The Resolution Advocate: Tips on Getting to the Goal Line in Civil Litigation-- Cliches That Apply to Mediation and Settlement Negotiations

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You don’t have to go to the law books to find the basic principles which apply to negotiation and settlement. In fact, these basic principles may be ones you learned growing up, and possibly used before you ever entered law school. They are from clichés that we all have heard and probably used in our personal lives, but do they apply to our work as trial lawyers and litigators? Here are some I apply regularly:

1. You Can’t Get Blood Out of a Turnip.

“‘You can't get blood from a stone.’ You can't get something from someone who doesn't have it. The proverb has been traced back to G. Torriano's ‘Common Place of Italian Proverbs.’ First attested in the United States in the ‘Letters from William Cobbett to Edward Thornton.’ The proverb is found in varying forms: ‘You can't get blood out of a stone; You can't get blood from a rock; You can't squeeze blood from a stone; You can't get blood out of a turnip, etc....’ ” The application to the negotiation and mediation process is that you have to have a flush target as a defendant, either because of insurance coverage or assets that are reachable through any collection effort. This is the third part of the three legged stool analogy of selection of lawsuits: liability, damages and collection!

2. You Get More Flies with Honey than Vinegar.

“...The proverb has been traced back to G. Torriano’s ‘Common Place of Italian ---Proverbs.’ It first appeared in the United States in Benjamin Franklin’s ‘Poor Richard's Almanac’ in 1744, and is found in varying forms....”

The importance of this one is that diplomacy is critical to successfully negotiating a resolution to a lawsuit. Some might thing that the vigorous advocate who attacks like a pit bull will get his or her way. In my experience, that does not work in mediation, and maybe even in litigating a case. The most successful lawyers at negotiation base their “power” in negotiating on a high degree of knowledge about their case and the law and facts applicable, as well as personal skills of persuasion. Those who bang the table, and conduct themselves like attack dogs gain little respect. The diplomatic negotiator gets others to listen, believe and reach agreements. Leave the vinegar bottle at home, and take your biggest honey jar to the negotiation table.

3. It Ain’t Over ‘Til The Fat Lady Sings.

The meaning: Nothing is irreversible until the final act is played out.

“Just to get this out of the way before we start: is it 'til, till or until? You can find all of these in print:

It ain't over 'til the fat lady sings
It ain't over till the fat lady sings

It ain't over until the fat lady sings

“You might even find versions with isn't instead of ain't. Grammarians argue about 'til and till; I'm opting here for till. Okay; so who was the fat lady? If we knew that, the origin of this phrase would be easy to determine. Unfortunately, we don't, so a little more effort is going to be required. The two areas of endeavor that this expression is most often associated with are the unusual bedfellows, German opera and American sport.

“The musical connection is with the familiar operatic role of Brunnhilde in Richard Wagner's Götterdämmerung, the last of the immensely long, four-opera Ring Cycle. Brunnhilde is usually depicted as a well-upholstered lady who appears for a ten minute solo to conclude proceedings. 'When the fat lady sings' is a reasonable answer to the question 'when will it be over?', which must have been asked many times during Ring Cycle performances, lasting as they do upwards of 14 hours. Apart from the apparent suitability of Brunnhilde as the original 'fat lady' there's nothing to associate this 20th century phrase with Wagner's opera.

“All the early printed references to the phrase come from US sports. Some pundits have suggested that the phrase was coined by the celebrated baseball player and manager, Yogi Berra, while others favor the US sports commentator, Dan Cook. Berra's fracturing of the English language was on a par with that of the film producer Sam Goldwyn but, like those of Goldwyn, many of the phrases said to have been coined by him probably weren't. Along with ‘It's déjà vu all over again’ and ‘The future isn't what it used to be,’ Berra is said to have

originated ‘The game isn't over till it's over.’ All of these are what serious quotations dictionaries politely describe as 'attributed to' Berra, although he certainly did say ‘You can observe a lot by watching,’ at a press conference in 1963. In any case, ‘the game isn't over till it's over’ isn't quite what we are looking for, missing as it is the obligatory fat lady.

“Dan Cook made a closer stab with ‘the opera ain't over till the fat lady sings’ in a televised basketball commentary in 1978. Cook was preceded however by US sports presenter Ralph Carpenter, in a broadcast, reported in The Dallas Morning News, March 1976: Bill Morgan (Southwest Conference Information Director): ‘Hey, Ralph, this... is going to be a tight one after all.’ Ralph Carpenter (Texas Tech Sports Information Director): ‘Right. The opera ain’t over until the fat lady sings.’

