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3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MARION

6
7 Plaintiff,)
8 vs.) Case No.
9)
10 Defendant.) CONFIDENTIAL
11) SETTLEMENT AGREEMENT
) AND ORDER

12 Agreement:

- 13 1. Except as otherwise specifically provided herein, the Court will dismiss all claims (and
14 counterclaims, if any), with prejudice and without costs or fees to any party.
- 15 2. Plaintiff will execute a written General Release (in standard form) of all claims actually
16 made, or which could have been made in this action, including any unknown or latent defects
17 or issues.
- 18 3. _____ will prepare the paperwork for items (1) and (2).
- 19 4. _____ will hold _____ harmless (by paying or
20 negotiating to a lesser sum) the lien (or intercompany arbitration) claimed by _____
21 _____ in the approximate total amount of \$ _____.
- 22 5. \$ _____ will be paid forthwith, to Plaintiff and Plaintiff's attorney,
23 by _____. Plaintiff's attorney agrees to hold the funds in trust and
24 not distribute any funds until the General Release is signed and (with the exception of item
25 _____) the known and unknown claims against the
26 payment are satisfied or negotiated so that Plaintiff holds the Defendant(s) and its (their)
27 carriers harmless thereon.
- 28 6. This agreement is binding now, and is specifically enforceable as of signing, except as
follows (describe any condition precedent):

7. To the extent there is any dispute (or any need for clarification or interpretation), the parties
appoint this judge as the mechanism to determine (summarily without a trial or appeal) any

1 matters to complete or enforce this settlement.

2 8. The court acknowledges this agreement, and accepts the responsibility to retain jurisdiction
3 to specifically enforce the agreement in this case if necessary, even to the point of reopening
4 this case (and/or changing venue as may be appropriate and convenient) to enter
5 supplemental orders to effect the intent of the parties.

6 9. If any party fails to complete any act reasonably required to complete this agreement, the
7 Court is authorized to take action necessary to complete it without such act or signature.

8 10. This agreement represents the entire agreement of the parties.

9 11. The parties further agree that the amount of this settlement agreement as well as the
10 negotiation of this settlement, shall not be communicated, disseminated, or otherwise
11 disclosed to any person except as provided herein. The parties are allowed to disclose the
12 terms of this settlement to any person to the extent necessary for the preparation of tax
13 returns or for financial advice. The parties may also disclose details to others necessary to
14 permit and to satisfy any other legal obligation. However, in such an event, the party will
15 instruct anyone to whom they disclose such settlement information that the information is
16 CONFIDENTIAL and is not to be communicated to any person. The parties agree that no
17 false information regarding this agreement shall be made public. The parties will simply
18 respond to any inquiries regarding the status or outcome of this case and the claims herein
19 by stating that it has been "resolved", "ended", "finished", or "settled".

20 **PLAINTIFF(S):**

DEFENDANT(S):

