SETTLEMENT AND TRIAL

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presented by

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BIOGRAPHICAL SUMMARY FOR CARY J. MOGERMAN

Cary J. Mogerman is a Fellow of the American Academy of Matrimonial Lawyers and is listed in *The Best Lawyers in America*, for Family Law. He is a former chair of the Family Law Section of the Bar Association of Metropolitan St. Louis. Mr. Mogerman is a partner in the St. Louis, Missouri firm of Zerman & Mogerman, L.L.C., where his practice is limited to divorce law and related appellate practice. He received his undergraduate degree from Drake University in 1982, and his law degree from Washington University School of Law in 1985. In 1997, he received the John C. Shepherd Professionalism Award presented by the Bar Association of Metropolitan St. Louis. He has published several articles on divorce law, and co-authored chapters 5 and 26 of the Missouri Bar deskbook entitled *Family Law* .

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A. ASPECTS OF SETTLEMENT, OR, "IS A BAD SETTLEMENT BETTER THAN A GOOD TRIAL?"

1. When to settle the case:

- When there are no disputed issues
- When the offer puts you at risk of loss, i.e. when you have been offered something you stand to risk losing at trial.

The only way to know whether they have put you at risk is to know the range of possible results, and to know the client's primary objectives.

The only way to know the range of possible results is to know your case, know your judge, and know the law.

Know your case: Preparation, preparation, preparation. There is no substitute, and all cases must be prepared the same way---to prepare for trial is to prepare for settlement. You cannot be prepared for settlement unless you are prepared for trial.

Knowledge of your case is empowering. It gives you great strength in negotiations, and it provides your client with strength and confidence at the most important time.

Know your judge: In evaluating settlement options, it is critical to have knowledge of the judge who will hear the case. If you don't know your judge, then ask around and find out. Know his or her likes and dislikes.

The broad parameters of judicial discretion make knowledge of the judge critical to an informed decision for the client.

Lack of knowledge of the judge is inexcusable. You do your client no favors without benefit of this knowledge.

Know the law: If you don't know the applicable law, you will leave money on the table and you will waste precious time and resources arguing for the impossible, or giving up something you should not have to.

2. Know your client's objectives:

Sometimes, they will be consistent with your judgment. Other times not. Don't be presumptuous.

Is it important to stay in the house?
Is it important to obtain a fixed term and termination date on maintenance?
Is it important to prevent the potential breakup of a family business?
Does the client need a college order?
Does a party or a child have health considerations that bear upon settlement.

3. Benefits of settlement:

Minimization of risk

Greater likelihood of compliance

Generally less destructive to family relationships

Maximize attention to detail and customize outcome

4. General considerations about settlement:

a. Settlement should ultimately be the decision of the client, not the attorney. In order for the client to have confidence in the settlement, *the client must know at all times that the attorney is prepared to try the case and would be delighted to do so.*

b. Sometimes the attempt to settle can take on a life of its own. Don't become so seduced by the prospect of a settlement that the settlement becomes the sole objective, at all costs.

c. It is essential to maintain a cordial relationship with opposing counsel wherever possible. Sometimes, it is not possible. You did the best you could!!

d. The "four-way" meeting in which both clients and attorneys meet in the same room has limited utility and frequently a waste of time. In the author's experience, such a meeting, if necessary, is best saved for working out the final logistical details of a general settlement already reached.

e. The primary motivator for settlement is the minimization of adverse risk. Therefore, creation of risk to the other side should be a key objective of the discovery and pre-trial phase of the case.

5. What your settlement agreement should include:

---A specific parenting plan. Include dates and times. Don't ever leave open.

---All property, including account numbers and resonable correct balances.

---All debts should be allocated, and there should always be indemnifications.

---Obligation to pay taxes on what assets falls to who?

---If selling the house, list all acceptable deductions from gross proceeds. Be sure to include the refund of the mortgage escrow account upon satisfaction of the mortgage.

---Maintenance:

-Make sure the language complies with requirements of Code Sec. 71 so it will qualify as IRS alimony and thus be deductible to payor and included in the income of the payee. There must be a termination trigger.

-Make sure the maintenance is not frontloaded and that it passes the recapture test.

-If no maintenance, make sure there is a waiver.