“Another US sporting theory is that the fat lady was the singer Kate Smith, who was best known for her renditions of ‘God Bless America’. The Philadelphia Flyers hockey team played her recording of the song before a game in December 1969. The team won and they began playing it frequently as a good luck token. Smith later sang live at Flyer's games and they had a long run of good results in games where the song was used. Sadly, Ms. Smith sang before games, not at the end. If the phrase were ‘It ain't started until the fat lady sings,’ her claim would have some validity.

“Whilst printed examples of the expression haven't been found that date from before 1976, there are numerous residents of the southern states of the USA who claim to have known the phrase throughout their lives, as far back as

the early 20th century. ‘It ain’t over till the fat lady sings the blues’ and ‘Church ain’t out till the fat lady sings’ are colloquial versions that have been reported; the second example was listed in Southern Words and Sayings, by Fabia Rue and Charles Rayford Smith in 1976.

“Carpenter's and Cook's broadcasts did popularize the expression, which became commonplace in the late 1970s, but it appears that we are more likely to have found the first of the mysterious fat ladies in a church in the Deep South than on the opera stage or in a sports stadium.”

Here the application of this phrase to negotiation and mediation is consistent with the meaning set forth above. As long as folks are talking to each other about resolution, there is hope. Thus it is critical in negotiations to keep the dialogue ongoing. I recently was involved with a co-counsel whom I reluctantly let lead the negotiations in one of our cases. Instead of following this principle of continuing to communicate, he consistently dropped the ball and insisted that it was the other side that should call. The dialogue was inconsistent and often nonexistent, and he took no advantage of the momentum that was built up from time to time in the direct negotiations. The case took forever to resolve (several months), when it should have been resolved in a several days of talks, and it took a mediation and more legal fees to finally get it done.

Communication in settlement is the key. Trying to settle cases is no longer viewed as a sign of weakness. Make the overture of, “Let’s talk.” Then keep the talking going until the case is

resolved or each side says “I have given you my last, best and final offer,” and the case cannot settle.

4. Know When To Hold ‘Em, and Know When To Fold ‘Em.

This is an expression that emanates from the Kenny Rogers song, “The Gambler.” It refers, of course, to the skill that a successful poker player has in knowing when to stay in or drop out of a hand. We use it in all kinds of business and personal situations to describe the decision to stay in the battle or drop out and fight another day.

The words go:

“You got to know when to hold 'em; know when to fold 'em,
Know when to walk away; know when to run.
You never count your money when you're sittin' at the table.
There'll be time enough for countin' when the dealin's done.”

No doubt this refers to the skill of knowing when the right deal is on the table and making the judgment of settlement vs. trial; a skill which all of us wish we had developed to a perfect sense of predicting the future of how a case will end up when it is tried, appealed and the final gavel is dropped and judgment entered. While none of us has the crystal ball to use in advising our clients, we use our education, experience and skills to provide our clients with our best judgment of whether a settlement opportunity provides the preferred result rather than going to trial. The uncertainty of the future and the eventual decision making process emphasizes the need to make a concerted effort to settle.

5. Here Today, Gone Tomorrow.

“This phrase was coined by Aphra Behn (1640-1689) who Virginia Woolf, in ‘A Room of One's Own,’ canonized ‘as the first professional English woman writer.’ From ‘More Than A Woman: A few of our favorite unsung heroines,’ Page 62-63, B*tch - feminist response to pop culture, Issue No. 35, Spring 2007.

“Wikipedia also cites Virgina Woolf in stating this ‘fact’ (she doesn't say it as quoted however, if that's what those quote marks mean (http://etext.library.adelaide.edu.au/w/woolf/virginia/w91r/chapter4.html).”

The point for us here is that negotiations can get cold and parties can back off if the negotiations seem to be going nowhere, or there is no ongoing communication. Keep talking; try to resolve terms as you proceed. The more you can agree upon as you proceed, the greater the chance there will be success at the end of the discussions. So an offer on the table needs to be answered with an acceptance, counter or some additional basis for discussion.

6. A Bird in the Hand is Worth Two in the Bush.

“This proverb refers back to medieval falconry where a bird in the hand (the falcon) was a valuable asset and certainly worth more than two in the bush (the prey). The first citation of the expression in print in its currently used form is found in John Ray's A Hand-book of Proverbs, 1670, which he lists it as: ‘A [also 'one'] bird in the hand is worth two in the bush.’ By how much the phrase predates Ray's publishing isn't clear, as

variants of it were known for centuries before 1670. The earliest English version of the proverb is from the Bible and was translated into English in Wycliffe's version in 1382, although Latin texts have it from the 13th century: Ecclesiastes IX – ‘A living dog is better than a dead lion.’