21 _____ By: _____

22 _____ By: _____

23 _____
24 of Attorneys for Plaintiff

_____ of Attorneys for Defendant

25 IT IS SO ORDERED.

26 Dated this _____ day of October, 2007.

27 _____
28 Don A. Dickey, Circuit Court Judge

Settlement Conferences

1. Do's and Don'ts.
 - a. Send a confidential letter to assist settlement judge.
 - b. Plaintiff: Summary of Medical Specials.
 - i. Total for each provider.
 - ii. Total for PIP and other Insurance payments.
 - iii. Any lien holders who "must" agree, phone numbers, available and anticipating our call.
 - c. Prepare your client to review the comparison of settlement results vs. the anticipated trial results with an open objective mind.
 - d. Don't make an offer the day before Settlement Conference.
 - e. Don't send a copy of your "confidential" settlement letter to the opposing side.
2. Are limits an issue? Personal attorney if excess case.
3. Plaintiff herself - describe nature and extent of injuries, treatment and present complaints, and the effect on lifestyle.
4. Whose turn is it? It is surprising to see how often one party has forgotten an offer already made in writing (or misinterpreted a statement on the phone as an offer).
5. I don't care how many times I carry water back and forth, I will negotiate however the you want to. One plaintiff's attorney is well know as a \$500.00/move negotiator. I see no reason to change that. I might give you some advice but its your client's ball game. I don't recommend a bottom line (take or leave it) demand from either party in the first two plays.
6. My model for negotiation in Settlement Conference.
 - a. Both parties have voluntarily requested the conference, have shown up and will move.
 - b. Movement is everything (almost).
 - c. Patience and timing are also important.
 - d. My model requires that I trust you on the facts and the law (and as you know, sometimes there are disputes as to either or both between the parties). But, my model requires me not to trust you on your position. Don't take this personal. I am not saying that I do not think that our attorneys are anything but completely ethical. But, if I actually did take you at your word on your client's settlement position, then I would be required to quit anytime anyone said they won't move any further. My model allows me to nudge a little when the party says that it is as far as they will go.

- e. Judicial ethics state that “Where feasible, the judicial functions in the settlement and trial phases should be performed by separate judges.” When I conduct a settlement conference on my own cases I always offer the parties an opportunity to get another trial judge if they don’t feel comfortable afterwards.
 - f. As long as the process is voluntary, then whatever coercion exists is one that is, in effect, anticipated and requested. I submit that such coerciveness after the settlement conference begins, it is something that the parties expect, particularly where there are objective reasons to support it (e.g. costs, net recovery after the costs, and overall risk benefit analysis).
7. Trust. What we are working for is “trust”. Trust by the parties in the process - sufficient to allow them to take a risk by moving their position in the expectation that an objective response by the opponent will be in the form of reciprocal movement and if there is enough movement - both parties will “blink” and quit at a common place.
8. Good Settlement.
- a. Equal degree of dissatisfaction by both sides.
 - b. I think its time to graduate to a higher place, if we can. Sometimes both sides are delighted with the results or surprised that they ever participated in maneuvering themselves and the opposing party to a settlement.
9. The Joe Ochoa “Threat”

JUDICIAL ASSISTED SETTLEMENTS IN LITIGATED CASES

Hon. Don A. Dickey
Marion County Circuit Court
October 9, 2008

1. What are "Litigated Cases"?

a. There are few civil cases actually tried.

i. Causes:

1. Rising costs of litigation, experts
2. Increasing interest in arbitration (required in certain contracts)
3. Mandatory Arbitration (less than \$50,000; ORS 36.400)
4. Increasing Mediation/Judicial Settlements
5. Changing Expectations/Skill sets of attorneys

In short, we are looking for faster, cheaper, more creative methods of resolving cases that are tailored to the interests of the parties.

ii. Effects on Quality of Jury Trials? (Possible loss of rights?)

- #### b. Litigated Cases are generally civil cases filed in court, usually damages only cases (without ongoing relationships): money is demanded by one party, and denied by the other.

As we prepare for the settlement conference, the first question we should ask ourselves is: "Is this dispute really just about money"?

2. Role of Settlement Judge.

- #### a. Has changed: 15 years ago or so, there were no settlement judges.

- #### b. Oregon Judicial Districts' rules differ: Uniform Trial Court Rule 6.200 provides for mandatory settlement conferences if a settlement conference is requested by one party, **IF** that county has adopted a corresponding local rule. (Marion County has not adopted that rule).

- #### c. Offers input and evaluation of an experience judge. People may see the settlement judge's role in terms of a unique position and ability to comment on what a jury might do. This may be precisely what one or more of the parties want/need.

