From the Bench

WRITING EFFECTIVE SETTLEMENT CONFERENCE LETTERS

HON. SUNIL R. HARJANI

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

You and your opposing counsel are headed to a settlement conference with a judge. The judge may request that letters first be exchanged with a settlement demand and a settlement offer. This is an important part of the process. As a federal magistrate judge, I read hundreds of settlement letters every year. Some are excellent, others not so much. Here are my suggestions:

Write for the judge. Often, settlement demand and response letters are addressed to the opposing party. Part of what lawyers seek to do from the start is convince the other side that they have a strong case. Remember, though, that your letter might be the judge's first exposure to the case.

When cases are referred to me for a settlement conference, I often have had no involvement even though the litigation may have been proceeding for several years. There are times, while reading a settlement letter, that I feel as if I just walked into the middle of a conversation. Counsel often jump into the weeds of the case without giving any background information.

As a result, I often find myself asking basic questions about the overall factual picture. In business cases: What do the companies do? What do they produce or what services do they provide? Where are they located? How large are they? In employment discrimination cases: What was the plaintiff's job? How long did the plaintiff work at the defendant company? With what compensation? Is the employee working now?

The same is true of the legal claims and defenses. Sometimes they are not discussed until deep into the letter. A short paragraph near the beginning helps the judge understand the nature of the case. For example: "My client, a McDowell's restaurant cashier for two years, was terminated in 2019 because she is African American. She brings this claim against the franchisor under Title VII." Reading that statement, the judge immediately knows what the case is about.

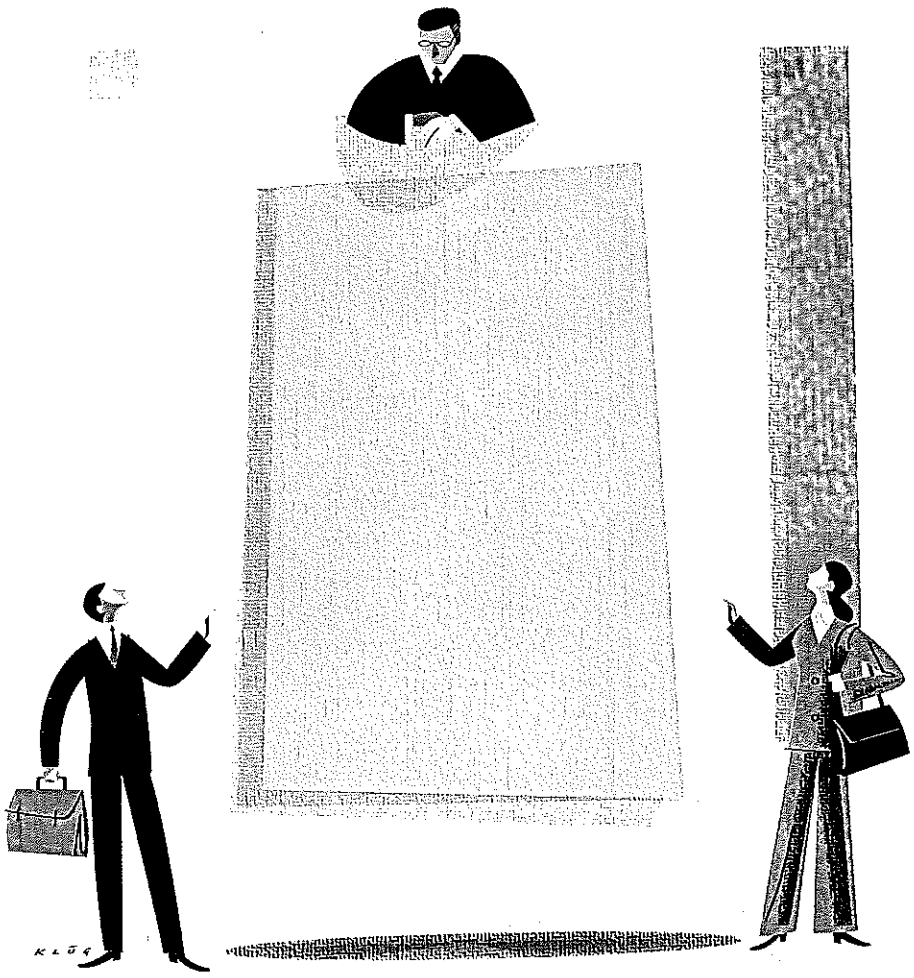
Explain the source of your evidence. Settlement letters often tout the strength of that party's case but rarely explain how the party will prove its case at trial. They routinely narrate a set of facts without attribution to the source of the evidence. Questions naturally come to mind: Who will testify to that great fact? What exhibits help prove it? Is there any corroborating evidence?