“Alternatives that explicitly mention birds in hand come later. The earliest of those is in Hugh Rhodes' The Boke of Nurture or Schoole of Good Maners, circa 1530: ‘A byrd in hand - is worth ten flye at large.’

“John Heywood, the 16th century collector of proverbs, recorded another version in his ambitiously titled A dialogue conteinyng the nomber in effect of all the prouerbes in the Englishe tongue, 1546: ‘Better one byrde in hande than ten in the wood.’

“The Bird in Hand was adopted as a pub name in England in the Middle Ages and many of these still survive. The term bird in hand must have been known in the USA by 1734, as that is the date when a small town in Pennsylvania was founded with that name .”

A deal done in negotiations means finality, certainty, and conclusion, rather than no closure, uncertainty and no resolution. You have to consider the impact that money or accepted terms have on the future. Your client can now put his/her/their life back together as best possible, recovery can begin, and the drain of litigation is over. What a relief for most people!

I’ll do a Part II before the year is out.

Let me here your views to gkornblum@kornblumlaw.com. Good Mediating. . .

Posted by Guy O. Kornblum at 10:55 AM No comments:

The Resolution Advocate: Tips on Getting to the Goal Line in Civil Litigation: The Three "C's" of Settlement Negotiations

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Three basic principles are at the heart of settlement negotiations, whether they are direct or supervised in the more formal setting of a mediation: candor, communication, and confidentiality.

The level of candor required depends on the parties, their relationship and the forum. That is, the parties may be more guarded in direct negotiations, whereas in a supervised mediation, the presence of the mediator and the use of such as an intermediary may persuade the parties to be more candid about their case during the negotiations.

Communication is critical to the process. Once the parties stop talking, then there is no chance of a settlement even with a mediator. As long as the parties are talking to each other, even if through a third party, there is a chance for a negotiated resolution. Of course, the potential for settlement is advanced only if the communication is diplomatic and professional and not adversarial and hostile.

Confidentiality is also critical to the process. It encourages both communication and candor. The parties must understand that they will not be prejudiced by their exchanges, and that such will not be used against them in subsequent proceedings in the litigation. This assurance of confidentiality is at the heart of negotiations, whether direct or supervised.

These are the three essential underlying principles which allow the parties to reach a point where they together decide if the matter can be resolved. It is the policy that the decision making rests with the parties that requires that the three "C's" underlie and support the process of negotiation. Without an assurance of confidentiality, the parties are not going to candidly exchange information. Without confidentiality, communication and open discussion are stymied, as the parties will believe that whatever is said may end up being part of the other's case at trial. The integrity of the process of negotiation in any format can only be assured if the parties are confident that their exchanges, disclosures and bargaining will be protected from being used against them in subsequent proceedings. The parties must believe that they will not be prejudiced if they engage in any settlement exchanges.

The Preface the Uniform Mediation Act states, ". . . [T]he law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the process are met, rather than frustrated. For this reason, a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings."

The drafters of the Uniform Mediation Act, approved by the American Bar Association at its Mid-Winter Meeting in Philadelphia, Pa., February 4, 2002 [as amended 2003] ("UMA") refer to these public policies underlying its adoption:

• Promote candor of parties through confidentiality of the mediation process, subject only so the need for disclosure to accommodate specific and compelling societal interests (internal citation omitted);

• Encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process,active party involvement, and informed self-determination by the parties (internal citation omitted); and

• Advance the policy that the decision-making authority in the mediation process rests with the parties (internal citation omitted).

The Federal Rules of Evidence do not contain any specific provision relating to communications during mediation. Rule 408 protects some communications during negotiations, but does not address a mediation itself. District courts have specific rules adopted to protect what takes place during a mediation and serve the purpose of carrying out the policies of encouraging candor and communication in supervised negotiations.

The protection of rules and statutes relating to direct negotiations is narrower than the confidentiality which

attaches to the mediation process. For example, California Evidence Code section 1152 applies to an offer for compromise or to furnishing something for value to another person who has sustained, or claims to have sustained, loss or damage, and also applies to "conduct or statements made in negotiation thereof…."

Despite the legal niceties, the parties should approach any negotiations with the understanding that they will all cooperate in implementing a principle of confidentiality so that the negotiations can progress towards an agreed upon resolution of the case.

Good Mediating. . .