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To define terms, we should distinguish:

1. Evaluative (as opposed to facilitative) – A process by the mediator or judge suggests a direction or result for the settlement
 2. Evaluation – The process of the parties estimating the value of the case if tried to the jury. What is the expected result to be received from a jury based upon the law, the facts, the credibility of the witnesses, the liability (and apportionment of fault as between the 2 or more parties) combined with an assessment of the total damages? There may be special issues which bear on the value (conviction of a crime, meth use etc.). What will the jury award in this case? This evaluation is the party's objective alternative to a settlement. It is normally considered in terms of ranges.
- d. I tend to think of my model as being closer to that of a traditional facilitative mediator. But I certainly will give an evaluation at the "correct time". Generally, my belief is that I should not suggest a specific position unless the parties are running out of alternatives.
- i. A specific position can distract the focus of the parties from negotiation with each other.
 - ii. If I speak up too early, even if the parties generally agree with the position, both parties may try to save (or make) some money off that position.
3. Differences from Traditional Mediation.
 - a. Attorneys have an opportunity for a reality check; to obtain input from a judge: "Is there something I am missing?"
 - b. The settlement can be enforceable immediately by Judgment.
 4. My Settlement Order for the parties to appear:
 - a. Is based solely upon the voluntary requests from both parties.
 - b. The Court is not concerned with the parties' readiness for trial (because the parties have decided they are ready to attempt settlement).
 - c. Requests the parties' position papers for settlement (max. 4 pages).
NOTE: There are no Ex-Parte rules limiting contact with a settlement judge (so long as the judge does have decision making authority)

- d. Order all necessary persons to appear (As my grandfather used to say: “Nothing happens unless you show up”). Occasionally, we receive a request for a party’s representative to be permitted to appear by telephone. This will be allowed if the other party (the Plaintiff) does not object. But sometimes the risk manager or adjuster interprets the concept of permission to appear by telephone as permission not to participate. There are several reasons (real and perceived) why all decision makers should show up.
5. Considerations for the participants and judge.
- a. Consciously select your settlement judge. You should be able to choose whoever you want: it is your case. However, to reduce any conflict of interest issues, you might consider selecting a neutral judge with no decision making authority.
 - b. Check with other attorneys who have used this judge as to any questions of procedure/ or relevant tendencies.
 - c. Consider any “need” to contact the judge before the session (especially if there are issues other than money). Disclose any special procedural matters to the judge early.
 - d. Who should be “invited”? What third parties should be available by phone if necessary (lien holders, possibly experts, etc)?
 - e. Prepare and deliver a settlement letter to the judge (don’t copy the opposing party).
 - f. Prepare yourself/ client for the range (the “ball park”) within which you might consider settlement.
 - g. Be prepared to discuss your evaluation of your case in “ball park” terms:
 - i. With your client and the judge, frankly and confidentially; and
 - ii. With the opposing party (through the judge), by raising questions, in effect: “Have you considered the following facts or law?”
 - iii. If you learn something new, be prepared to adjust your evaluation
 - h. Show up (attorney and client).
 - i. Don’t go outside the “goal posts”.
 - j. Trust your judge as much as you dare.
 - k. Make the right moves for the right reason, and at the right time.

- l. If you intend the move you are presently considering to be your last one, announce it to your opponent. Why wouldn't you want the other side to know that? In fact, if your want credibility (and who doesn't?) why wouldn't you want to make an especially good move as your last?
- m. Expect your judge to assist the parties with an appropriate form of Stipulated Agreement and Order probably providing:
 - i. Dismissal of all Claims and Counterclaims.
 - ii. General Releases of all Claims.
 - iii. That the agreement is specifically enforceable.
 - iv. Appoint the Settlement Judge as the mechanism for specifically enforcing the Order.
 - v. Despite the dismissal, the parties agree that the Court retains jurisdiction to reopen the case to enforce the agreement.
- 6. Issues at the beginning. Assuming we have a money only case, we are ready to start talking about money.
 - a. What are the starting "goal posts"? (What is the status of the previous negotiations as we start the settlement conference?).

The goal posts define the limits of the playing field. It is rarely reasonable to go off the playing field (outside the goal posts).
 - b. Whose "turn" is it?
 - c. How much are the maximum economic damages (the limits of the hard dollar amounts which could be argued at trial at the end of the evidence (what is the largest amount the jury can consider awarding)? To who are they owed? Plaintiff's Counsel should prepare a worksheet setting out these values, and deliver it to Defendant no less than several days before the settlement conference. This is NOT something that the plaintiff should even consider holding back: providing this information is all but mandatory. Plaintiffs lose credibility if they fail this test.

