From the Bench

THE FIVE DON'TS OF SETTLEMENT CONFERENCES

HON. SUNIL R. HARJANI

The author is a U.S. magistrate judge in the Northern District of Illinois and an associate editor of LITIGATION.

As part of my judicial duties, I conduct a large number of settlement conferences every year. Time and again, I see lawyers employ the same strategies. I have come to believe that some of these techniques are counterproductive. Here are five thoughts that may help you reconsider your own tactics and challenge some of your basic assumptions about effective settlement negotiations. As I always say at the beginning of a settlement conference, keep an open mind.

Don't come to the settlement conference with a bottom line. It is a rare day when a plaintiff's bottom-line settlement number matches the defendant's bottom-line number. If that were the case, a mediator's job would be easy. The bottom-line numbers rarely match because they are calculated within a framework that is most favorable to your client. Try as you might, as an advocate, it is nearly impossible to achieve 100 percent neutrality in advising your client on the potential success rate of the case. Your judge or mediator is more capable of making that assessment than you are because he or she is truly the neutral party in the process.

The bottom-line numbers also don't match because they are guided by your client's desires—whether it is to receive a large payment as a plaintiff or to settle the case at the cheapest possible number as the defendant. Both of these goals result in bottom-line numbers that are often unachievable. Yet, despite this, I have settled hundreds of cases where the initial bottom-line numbers have not matched. How is that possible? Because I spend time at the conference with the parties discussing the facts, the law, the possible damages, their needs and interests, the benefits of settlement, and monetizing those elements into a reasonable settlement range for the case. Part of that time usually involves a lengthy discussion with the lawyers and clients suggesting that they need to rethink their approach to the case and their calculation of a settlement value. At the end of the conference, I regularly hear lawyers lament to me about how they have settled at a number higher or lower than their bottom line. My response is usually, "I am not surprised."

I recognize that you have likely discussed with your client a settlement range that you hope to achieve at the conference. A bottom line, however, is a hard line in the sand and one that substantially increases the difficulty of reaching a settlement. How about saving some time and disappointment by avoiding the bottom-line discussion with your client prior to the settlement conference? I submit that it is sufficient to tell your client the following: "We made an opening offer to settle the case in our settlement letter. Let's hear what the judge has to say, let's be flexible, and let's see how the negotiations progress." You will save an enormous amount of time, avoid having your client feeling bamboozled by the conference, and increase the chances of achieving a settlement at the conference. In my experience, lawyers and clients who come to the conference with flexibility, with an open mind, and without a firm bottom line usually achieve a settlement of the case that day.

Don't make your judge simply shuttle numbers for you. Sometimes, the lawyers at a settlement conference only want me to shuttle numbers back and forth. I can see their notes scribbled on yellow legal pads listing their next few moves. Their body language screams that they simply want me to convey their pre-chosen and next monetary offer. A few lawyers don't even want to talk much and simply say, "Judge, we will move to $50,000," and then wait for me to wander to the other room.

That's not mediation. Trust me, the training involved to become an effective mediator is much more intense than learning to be a medieval courier delivering messages between warring sides. Lawyers are more than capable of exchanging numbers on their own; they do not need the court's involvement for that process.

Mediation is about identifying the parties' needs and interests, providing the clients their day in court, evaluating the facts and law from a more balanced perspective, and recognizing the benefits that settlement provides over a winner-take-all litigation outcome. It requires conversation to foster an open mind-set and a willingness to reevaluate your preconference thoughts. Showing up at a conference planning simply to shuttle numbers, without the right mind-set, will surely annoy your judge. If you want to shuttle numbers and are fully confident that you got those numbers exactly right, I suggest you negotiate with the other side yourself and don't request a judicial settlement conference.

Don't move your offers up or down in equal amounts as your opponent. I often hear, "Judge, since they went down by $10,000, we will move up by $10,000." Why? Lawyers believe that equal moves (up or down by the same margin as the opponent) are a fair and proportional move. However, if you have started at an unreasonably high or low number, then an equal and parallel increase or decrease in your offer does not mean much of anything. In addition, an equal-increment move often demonstrates to your judge that you have not listened to anything the judge has said. This is because the judge has likely tried to help you evaluate the case and given you a sense of a more reasonable settlement position than your preconference notions.

Often I see parties starting at unreasonably high or low positions. Without criticizing their opening offers, I politely work with the parties to demonstrate that their opening offers are out of range. Then, and most importantly, I focus on evaluating objective criteria, such as reviewing potential jury verdicts in similar cases, case law where summary judgment has been granted or denied on a relevant legal issue, and settlement values for analogous cases that have settled in our district. Objective criteria help bring the opening unreasonable position to a more palatable and sensible place. Thus, simply moving in lockstep with your opponent demonstrates that you have chosen to ignore that advice and only engage in positional bargaining and number shuttling. It devalues the process and likely decreases the chances of achieving a settlement.

Old habits die hard, but it's time to rethink some settlement strategies.

Don't try to turn the judge into your advocate. I sometimes feel that lawyers want to "turn" me, much as Nicholas Brody (a fictional American prisoner of war) was allegedly "turned" in season one of *Homeland*. That is, lawyers want to convince me that their position is the right one and that my role should be to hammer the opponents, yell at them if necessary, and make them come to their senses.

Why would I do that? I am a judge charged with being a neutral and impartial mediator. Judges are certainly happy to provide thoughts about the risks involved in further litigation and the challenges that parties face if they don't settle. Judges are also willing to hear about strong evidence in your favor and will acknowledge good facts when presented to them. But trying to turn the judge into your advocate is both presumptuous and disrespectful.

Presumptuous because it assumes that you are completely correct in your view of the case and your assessment of its settlement value; disrespectful because it presumes the judge is just a potted plant simply waiting to be swayed to your side with no evaluative skills of his or her own. Moreover, a judge hammering the other side borders on coercion, which is the exact opposite of what your judge is trying to achieve; namely, an informed and voluntary resolution. Remember that settlement advocacy is a distinct skill, different from litigation or trial advocacy. Find that gear in a settlement conference other than the one you use in court, demonstrate a recognition of both the strengths and weaknesses of your case, and don't try to turn the judge to your side. It just doesn't work.

Don't ignore your judge's advice. When your judge tells you a number that will get the case done, listen. The judge has gathered information from both parties in confidence; the judge has a feel for what each side is thinking and what it will take to settle the case. The judge has also flushed out the clients' needs and interests and knows how far he or she can push the clients at the finish line. Your judge has made relationships with the lawyers and clients over the course of the conference that foster a sense of trust.

There are times when I have suggested to counsel that his client should offer $60,000 to close the deal, and after conferring privately, counsel responds that his client's best and final offer is $55,000. Really? It is certainly a party's choice to respond in that way, but it does leave a bad taste when a case doesn't settle under these circumstances after four hours of conferencing, and with the knowledge that everyone will be swimming in discovery for the next two years.

Judges don't suggest numbers in a vacuum, and they don't seek to favor any particular side with their recommendations. Rather, they blend an evaluation of the facts and law with the art of negotiating and the skills of mediation to arrive at their recommendation. Trust your judge, and your case will more likely settle.

Old habits die hard, but it's time to rethink some settlement strategies. Consider these concepts before your next settlement conference, and you will better assist the judge in helping you achieve a successful resolution. ■