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THE SETTLEMENT SERIES: PART 2

Over-Aggressiveness at the Four-Way

Educating the client on the pitfalls of hostility

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Editor's Note: This is the second article in a special 10-part series on settling cases.

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A settlement conference is, in both purpose and spirit, the polar opposite of a contested hearing.

Unlike an on-the-record courtroom trial, the conference is an off-the-record attempt at mutual compromise and amicable resolution. This distinction is, of course, well-known to attorneys. For a layperson and inexperienced litigant, however, the difference between an upcoming settlement conference and a contested hearing may not always be so crystal clear. The need for a party to understand this distinction, in advance of a settlement conference, is particularly relevant on the issue of demeanor, and the need for both an attorney and an actual party to avoid over-contentiousness and ineffective hostility at the settlement table.

It is always helpful for counsel to consider the possibility that a client may genuinely but erroneously believe that an upcoming conference will be, and is supposed to be, conducted as a highly adversarial process. Further, a litigant who carries such a pre-conceived notion may logically expect that his or her attorney will charge into the conference like a gangbuster and try to rip holes in the other party's case through vicious cross-examination and loud oral advocacy. The party having such an expectation may experience shock, confusion, disappointment and even anger at his or her attorney, when counsel attends the settlement conference and deliberately presents very calmly and courteously to the other party and counsel. Further, the party may proceed to engage in personal yelling, screaming and other inappropriately rude behavior, simply because he or she did not have any real advance understanding of the process.

While such a litigant may conclude that his or her "calm" counsel

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is unaggressive and thus "weak" at the settlement table, he or she may be jumping to a highly erroneous conclusion. To the contrary, the attorney may well be intentionally and wisely presenting in a calm and friendly manner so as help foster a foundation with the adversary for mutual good faith and possible settlement. The problem, however, arises when the attorney has not previously explained this concept the client, or otherwise prepared the client for what to reasonably expect and not expect at the conference, including a discussion on demeanor. Without such a discussion, the client may well experience a false perception. Yet, even an erroneous perception can rock the core of the attorney-client relationship and foil potential opportunities for settlement of a case.

For this reason, it is wise for counsel to: (1) generally assume that the client knows nothing about how and why a settlement conference runs in a particular fashion, and then (2) dedicate time and effort in advance of the conference to clearly and logically educate and prepare the client not only on the distinctions between a contested hearing and a settlement conference, but the specific reasons for same. In this fashion, the client will more fully understand and appreciate the nature of counsel's conduct.

The attorney should emphasize to the client that, unlike a trial, a settlement conference is designed to see if a mutually agreeable resolution can be reached between the parties themselves rather than by a judge or jury. At trial, one can expect that there may be some aggressive, contentious, and sometimes overly theatrical courtroom antics designed to sway a judge or jury in the decision-making process. While such tactics may be potentially effective in some cases, they are generally unlikely to work well in the entirely different context of a settlement conference.

In turn, successful settlement conferences come about more easily when all parties treat each other cordially and respectfully, without unnecessary hostility, drama and histrionics. After all, how many attorneys have ever actually resolved a case at a settlement conference by shouting, finger-pointing, eye-rolling, and engaging in other disrespectful and exaggerative behavior? While there are exceptions to every rule, the answer for most lawyers is probably zero. It is thus very important for counsel to explain this reality to any client who is truly interested in successfully negotiating a fair end to his or her case, irrespective of how he or she personally feels about the opposing party.

A party benefits from an upfront explanation of the critical role of civility and respect at a settlement conference. While an important part of an attorney's role is to zealously advocate on behalf of a client's interests, the lawyer's words, actions and overall conduct and demeanor must all be logically intended and calculated to be effective through diplomacy, rather than ineffective due to hostility. Moreover, the lawyer may consider further explaining to the client that a settlement conference is strategically neither the time nor place to "try" the matter. In fact, such a strategy might in the long run be detrimental to the client's own position, if the litigation does not resolve at the four-way and instead proceeds to trial. Specifically, if there are potentially overlooked holes in the other party's case, the highlighting of such holes at the settlement conference, might in some circumstances be educating the adversary and giving him or her greater focus and time to repair

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those holes before trial.

Further, the attorney may explain to the client that even if the attorney aggressively "destroys" the other side's position through unofficial cross-examination at the conference, there is no record of same, as communications in a settlement conference are generally inadmissible at trial. In other words, a judge or jury will likely never hear or otherwise know about any part of an attorney's fantastic arguments and stellar performance in a conference room.

Moreover, for a settlement to take place, the decision does not rest with a judge or jury, but is totally dependent upon the voluntary consent of both parties. Given the realities of human nature and behavior, a litigant or attorney is unlikely to voluntarily settle a case in a conference room when the other side is acting aggressively toward them. A party must therefore understand in advance that a settlement conference is arguably the last place in the world for a party, and especially a trained professional, to engage in a verbal altercation like a dress rehearsal for trial. Such demeanor rarely convinces anyone on the receiving end to settle. Instead, all that overaggressive conduct by a client or attorney tends to produce is reciprocal hostility.

Unfortunately, however, there are times when some attorneys actually do come rudely charging into a settlement conference, barking out demands to the other side as if on auto-pilot, in a manner which is wholly combative, unnecessarily hostile, and entirely inefficient as a negotiation strategy. There may be many various reasons for this maneuver, including inexperience. It is also possible that the attorney somehow feels a compulsion to demonstrate to the client that he or she is in fact a courthouse "tiger," and a worthy warrior who will fight to a bloody finish to protect the client's honor. Such behavior might actually please a particular party in the short run. In the long run, however, if the case fails to settle, that party may have nothing to show for such a maneuver but mounting legal bills and mounting stress. At that point, this same client who was so delighted to see his or her overaggressive attorney attack the other party in a doomed settlement conference might have very different feelings about the lawyer's effectiveness and negotiation-by-outburst strategy. After all, if all a party's attorney does is yell and scream and parrot the words and feelings of the client, then why does the client need the attorney in the first place?

There are a great many aggressive and effective advocates who artfully and successfully negotiate for their clients in a calm and highly professional manner, without ever actually arguing or losing their cool or open-mindedness toward constructive settlement. In fact, some of the state's most esteemed, polished and successful attorneys deliberately and skillfully present themselves at all times in a highly respectful and even friendly manner in dealing with the opposing party and counsel in the conference room. This takes some practice in restraint, patience, self-control and basic social skills, but such talents can be extremely valuable in effectively promoting positive talk at the negotiation table. Calm conduct is also consistent with the role of the attorney as a professional who brings appropriate composure rather than emotional outbursts to the settlement table.

Overall, the calm rather than rough waters flow most easily to the shores of settlement. It is therefore prudent for an attorney to prepare and educate the client on the appropriate protocol of deliberate civility at the settlement conference, and the specific reasons for same, before attending the conference itself. ■