

## **II. THE NEUTRAL'S PERSPECTIVE**

### **A. [4.4] Introduction**

Judges and lawyers participate in numerous mediated settlement conferences each year. Oftentimes, the participants depart the conference feeling they have wasted their time and the clients' money without making progress. Why? There are four major reasons why settlement conferences fail: (1) failure of the court and counsel to treat a settlement conference as a serious and integral part of the litigation process; (2) lack of preparation on the part of counsel and their clients prior to participating in the settlement conference; (3) lack of sufficient information from which to evaluate settlement options; and (4) lack of full settlement authority by client representatives at the settlement conference.

Because over 95 percent of all civil cases terminate prior to trial, it is imperative that the bench and the bar consider how to maximize their efforts when utilizing judicial settlement conferences or private mediation. The following sections discuss steps to be taken prior to and at the settlement conference to ensure that everyone's time is well spent and to enhance the likelihood of a settlement. While the text focuses on judicial settlement conferences, much of the underlying theory and suggested procedures applies to private mediation as well.

### **B. [4.5] When To Initiate Topic of Settlement**

A judge should raise the topic of settlement at every court appearance. While the court would prefer that counsel initiate settlement discussions on their own, this rarely happens. When the court initiates the topic, it enables all counsel to save face with their clients by allowing them to report back to their clients that "the judge has asked us to consider settlement." Therefore, the court can be a catalyst to encourage 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. Lawyers should not avoid the topic. A party with a strong case should not hesitate to explain its position to the other side during a settlement conference. In many ways, raising the topic of settlement early enables the lawyer to know how to devote his or her efforts. If there is a serious interest in settlement, counsel can focus efforts on procuring information from which to discuss settlement. On the other hand, if there is no interest in settlement, counsel should devote efforts to prepare the case for trial.

When is a case ready for a settlement conference? There is no one magic moment in time. The key is parties with a sincere interest in seeking a negotiated resolution and enough information to make an intelligent decision. As a result, successful settlement talks can take place 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 is well-prepared parties interested in a negotiated resolution.

From a judge or mediator's perspective, settlement conferences are more effective when parties face a less desirable alternative. For example, setting a settlement conference with a looming date for filing of dispositive motions, a final pretrial order, or a firm trial date is more effective than setting a settlement conference without the pressure or expense created by those deadlines. The presence of firm dates imposes a reality check on the participants. This enables counsel to discuss with their clients the likely expense and litigation risks that each of those dates holds. Parties

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

From a lawyer's perspective, settlement conferences are more effective when the lawyer has sufficient information to advise a client regarding the strengths and weaknesses of a case and the potential costs to be incurred and also has an understanding of the client's interests, concerns, and goals. If the client's interests can be protected and goals achieved through a settlement, counsel should not be reluctant to initiate a request for a settlement conference.

### **C. [4.6] Written Settlement Demands and Offers Should Be Exchanged**

Prior to the settlement conference, the plaintiff should deliver to the defendant a written itemization of damages and a settlement demand. The defendant should respond with a written settlement offer. This is an extremely important exercise because it requires the clients' active involvement in the settlement process. A lawyer should not submit a written settlement demand or offer without prior approval from the client. In addition, the written offers change the psychology of the litigation, if only for a brief period, to a focus on settlement. At this point, parties may realize they do not have enough information with which to itemize damages or to value the case. If that is the situation, the parties can focus their energies on discovery and gather the necessary information to enable them to exchange written demands and offers. A party who is not prepared to exchange a written settlement demand or offer is generally not ready to participate in a settlement conference.

Requiring the parties to exchange their demands and offers in writing adds a level of seriousness and precision that is often lacking when demands and offers are conveyed orally. Absent a writing, parties can disagree as to the contents of the actual settlement proposals. This can lead to confusion, distrust, and delay in negotiations. A written proposal generally will be more inclusive of all proposed terms and can easily be transmitted to clients for their review and input. The parties should submit to the judge or mediator copies of their most recent written demands and offers at least three days before the settlement conference.

### **D. [4.7] Clients with Full Authority Should Be Present**

Clients with full authority should attend the settlement conference in order to maximize the possibility of settlement. It is essential that clients with full authority be present for a number of reasons. First, it is their case, and they should have the opportunity to hear presentations made by the other side so that they have a clear understanding of the alternatives facing them. Many clients do not comprehend or appreciate the complexities of the litigation process. At a settlement conference, clients have the opportunity to observe, ask questions, and participate in decisions that directly affect them. Second, what transpires in a settlement conference oftentimes can affect a party's perception of a case. A settlement conference can educate a client regarding risks and weaknesses of the case and present creative options to settle the dispute. A report to a client who is available only by phone cannot adequately capture this information. Third, if a client with full authority is unwilling to attend, the client is probably not interested in settling. If the opportunity for resolution is important enough for the court or a mediator to set aside several hours to engage in this process, it should be important enough for the client to participate in good faith. Finally, full participation gives the client a better understanding of and appreciation for our system of justice. Clients are grateful for the opportunity to discuss their problems with a judge or mediator in the informal and relaxed atmosphere of a settlement conference. When clients successfully work out a solution to a thorny problem, they walk away with a positive feeling towards the process, the court,

and their counsel.

