The Case That Should Have Settled

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OVER THE COURSE OF A career, a litigation attorney will see all kinds of cases walk through his or her doors—large cases, small cases, cases that may impact more than just the parties involved, cases that have already impacted a larger audience, and, sometimes, cases that should never see a courtroom.

These cases are usually few and far between (one would hope), but every once in a while one comes through. This is the case that no one wants—not necessarily because it does not have merit or is not a "good" case, but perhaps because the defendants are already judgment proof or because the evidence does not support the facts or because the main witness is a shaky one. Whatever the reason or reasons, the attorney usually knows fairly soon, and to their core, that this is a case that should settle. (Setting aside those unscrupulous types who might be anything for fees, most attorneys would likely hesitate before spending a client's money unnecessarily.)

Sometimes, these cases are referred to as dogs and sometimes they are used as teaching opportunities for younger attorneys, allowing them to cut their teeth in court or certain aspects of litigation. Regardless, these cases can often be the elephant on the desk of the attorney, being moved around or put to the side until it absolutely cannot be avoided.

Where do they come from? Why do they get filed? Why do they torment us so? How do you handle them? And can they be settled? Many years ago, when I was still a young attorney working at a firm over the hill, I worked on a case like this. We were counsel for the defendant who was passionate about his position—that he did nothing wrong, did not owe the plaintiff a penny and had claims of his own equal to or above those of the plaintiff. The plaintiff was dogged in his determination to pursue our client over perceived wrongs. As the case went on, thousands upon thousands of pages of paper were used in copies (I spent several weeks in a room with 100 boxes full of documents, looking for the needle in the haystack) and motions flew back and forth with the regularity of the daily United Airlines JFK to LAX non-stop flight.

At some point in that case (which stretched over 18 months or so), it began to look like the case should not be tried and that it should settle. Unfortunately, by that point, both parties were so deeply entrenched in their positions that it was unlikely to go anywhere but to a jury and, normally, it might have. Except in that particular case, the judge—also recognizing that the case should settle—stone-walled the parties and threatened to trail the case for months unless it was settled. It did finally, and with neither party very happy.

In another case, the facts supported liability on several causes of action and the plaintiff, feeling wronged and trod upon, wanted his day in court. The matter was filed and the defendants made several procedural motions over the course of four months, some of which were granted and some which were not. By the time the case was at issue, almost

ten months had passed since the original complaint had been filed. In all likelihood, both sides had already spent more in attorneys' fees than either could hope to gain.

The plaintiff adamantly believed that the defendants were hiding something and the defendants refused to be pushed around and made a negligence offer to settle and nothing more. The case continued to roll to trial. In a candid conversation between counsel just a few weeks before trial was scheduled to begin, the plaintiff's counsel asked the defendants' counsel why a more substantial or meaningful settlement offer had not been made. The plaintiff's counsel truly wanted to understand the reasoning behind the defendants' position, knowing that both sides had already incurred substantial attorney bills and that a settlement could possibly be had for less than the cost to try the case. That case did not settle.

Often, emotions run high in litigation. In that case, the defendants' counsel revealed to the plaintiff's counsel that part of the reason several of the defendants did not want to settle was that they felt personally attacked by the filing of the case and were offended, even though the heart of the matter was a business dispute.

In that same example, there was no judge stepping forward to force the parties to settle. Did the attorneys do their clients a disservice by not trying harder to settle, particularly when any recovery was far below the amount spent by both sides in fees? Did the case use system resources that might have been better spent on another matter? Or, by virtue of the fact that the case went through the process, was tried and reached a result, did the system work, since the parties were given their day in court and an opportunity to be heard?

As attorneys, we try to evaluate the merits of a case before we take it on, and try to keep our clients' expectations realistic, hoping to focus our time and energy on matters that will have a positive result for our clients. When faced with cases we may personally believe should settle, we are still bound to pursue them (to the extent they are not frivolous or without merit) and follow the clients' wishes. Sometimes, those cases resolve themselves and the clients are happy.

Other times, the clients may believe that another result was possible. Is trying those cases to conclusion, rather than trying harder to settle them, a drain on the system? Is it a disservice to our clients if we favor settlement over litigation?

Perhaps even in the current culture of budget cuts and reorganization, which might favor alternative dispute resolution, there are civil cases that still need to be tried and simply by pursuing them through to their litigated end, we are continuing to support the system and keep the wheels of justice (however she is viewed), turning.