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Settlement Success and Safety: Two Crisis Points

Luke Andrews

SETTLEMENT SUCCESS AND SAFETY: TWO CRISIS POINTS*

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In litigation, as in life, there is a recurring temptation to relax too soon—to let up or lower one's guard before the mission is accomplished. The temptation takes two especially dangerous forms during settlement negotiations. Failing to keep the pressure on at these two key crisis points can cost you and your clients money—or worse.

The first crisis point is the moment when you realize a deal is probably imminent. You've been arguing with the other side for hours (or months or years), but now they seem to be cooperating, and the distance between your position and theirs has grown so small that it seems wasteful to keep fighting. You figure it's time to split the difference and be done with it. But no—this is the time to heed Chris Voss's admonition in the best negotiations book out there:

> The art of closing a deal is staying focused to the very end. There are crucial points at the finale when you must draw on your mental discipline. Don't think about what time the last flight leaves, or what it would be like to get home early and play golf. Do not let your mind wander. Remain focused.[1]

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The views expressed herein are those of the author and do not reflect any policy or position of his firm.

1. CHRIS VOSS, NEVER SPLIT THE DIFFERENCE: NEGOTIATING AS IF YOUR LIFE DEPENDED ON IT 185 (2016).

Of course, maintaining focus is harder than it sounds. Here are some practical tips to keep your side sharp in the final stages of negotiation and extract every last possible concession from the other side.

- Move slowly. Don't rush your decisions. Avoid all artificial time pressures and deadlines. Never be afraid to take a break or call it a day and pick things up later.
- To keep things slow, have a final decision-maker who's not in the room and not readily reachable. (This is often not permitted in mediations, but otherwise, it's a very useful arrangement.)
- If possible, have a designated "tire-kicker" on your team—someone whose job is to be skeptical and resistant to making a deal. (It's best if this is the person's natural bent anyway.) Consider giving that person total veto power. In one of my negotiations, my naysaying colleague got us a deal 20% better than the rest of the team was willing to take, simply by saying "no" at a critical time.
- Find ways to minimize ancillary incentives and fears that make you too eager to cut a deal. It's essential to negotiate from a place of strength, which means not needing or wanting the deal too much. But it's hard not to want the deal when the alternative is pulling three straight all-nighters on a brief or risking a big financial loss at trial. Try to have your tire-kicker or other primary decision-maker be someone who's free from such distractions and able to look at things objectively.
- Look for "outside the box" concessions that you can request or offer. Money might be everything, but it's not always the only thing. Is there something else that you or your client wants? Ask for it. Is there something else that you or your client can offer at

> little or no cost to yourself? Offer it, but only in exchange for a concession you want from the other side.

The second crisis point comes when you finally reach what looks like a deal. You have agreed on the broad terms of your settlement, and all that's left is to prepare the final documents. This is danger time. No matter how badly you want to call it a deal and call it a day, you must resist that temptation.

Why? Because calling the deal too soon risks overlooking or missing out on some important point that your side needs. Under Georgia law, an attorney who accepts a deal by letter or even email, without making clear that it's contingent, can bind the client irrevocably.[2] If the deal as accepted by the attorney turns out to be different than the deal the client wanted, and if the client did not personally authorize its acceptance, then, in the words of one recent Georgia Court of Appeals case, "[the client's] recourse is against the attorney."[3] Scary stuff.

The way to avoid the unintentional and premature acceptance of a deal is to state clearly that the terms you have identified are only an "agreement in principle" and that there is no final settlement until all clients have signed off on the completed paperwork. Absent such explicit caveats, you risk a messy, secondary dispute in the form of a motion to enforce a settlement agreement.

On the other hand, if you are certain that the terms on the table are excellent for your side and you know without a doubt that you want to cinch an agreement on those terms, then avoid all caveats and push the other side to confirm that they've accepted your deal and that it's final.

In sum, never stop pushing for every penny and every concession you can think of, and don't let anyone finalize the deal until you've obtained all you possibly can. Litigation is a contact sport. Protect yourself at all times, and always keep driving past the finish line.

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2. *See* Progressive Mountain Ins. Co. v. Butler, 875 S.E.2d 422, 424, 426 (Ga. Ct. App. 2022).
3. *Id.* at 424.