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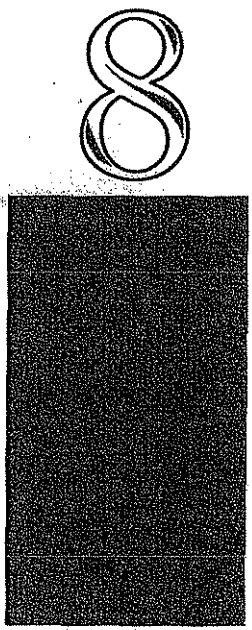

Eight Golden Rules for Settling Commercial Litigation

William D. Grand

Prepare for trial and prepare to settle.

FROM THE MOMENT you are retained to represent a client in a commercial lawsuit, you should have two goals: to prepare for trial, and to settle the case before trial. Although settling the case is where you should be going, trial preparation is the way to get there. Assuming that one

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or both of the parties has refused alternative dispute resolution ("ADR")—and you should at least consider the idea of ADR in every case—you should tailor your trial preparation efforts in a way that will greatly enhance the possibility of a satisfactory settlement. The way to do so can be reduced to eight straightforward rules which, like Kant's categorical imperative, can be made to apply to everyone. So here they are, the "Eight Golden Rules for Settling a Commercial Lawsuit."

RULE 1: CREATE INCENTIVES • The first rule of moving things toward settlement is to give your opponent a good reason to settle. Fortunately, you can turn your opponent's own stubbornness against her to do this.

Rigid Positions

At the outset of the litigation, the parties' behavior often seems rational enough, at least to the parties themselves. The plaintiff, believing that it has been damaged monetarily by a wrongful act of the defendant, resorts to a lawsuit, because its demand for compensation has been met with an outright denial of responsibility or a meager offering. The defendant, believing that it has acted properly, or believing that plaintiff's demand is excessive, rejects plaintiff's demand and files an answer. The parties at this early stage often have strong views of the correctness of their positions, and strong opinions on the reasonableness of their decision to move forward with the litigation.

Cost Revelations

Bearing in mind that both sides believe their cause to be righteous, and bearing in mind that commercial litigation seeks a monetary solution to an alleged wrong, the road to placing your adversary in a settlement mode should become clear. You must place your adversary in a position where it has a reason to give up something of value (i.e. a claim or money) to settle the lawsuit. You do this by making it evident to the opposing party that the cost of not settling may be higher than the cost of settling.

Setting the Table

How do you achieve this goal? First, and most basic, you begin to diligently prepare a strong case. Marshal the facts, begin deposing the appropriate people, including third parties, and gain a thorough knowledge of the legal issues. If you represent the plaintiff, prepare a detailed analysis of your client's damages as early in the case as possible. Until you have made significant inroads into this process, there will be no reason for the opposition to settle, because it will not have seen any evidence to alter its belief in the righteousness of its position, and it will continue to believe that litigation, and not a compromise, is the path to justice.

The Unflattering Mirror

Through discovery, you will almost always uncover some weaknesses in your adversary's case. Favorable admissions, helpful documents, and facts to bolster or destroy a possible defense become part of the record. You can now confront your adversary with hard evidence, not just puffery and braggadocio, that it may lose at trial. Your adversary is now faced with the prospect of continuing to incur litigation costs without being certain of the outcome.

Seeds for settlement have now been planted. Without more, you are on your way to being prepared for trial, but you will probably not achieve a settlement, unless the opposing party is made aware of what you have accomplished.

RULE 2: DELIVER THE MESSAGE • Once the groundwork has been laid, you will not have moved closer to settlement unless you have delivered the message to the opposing party (not just to its counsel) that there is now a significant potential cost to continuing the litigation — the risk of losing (or achieving substantially less than it had envisioned). The message will be delivered by showing the adverse party some of the compelling facts you have marshaled in support of your client's position, coupled with the determination of your client.

A Tough Crowd

The message will not be well received; the strong beliefs that brought the parties to litigation in the first place will not be altered by unsubstantiated charges. Therefore, your message that the opposing party is at risk must be substantiated and must be repeated numerous times in various ways until your adversary begins to see a changed landscape from the one visualized at the beginning of the lawsuit. There are numerous ways to deliver the message. The following are some of those ways.

Ferret, Ferret, Ferret

At the outset, if the stakes are meaningful, make the document phase meaningful—do not be content with whatever documents the opposing party produces the first time. Go back three or four times, asking for documents that were omitted from the first production, for other files that may exist, files that were maintained by individual employees, computer records, and so on. Take the deposition of the person who was in charge of collecting the documents. Continue (with motion practice if necessary) until you feel confident that your adversary has produced all the relevant documents or at the very least cannot help but know that it has consciously not produced documents that were clearly requested.

Forcing a comprehensive document production by your adversary will not only assist you in your trial prepara-

tion, but it will arouse the opposing party (not just its counsel) to the determination of you and your client.