#### **E. [4.8] Avoid Surprises by Means of a Standing Order**

Every judge or mediator has a personal method 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. The distribution of a standing order, which outlines procedures and expectations of counsel and their clients, results in a more effective settlement conference. A copy of the author's standing order setting settlement conference is included at §4.67 below.

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.

#### **F. [4.9] Steps the Court or Mediator Can Take To Promote Settlement**

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

First, as described in §4.8 above, 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 prior to the conference and requiring the attendance of clients with full authority goes a long way towards ensuring that meaningful discussions take place at the time of the conference.

Second, the court must set aside sufficient time to enable the settlement process to operate. In settlement conferences conducted in a mediation format, two to three hours is generally sufficient to determine whether settlement is feasible. In a mediation format, the process must allow sufficient time for the court's opening statement explaining the process, the parties' opening statements, discussion between all parties, separate caucuses with the court, and a final session to confirm the settlement terms. It takes time for parties and their counsel to digest the information they receive and to reevaluate their options. Setting aside sufficient time will ensure that the parties and counsel have an ample opportunity to settle the case. Resolution of disputes that have gone on for months and years requires the concentrated attention of the court and the parties. As a result, a minimum of two to three hours should be set aside for each settlement conference.

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 (1) *facilitative*, in which the court will aid the parties in communicating with each other, but will not make a recommendation or (2) *evaluative*, in which the court will make a settlement recommendation. The court should explain to the parties that they control their own destinies regarding settlement and commit them to the proposition that they have a serious desire to settle the case. If they understand that the proceedings are confidential and statements made will be inadmissible at trial, the parties should be encouraged to be open and frank in their discussions. The parties are told that counsel and clients will each be given an opportunity to express their views. The parties should be encouraged to address their remarks to each other, not to the court, and should be advised not to interrupt each other. The parties should understand that the judge will conduct separate caucuses and will engage in shuttle diplomacy

to see if a resolution can be achieved. Questions regarding procedure should be answered. The judge should ensure that neither counsel nor the parties are surprised by the process.

Fourth, the court must maintain impartiality throughout the process and should not coerce settlements. The decision to settle belongs to the clients, with input from counsel. The court should ask open-ended questions designed to stimulate discussion. A facilitative style is best, and a judge should adopt an evaluative approach only if both sides request such 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 may place one of the parties in a defensive posture. In the separate caucuses, the judge asks the parties to discuss the view expressed by the other side and makes certain that each party understands the risks of further litigation. The judge will relay settlement offers between the parties and provide a reality check on positions taken. Even if the case is not settled, the judge should make sure the parties are not later surprised by future steps in the litigation process.

Fifth, the court should encourage the parties to do the talking. The most effective settlement conferences are those in which the judge talks the least. If the parties are speaking to one another, analyzing the various issues, and discussing possible resolutions, often they can reach a resolution without much input from the court.

Sixth, in the event an agreement is reached, the court should make sure all settlement terms are reviewed and confirmed with counsel and the parties in a joint session at the conclusion of the conference. One of the attorneys should prepare and deliver to all parties a written confirmation of the settlement terms within one business day. The other side should respond one business day thereafter either to confirm the terms or point out discrepancies. The parties should send copies of these two letters to the judge. The settlement terms should be placed on the record when a party requests that it be done or when it will be helpful in assuring the existence of the agreement.

Finally, in those cases in which settlement is not achieved, the parties should be thanked for their willingness to participate and should be encouraged to continue to pursue settlement. They also should be reassured that they will receive a fair trial. A jury trial is a constitutionally protected right. Trial remains an available and viable alternative.

#### **G. [4.10] Steps Counsel Can Take To Promote Settlement**

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

First, counsel should be sure the client understands the process and has agreed on 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. A helpful book published by the National Institute for Trial Advocacy, John W. Cooley, *MEDIATION ADVOCACY* (1996), provides an explanation of how counsel can improve their settlement preparation and settlement skills.

Second, counsel should be prepared to deliver an opening statement that is clear, concise, and persuasive regarding the strengths of a client's case. Counsel should attempt to make the opposing client understand the risks of proceeding with a trial. Settlement is a means of risk avoidance. Counsel's role is to minimize a client's risk while maximizing risk for the other side. A strong

opening statement may be the only time counsel has to speak directly to the other side's client and make that person aware of the risks associated with his or her position. Counsel should express a serious desire to negotiate an agreement satisfactory to all parties, and an attorney who demonstrates competence and professionalism enhances a client's settlement prospects.

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.

Fourth, counsel should understand that negotiations may be made through the judge and should develop an effective strategy to accomplish the client's objectives. A judge should 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 counter-offers 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.

