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THE SETTLEMENT SERIES: PART 6

'Deal or No Deal' - Settlement Edition

When a third party unofficially controls your client's decisions

By Lawrence R. Jones

Editor's Note: This is the sixth article in a special 10-part weekly series on settlement of litigation.

Several years ago, there was a popular television game show hosted by Howie Mandel called "Deal or No Deal." The contestant had to randomly select one out of 26 briefcases, with each case containing an undisclosed sum of money ranging from one penny to $1 million. The show's "banker" would then offer to buy the chosen case back from the contestant for an amount that could be substantially either more or less than the unknown amount of money in the case.

Ultimately, the contestant had to decide whether to accept the banker's offer, or reject the offer and gamble on the possibility that the chosen case contained more money than that offered by the banker. In order to help decide, the contestant would bring three "personal advisers" consisting of friends, co-workers or relatives, to stand on the sideline of the stage and literally yell out advice to the contestant on whether to either accept the banker's offer ("DEAL!"), or reject the offer and keep the case and its contents ("NO DEAL!").

The most puzzling aspect of this part of the show was that none of the advisers had any greater information than the contestant regarding how much money was actually inside the chosen case. Yet, these advisers loudly and confidently yelled out their opinions with great authority and self-assuredness, while the nervous contestant often relied heavily on their advice. Then, on the occasions when the advice backfired and the contestant held onto a case that contained only a few dollars, the advisers would often shrug their shoulders with a sheepish look on their faces. Of course, it was not the advisers' money that was lost in this process, but only that of the contestant who relied upon the advisers in the first place.

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"Deal or No Deal" serves as a strong analogy to what often happens in actual court cases. In deciding whether to accept or reject a proposed settlement ("deal"), litigants frequently rely on friends, neighbors and co-workers as "unofficial advisers," who are often more than happy to figuratively stand on the sidelines of litigation and yell out all kinds of opinions on what the party should do, while risking nothing of their own in the process. In fact, probably every attorney who practices civil litigation has, at one point or another, recommended a proposed settlement to a client, only to receive a response along the following lines: "My friend says I would be a fool to accept this settlement offer"; or "My co-worker says he/she knows someone who received X dollars settling a similar case, and therefore I should get at least that amount in my own case."

In such instances, one of the biggest challenges for an attorney occurs when a client starts tuning out the lawyer's advice, and replaces it with the contrary opinions and gut feelings of a third person who may have insufficient factual and legal information to be offering reliable advice. When a client becomes deeply dependent or co-dependent on the advice of a third person, such a relationship can potentially affect the progress of meaningful settlement negotiations, including acceptance or rejection of otherwise reasonable offers and counteroffers for complete resolution.

It is, of course, natural for a party to seek advice from very close family members and confidants, such as a spouse, parent or adult child, particularly on the issue of whether to settle a case or proceed to trial. This is a very predictable component of human behavior. It is further true that in many instances, close family members may not only offer moral support, but sometimes have highly reasonable, logical and valuable advice to offer the litigant when asked. There are also occasions, however, when even a close family member oversteps his or her bounds and directly interferes with a party's own right to make a decision by attempting to completely overpower and control the party with persistent and overbearing direction on what to do in litigation.

Further, it is frequently the case that the party's "adviser" is not even a close family member, but rather a far more peripheral person such as a workplace acquaintance, a neighbor down the block, or a relatively new dating partner. In fact, sometimes the "adviser" turns out to be a random stranger in an online setting who the client has never even met, but who nonetheless is advising anyone willing to listen on how to run their lives.

Against this backdrop, it is sometimes helpful for counsel to discuss with the client, at the very start of a case, the general concept and potential pitfalls of third-party advice, especially from people who truly have not been part of the events underlying the litigation. Some important points to underscore may include the following:

1) A third person who volunteers advice on a legal matter, even if well-intended, may possibly not have all of the factual information or legal knowledge and qualifications to offer a fully sound recommendation.

2) If a party shares information about his or her case with a third person, there may be nothing stopping that person from sharing that information with a fourth person, or even with the opposing party. Such a result can occur innocently, as a matter of gossip, but it can also arise after a subsequent deterioration of the relationship between the party and the "adviser."

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3) It is highly risky for a party to go online to discuss and reveal specific strategies of one's case, or to blindly accept advice about the case from strangers on social media with whom one historically has little or no personal relationship.

4) No two cases are exactly alike. The fact that a person in one case allegedly obtained a particular result by way of settlement or judgment does not mean that the same or similar result is guaranteed to occur in another case.

Regarding this last point, it is often helpful to discuss simple hypotheticals with the client to underscore the concept that there can be countless factors and reasons why one case settles or receives a verdict for one amount, while another case settles or receives a verdict for a substantially different amount. For example, if a plaintiff in a negligence case receives a $100,000 settlement for a broken leg, this outcome does not mean that the next broken leg case will or should resolve in a similar manner. There may be fact-specific circumstances surrounding the injury and the damages, as well as different comparative fault issues, existence or non-availability of credible witnesses, differing insurance policies, variations in a party's willingness to compromise, and other relevant and distinguishing factors.

Similarly, in a contested divorce, the fact that a "friend" allegedly received $300 per week for 10 years in alimony does not mean that every supported spouse now has an automatic right to expect a similar outcome in his or her own case. This is especially true if the $300 per week was the result of a consensual settlement, as there may have been multiple other factors and considerations by the parties in reaching the particular terms of their agreement.

Whether an adviser is (a) a close family member or (b) an otherwise peripheral third person, there are some circumstances, when the adviser essentially has both the client's ear and mind. There are some parties to contested litigation who simply cannot or will not authorize any recommendation by counsel without first obtaining the seal of approval from the non-party adviser. The non-party often reviews all of the party's legal paperwork and, with the litigant's consent, regularly accompanies the party to the attorney's office and to court for scheduled proceedings. In such a circumstance, while the attorney may technically be representing only one named party, with a sole duty and allegiance to advocate for that party's best interests, the reality is that he or she may, as a practical matter, find himself or herself occasionally having to persuade not only the litigant, but also the unofficial "adviser" on whether to accept or reject a proposed settlement.

It is important to remember, however, that the non-party who at the party's invitation attends an attorney-client meeting may not be subject to the confidentiality rules of the attorney-client privilege. Accordingly, if a party insists on having a non-party present during a lawyer-client meeting, counsel should explain this principle to the client, with the client acknowledging receipt of such information in writing.

Further, counsel may consider requiring the non-party to sign a confidentiality agreement, reflecting his or her understanding, acceptance and agreement of adherence, and confirming that the non-party will not voluntarily repeat the substance of such discussions to another person without written permission from the client or further court order.

In summary, while a party may naturally seek advice from third persons, such advice may or may not be logical and sound. An attorney serves a client well not by automatically discouraging or discounting such advice offhand, but rather by simply discussing with the client, in a constructive and enlightening manner, the potential risks and pitfalls of putting an important decision regarding settlement solely into the hands of any third person — including one's own attorney. Rather, it is the party who must apply his or her own logic and reason when confronted with the ultimate question in litigation: Deal or no deal? ■