

Settlement Conference Tips for Judges

by Morton Denlow

Most cases eventually settle. The guidance offered by the judge at the settlement conference can be a big factor in how satisfied the parties are with the outcome.

Judges and lawyers plow through countless settlement conferences each year. Often, the participants walk away feeling that they have wasted their time and the clients' money, without making progress. Why? Based on my 24 years in private practice and six years on the bench, I see four major reasons why settlement conferences fail:

- The court and counsel fail to treat a settlement conference as a serious and integral part of the litigation process;
- Lack of preparation on the part of counsel and their clients before participating in the settlement conference;
- The unwillingness of participants to use the negotiation process as a method of resolving their dispute; and
- Lack of full settlement authority by client representatives at the settlement conference.

Because over 95 percent of all civil cases terminate without a trial, it is imperative that bench and bar consider how to get the most from judicial settlement conferences. This article will discuss some of the steps I take before the settlement conference to make sure that everyone is ready to engage in a serious settlement discussion, and some of the things attorneys can do to make the negotiations worthwhile.

WHEN TO INITIATE THE TOPIC OF SETTLEMENT

I make it a practice to raise the topic of settlement at almost every court appearance. While I would prefer that counsel initiate settlement discussions on their own, this rarely happens. I find that I enable both sides to save face with their clients if I initiate the topic and allow the attorneys to report back to their

**This article appeared in the May 2002 issue of The Practical Litigator, Volume 13, Number 3. Reprinted with permission.*

clients that “the judge has asked us to consider settlement.” Some lawyers are reluctant to initiate settlement talks out of fear that either their clients or their opponents may perceive such a discussion as a sign of weakness. I never felt that way because I always wanted to know which direction I should devote my efforts. If the case was going to settle, I focused my efforts to insure that I had enough information from which to discuss settlement. On the other hand, if there was no interest in settlement, I could devote my efforts to prepare the case for trial.

The Right Attitude Is the Right Time

What is the proper time to set a settlement conference? There is no one magic moment in time. The key is that the parties must have a sincere interest in seeking a negotiated resolution and enough information from which to make an intelligent decision. As a result, I have been involved in successful settlement talks shortly after a case has been filed, before and after discovery has been completed, before and after rulings on dispositive motions, before and after final pretrial orders have been prepared, and before and after trials have been held. The key factor has been well-prepared parties committed to a negotiated resolution.

A Little Bit of Pressure

From a judicial perspective, settlement conferences are more effective when parties face a less desirable alternative. For example, setting a settlement conference with a looming discovery cut-off date, date for filing of dispositive motions, final pretrial order or firm trial date is more effective than setting a settlement conference without other dates looming. The presence of firm dates enables counsel to discuss with their clients the likely expense and litigation risks which each of those dates hold and imposes a reality check into the

settlement process. Parties will generally act more realistically and responsibly in settlement conferences when they have firm dates staring back at them.

WRITTEN SETTLEMENT DEMAND AND OFFER

Before the settlement conference, I require the plaintiff to deliver to the defendant a written itemization of damages and a settlement demand. I require the defendant to respond with a written settlement offer. This is an extremely important exercise because it requires the parties to become actively involved in the settlement process, it crystallizes positions, and it changes the psychology of the litigation, if only for a brief period, to a focus on settlement. At this point, parties may realize that they do not have enough information with which to itemize damages or to evaluate the case. If that is the case, the parties can focus their energies and discovery in gathering the necessary information to enable them to exchange written demands and offers.

Requiring the parties to exchange their demands and offers in writing adds a level of seriousness and precision which is often lacking when demands and offers are conveyed orally. Absent a writing, parties can disagree as to what the actual settlement proposals were. This can lead to confusion, distrust and delay in negotiations. A written proposal will generally be more inclusive of all proposed terms and can easily be transmitted to clients for their input. I require the parties to provide me with copies of their written demands and offers two days before the settlement conference.

