



United States District Court
NORTHERN DISTRICT OF ILLINOIS

**REPRESENTING a PRISONER for the LIMITED PURPOSE of
SETTLEMENT:**

A Guide for Pro Se Litigants' Settlement Assistance Program Counsel

Prepared for June 29, 2017 CLE Training by:



Congratulations! You have received electronic notice of your *limited* appointment as settlement counsel for a confinee. If you are asking, “What do I do next?” this Guide will shepherd you through the process step by step. Please know that if you encounter any problems along the way, contact SAP at 312-202-3662 or cgordon@clccrul.org.

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I. What is Limited Representation?

You have agreed to provide limited representation, i.e., perform a discreet segment of the full panoply of litigation tasks from drafting a complaint to trial.

- A. Your duties are to: 1) read the pleadings and other essential court documents; 2) confer with the client; 3) evaluate the client's case and advise him or her as to its strengths and weaknesses; 4) discuss the damages permitted by law and the consequences of settling; 5) prepare a letter demanding specific relief and explaining your rationale; 6) negotiate with opposing counsel; and 7) advocate for your client's interests at the settlement conference with the judge and the Defendant's representative. You will also finalize the settlement documents and see that your client is paid if you succeed at settling the case. If the case does not settle, you may move the court to be relieved of your appointment.
- B. Your duties do *not* include: motion practice, full discovery or preparing the case or your client for trial. Try and avoid mission creep; don't let a wily client draw you into "helping" in other areas.

II. Getting Started:

- A. **Limited Scope Engagement Agreement.** Most likely your firm requires a retainer agreement before you can even start to work on a matter. You should modify your standard retainer agreement to reflect the limited nature of your duties, with a caveat that you may decide to do more, which would require a new agreement. Give your client the engagement letter to sign before your first consultation. **Attachment 1: Sample Limited Scope Engagement Letter/Retainer Agreement.**
- B. **Limited Appearance.** Even though the judge has appointed you to this limited scope representation, after you have received your client's signed retainer, you must electronically file a Limited Appearance for Settlement Assistance Program Counsel found at: <http://www.ilnd.uscourts.gov/home/assets/documents/SAP%20Limited%20Appearance%20Form.pdf>. File the Limited Appearance just as you would file any other appearance. **Attachment 2: Limited Appearance for Settlement Assistance Program Counsel form**

III. The Pro Se Complaint

- A. **What to Expect:** You are appointed after your client has already drafted (and perhaps amended) and filed the complaint. You can find the case docket on the PACER system using the case number. The pro se complaint is usually handwritten on a simple form that the district court makes available to the prisons and county jails. Although the pro se litigant did not have a licensed attorney to help prepare the complaint, it often contains citations to statutes and case law, and cogent statements of the causes of action. These may be the handiwork of a person familiarly known as a "jailhouse lawyer," i.e., a prisoner with some judicial system savvy who often assists other detainees or inmates to write briefs or complaints to redress wrongs related to their confinement.
- B. **Special Considerations:** The good news is that the pre-existing pleading means you don't have to draft a complaint from scratch, and you have no *duty* to amend or further amend the one on file. The bad news is you have to live with the complaint *as is*, so you have no opportunity to

conform the complaint to facts or theories you may uncover or develop in consultation with your client or in document review.

IV. Initial Appearance in Court

- A. **Appearing in Court:** Usually the judge will set a “status hearing” after you have filed your limited appearance. This will be your opportunity to meet the judge who will be conducting the settlement conference. It may also be the first time you see your client or hear your client’s voice on the telephone. This is *not* the settlement conference, but you should still prepare!
- B. **Preparing for the Status Hearing:** Before the status hearing, it is wise to contact the defendant’s counsel. Introduce yourself, explain your role, and ask that counsel make no further overtures to your client, but to communicate only through you. Although most discovery is stayed after the case gets referred for settlement, you should still be able to obtain the basic documents and information necessary for you to begin understanding and evaluating your case. Politely ask defense counsel for essential documents such as the client’s institutional file, his medical records if appropriate, incident or interview videotapes, the client’s deposition transcript and like materials.
- C. **Determining how much time you need:** Based on the pleadings and other materials you obtain or anticipate obtaining, form a general idea of how long you think it will take you to prepare for the settlement conference. For instance, how complex is the main issue? How much research will you need to do? How much material do you have to review? How long will your demand letter take? How much client contact will you need? Setting the settlement conference six to eight weeks after the status is usually reasonable, but you may want more time. The Order setting the settlement conference date will also dictate when the letters are to be exchanged between counsel, and who is responsible for providing courtesy copies to the judge.
- D. **At the Status Hearing:** Approach the podium when your client’s name and case number case are called, and announce your name and your party. Your client may “appear” at the status hearing by telephone from his place of confinement. The connection and the client’s availability are arranged by the government defendant’s counsel. Don’t ask me how they do it; just know that it’s their responsibility, not yours.
- E. **Picking a Date for the Settlement Conference:** The judge will offer counsel a range of dates, and you and the defendant’s counsel will agree with the judge on a date certain. Most judges are terribly busy and do not permit the parties to change the settlement conference date after it has been set. You can make a judge very happy by having conferred with opposing counsel and knowing the dates that work for both of you.