When that information is absent, it is assumed that the only evidence will be the client's testimony, even if discovery has actually uncovered key supporting witnesses and documents. When the judge discusses the strengths and weaknesses of the case, part of that analysis includes an assessment of the quantity and quality of the evidence that will be presented at trial. If you don't explain the sources of your evidence, the judge cannot give an informed and credible evaluation.

Identify and analyze the elements of the claims or defenses. This sounds simple enough. Yet, it is amazing how often a discussion of the law that applies and the elements of the claims and the defenses are missing. Judges handle hundreds of cases every year, in all areas of the law. Given that volume, it is always useful to be reminded of the applicable legal framework.

Lay out some relevant case law from the court of appeals. Then briefly explain how the facts you've uncovered meet those elements. You'll have to do that in your closing argument. You might as well start now. After all, you may never get to trial, and this will help the judge understand how your case-in-chief will play out.

Don't complain. Lawyers often take up valuable pages doing one thing that does not move the settlement needle forward. They complain. They criticize discovery behavior. They threaten Rule 11 and Rule 37 motions. They call the other side's case meritless, lament how disappointed they are with the litigation conduct, grumble about



prior bad-faith negotiations. They protest that their clients have been unnecessarily forced to spend money on the litigation.

I generally skip over those parts. They add no value. I focus instead on the discussions of the facts and the law, which help me evaluate the strength and weakness of the case. I also look for the parties' needs and interests—moving past the litigation, looking for a reinstatement of employment, conserving resources, reducing litigation expenses, or resolving a dispute so the parties can continue their business relationship.

I keep an eye out for language that suggests a party's willingness to compromise. I look for a reasonable settlement demand or offer that properly and credibly factors in the risks of continuing litigation and that demonstrates the optimism and good faith needed to reach a negotiated resolution. Its absence suggests that the case is not ripe for a productive settlement conference, which might not be the signal that you intend to send.

Avoid inflated demands or deflated offers. Lawyers often believe that to get the best deal possible, they must start really high or very low, and that doing so will somehow result in a more advantageous settlement. I regularly see $500,000 settlement demands and $2,000 offers. Widely divergent starting figures are really unhelpful and often result in the judge spending extensive time talking the parties out of their ridiculous initial numbers. I sometimes have required revised demands and offers. If parties adhere to unreasonable positions, I occasionally cancel the settlement conference.

Grossly inflated or deflated settlement numbers demonstrate that counsel have not properly evaluated the best and worst outcomes in the case, have not properly researched the range of possible damages and litigation costs that could be incurred, and have not deduced a realistic and reasonable range for compromise. Most of all, they undermine credibility and indicate that litigants may not be ready for a settlement conference.

Reasonable settlement proposals usually result in reasonable responses. If they don't, the judge will see it and call it out. So skip the initial numbers game, push back against your client's unreasonable opening request, and begin at a reasonable and defendable figure. You will enhance your credibility and facilitate settlement.

Address your opponent's evidence. Letters that ignore the other side's evidence are not particularly effective. Most judges were trial lawyers. We understand that there are two sides to the story. We try to visualize how a trial will play out.

When you discuss only those facts that are favorable to your client, without explaining how you will deal with opposing or problematic evidence, you show a lack of thoughtfulness and intellectual honesty. Acknowledging bad facts does not show weakness. Rather, it shows good lawyering, particularly when you reveal how you will deal with the negative information at trial.

No case is perfect. Frank discussion of shortcomings goes a long way. Don't save those moments for private caucuses. Noting unfavorable evidence and explaining how you plan to counter it helps the judge and the other party better assess the risks of proceeding to trial.