---Read the release:

Is this what you want? Broad enough? Too broad?? Paramour released?

---Pensions/deferred compensation plans:

Is it a divisible plan? Not all deferred compensation plans can be divided. This is something to know BEFORE, not after, a settlement.

Is there a survivor option available? Does the agreement provide that the alternate payee is to be named the surviving spouse to the extent of the benefit awarded? The trend in the cases suggests that if available, the alternate payee should receive this as a matter of right. *See* Conaway v. Conaway, 899 S.W. 2d 574 (Mo. App. W.D. 1995); Wells v. Wells, 998 S.W. 2d 165 (Mo. App. W.D. 1999).

Consider this language, taken in part from Shulman and Kelley, Dividing Pensions in Divorce, (1986, John Wiley and Sons, Inc.):

> The Participant shall not take any actions, affirmative or otherwise, than can circumvent the terms and provisions of this agreement and the Qualified Domestic Relations Order, or that could diminish or extinguish the rights and entitlements of the Alternate Participant as set forth in this agreement or under the terms of the QDRO. Should the Participant take any action or inaction to the detriment of the Alternate Participant, the Participant shall be required to make sufficient payments directly to the Alternate Participant to the extent necessary to provide the Alternate Payee with her full entitlement hereunder.

--- Tax filing status: How is an anticipated refund or liability to be apportioned? If the parties are to file separately, are there any available tax deductions to be allocated as part of the settlement? What about dependency exemptions?

---Security:

Security for the payment of child support
Security for the payment of maintenance
Security for a property division which will occur over time, rather than immediately.

---Non-diminution clause

Consider including a clause which contains a representation that neither party has caused a diminution in the funds divided and valued in the agreement, from the most recent valuation date to the date of actual division or transfer. Further, include a bar against such withdrawals until division or transfer.

---As a matter of style, use forceful, mandatory language, i.e. "Husband shall forthwith….." rather than "Husband agrees to……" This limits the "performance ambiguities" inherent in the language of agreement.

---Boilerplate: read it!!! Does it apply to your case? Does it impose unnecessary burdens upon your client, or create obligations or other risks, that were never agreed upon?

B. TRIAL PREPARATION AND PRESENTATION

1. You've done all the discovery. Trial is 60 days away. How do you prepare for trial?

   a. Read every piece of paper in the file—notes, phone messages, and especially the pleadings. Do they say what you want? Is there an issue you've forgotten? Is there a witness you forgot to talk to?

   b. Obtain all the latest numbers from client and update financial statements.

   c. Get your subpoenas out.

d. Do you have an agreement with your opposing counsel that all bank records and financial statements go in evidence without a witness?

2. Presenting your case

Is it advantageous to be the petitioner? Yes.
What if I'm not the petitioner? Give an ***opening statement***.

How do you organize the paper?
1. Outline your order of proof
2. Select your exhibits
3. Trial notebook
4. Evidence notebooks/folders
5. Cross-exam folder—for your surprises
   ties to depo and int. answers
   Must use depos to obtain admissions on disputed issues- cite to page on your notes so when witness changes story, you can pound it home.
6. Proposed decree

7. Other thoughts:

Don't swap exhibits until your case commences.

Regarding Property: Must prove existence and value

Summary exhibits are very helpful and efficient.
(see appendices for examples of coversheets for summary exhibits)

Regarding Maintenance: Must prove expenses- award must be supported by substantial evidence. *Waite v. Waite*, 21 SW 3rd 38 (Mo. App. E.D. 2000); *Shelton v. Shelton*, 29 SW 3rd 400 (Mo. App. E.D. 2000).

Must prove ability to pay

Effect of *Hill v. Hill*, (Mo. banc 2001)

The cancelled checks should back up you summary exhibit --this is irrefutable proof of expenses.

Is there a medical issue or a health problem inhibiting employment? Get depo or witness.

Chalk talk—use depo to prepare.

Remember to move for admission of your exhibits. As you prepare, you must decide how each exhibit will get into evidence.

Remember that having the financial statements in the court file does not place them in evidence. *Jing Li Chen v. Xiao Chuan Li*, 986 S.W. 2d 927 (Mo. App. E.D. 1999).

Offers of proof preserve the record for appeal.

Think outside the box when assembling your exhibits.

8. Conclusion