Go to the Top

Your adversary may initially view you as a minor annoyance, an inconsequential obstacle on its road to justice, but you must eventually make it known that the lawsuit is a serious matter. If the size of the case warrants it, schedule the depositions of all employees who have significant relevant information, including key employees such as the president or controller.

In a smaller case, consider delivering the message when you depose the principal. In addition to obtaining discovery at the deposition, challenge the specious positions taken by the principal in her pleadings in a way that suggests that the principal may be embarrassed in court. Begin to present the landscape you intend to paint at the trial, so that your adversary counsel, and more importantly her client, gets a strong hint of what is to come.

Dropping the Right Bombs

At any point in the litigation when you obtain information that you believe significantly enhances your client's position, consider whether to immediately make it prominent as a settlement facilitator. You will have to make a strategy decision. If the information is protected from discovery because of the work product doctrine or because the type of information is not targeted in discovery requests, you should decide whether the information is best revealed then or at trial. One question you should ask yourself is whether your adversary can somehow bleach the facts or arrange for rebuttal witnesses if the facts are known to it well in advance of trial.

Trial strategy is important, but do not let it overwhelm your paramount goal of attempting to settle the litigation early with the least cost to your client. Carefully consider, therefore, using all helpful information early in the litigation.

If you decide that the information should be disclosed and emphasized before trial, deliver the information in a way that is designed to reach the adversary party as well as its counsel. One way is to send a letter to your adversary counsel highlighting the information and containing a settlement offer—even if the offer is that your client will accept a dismissal of the claims against it without seeking litigation costs. Because the letter contains a settlement offer, the attorney is obligated to convey the offer to his or her client and will forward the letter to the client.

Let 'Em Eat Numbers

If you represent the plaintiff, consider outlining in detail the damages you are seeking, and include a binder of materials documenting your client's damages, assuming you have solid proofs to support the claim. For example, in a suit alleging the delivery

of defective goods, attach invoices evidencing your client's purchases to "cover," and attach an analysis, with supporting documentation, of all internal costs that were incurred as a result of the problem.

Exploit Adversary's Weakness

Seize upon any serious weakness in your adversary's case. For example, if your adversary has committed some fraudulent act and punitive damages are a possibility, make sure the fraud claim remains prominent in the case. If you send a settlement letter, repeat your client's fraud claim. Reiterate that you are seeking punitive damages. Refer to cases that awarded punitive damages under analogous circumstances and state the amount that was awarded.

Deliver the Bill

Emphasize any claim that entitles your client to recover attorneys' fees or treble damages. If you discover the basis for such a claim during the course of the litigation, immediately move to amend your pleading to add the claim. There are few settlement motivators as effective as the prospect of having to pay not only your own attorney but the adversary's counsel as well. A similar motivation is present with a treble damage claim. Be sure there is a sound basis for the claim, however—otherwise you will be wasting your client's resources defending a motion for partial summary judgment or a Rule 11 sanction motion.

Summary Judgment

Finally, to deliver the message you can file a motion for summary judgment which might result in the dismissal of some of the claims or defenses. Then negotiate a settlement while the motion is pending.

Achieving a favorable settlement is usually the result of the confluence of the following factors: a vulnerability in your adversary's case that you grasp tightly as if with a pair of strong tongs, pressure (by "delivering the message") to make your adversary aware of this weakness, and a creative solution to relieve the pressure in a way that is favorable to your client and palatable to your adversary.

RULE 3: EDUCATE YOUR CLIENT • You may do an exemplary job of positioning your adversary to settle, but what if your client then becomes the impediment because it has unrealistic expectations?

A Few Choice Words

To avoid this problem, you should sit down with your client at the commencement of the litigation, and periodically thereafter, to explain what can realistically be achieved in the litigation. For example, if you represent a defendant against whom there are $2 million in claims, explain to your client which claims are likely to be dis-

missed on motion before trial, which you believe will still be remaining before trial, and what the settlement potential will be at that point. Do not try to be a hero at the outset of the litigation and imply to your client that every claim will be dismissed. If you believe that the $2 million claim will be worth $500,000 before trial, tell your client that. If you then are able to settle for $300,000, or better yet are able to get all the claims dismissed, you *will* be a hero.

From Stout-Hearted to Faint

Another reason for being realistic when you talk to your client about the prospects of the case is that clients intensely dislike lions that metamorphose into frightened chickens on the eve of trial. Many litigators are bold throughout most of the litigation process, secure in the knowledge that a trial is two to three years away—a seemingly remote prospect. The same litigators, on the eve of trial, may focus for the first time on the weaknesses in the case and on some of the strengths of the adversary's case. Feelings of uncertainty erupt before the final battle (the trial), often enhanced by a sobering settlement conference with the trial judge. This is the moment of truth, when many litigators' feet suddenly turn to clay, and they go back to their clients suggesting that it would be wise to settle on terms much worse than the client had been led to believe would be in the offing. This is not a happy circumstance for you or your client.