Don't confuse litigation advocacy with settlement advocacy. Good litigators have different gears. Settlement advocacy is a distinct art, different from trial advocacy. In settlement advocacy, take it down a few notches. Advocate your position in a more balanced and candid manner. Strike a reasonable tone. Demonstrate a commitment to working out a resolution.

Illustration by Dave Klug

Rhetoric about your overwhelming chances of success at summary judgment, threats about how you intend to crush your opponent at trial, or statements disparaging the opposing case mean nothing. They just hurt your own position. They do not make you look strong, and they do not strengthen your client's negotiating position.

Rather, they simply cause the other side to put up its guard. When you write like you're looking for total victory, you're engaging in litigation advocacy, not settlement. If you are unable to muster the courage to be reasonable and express a willingness to compromise, you're not ready to settle.

Be candid with the settlement judge. There are times where you need to tee up certain issues for the judge conducting the settlement conference. Note at the end of your letter that you need to speak to the judge privately. Confidential telephone conversations with each side's lawyers before the settlement conference often provide the judge with the intelligence needed to formulate a strategy to pursue settlement.

Privately, lawyers have told me that they have client management issues or that certain arguments will work well with their client while others will not. Lawyers like to brief me on the emotions their clients will express at the conference, or let me know that their client may have an unreasonable bottom line. Once a lawyer told me privately that he was instructed not to leave the conference without a settlement no matter how long it took and regardless where the numbers landed. He of course was still going to negotiate for the best deal possible, but he was instructed by the client to settle the case that day.

Those bits of information help the judge tailor a strategy. Settlement conferences are not one-size-fits-all. They are more than just shuttle diplomacy and exchanging figures. Judges have many settlement strategies and mediation tools. We study the literature in this area. We read about different techniques to break impasse. And we talk with each other about our experiences. Understanding your client's mind-set helps the judge decide which strategies to use, when.

Don't worry. We'll keep your secrets. We know that our credibility in maintaining confidences is vital to our effectiveness as well as to our reputations. If you need to inform the judge of a key piece of information privately, make the request in your settlement letter.

Don't try to use the judge to pressure your opponent. Lawyers often want me to hammer the other side. Most judges can sniff out that tactic pretty easily. It usually consists of a very aggressive statement of facts, a failure to acknowledge the apparent risks, a claim that complete victory is imminent, an outrageously high demand or lowball offer, and a statement that the settlement conference will be useful in helping the opposing side's client see the light of day.

That is basically a request for me to pound the opposing party. I will not do so. Cases are rarely black-and-white or risk-free. The costs of litigation and the uncertainties associated with a jury verdict are always present. Even with a strong case, the time needed for the litigation, the distraction, and emotional burdens do not disappear. Those attributes create settlement value that can be monetized.

I am happy to evaluate the risks involved, help narrow the settlement range, and pursue resolution. But mediation is not about me picking a side and then convincing the other party to succumb. Opposing clients have different needs and interests. Flushing out those needs and interests to find a solution that works for everyone is what mediation is all about. If you truly believe that victory is imminent, and you are unwilling to factor in other non-monetary needs and interests, don't ask for a settlement conference.

Be courteous. Make an offer to settle, not a demand. Thank your opposing counsel for their settlement proposal. Don't reject a settlement opportunity; decline it kindly, and with appreciation.

Reserve your insulting comments. Avoid accusing opposing counsel of unprofessional conduct. State that you look forward to working cooperatively toward a resolution. No matter how contentious the litigation, this is the time to sidestep all that and try to get the matter resolved.

Striking a settlement is hard, if not impossible, when you adopt an indignant tone. Would you want to strike a deal with a nasty car salesperson?

The tone of a good letter conveys optimism, room to move, and a willingness to compromise.

Judges understand that clients want litigation warriors. It's hard to get those clients to put the brakes on the battle mentality. But you are called "counselor" for a reason. Having those difficult conversations with your client is part of your job.

An impressive settlement letter allows the judge to understand what the case is about, visualize how it will play out at trial, identify the pitfalls, note the needs and interests of the clients, and comprehend the itemized and credibly explained settlement positions. The tone of a good letter conveys optimism, room to move, and a willingness to compromise.

That's what your settlement conference judge needs and wants. If you don't like taking this approach, then ask yourself, "Are you really ready to settle?" ■