V. Initial Contact with your Client:

When there is sufficient time between your appointment and the first status hearing, SAP will advise Plaintiff that a volunteer attorney has come forward, and that you will be in touch with him by letter or phone. SAP tells him that you will ask him to sign an engagement letter before you will talk to him. Often, your appointment and the status hearing come so close together that SAP doesn’t have time to send such a letter.

- A. **Call your client at his place of confinement or detention.** This involves contacting the counseling or legal department at the institution at least two business days in advance to arrange the call. You

will fax the institution a request for an attorney telephone call, identifying your client by name and inmate number, and yourself by name and ARDC number, and suggest options for the time of the call. Most of the institutions in the Illinois Department of Corrections (IDOC) allow attorney calls weekdays between 11:00 a.m. and 2:00 p.m. While institutions don't usually ask for the appointing Order, you should perhaps be prepared to attach it to the fax if requested. **Attachment 3: Telephone Call Request for Stateville C.C. and Pontiac C.C.**

- B.** Cook County DOC does not allow telephone calls to detainees except by court order. An attorney can, however, visit a client between 9:00 a.m. until 8:30 p.m. seven days a week without notice. You will need a government picture ID to get into the CCDOC, and in order to see a detainee at his or her division, you must show your ARDC card and your Appointing Order or Limited Appearance. Avoid taking contraband, which not only includes the usual prohibited items, but also cell phones, gum and staples in your documents. **Attachment 4: CCDOC Security Guidelines for Attorneys.**

VI. Special Considerations for a Pro Se Client.

- A. Be informed.** Before contacting your client, be sure you have reviewed the docket in addition to the complaint, so that you know what has taken place in the case to date. The pro se plaintiff will appreciate that you have taken the time to learn about his case, which, you should remember, he has been handling on his own up to now. The main issues framed before the Court may not necessarily be your client's main concerns, since the client is obviously not a lawyer. Review the judge's standing order or other guidance on settlement conferences. Also try to familiarize yourself with the applicable law. The Court has useful handbooks located under the "Attorney" tab of its website. You can also reach out to SAP or others in the field with questions of law.
- B. Listen to your client.** Let him tell his story, even if it takes a while. Ask him to show you whatever documents he has. The litigant's complaint is personal, and the client wants to be heard. Listening, however, does not mean disregarding legal analysis. Hear the client, but explain the difference between what is actionable and what is not.
- C. Set expectations.** Ensure the client that your conversations are confidential, and explain your role as an advocate. Pro se plaintiffs may misunderstand the value of a "free lawyer." Make sure the litigant knows you volunteered, and that you did so because you think it is important for him to have legal help. On the other hand, make sure the litigant understands the context of your limited appointment. If you are not an expert in the field, that's OK! Just make sure the litigant knows that. Your legal skills and your experience as a federal court practitioner are what make your service invaluable to the pro se litigant through settlement negotiations. You are not there to "win" at trial, but to secure a settlement that makes the client happy. Be sure the client understands the difference.
- D. Prepare the litigant for the settlement conference.** Discuss the procedure of the settlement conference in plain terms, including where it will take place, who will be present. This is another place where your early review of the file pays off. Be specific to the litigant's case and the judge's settlement conference rules. Explain how a settlement conference differs from a trial. It's not about proving who is right – it's about talking and trying to resolve the claims. Familiarizing the litigant with what to expect may help him feel empowered by its process, even if the focus of the conversation is somewhat different than the litigant would like it to be.

You will be validated when the judge explains the process at the beginning of the settlement conference in almost the same words you used!

- E. Respect your client's autonomy and authority.** A detainee or prisoner has had all autonomy and authority stripped away rather abruptly – sometimes brutally -- and without apology. Try not to add to the feeling that he has no power over anything. Explain that you will be there to guide him and offer your legal opinion, but that the decision on whether to settle always belongs to the litigant. Restore the litigant's sense of agency; keep him feeling empowered.
- F. Keep the unique role of the SAP volunteer in mind.** Although your appointment is limited, your preparation, compassion for the litigant, and working knowledge of the legal claims are not; they are powerful tools in enabling a resolution.

