MAGISTRATE JUDGE JEFFREY COLE
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INSTRUCTIONS AND PROCEDURES FOR SETTLEMENT CONFERENCES

The importance of settlements in the federal system cannot be overestimated *See generally Marek v. Chesny*, 473 U.S. 1 (1985). The historically-strong federal policy favoring settlement of cases, is, if anything, even stronger today in light of the continued expansion of court dockets and the inability of the system to try every case. The consequence of this expansion, among other factors, has resulted in most cases being settled rather than tried. *See* discussion in *Foster v. National City Bank*, 2007 WL 1655250 at *3 (N.D.Ill. 2007)(collecting cases).

Experience has taught the wisdom of early consideration of settlement. The reasons are many and obvious. *See EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985). Settlement allows the parties to avoid the risks of all litigation, and the substantial cost, expenditure of time, and the emotional toll that are inherently a part of the litigation process. In an address to the Bar Association of the City of New York in 1921, Learned Hand, then a young district judge, lamented:

> "After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Lectures on Legal Topics, Learned Hand, The Deficiencies Of Trials to Reach the Heart of the Matter, 105 (The MacMillan Co.1926).

HOW TO APPROACH THE SETTLEMENT CONFERENCE

Even for those cases that cannot be resolved through settlement, early consideration of settlement can allow the parties to better understand the factual and legal nature of the cases, which can save the parties considerable time and money by eliminating claims and defenses that cannot and ought not be advanced.

What Joel Shapiro, Senior Conference Attorney for the United States Court of Appeals for the Seventh Circuit has written about the mediation of civil cases in the Court of Appeals applies equally to settlement conference in the District Court and should be taken to heart by all lawyers:

> How can advocates use the opportunities presented by [a settlement conference] to best advantage? *First,* they can acknowledge to themselves that settlement is no less worthy a litigation goal than "victory"; that skill at settlement is no less important to a lawyer's reputation and attainments than skill at "winning". A case that is settled on terms consistent with the client's interests is a case that ends well, reflecting credit on the lawyer who guided it to a successful conclusion. *Second,* attorneys can counsel their clients forthrightly on the risks and costs (emotional as well as financial) of continuing to litigate, and on the benefits of settlement. If this means acknowledging to the client that his case is not as strong as it may once have appeared, so be it. If it means telling the client what he *needs* to hear instead of what he *wants* to hear, that is why lawyers are called "counselors". *Third,* attorneys can pay close attention to the

other parties' interests (because a settlement has to work for everyone or it will not work at all) and think about how to provide sufficient value to all parties to make settlement possible. *Fourth,* attorneys can make a point of acting respectfully toward one another and one another's clients. Even if that were not th e *right* thing to do, it would be the smart thing to do. In mediation, as elsewhere, goodwill is a valuable asset.

The Circuit Rider, 27 (November 2007).

PRE-SETTLEMENT CONFERENCE MEMORANDA/POSITION PAPERS:

1. The parties' memoranda: Prior to the conference (and in conformity with the time table set forth below), the parties will exchange position papers that provide a comprehensive analysis, both legal and factual, of their respective positions and, where possible, analyze what they perceive to be the weaknesses of their opponent's presentation.

2. Contents of memoranda: Thus, each memorandum must contain an explanation of the evidence in support of the author's position and/or harmful to the opponent's position and a discussion of the legal principles (supported by appropriate case authority) on which the parties rely to establish or refute liability. Failure to include significant legal authority and/or evidence for or against one's position undermines the strength of the parties' case.

3. The purpose of the memoranda: The purpose of the memoranda is, in part, to encourage a meaningful and informed assessment of their own and their opponent's positions, thereby promoting the kind of informed assessment of the whole case that is essential regardless of whether the case is tried or settled. Former Attorney general Edward Levi was fond of quoting Cicero as saying that if you couldn't state your opponent's case you did not know your own. Thus, the memorandum of each side ought to be able to explain the weakness of the opponent's case as readily as it can explain the strength of its own position. All parties must be willing to reassess their previous positions and should be willing to explore creative means for resolving the dispute.

4. Length of Memoranda: Memoranda typically are five pages or less, although they may be more extensive if the case warrants more elaborate treatment of the facts and the issues. Thus, if counsel believes that more pages are required to provide the comprehensive presentation required, he or she should not feel restricted to five pages. Having said that, counsel should keep in mind that the memoranda are not motions for summary judgment and should not approximate in complexity and length such motions.

5. Inclusion of Exhibits: All too often, during the settlement conference, counsel will discuss evidence that has not been discussed in the Memorandum and which not only should have been included, but which could easily have been attached as an exhibit to the Memorandum. It is counter-productive not to attach significant exhibits to a party's presentation. And it is unfair to wait until the conference to advance such evidence. Significant and supporting exhibits are often quite helpful and sometimes indispensable both to the court and to opposing counsel. If exhibits are included, they must be separated by protruding tabs in

accordance with Local Rule 5.2.

6. Superficial and skeletal presentations: Such presentations do nothing more than state ultimate conclusions about the validity of one's position – or the invalidity of an adversary party's position – and make an unsupported demand or offer serve no useful purpose and actually can adversely affect the progress of the conference. For example, it is not acceptable to say my client is entitled to $x because he was discriminated against because of his race, gender, disability, etc., or that the plaintiff is entitled to nothing because my client did nothing wrong.