(Insurance carriers and risk management people might be likened to dinosaurs - they move very slowly. But more accurately, they move or act upon facts, so don't wait until the settlement conference to advise them of facts that they want and are entitled to, in order to appropriately evaluate the case.)
 - d. Are there liens on the recovery (Health Care, PIP insurance, Workers Comp etc.)? Does the Plaintiff's Attorney have a relationship with the lien holders (represent another party)? Do we have contact information for the lien holders so we can

contact them during the session? Should the lien holders be invited to personally attend the settlement conference?

- e. Which party will assume responsibility for payment the various liens and/ or outstanding debts? (Hold harmless and indemnify the other party).
- f. Confidentiality provision? (Probably not applicable to government cases. Should there be liquidated damages?)

7. Evolution of my overriding principles:

- a. Movement: Movement is everything - “Just keep the ball in the air. . .” Walk back and forth with new numbers as long as it takes. Don’t worry about anything else: if there is movement, everything is fine.
- b. Timing: Timing has to be considered. Don’t give away too much too soon. This is a dance. It should last for the entire song. This is the beginning of recognition that what you do, and when you do it, may affect the response of the other party, and that you need to care about that.
- c. Trust: Trust is a must.
 - i. Emotional connection by the mediator will help. There must be identification with each party’s position – but not necessarily with their assessment. If fact, unless there is “overlap” in the parties evaluations, the mediator cannot reasonably agree with both sides at once. (This is more than just understanding the problem- it requires seeing the relationships and the different options on each side and the reasons for various possible positions and options, as well as potential weaknesses or flaws in those options.)
 - ii. The parties must trust each other. The process is really an attempt at conversion of your negotiating partner. You know you both want the same thing: settlement. And so, ultimately you are both a part of the same “chain gang”. If you work together honestly, with appreciation that you are both in the same boat together, with a respect for the other guy, the result almost automatically is trust, and there must be some degree of that or there will be no settlement.
- d. Options: What are the differing “Options” for response to the current offer on the table? One should consider what message will be communicated if a particular option is selected for response vs. the message you really want to send. A simple number can and does say a lot more than just the number. The context in which it is delivered, for example: (a) how much movement does it represent from your prior move(s); (b) how much movement is it relative to the other sides’ last offer and prior moves; and (c) when it is made . . . all reflect on how the other party

might react to the number. Each new number represents both a statement of the ball park where you think this game should be played, and a suggestion that the other guy should move. Each new number communicates something different depending on context and timing.

8. Rhythm and timing.

Examples:

a) 50 ----- 4	b) 100 ----- 20	c) 200 ----- 15
40 ----- 6	90 ----- 25	180 ----- 25
30 ----- 8	80 ----- 30	160 ----- 35
_? ----- _?	Split the diff. = ____	150 ----- 45
	Projection = ____	140 ----- ?

9. How the same evaluation by both parties can provide leverage:

a. Plaintiff: **Damages - % Liability - Costs = Net Recovery**
 $50 - 20\% \times 50 - 12 = 28$

Defendant: **Damages - %Liability + Costs = Net Expense**
 $50 - 20\% \times 50 + 12 = 52$

b. Subparagraph a. doesn't consider attorney fees as a cost. If Plaintiff is paying her attorney 33% before trial, and 40% after trial, then the net recovery before and after trial for Plaintiff would be:

i. $50 - 17 = 33 - 10 - 12 = 11$ **Net at settlement, or**

ii. $50 - 20 = 30 - 20\% \times 50 - 12 = 8$ **Net after trial**

c. Of course, if the attorney fees are allowed in addition to the recovery at trial, the results would be different. The "leverage" may be completely different.

And, rarely would both sides evaluate the case exactly the same. So, we are almost always referring to two different estimate ranges for the jury results.