VII. Develop the Demand for Specific Relief:

- A.** Consider these three factors when assessing the value of your case:
 - a. The strengths and weaknesses of the evidence given the applicable law. Treat the pro bono prisoner case the same as you would any case.
 - b. The identity of the defendant. You may have Cook County defendants (Sheriff Dart and his employees); IDOC (Wardens and employees of prisons); CPD; or contractors (medical and other service providers). They are represented by the Office of the State's Attorney, the Attorney General, Corporation Counsel and private attorneys, respectively. Different defendants and their counsel have different concepts of the "value" of an inmate's suffering or injuries, and, historically pay slightly different amounts for the same categories of injury, e.g., conditions of confinement or deliberate indifference to medical needs.
 - c. Historical settlements for similar injuries. The SAP Director has some data on settlements for the some types of injuries for the years between 2014 and 2016. Beware, the modest amounts paid out compared to the descriptions of the injuries may surprise (and dishearten) your client, and perhaps you.
- B.** Consider your client's wishes. They may not always sync with the factors above. Pro se Plaintiffs frequently seek hundreds of thousands of dollars in their complaints. This may be because news of a huge settlement or verdict travels fast among confinees, and every plaintiff thinks his case is worth an equally large sum. They are almost always wrong in their comparisons. They may also just be pulling a number out of thin air, knowing that they'll likely settle for a few thousand dollars.
- C.** Consider forms of relief other than money. The beauty of settlement is that you can bargain for and agree to relief that might not be available from a trial jury. Think creatively about what kinds of relief other than or in addition to money could be provided, e.g., chaplain services, staff de-escalation training, doctor's visit, referral to a specialist or a change in housing. It cannot hurt to ask.

VIII. Prepare a Demand Letter in Accordance with the Standing Order

- A.** Standing Order for Settlement Conferences. Every district and magistrate judge has a Web page with a link named Settlement Conferences, under which you will find a PDF of the judge's

Standing Order for Settlement Conferences. It contains, among other things, the judge's preferences for the contents of demand letters.

- B. For instance, Honorable Jeffrey T. Gilbert's Standing Order for Settlement Conference asks for a letter that contains a summary of: the claims, affirmative defenses, the evidence and the law that allow the plaintiff to make his case; itemized damages; and a specific demand that reflects the risks and probabilities. You can find it on the link to him on the Court's Web page. **READ YOUR JUDGE'S STANDING ORDER and FOLLOW IT. Attachment 5: Magistrate Judge Gilbert's Standing Order.**
- C. Send your draft of the demand letter to your client, then call or meet to discuss it. Finalize the demand letter and email (and mail) it to opposing counsel (and to SAP if your firm permits). **Attachment 6: Sample Demand Letter with fictional parties.** Read the judge's Standing Order or the docket entry setting the settlement conference for instructions on how to provide the judge a copy of the letters.

IX. The Defendant's Response to the Demand Letter

- A. According to the Standing Order, or a docket entry by the judge, the defendant will usually file a response to the demand letter a week or two later. The response should follow a similar format and directly address your demand. A counteroffer of zero is not considered good-faith bargaining. Send a copy of the opponent's letter to the client, and try to make time to discuss it with the client. Forewarn your client that sometimes opponents can make very harsh and dismissive comments about your client's claims and your client's chances of prevailing.
- B. Follow the judge's instructions for providing copies of both letters to the judge. The letters are *not filed* with the court on the ECF system.

X. Prepare for the Settlement Conference

- A. Review your pleadings, letters and documents. Confer with the client again to prepare for the Settlement Conference.
- B. You should explain to your client what to expect at the settlement conference.
 - a. It is useful to make sure the client understands that a settlement is not a victory for either party; it is a compromise of the parties' wishes;
 - b. As with the demand letter, every judge has a protocol for how she or he conducts settlement conferences. Again, go to the judge's Standing Order for Settlement Conferences and explain it to your client or have him read it. Your client may need to be reassured that this protocol is not a special creation for pro se litigants; parties of all kinds enjoy the same kind of settlement conference.
 - c. If your client is in IDOC, he will participate by video connection between the court and his facility, which the courtroom deputy has arranged for with a "video writ" for the date and time stated in the Order setting the conference. You will have the opportunity to confer confidentially with your client by video throughout the settlement conference when the judge and the defendant's people leave the courtroom. If your client is at the County Jail, he will participate by telephone.