7. Explanation of damage calculation: Each memorandum must also contain an explanation of why damages or other relief would appropriately be granted at trial, with an itemization of the damages plaintiff believes can be proven at trial, and an explanation of how those damages were computed including a discussion of the legal principles supporting those damages.

8. Inclusion in the submission of relevant comparable verdicts or settlements:Where possible, parties should attempt to include in their submissions settlements or awards after trial in comparable cases.

9. Requirement of settlement demand: Finally, each memorandum must contain a specific settlement demand or offer. A demand that simply matches what the plaintiff thinks is recoverable at trial is not a proper settlement demand. It is not permissible to fail to respond to a demand with a counter offer simply because the defendant thinks the demand too high. Finally, it does not facilitate the settlement process to make demands that the plaintiff knows are inordinately high or for the defendant to make an offer that he knows is inordinately low.

10. Time for submission of plaintiff's Memorandum: 21 calendar days prior to the date of the settlement conference, plaintiff's counsel shall serve on defense counsel its pre-settlement conference memorandum.

11. Time for submission of defendant's Memorandum: 14 calendar days before the settlement conference, defendant's counsel shall serve on plaintiff's counsel its responsive memorandum, which shall include at least the following information: (a) any points in plaintiff's letter with which the defendant *agrees*, (b) any points in plaintiff's letter with which defendant *disagrees*, with references to supporting evidence and legal principles, and (c) a realistic and good faith settlement demand.

12. Time for submission of all Memoranda to the Court: 7 days before the settlement conference, the plaintiff's counsel shall be responsible for providing to chambers copies of the defendant's submission and its own submission. The seven day period can include weekends.

13. Attendance of parties required: Unless the court allows otherwise by separate order, parties with full and complete settlement authority are required to personally attend the conference. This means that if a party is an individual, that individual must personally attend; if a party is a corporation or governmental entity, a representative of that corporation or governmental

entity (other than counsel of record) with "**full and complete settlement authority**" must personally attend. Having a client with authority available by telephone is not an acceptable alternative, except under the most extenuating circumstances. The purchase of a domestic airplane ticket is not an extenuating circumstance.

The court sets aside a significant amount of time for each settlement conference and believes that it is impossible for a party who is not present to appreciate fully the process and the reasons that may justify a change in one's perspective towards settlement. Violation of this rule may result in a monetary sanction.

14. "Full and complete settlement authority": as used herein full and complete settlement authority means the authority to negotiate and agree to a binding settlement agreement at any level up to the settlement demand of the plaintiff. If a party requires approval by an insurer to settle, then a representative of the insurer with full and complete settlement authority must attend. Experience has shown that the personal presence of the parties, and their direct participation in the discussion almost always increases the likelihood of settlement. Thus, absent a showing of unusual and extenuating circumstances, a client will not be permitted to participate by phone.

While a party's in-house counsel is certainly welcome to attend the conference, generally, it will not be sufficient for in-house counsel to act as the parties' representative. Experience has shown that in-house counsel do not, in fact, have full settlement authority but only authority up to an amount pre-determined by the client.

15. Noncompliance with all the above requirements can have a significant and obvious adverse effect on the orderly handling of cases. *See Perry v. Jones*, 2007 WL 1455863 (N.D.Ill. 2007).

16. Conference format: A mediation format will generally be followed. Each side, if it wishes, may have an opportunity to make a presentation of its position, which will be followed by joint discussion with the court and private meetings between the court with each side, as deemed necessary. Here, as always, preparation and participation are the keys to a successful conference.

17. Statements inadmissible**:** Any statements made by any party during the settlement conference will be governed by Rule 408, Federal Rules of Evidence. The court expects the parties to address each other with courtesy and respect, but at the same time strongly encourages the parties to speak frankly and openly about their views of the case.

18. Cancellation or rescheduling of the conference: Because of the number of settlement conferences that Magistrate Judges conduct, it is often necessary that they be scheduled weeks and sometimes months in the future. Consequently, it is essential if the parties are required to reschedule or if they have concluded that a settlement conference is not necessary because, for example, they have already settled the case, that they inform chambers as far in advance of the conference as possible.

19. Notwithstanding the importance of settlements in all courts today, *see generally Marek v. Chesny*, 473 U.S. 1 (1985), parties cannot and ought not be pressured into settlements that they believe are not warranted. *Goss Graphics Sys., Inc. v. Dev Indus., Inc.,* 267 F.3d 624, 627 (7th Cir. 2001). "If the parties want to duke it out, that's their privilege." *Id*. at 627-28; *Tsironis v.Bismarck Hotel*, 1996 WL 15830, at *2 (7th Cir. 1996); *Strandell v. Jackson County, Illinois*, 838 F.2d 884, 887 (7th Cir. 1988).

20. **Motions to Continue the Settlement Conference: No conference, once scheduled, shall be canceled or rescheduled except by court order pursuant to written motion made and noticed not less than 7 days in advance of the conference. The motion shall fully and comprehensively explain the reasons for the requested extension and be supported by affidavit or declaration by a person testimonially competent to make the representations justifying the need for the continuance. Thus, an affidavit or declaration of counsel recounting information received from a third person whose situation necessitates the continuance will not suffice. Telephonic requests to reschedule a settlement conference will not be entertained in the absence of exigent circumstances.**

ENTER:

JEFFREY COLE
United States Magistrate Judge

June 22, 2015