs settle with all the defendants except Sta-Rite for slightly more than $5 million. The plaintiffs demand $4.7 million from Sta-Rite. Notwithstanding insurance coverage of $22.5 million, Sta-Rite offers $100,000. The case goes to trial. Three weeks later, the jury returns a $25 million verdict on compensatory damages alone. At this point, Sta-Rite agrees to settle for the jury verdict.

Anecdotes of this nature enliven the lore of the law. Experienced courtroom lawyers tell similar stories in every jurisdiction. But are such settlement blunders representative? Perhaps they are exceptions to our normal practice. Perhaps we almost always get it right when settling lawsuits. Alas, that appears not to be true.

The evidence is mounting that both plaintiffs and defendants routinely make significant mistakes when negotiating settlements. We reject settlement proposals that would have satisfied our client's interests better than going to trial. And we accept much less (or pay more) than the likely result of trial justifies.

A recently published study on settlement errors concludes that, in **61**% of the cases in which plaintiffs rejected a settlement offer and went to trial, the verdict was less than the offer.[2] Defendants were hit with a higher verdict in **24**% of the cases in which

[2] Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," 5 *Journal of Empirical Legal Studies* 551, 566-567 (Issue 3, September 2008)

they refused to pay the plaintiff's final demand. By how much were the parties off the mark? On average, the plaintiffs received verdicts that were $43,000 below the defendant's final offer. But the defendants ended up paying an average of $1,140,000 more than the settlement demand they turned down.[3] And those numbers do not include the substantial legal fees and out-of-pocket costs that both sides incurred by going to trial.

These findings should trouble anyone routinely involved in litigation. Implicit is the conclusion that a substantial number of cases are settled at numbers that are either too high or too low. For example, in a breach of fiduciary duty case, the plaintiff demanded $300,000 and the defendant offered $35,000. The eventual verdict was $3,300,000. Had the defendant accepted and paid the plaintiff's settlement demand, plaintiff would have walked away with substantially less than the true value of the case, even after subtracting additional fees and the time value of money.

As I argue in other parts of this book, there are often good reasons for accepting less or paying more than the *financial* value of a lawsuit, reasons generally arising out of the interests of one or both of the parties. But when making such tradeoffs, we should know that is what we are doing. In too many cases, we do not have that knowledge.

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[3] *Id.* Other studies have shown essentially the same results. *See* Samuel Gross & Kent Syverud, "Don't Try: Civil Jury Verdicts in a System Geared To Settlement," 44 *UCLA L. Rev.* 51 (1996); Jeffrey Rachlinski, "Gains, Losses and the Psychology of Litigation," 70 S. Cal. L. Rev. 113 (1996); Samuel Gross & Kent Syverud, "Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial," 90 Michigan L. Rev. 319 (1991).

CHAPTER 2:

WHY WE FAIL TO GET OPTIMAL SETTLEMENTS

Many are the reasons why cases fail to settle at optimal values for both sides. They include poor planning, poor understanding of a case by one or both parties, poor negotiating skills, bad timing, lack of an appropriate settlement strategy, getting caught in decision traps, ego contests, and more. As important as such factors can be, making laundry lists of settlement do's and don'ts is of little help. Such an approach leaves us feeling lost in a dense stand of trees, unable to find a path to the result we need.

The core reasons for our failure to reach the best possible settlements are five: (1) insufficient understanding of and attention to the parties' respective interests, (2) inability to accurately estimate the present financial values of the lawsuit (the parties' respective BATNA's), (3) failure to develop creative options that address the parties' interests in light of the likely outcome of trial, (4) negotiating poorly, and (5) falling victim to bad decision making. Some might add that the failure to develop an overall settlement strategy is the fundamental failing that exacerbates these particular shortcomings. I would not disagree.

This book addresses the first two topics: Interests and Financial Value. Of those two, the most time and effort is devoted to the second, financial value, because it is by far the more challenging—and rewarding—to get right. If litigation professionals and their clients did nothing else but get a more accurate reading of the present financial

value of the case, they would dramatically improve their ability to obtain good settlements.

Understanding Interests

Roger Fisher and William Ury launched a revolution in negotiation theory and practice with their 1981 book, *Getting To Yes: Negotiating Agreement Without Giving In.*[4] Although it is rich in other insights about negotiation, the book's key message is the proposition that we will get better results when we seek to satisfy interests rather than to assert positions. This *Getting To Yes* approach is often called interest-based bargaining. Its key method is to ask why we want whatever we say we want, looking behind the position to the need the position seeks to satisfy. Having discovered the underlying interests, we can then look for different ways (options) of satisfying them.

