

# **STEPS TO AN EFFECTIVE SETTLEMENT CONFERENCE: BEFORE YOU COME TO THE TABLE**

**BY: U.S. MAGISTRATE JUDGE MORTON DENLOW  
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## **I. INTRODUCTION.**

**Judges and lawyers participate in numerous settlement conferences each year. Oftentimes, the participants depart the conference feeling that they have wasted their time and the clients' money without making progress. Why? Based on my twenty-four years in private practice and five years on the bench, I see three 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; and 3) the unwillingness of participants to use the negotiation process as a method of resolving their dispute. Because over 95% of all civil cases terminate without a trial, it is imperative**

**that bench and bar consider how to maximize their efforts when utilizing judicial settlement conferences. This article will discuss steps which I take prior to the settlement conference to insure that everyone's time is well spent.**

## **II. WHEN TO INITIATE TOPIC OF SETTLEMENT.**

**I make it a practice to raise the topic of settlement at almost every court appearance. While I would prefer that counsel initiate settlement discussions on their own, this rarely happens. I find that I enable both sides to save face with their clients if I initiate the topic and allow the attorneys to report back to their clients that "the judge has asked us to consider 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. I never felt that way because I always wanted to know which direction I should devote my efforts. If the case was going to settle, I focused my efforts to insure that I had enough information from**

**which to discuss settlement. On the other hand, if there was no interest in settlement, I could devote my efforts to preparing the case for trial.**

**What is the proper time to set a settlement conference? There is no one magic moment in time. The key is that the parties must have a sincere interest in seeking a negotiated resolution and enough information from which to make an intelligent decision. As a result, I have been involved in successful settlement talks 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 has been well prepared parties committed to a negotiated resolution.**

**From a judicial perspective, settlement conferences are more effective when parties face a less desirable alternative. For example, setting a settlement conference with a looming**

**discovery cut-off date, date for filing of dispositive motions, final pretrial order or firm trial date is more effective than setting a settlement conference without other dates looming. The presence of firm dates enables counsel to discuss with their clients the likely expense and litigation risks which each of those dates hold and imposes a reality check into the settlement process. Parties will generally act more realistically and responsibly in settlement conferences when they have firm dates staring back at them.**

### **III. WRITTEN SETTLEMENT DEMAND AND OFFER.**

**Prior to the settlement conference, I require the plaintiff to deliver to defendant a written itemization of damages and settlement demand. I require defendant to respond with a written settlement offer. This is an extremely important exercise because it requires the parties to become actively involved in the settlement process, it crystallizes positions and it changes the psychology of the litigation, if only for a brief**

**period, to a focus on settlement. At this point, parties may realize that they do not have enough information with which to itemize damages or to evaluate the case. If that is the case, the parties can focus their energies and discovery in gathering the necessary information to enable them to exchange written demands and offers.**

**Requiring the parties to exchange their demands and offers in writing adds a level of seriousness and precision which is often lacking when demands and offers are conveyed orally. Absent a writing, parties can disagree as to what the actual settlement proposals were. This can lead to confusion, distrust and delay in negotiations. A written proposal will generally be more inclusive of all proposed terms and can easily be transmitted to clients for their input. I require the parties to provide me with copies of their written demands and offers two days before the settlement conference.**

#### **IV. REQUIRING THE PERSONAL APPEARANCE OF CLIENTS WITH FULL AUTHORITY.**

**I insist that a client with full authority appear at the settlement conference. It is essential that clients with full authority be present for a number of reasons. First, it is their case and they should be given the opportunity to see and understand the alternatives they face and to hear presentations made by the other side. I find that many clients do not understand or appreciate the complexities of the litigation process. At a settlement conference they have the opportunity to observe, ask questions and participate in decisions which affect them. Second, what transpires in a settlement conference can oftentimes make a difference to a party's perception of a case. This cannot be adequately captured by a telephone report to a client who is available by phone. Third, if a client is unwilling to attend, the client is probably not interested in settling. I take the view that if it is important enough for the court to set aside several hours to engage in**

**this process, it should be important enough to the client. Finally, client participation in this process gives them a better understanding and appreciation for our system of justice. Clients are grateful for the opportunity to discuss their problems with a judge in the more informal and relaxed atmosphere of a settlement conference. When they successfully work out a solution to a thorny problem, they walk away with a positive feeling towards the court and their counsel.**

#### **V. AVOID SURPRISES BY MEANS OF A STANDING ORDER.**

**Each judge has their own way 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. I have found that the distribution of a standing order, which outlines my procedures and expectations of counsel and their clients, results in a savings of time for all concerned and more effective settlement**

**conferences. A copy of my standing order setting settlement conference is attached.**

## **VI. CONCLUSION.**

**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 which explains the court's procedures and requirements will facilitate the process and result in more efficient and satisfying settlements.**