REQUIRING THE PERSONAL APPEARANCE OF CLIENTS WITH FULL AUTHORITY

I insist that a client with full authority appear at the settlement conference. It is essential that clients with full authority be present for a number of reasons. First, it is their case and they should be given the opportunity to see and understand the alternatives they face and to hear presentations made by the other side. I find that many clients do not understand or appreciate the complexities of the litigation process. At a settlement conference they have the opportunity to observe, ask questions and participate in decisions that affect them. Second, what happens in a settlement conference can make a difference in a party's perception of a case. This cannot be adequately captured by a telephone report to a client who is available by phone. Third, if a client is unwilling to attend, the client is probably not interested in settling. I take the view that if it is important enough for the court to set aside several hours to engage in this process, it should be important enough to the client. Finally, client participation in this process gives them a better understanding and appreciation for our system of justice. Clients are grateful for the opportunity to discuss their problems with a judge in the more informal and relaxed atmosphere of a settlement conference. When they successfully work out a solution to a thorny problem, they walk away with a positive feeling towards the court and their counsel.

AVOIDING SURPRISES BY MEANS OF A STANDING ORDER (See Appendix A)

Each judge has their own way of conducting a settlement conference. Although many judges or courts have standing orders for final pretrial orders, very few have adopted such orders for

settlement conferences. I have found that the distribution of a standing order, which outlines my procedures and expectations of counsel and their clients, results in a savings of time for all concerned and more effective settlement conferences. A copy of my standing order setting settlement conference can be found in the Appendix.

Settlement plays an important role in the disposition of cases. Courts and lawyers can make the settlement conference more useful and effective if the necessary preparation takes place before the parties come to the table. A standing order that explains the court's procedures and requirements will facilitate the process and result in more efficient and satisfying settlements.

THE SEVEN STEPS

There are at least seven steps that a judge can take to make the settlement conference effective.

Step 1: The Standing Order

First, as discussed earlier, the court should use a written standing order that requires the parties to do their homework before the conference begins. Requiring the parties to exchange written settlement demands and offers before the conference and requiring the attendance of clients with full authority will go a long way towards insuring that meaningful discussions take place.

Step 2: Dedicated Time

Second, the court must set aside sufficient time to enable the settlement process to operate. I conduct my settlement conferences in a mediation format, and I have found that within one to two hours I can generally settle a case or determine that settlement is not currently

feasible. In a mediation format, you must allow sufficient time for the court to give an opening statement to explain the process, for the parties to make their opening statements, for discussion between all parties, for separate caucuses with the court, and for a final session to confirm the settlement terms. It takes time for parties and their counsel to digest the information they receive and to re-evaluate the options they face. Setting aside sufficient time will insure that the parties and counsel have an ample opportunity to settle the case. Resolution of disputes that have gone on for months and years require the concentrated attention of the court and the parties. As a result, I generally schedule two hours for each settlement conference.

Step 3: The Ground Rules

Third, the court should provide a clear opening statement that explains the process and the ground rules. The court should explain whether the process will be:

- *Facilitative*, in which the court will aid the parties in communicating with each other, but will not make a recommendation; or
- *Evaluative*, in which the court will make a settlement recommendation.

I generally explain to the parties that today they control their own destinies regarding settlement and commit them to the proposition that they have a serious desire to settle the case. I encourage the parties to be open and frank in their discussions by explaining that the proceedings are confidential and statements made will not be used in discovery and will be inadmissible at trial. I tell them that counsel and clients will each be given an opportunity to express their views. I encourage the parties to address their remarks to each other, not to the court, and I insist that they not interrupt each

other. I explain that following the initial joint session, I will conduct separate caucuses and will engage in shuttle diplomacy to see if a resolution can be achieved. I invite their questions regarding procedure. I want to be sure that the process surprises neither counsel nor the parties.

Step 4: Impartiality

Fourth, the court must maintain its impartiality and should not coerce settlements. The decision as to whether to settle belongs to the parties, with input from counsel. The court must maintain its neutrality throughout the process. I ask open-ended questions designed to stimulate discussion. I therefore use a facilitative style, and I only become evaluative if both sides request my input after an impasse is reached. In this way, the court does not become a hindrance to the settlement process by providing an early evaluation, which places one of the parties in a defensive posture. In the separate caucuses I ask the parties to discuss the view expressed by the other side and make certain the party understands the risks of further litigation. Even if the case is not settled, I want to be sure future steps in the litigation process do not later surprise the parties.

Step 5: Party Participation

Fifth, the court should allow the parties to do the talking. I have found that the most effective settlement conferences are those in which I talk the least. If the parties are speaking to one another, analyzing the various issues and discussing possible resolutions, they can often reach resolution without much input from me.