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.

Sixth, counsel should ensure 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. A list of no-nos for counsel is included in Judge Denlow's "Top Ten Ways To Prevent Settlement." See §4.68.

## **H. [4.11] Conclusion**

The court and counsel should devote the necessary time and energy 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 on 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.

A settlement conference permits a lawyer to use all of his or her skills as advocate, counselor, and negotiator for the benefit of the client. Lawyers should practice these skills knowing that such expertise will be called on more frequently than trial skills.

## IV. APPENDIX

### A. [4.67] Standing Order Setting Settlement Conference



**MAGISTRATE JUDGE MORTON DENLOW**  
219 South Dearborn Street  
Courtroom 1350  
Chambers 1356  
Chicago, IL 60604  
(312) 435-5856  
Fax (312) 554-8547  
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#### **STANDING ORDER SETTING SETTLEMENT CONFERENCE**

This case has been set for a settlement conference before Magistrate Judge Morton Denlow. All parties and their lead counsel are ORDERED TO APPEAR at the Dirksen Federal Building, 219 South Dearborn Street, Courtroom #1350, Chicago, IL on the date and time set forth in the attached minute order.

#### **SETTLEMENT CONFERENCE PREPARATION**

Over 95% of all civil suits are settled prior to trial. Therefore, settlement preparation should be treated as seriously as trial preparation. Planning is essential because the party who is best prepared obtains the best result. The Court has found that the following steps are essential to a successful settlement conference.

##### **A. FORMAT**

**1. PRESETTLEMENT CONFERENCE DEMAND AND OFFER.** Settlement conferences are generally unproductive unless the parties have previously exchanged demands and offers and have made a good faith effort to settle the case on their own. Accordingly, at least fourteen (14) days prior to the settlement conference, the plaintiff shall submit a written itemization of damages and settlement demand to defendant. No later than seven (7) days prior to the settlement conference, defendant shall submit a written offer to

## **APPENDIX A**

plaintiff. On occasion, this process will lead directly to a settlement. If settlement is not achieved, three (3) business days before the conference the parties shall deliver or fax to Judge Denlow's chambers, but not file, copies of the last written settlement demand and offer.

**2. ATTENDANCE OF PARTIES REQUIRED. Parties with ultimate settlement authority must be personally present.** 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: opening presentations by each side followed by a joint discussion and private caucusing by the Court with each side.

**4. STATEMENTS INADMISSIBLE.** Statements made by any party during the settlement conference will not be admissible at trial. Parties are encouraged to be frank and open in their discussions.

**5. OTHER ADR PROCESSES.** If the parties desire private mediation, arbitration, mini-trial or other procedure, they should immediately advise the minute clerk, who will arrange a conference call with the Court to discuss the options.

**B. ISSUES TO BE DISCUSSED AT SETTLEMENT CONFERENCE**

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

1. What are your objectives in the litigation?
2. What issues (in and outside of this lawsuit) need to be resolved? What are the strengths and weaknesses of your case?

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

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?
6. What remedies are available through litigation or otherwise?
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 liens? Do we need to include a representative of the lienholder?

**C. INVOLVEMENT OF CLIENTS**

For many clients, this will be the first time they have participated in a court supervised settlement conference. Therefore, counsel shall provide a copy of this Standing Order to the client and shall discuss the points contained herein with the client prior to the settlement conference.

**D. 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 concerning Steps to an Effective Settlement Conference. Reading these articles will assist you in preparing for the settlement conference.

ENTER:



Dated: March 17, 2000

**MORTON DENLOW**  
United States Magistrate Judge

## **B. [4.68] Top Ten Ways To Prevent Settlement**

### **TOP TEN WAYS TO PREVENT SETTLEMENT**

**By**

**U.S. Magistrate Judge Morton Denlow**

I have found that parties successfully avoid settlement when they engage in the following behavior:

1. Insult opposing counsel and the client at the settlement conference (e.g., accuse them of lying and cheating).
2. Fail to bring a party representative with full settlement authority (e.g., bring a party representative who has no authority beyond existing offer).
3. Spend more in legal fees than is involved in the case (e.g., come to settlement conference having already spent \$75,000 in fees to defend \$30,000 claim).
4. Put your own interest in attorney's fees ahead of your client's interests.
5. Refuse to make any settlement demand or offer.
6. Pull your settlement demand out of thin air without a factual or legal basis for it (e.g., demand \$1,000,000 in settlement when maximum statutory recovery is \$300,000).
7. Raise your demand or lower your offer at the settlement conference (e.g., announce at the beginning of the settlement conference that your demand has now increased from \$25,000 to \$100,000).
8. Announce at the beginning of the settlement conference that you have no interest in discussing settlement until after judge has ruled on the summary judgment motion which you intend to file.
9. Show up at the settlement conference without first looking at the file.
10. Fail to show up at the scheduled settlement conference.

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**APPENDIX B**

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