RULE 4: DEFINE THE UNDOABLE • There are many ways to settle a case. Most cases have a monetary element to them, but there may be creative ways to structure a money settlement to make it palatable. Or something of value other than money may be given. But whatever the case, always make sure that you know exactly what your client *won't* do; and never commence serious talks until you adversary acknowledges it.

For example, suppose, in a trade secret case, you know that your client cannot or will not pay any money to settle the case. Suppose your client had hired an employee who allegedly stole trade secrets from the plaintiff, and the plaintiff alleges that your client was consequently able to enter a product market sooner than it otherwise would have been able to. A settlement may be based on concessions other than the payment of money. The settlement could be based upon an agreement that the employee will not work on certain products in the future, or an agreement that your client will not develop a product using the information the hired employee allegedly brought with him. If you know that your client is willing to settle on some of these terms, but will not pay any money to settle the case, make that known at the outset. If you say it often enough and loudly

enough, the other side may finally start believing it, and may come up with some creative ideas itself on how the case can be settled without the payment of money.

RULE 5: SEIZE THE MOMENT • You need to develop a sense for judging when the right moment to settle is at hand. Going back to Rule 1, there has to be some reason for your adversary to settle before the subject of settlement should be broached. You should never initiate settlement discussions from a position of weakness; only after you discern or have placed your adversary in a position where there is a reason to settle should you initiate settlement talks.

Put Your Adversary on Notice

If you believe that the right moment is at the outset of the case, before major legal expenses have been incurred by your client, you will probably still want to serve an initial round of comprehensive document requests, interrogatories, and deposition notices, to put your adversary on notice of what the consequences of not discussing settlement will be.

Using Discovery Wisely

If you perceive that there is no chance for settlement discussions being productive at the outset of the case, then revisit the issue after the first round of discovery. Remember, however, that the opposing party may not feel the impact of that first round of discovery until several months after you have lived it. This is because transcripts and legal bills lag behind the actual discovery, and opposing counsel may or may not have been diligent in giving his or her client a detailed description of what has been going on.

Time To Sink In

Also remember that discovery may not have involved the "bottom line" people at the company, for example the president or the controller, and it may not be until they see, hear, or partake in the discovery, or pay the bills, that they focus on the fact that the litigation could negatively affect the company's profit-and-loss statement. Similarly, it may not be until after the litigation has disrupted your adversary's normal routines that it recognizes the effect of the litigation.

In any event, when there is a reason for your adversary to settle, and you believe the message has already been delivered or can be delivered through a settlement meeting, pursue the settlement aggressively. If you have laid the proper groundwork, your adversary will be feeling the pressure to settle. Move quickly, before the pressure is relieved, diminished, or ignored because of greater pressures arising in other areas.

RULE 6: KEEP THE PRESSURE ON • Do not appear timid about the prospect of trying the case. At the time you initiate settlement talks,

schedule more depositions, even if they are held in abeyance during the settlement talks. Unless the pressure remains, the chances of a settlement occurring at that point will begin to diminish.

Similarly, if you are close to trial, make it known to your adversary that you are prepared to try the case and are actively moving in that direction. And do not bluff—prepare!

RULE 7: ALLOW YOUR ADVERSARY TO SAVE FACE • Everyone resists buckling under pressure, at least initially. You therefore must make it appear that the settlement is in the best interests of both parties, or you will not achieve a settlement.

Bend a Little

You must be in a position to give up something during negotiations. For this reason, if you represent a plaintiff, your client's initial settlement demand should not be too low, although it should take into account the limits of what can realistically be achieved at a trial and the impact of your demand upon your adversary—you do not want settlement discussions to end before they start.

Give Away What You Can Afford

Everyone likes to believe they are getting a bargain. A "million dollar" case that settles for several hundred thousand dollars is a bargain to a defendant. It will also seem like a bargain if you are able to make concessions that are not of critical importance to your client. It will seem like even more of a bargain if the consequences of not settling have been made known to your adversary, are kept in the forefront, and are formidable.

RULE 8: END THE RELATIONSHIP • Avoid settlements in which your client, as part of the settlement package, agrees to make a repair, do further work, provide additional products, etc., to the opposing party. That kind of settlement is an invitation to continued litigation. Having just completed one litigation, your client will not be enthusiastic about embarking upon another litigation, especially when it believed that this was one adversary it was done doing battle with.

Make sure the relationship is over, and be sure that *all* claims that the opposing party has against your client are discharged through the execution of appropriate releases.

CONCLUSION • Settlement *is* victory in commercial litigation. Preparation for trial is an important means to achieve that goal. The eight rules will allow you to tailor your trial preparation, at the opportune time, to make settlement happen.