Step 6: Memorialize the Terms (See Appendix C)

Sixth, in the event an agreement is reached, I make sure all settlement terms are reviewed and confirmed with counsel and the parties in a

joint session at the conclusion of the conference.

I ask one of the attorneys to prepare and deliver to all parties a written confirmation of the settlement terms within one business day. I give the other side one business day thereafter to either confirm the terms or point out discrepancies. I request the parties to copy me in on these two letters. On occasion, I will place the settlement terms on the record. I do this when a party requests that it be done or where I feel that it will be helpful in assuring the existence of the agreement.

Step 7: Thanks!

Finally, in those cases in which settlement is not achieved, I thank the parties for their willingness to participate, and I reassure them that they will receive a fair trial. A jury trial is a constitutionally protected right. I make clear that trial remains an available and viable alternative.

STEPS COUNSEL CAN TAKE

There are at least six steps counsel can take to assist in securing a successful settlement conference.

Step 1: Mutual Understanding with the Client

First, counsel should be sure the client understands the process and has agreed upon a strategy. This should include a clear understanding of the objectives to be achieved, the negotiating strategy to be employed and the division of responsibilities between lawyer and client. Frequently lawyer and client appear without having previously discussed settlement strategy. This is a big mistake and can lead to poor settlement results. *Mediation Advocacy* by John W. Cooley is a helpful book published by

NITA that provides an explanation of how counsel can improve their settlement preparation and skills.

Step 2: Opening Statement

Second, counsel should deliver an opening statement which is clear, concise, and persuasive regarding the strengths of her client's case. She should attempt to make the other side understand the risks he faces if he proceeds. I view settlement as a means of risk avoidance. I believe counsel's role is to minimize her client's risk while maximizing risk for the other side. A strong opening statement may be the only opportunity counsel has to speak directly to the other side's client and make him aware of the risks associated with his position. Counsel should avoid personal attacks and express a serious desire to negotiate an agreement satisfactory to all parties. An attorney who demonstrates competence and professionalism enhances her settlement prospects.

Step 3: Know the Judge

Third, counsel should understand the judge's style and whether the session is facilitative or evaluative. If the settlement conference is facilitative then emphasis must be placed on communicating with the other side. If the session is designed to be evaluative, a more legally reasoned presentation directed towards the judge is in order.

Step 4: Negotiate

Fourth, counsel should understand that she may be negotiating through the judge and develop an effective strategy to accomplish her client's objectives. I generally do not ask the parties for a bottom line in the separate caucuses because as long as the client is present everything is negotiable. However, the parties must understand that the process is a negotiation and

the judge is a conduit for counteroffers and counter-demands. Counsel should not be afraid to ask to meet separately with the client outside the court's presence in formulating their next proposal.

Step 5: Consider the Alternatives

Fifth, counsel should consider whether there are any creative methods of settling the dispute. One of the major advantages of settlement over trial is the ability to structure a resolution that is not limited by the relief that can be granted at trial. Structured settlements, continued business relationships, and resolution of other conflicts between the parties can all be rolled into a settlement.

Step 6: Confirm the Agreement

Sixth, counsel should insure that any agreements reached are confirmed at the conclusion in a face to face meeting and

followed up by a confirming letter or a statement on the record.

CONCLUSION

The court and counsel should devote the necessary energy and time to make settlement conferences productive. An effective settlement conference not only provides clients and counsel with an efficient means to solve problems but also creates a positive impression of our judicial system. The success or failure of a settlement conference will depend upon the preparation that takes place before the parties come together and the time and attention counsel and the court pay to the process. Judges and lawyers acting as problem solvers promote respect and confidence in our profession.



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STANDING ORDER SETTING SETTLEMENT CONFERENCE

The Court believes the parties should fully explore and consider settlement at the earliest opportunity. Early consideration of settlement can prevent unnecessary litigation. This allows the parties to avoid the substantial cost, expenditure of time, and stress that are typically a part of the litigation process. Even for those cases that cannot be resolved through settlement, early consideration of settlement can allow the parties to better understand the factual and legal nature of their dispute and streamline the issues to be litigated.

Consideration of settlement is a serious matter that requires thorough preparation prior to the settlement conference. Set forth below are the procedures the Court will require the parties to follow and the procedures the Court typically will employ in conducting the conference.

