From the Bench

THE DOS AND DON'TS OF SETTLEMENT CONFERENCES

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More than 25 years ago in these pages, the late Roger J. Miner of the Second Circuit contributed an article entitled, "The Don'ts of Oral Argument." 14 LITIG. (Summer 1988), at 3. It was and remains an enormously useful article for litigators preparing for appellate arguments (and, in many respects, for district court arguments as well). Given the proliferation of alternative dispute resolution in the intervening period as well as the high percentage of cases that are resolved prior to trial, it is vital to consider the settlement conference as just as integral to the litigation as any other part of the process. Accordingly, it seems appropriate to present an article similar to Judge Miner's, designed to assist the litigator who is preparing for a court-directed settlement conference.

I have conducted hundreds of settlement conferences as a magistrate judge and observed many things lawyers do to enhance the settlement process—and just as many done to impede it. Obviously, judges have their own preferences in every aspect of litigation, and settlement conferences are no exception. The list below of the top 10 dos and don'ts, in no particular order of significance, thus reflects my own particular practices and procedures. It is, of course, always advisable to obtain information in advance about the preferences of the particular judge who will be presiding over your settlement conference by reviewing the judge's individual practice rules and, if possible, talking to other lawyers who have had settlement conferences with that judge. With that caveat, here goes:

Think about the case from the other side's perspective. My settlement rules include the well-known statement Atticus Finch made in *To Kill A Mockingbird*: "You never really understand a person until you consider things from his point of view—until you climb into his skin and walk around in it." Take that to heart. To the extent you and your client are able to be empathetic, both before and during the conference, you will exponentially increase the chances of settlement.

Don't wing it. Prepare for a settlement conference like you would a full-blown evidentiary hearing. For many parties, the settlement conference may be their only "day in court." While no witnesses will attend the conference, you should be well versed in the record, familiar with what a possible summary judgment motion will involve (assuming the conference occurs beforehand), and knowledgeable about the evidence that will be offered at trial. To the extent the judge engages in an evaluative, rather than merely a facilitative, process, you want to be ready to make the best case you can for your client's position.

Bring documents and key evidence. Leaving a crucial document or other piece of evidence in your office has a detrimental effect on the settlement process and makes the judge's job mediating the dispute that much harder. Likewise, if a defendant is asserting an inability-to-pay defense or will require a payment schedule, it is essential that counsel bring financial records to justify that position—though it's best if such information is provided to the other side *before* the conference. In addition, don't wait until the last minute to mention court decisions you think have important ramifications for your client's position. The better practice is to identify such cases in the pre-conference submissions or, at a minimum, make copies available to the court and opposing counsel at the conference.

Be as candid as possible in any pre-settlement submissions to the court. Mindful that counsel will engage in a certain amount of advocacy (some would say puffery) no matter what, many judges still require the parties to submit ex parte settlement letters that include a meaningful evaluation of the settlement value of the case and the rationale for it. Lawyers can't help themselves and usually submit what reads like a brief. Giving an honest assessment of the strengths and weaknesses of the case and providing a realistic assessment of each side's litigation

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risks, were the case to be resolved on the merits, aids the settlement judge and helps expedite the process enormously. Lawyers are reluctant to put such assessments in writing, but these submissions, assuming they are ex parte, will be treated as confidential and subject to Rule 408 of the Federal Rules of Evidence.

Be prepared to make an opening statement. Many judges require lawyers to make a brief presentation in the presence of the other side at the outset of the conference before breaking into private session. Be ready to summarize not merely the parties' positions ("my client wants one million dollars") but their interests as well ("my client wants vindication for her unjust termination and back and front pay"). Don't treat the opening statement, however, as if it were the equivalent of a jury argument. While there is no formula for the most effective opening, counsel should consider addressing the most significant issues of fact and law, the current posture of the negotiations between the parties, and any other matters that may help to advance settlement. Gear the presentation to the opposing party, not the court. And don't read an opening statement under any circumstances!

Make a demand and engage in real negotiations before coming to the courthouse. Cases are much more likely to settle if the lawyers have exchanged offers before the conference. When parties have discussed settlement without judicial intervention, the settlement conference moves more smoothly and differences begin to narrow. Aim for less negotiation on "the local train" and more on "the express train."

Don't bring someone without ultimate authority to settle. Because it is essential the decision-makers hear their adversaries' presentations and be available to answer questions from the court, the person who attends the settlement conference should be the one with responsibility for determining the amount of any final settlement—not someone restricted by a higher-up. Thus, for corporate parties, labor unions, and insurance carriers, bring the person ultimately responsible for giving settlement authority, not someone who would need further permission from someone else. Granted, this is more complicated when the party is a government agency, given rules on the authorization of taxpayer-funded settlements. But even government lawyers should make available the highest-ranking decision makers they can. A related point is that it is preferable for the authorized representative to be someone whose conduct is not at issue in the lawsuit. For example, in an employment discrimination suit, it can impede a settlement if the authorized representative is the alleged discriminating official.

Don't make the court manage your client's expectations. Take ownership of risk assessment at the earliest juncture and reassess as the litigation proceeds. Counsel must focus on the best-case and worst-case scenarios and everything in between, and have candid discussions with their clients before the settlement conference about the odds that the fact finder will or won't come out their way. These are not easy conversations to have, but they will likely be reinforced by the settlement judge in some fashion, and that injection of realism will be much more meaningful if counsel have prepared their clients for it. Equally important in managing client expectations is to make sure your demand is anchored to the facts and the law. You will test the court's patience, not to mention your adversary's, if you don't have a rational basis for your demand, informed by such things as likelihood of success and litigation costs.

Anticipate all of the material terms of the settlement before the conference. That way, if you resolve the case, you will be able to put the terms on the record and create a binding and enforceable agreement, even if you never execute a written instrument memorializing the terms. You can spend time drafting language that will be important for any final settlement when the judge is meeting with the other side.

Don't just come with a bottom line—be willing to be flexible and creative. One of the most successful mediators of labor disputes of the 20th century, Theodore W. Kheel, once said:

> The essence of mediation is getting information, and the dirtiest question you can ask in bargaining is "What will you settle for?" If you ask that question, you ought to resign, but that's the question you must have an answer to. You get it by asking every question except that. What's left over is the answer.

While litigants often arrive at a settlement conference with a so-called bottom line, usually egged on by their counsel, it is much better to come with an open mind ready to go beyond the prearranged bottom line to what they are truly willing to accept. Many settlement judges will, like Kheel, not ask parties for their bottom line, but instead simply await some signal that the party does not want to negotiate any further. That's when the work really begins and when cases often get settled.

Settling a lawsuit is a challenging enterprise, but it offers litigants certainty, control of the outcome, and closure. In the end, most parties, whether plaintiffs or defendants, want those things more than anything else. Litigators should therefore, as Lincoln famously said,

> [d]iscourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the *nominal* winner is often a *real* loser—in fees, and expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Abraham Lincoln, *Notes on the Practice of Law*, *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 245–46 (Library of America 1989) (emphasis in original). ■