As valuable as the Fisher/Ury *Getting To Yes* method of negotiation is, however, lawyers and other litigation professionals have been reluctant to adopt it as a guide to settlement negotiations for two reasons: First, most trials culminate in damage awards (or defendants' verdicts). They are about money. As the quintessential fungible commodity, money satisfies most (though not all) interests. When negotiating about money, which is the case with most settlement negotiations, it is particularly challenging to find underlying interests that could be satisfied without paying money. Or so it seems.

[4] This book was an outgrowth of the Harvard Program on Negotiation, which has spawned dozens of related books, hundreds of scholarly articles, numerous workshops, and several nonprofit and commercial negotiation firms.

Second, we have an inadequate understanding of the term "interest" and what it means in any given lawsuit. If we inquire about our client's interests at all, we likely think of them superficially, i.e., in terms of what is most obvious. A client rendered a paraplegic by defectively designed machinery needs medical care and personal assistance—something money can buy. Since that interest readily translates into money, we may not give much attention to the client's need for vindication or acknowledgement of the wrong she has suffered.

Our inadequate understanding of the term "interest" also makes it more difficult for us to see that lawsuits are often about more than money—even when money is the only thing a jury can award. A deeper and more nuanced understanding should lead to greater facility in fashioning settlements that satisfy the interests of both parties. Section III of this book is an effort to improve that understanding.

Present Net Financial Values

If both sides had a crystal ball with which they could see the precise outcome of a lawsuit, a rational settlement would be easy and optimal. (Because parties do not always act rationally, such settlements would not, alas, be universal.)

Put differently, to get optimal settlements, we should do everything we can to find out what the present net financial value of a lawsuit is. This is not the same as estimating the final executed judgment. Rather, it is about estimating the present value of the final executed judgment *if there is a final executed judgment*.

It is common for plaintiffs and defendants alike to use a projected jury verdict as the sole basis for settlement negotiations. Plaintiffs project their dream verdict and demand that defendants pay that to settle the case. Defendants likewise base their offers on what they hope the verdict will be. It is seldom that either side explicitly factors in contingencies that could prevent the jury from ever hearing the case, various factors that could increase or lower that eventual verdict if there is one, the costs of getting a judgment, and the problem of actually collecting a final judgment. In my experience, lawyers rarely explicitly discount a verdict expected 36 months from now to its present value.

Yet to get an accurate reading of the net present financial values of a lawsuit for plaintiff and defendant (they are not the same), it is necessary to take all of these factors into consideration. It is not enough simply to assume that they will have some impact on the ultimate value of the case. We need a method with which to make them explicit in our analysis. Section IV presents one such method.

Settlement Values

The net present financial values of a case are not necessarily its settlement values. The settlement value of a case for the plaintiff is a function of the interplay between her interests—what she wants and needs—and what can be achieved through a trial (generally its financial value for her). The same is true for defendant. A plaintiff's desire for a quick settlement because she needs to save her house from foreclosure affects her willingness and ability to hold out for a settlement that closely approximates the best

estimate of its financial value from her perspective. A defendant's need to avoid negative publicity even from a case totally without merit may mean that the settlement value for him far exceeds what it would cost in dollars to try and eventually win the suit. Every lawyer who has ever been involved in the settlement of more than a few cases knows this difference. Defendants often refer to the nuisance value of a lawsuit, i.e., what they are willing to pay to make the case go away even though they deem it to have no merit whatsoever.

It is evident that the settlement value for plaintiff will likely be different from the settlement value for defendant (just as the financial values for each party are different). Indeed, it is this difference that makes settlements between rational actors not only possible but probable.

Because good settlements are a function of the interplay between the client's interests (what the client wants) and the net present financial value (a rational projection of what the client should be able to get), it is critical to know both the interests and the financial value for purposes of assessing the settlement value. Assessing the settlement value is a process of determining what the client is willing to give up (or pay) in order to satisfy key interests that may go unmet by focusing solely on the financial value of the case. As noted, most clients and lawyers implicitly make such adjustments during settlement negotiations. They will do a better job of obtaining an optimal settlement for their clients, if they make such considerations explicit and address them methodically.

This is the end of the preview of *Win Before Trial*. Click here to purchase the complete book. (The book is included without charge in The Mediator's Assistant toolkit.)

For more information, contact Michael Palmer at 802 870 3450 or mike@winbeforetrial.com.

"Would you tell me, please, which way I ought to go from here?"

"That depends a good deal on where you want to get to," said the Cat.

"I don't much care where," said Alice.

"Then it doesn't matter which way you go," said the Cat.

"So long as I get somewhere," Alice added as an explanation.

"Oh, you're sure to do that," said the Cat, "if you only walk long enough."

Lewis Carroll, *Alice in Wonderland*