A. FORMAT

1. PRESETTLEMENT CONFERENCE EXCHANGE OF DEMAND AND OFFER. A settlement conference is more likely to be productive if, before the conference, the parties exchange written settlement proposals. Accordingly, at least twenty-one (21) days

prior to the settlement conference, plaintiff's counsel shall submit a written itemization of damages and settlement demand to defendant's counsel with a brief explanation of why such a settlement is appropriate. No later than seven (7) days prior to the settlement conference, defendant's counsel shall submit a written offer to plaintiff's counsel with a brief explanation of why such a settlement is appropriate. On occasion, this process will lead directly to a settlement. If settlement is not achieved, Plaintiff's counsel shall deliver or fax copies of all letters to Judge Denlow's chambers no later than five (5) business days before the conference. Do not file copies of these letters on the court docket.

2. ATTENDANCE OF PARTIES REQUIRED. **Parties with full and complete settlement authority are required to personally attend the conference.** An insured party shall appear by a representative of the insurer who is authorized to negotiate, and who has *authority to settle the matter up to the limits of the opposing parties' existing settlement demand*. An uninsured corporate party shall appear by a representative authorized to negotiate, and who has *authority to settle the matter up to the amount of the opposing parties' existing settlement demand or offer*. Having a client with authority available by telephone is *not* an acceptable alternative, except under the most extenuating circumstances.* Because the Court generally sets aside at least two hours for each conference, it is impossible for a party who is not present to appreciate the process and the reasons which may justify a change in one's perspective towards settlement.

3. MEDIATION FORMAT. The Court will generally use a mediation format: that is, a joint session with opening presentations by the Court and each side followed by private caucusing by the Court with each side. The Court expects both the lawyers and the party representatives to be fully prepared to participate. The Court encourages all parties to keep an open mind in order to re-assess their previous positions and to discover creative means for resolving the dispute.

4. STATEMENTS INADMISSIBLE. The Court expects the parties to address each other with courtesy and respect. Parties are encouraged to be frank and open in their discussions. As a result, statements made by any party during the settlement conference are not to be used in discovery and will not be admissible at trial.

B. ISSUES TO BE DISCUSSED

Parties should be prepared to discuss the following at the settlement conference:

*The purchase of an airplane ticket is not an extenuating circumstance.

1. What are your goals in the litigation and what problems would you like to address in the settlement conference? What do you understand are the opposing side's goals?
2. What issues (in and outside of this lawsuit) need to be resolved? What are the strengths and weaknesses of your case?
3. Do you understand the opposing side's view of the case? What is wrong with their perception? What is right with their perception?
4. What are the points of agreement and disagreement between the parties? Factual? Legal?
5. What are the impediments to settlement? Financial? Emotional? Legal?
6. Does settlement or further litigation better enable you to accomplish your goals?
7. Are there possibilities for a creative resolution of the dispute?
8. Do you have adequate information to discuss settlement? If not, how will you obtain sufficient information to make a meaningful settlement discussion possible?
9. Are there outstanding lien holders or third parties who should be invited to participate in the settlement conference?

C. INVOLVEMENT OF CLIENTS

Parties and their lead counsel are ORDERED TO APPEAR in Judge Denlow's courtroom on the date and time set for the settlement conference. For many clients, this will be the first time they will participate in a court-supervised settlement conference. Therefore, prior to the settlement conference, counsel shall provide a copy of this Standing Order to the client and shall discuss the points contained herein with the client.

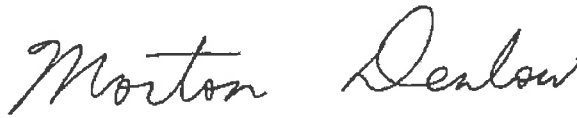
D. PREPARE FOR SUCCESS

In anticipation of a settlement, the parties should review and be prepared to complete Judge Denlow's Settlement Checklist/Term Sheet at the conclusion of the settlement conference. See Judge Denlow's homepage on the court's website.

E. VISIT THE COURT'S WEBSITE

For additional information concerning Judge Denlow's practices and procedures, visit the Court's homepage on the internet at: <http://www.ilnd.uscourts.gov>. There you will find published articles by Judge Denlow to assist you in preparing for the settlement conference.

ENTER:

A handwritten signature in cursive script that reads "Morton Denlow". The signature is written in dark ink and is positioned above a horizontal line.

Dated: December 2, 2009

MORTON DENLOW
United States Magistrate Judge