Des Moines Personal Injury Case
Outcomes by Experienced Attorneys on Identical Facts

Pair Number	Plaintiff's Opening Demand	Defendant's Opening Offer	Agreed Settlement
1.	\$32,000	\$10,000	\$18,000
2.	\$50,000	\$25,000	No Agreement
3.	\$100,000	Unknown	\$56,875
4.	\$110,000	\$3,000	\$25,120
5.	\$675,000	\$32,150	\$95,000
6.	\$100,000	\$5,000	\$25,000
7.	\$475,000	\$15,000	No Agreement
8.	\$210,000	\$17,000	\$57,000
9.	\$180,000	\$40,000	\$80,000
10.	Unknown	\$0	\$15,000
11.	\$350,000	\$48,500	\$61,000
12.	\$87,500	\$15,000	\$30,000
13.	\$175,000	\$50,000	No Agreement
14.	\$97,000	\$10,000	\$57,500
Average Settlement \$47,318			

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4 IN THE KEYBOARD(CIRCUIT/DISTRICT) COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MARION
6 NO. KEYBOARD(Case No.)

7 KEYBOARD(Plaintiff))
8 Plaintiff,)
9 vs.)
10 KEYBOARD(Defendant)) ORDER FOR SETTLEMENT
11 Defendant.) CONFERENCE
12

13 Based upon the records and files, and pursuant to consultation between the Court (or Court
14 Staff) and counsel and the agreement of the parties to participate;

15 IT IS ORDERED that a settlement conference is scheduled in this matter on KEYBOARD(
16 Date), at KEYBOARD(Time), before the below named Judge acting as a settlement judge. We have
17 set aside KEYBOARD(Amount of Time Set Aside) for this conference.

18 Because this conference has been scheduled at the request of the parties, the Court is not
19 concerned as to whether or not discovery is complete and/or whether the matter is otherwise ready
20 for trial. The settlement is set because all parties have voluntarily agreed to participate and have
21 voluntarily requested this Court order them and/or their representatives to appear.

22 IT IS FURTHER ORDERED that the following procedures shall apply to this conference:

23 Unless otherwise agreed, the settlement judge will not try the case, thus, the normal rules
24 regarding exparte contact are not applicable here. All communications or submissions made in
25 connection with the settlement conference are confidential and will not be disclosed. Any
26 documents submitted for the settlement conference will be carefully marked, sealed and maintained
27 in my chambers separate from the trial court file.

28 By 12:00 Noon on the day before the settlement conference, the attorney for each party shall

1 submit to me a letter, no more than four pages in length. The letter should be the attorney's candid
2 evaluation of the crucial issues, the obstacles to resolution, and a proposed road map on how the case
3 should be (or could be) resolved. It may include such information that has made resolution difficult
4 without the assistance of the court. Such information may include personality conflicts, policy
5 considerations and other outside influences. Letters may be faxed to (503) 588-7928. Letters may
6 be sent by e-mail to Kimberly.Taylor@ojd.state.or.us and Monica.Martinez@ojd.state.or.us.

7 This request is not intended to invite legal positioning, but to assist the court with the
8 attorneys in the development of settlement objectives.

9 **IT IS FURTHER ORDERED all parties asserting a claim or defense, and counsel shall**
10 **personally appear at the settlement conference, and defense counsel shall be accompanied by**
11 **a person having settlement authority. If the defendant is defended by an insurance company,**
12 **then a claims representative will attend unless the Court has specifically previously allowed**
13 **other arrangements.** At the settlement conference, the parties shall be prepared to discuss
14 settlement possibilities and options or alternatively, to make a decision that the case will not then
15 be settled. In the event a trial date is required to be set, the parties should bring their calendars.

16 If there are any third-party liens or subrogated interests involved in the case, the amounts
17 thereof should be determined with certainty before the conference. It is suggested that any third-
18 party claims' personnel be available (in person or by telephone) if such interests need to be
19 considered and resolved in order to complete the settlement.

20 Dated this KEYBOARD(Day) day of KEYBOARD(Month, Year).

21
22
23 _____
Don A. Dickey
Circuit Court Judge

24 Order prepared by
25 Judge Don A. Dickey #72068
26 Copy mailed to each attorney.
27 Fax No. (503) 588-7928
28