XI. Advocating at the Settlement Conference

- A. The judge will preside over the settlement conference, which will take place in the courtroom with parties present who have “settlement authority,” i.e., the power to bind his or her client. The session will probably proceed in this fashion:
- a. The judge will explain how the settlement conference will be conducted and what to expect (echoing and thus reinforcing what you already told the client and adding to your cred);
 - b. A representative of the defendant with the authority to settle at the level of the Plaintiff’s demand without additional consultation will attend with counsel and be permitted to speak;
 - c. The parties, with the help of the judge, go back and forth with demands and offers until they reach a compromise; and
 - d. The judge may caucus with the parties separately after each demand and counter-offer, to encourage the parties to see both the strengths and the weaknesses of each position.
- B. The parties reach a compromise! One or both of the parties will prepare the *Terms Sheet* that you brought with you, in the courtroom, in front of the judge, stating in it exactly the relief the parties agreed to. The judge will announce on the record that an agreement has been reached and that the terms have been preserved in the Terms Sheet. Signing the Terms Sheet (or giving you the authority to sign) means your client is agreeing to the terms listed, and *no others*. Even though a formal agreement has not been typewritten and executed, the parties are bound by the conditions listed on the Terms Sheet. **Attachment 7: Sample Terms Sheet.**

XII. Execute the Settlement Agreement and Release

- A. Review the Settlement Agreement the defendant drafts and edit as necessary to conform to the terms memorialized in the Terms Sheet, to make sure that your client gets the relief that you agreed to.
- a. A significant term of the Settlement Agreement is the breadth of the release your client is making. Be sure that your client understands that he is relinquishing the right to further litigate any claims raised in his complaint, or that could have been raised in his complaint relating to the same subject matter. The breadth of the release can become a bone of contention later, as the government’s draft agreement may contain the term “general release,” meaning a broader release of *all* claims that existed up to the date of the release. Be specific in the Terms Sheet and in the final agreement as to the scope of the release;
 - b. The agreement should contain a term as to the exact amount your client is to be paid, and the time frame for payment. Because the defendant’s representative has told the court that he or she has settlement authority (See Attachment 6), there should be no term requiring additional ratification of the amount or any other form of relief;
 - c. Settlements with the CCDOC, IDOC and the City of Chicago are not confidential, as these are public entities;
 - d. Often governmental defendants will ask for confidentiality, so as to reduce the political or other fallout from a widely publicized settlement, but they cannot insist on it; and
 - e. If you do agree on confidentiality, include Chicago Lawyers’ Committee for Civil Rights in the loop.

- B. Discuss the Settlement Agreement and Release with your client and make sure he understands that it is final and that he has released the claims identified in the agreement. Have him sign the agreement. **Attachment 8: Sample Settlement Agreement and Release.**

XIII. Professional Responsibility

- G. An SAP volunteer is bound by the Local Rules of the United States District Court for the Northern District of Illinois. The attorney may also refer to the Illinois Rules of Professional Conduct, which apply to pro bono representation. Both sets of rules contemplate that providing service to those who cannot afford an attorney is one's responsibility as a member of a learned profession and an officer of the court.
- H. Specific Local Rules of interest are found in **Attachment 9.**

XIV. Closure

- A. In order to formally end the case as required by the settlement agreement, electronically file a *Notice or Stipulation of Dismissal with Prejudice*. You can prepare this document independently to be filed by you for your client, or with the opposing counsel to be signed by both parties' counsel. Since it is your client's case, it is his or hers to dismiss. **Attachment 10: Stipulation of Dismissal.**
- B. If the case does not settle, move to withdraw as SAP counsel in **open court** after the settlement conference has ended; the judge will relieve you on the record of further duties. If you forget to ask in court, simply file a Motion for Relief from Appointment. **Attachment 11: Motion for Relief from Appointment.** If you do neither, your name will remain on the docket as counsel of record and you will continue to get notices of the progress of the case, while your client may not.
- C. **Call or email SAP with the result.** The Chicago Lawyers' Committee for Civil Rights wants to know the terms of your settlement and the number of hours you spent on the representation. Our funders evaluate the viability of the Program by such data. Remember, the terms of an agreement with a government entity are not confidential, although your client may not want to broadcast them.

ATTACHMENTS

1. Sample Limited Scope Engagement Letter/ Retainer Agreement
2. Limited Appearance of Settlement Assistance Program Counsel
3. Telephone Call Request for Stateville CC and Pontiac CC
4. CCDOC Security Guidelines for Attorneys
5. Hon. Jeffrey T. Gilbert's Standing Order for Settlement Conference
6. Sample Demand Letter (fictional parties)
7. Sample Checklist/Terms Sheet
8. Sample Settlement Agreement and Release
9. Select Rules of Professional Conduct
10. Stipulation of Dismissal
11. Sample Motion for Relief from Appointment