Negotiation
Class 10 - Closure

At last we reach the last letter of the POPINC mnemonic and discuss closure. There tends to be great emphasis on "getting the deal done" or "closing" the transaction. And business objectives drive that motivation. But when talking about negotiation as an art and science, we must remember that not all transactions end up with an agreement by the parties. If you remember from Class 2, Professor Gifford offers the following definition of negotiation:

> *Negotiation is a process by which two or more participants attempt to reach a joint decision on matters of common concern, where they are in actual or potential disagreement or conflict.*

Notice that in the process of negotiation the parties *attempt* to reach a joint decision. A final deal is not guaranteed. So sometimes "closure" means that the parties will stop negotiating for reasons other than having entered into an ongoing legal relationship with one another. They may walk away from the bargaining table. They may sue each other. They may let a judge and jury decide an existing dispute.

When is agreement appropriate?

Simply stated, it is appropriate for the parties to agree in a transaction when there is a proposed resolution that meets both of their interests. From a technical perspective, the parties will enter into an agreement when the issues have been narrowed to the point where there is an overlap in the positions that the parties are willing and able to take. Knowing whether the resolution meets your client's interests requires, of course, knowing what your clients' interests are. When those interests are financial, the process of determining whether the value is appropriate can be aided by economic analysis, experts reports, and decision tree analysis.

What should be in a settlement agreement?

Disputes do get resolved. And the parties need to memorialize the terms and conditions of the resolution. Here are a number of key terms that a good settlement agreement should address:

- *Specific identification of the dispute.* The settlement agreement should clearly identify the contours of what the parties were fighting about. This is because (as we discuss in the next bullet point) the parties will release each other from liability for legal claims that were brought or could have been brought in the dispute. For example, the parties may have been involved in a tort dispute. If there were potential breach of contract claims that could have been alleged or brought, but are not discussed in the definition of the dispute, then those claims could be brought after the agreement is entered into without violating the terms of the release. If the dispute was the subject of litigation, it is easy to define the dispute - you can simply refer to the case number. If it is a dispute not in litigation, you should define the dispute in terms of the claims and assertions made - for example, "all assertions of negligence and any and all related claims pertaining to the events involving Smith's injuries sustained at Jones' residence on July 10, 2019."

- *Release language.* This provision is key to a settlement agreement because it serves as the main consideration for the party giving up the right to take legal action in return for payment. (Remember, consideration can be comprised of a forebearance.) Release language should be comprehensive in the description of the claims being released, and the time period for which potential claims are released (usually from the past up through the effective date of the agreement. Here is a sample release clause (assuming all the capitalized terms have been well-defined):

  > Except for the agreements, obligations and covenants arising under this Agreement, Goodco hereby releases, remises and discharges Badco, its predecessors, successors, assigns, officers, directors, owners,

members, employees, agents, representatives, attorneys, assignees, parents, subsidiaries, partners, suppliers, licensees, vendors, insurers, affiliates and designees (the "Releasees"), from any and all claims, demands, damages, losses, costs, expenses, fees, actions, agreements, promises, and debts, whether known or unknown, discovered or undiscovered, foreseen or unforeseen, from the beginning of time until the Effective Date, including those arising out of or related in any way to the Agreement.

- *Who is bound by the release.* Note how the language covers successors, assigns, et al. That is particularly important if you are representing a company in a settlement agreement.

- *Terms of payment.* In return for the release, the party accused of wrongdoing will usually be required to pay a sum. The settlement agreement should precisely designate when payment should be made,, to whom, the number of payments, and other relevant financial terms.

- *Undertakings of the parties.* When a dispute is settled, the parties often agree, in addition to paying or receiving money, to do other things. For example, a party may be obligated to file documents to dismiss the lawsuit. Or a defendant in a defamation action may be required to publish a retraction. Or a party may need to modify its conduct going forward. These should be in the agreement.

- *Confidentiality*. An agreement to keep the terms of the agreement confidential (e.g. how much money was paid) will often be critically important to a defendant or an accused wrongdoer.

- *No admission of liability.* Similarly important to a defendant or accused wrongdoer will be a statement in the agreement that says that party does not admit any liability by entering into the settlement agreement. This is so that the fact of settlement cannot be used as evidence of culpability later.

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