

THE SETTLEMENT SERIES: PART 3

The 30-Day Client Preparation Plan

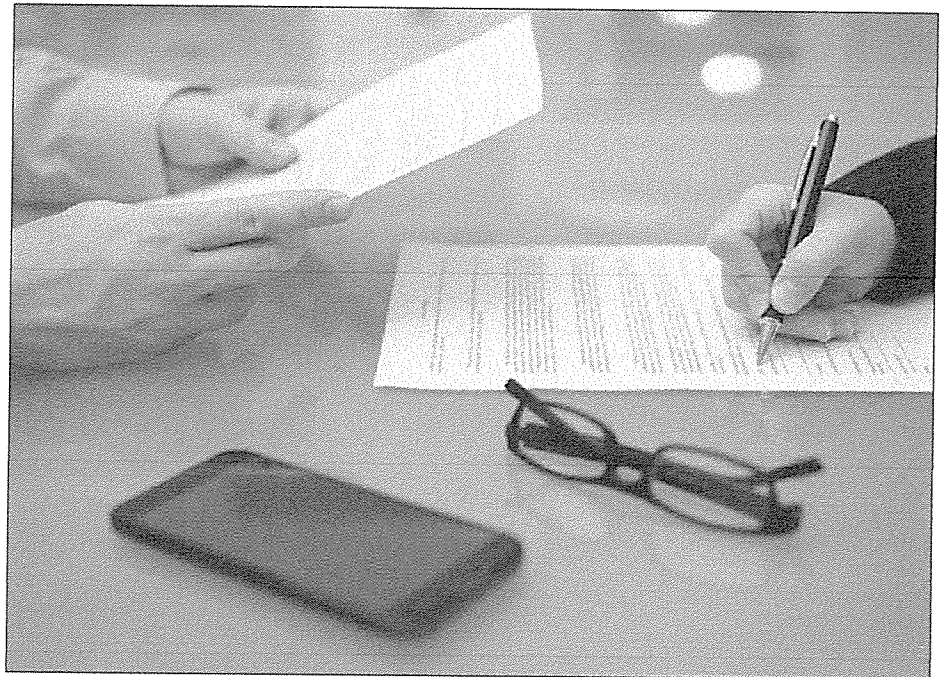
By Lawrence R. Jones

Editor's Note: This is the third article in a special 10-part weekly series on settlement of litigation.

In litigation, preparation is arguably at least 90 percent of any secret to success. This principle is true not only for success at trial, but also regarding any upcoming “four-way” settlement conference with the opposing party and counsel. Therefore, the focus of preparation should not simply be on the attorney or the client individually, but rather on both functioning together at the settlement conference as a unified team.

These days, the majority of attorney-client communications tend to take place by e-mail, text or phone. Unless the client lives hundreds of miles away, however, the importance of thorough preparation strongly supports the scheduling of at least one detailed face-to-face meeting in counsel’s office, to focus on the anticipated settlement conference itself.

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There are at least two significant purposes behind such a meeting. The first is for the attorney to educate and prepare the client on how a four-way conference works, and what to reasonably expect or not expect. The second purpose is to make certain, to the fullest extent possible, that attorney and client have a consistency in terms of reasonable goals, and how to attempt to diplomatically achieve them at the negotiation table. If there are in fact radical differences between the expectations of attorney and client on either the goals of the conference

or the manner of reaching them, then such differences may logically be identified, addressed and hopefully resolved between attorney and client well in advance of the four-way.

Unfortunately, there are some settlement conferences where it is painfully obvious that the attorney and client have had little or no advance preparation or meaningful communication with each other beforehand. Sometimes, it appears that the attorney is trying to prep the client for the first time while standing in a lobby, or hallway, or outside in the street. Other

times, the lawyer is pinch-hitting for another attorney and is actually meeting the client for the first time at the settlement conference itself. Such a last-minute approach to preparation may easily deprive both lawyer and client of a reasonable opportunity for enhanced readiness, while saddling the client with significantly heightened anxiety and confusion over the process itself.

Conversely, adequate advance preparation helps attorney and client, and permits a reasonable opportunity for both to process information and sleep on thoughts and ideas regarding the case. Given that a four-way settlement conference may potentially conclude a long-running and costly case to the mutual satisfaction of the litigants, it is wise to take advantage of the opportunity to thoroughly prepare a client for such a proceeding.

The following is an illustration of a sample plan by which the attorney and client can in organized fashion help each other prepare for the conference, and hopefully reach a consistency in both approach and goals, during the month leading up to a scheduled four-way settlement conference:

First, approximately 30 days before the conference, the attorney submits a written letter to the client, requesting that the client supply within 10 days his or her personal

thoughts regarding each outstanding contested issue, and what he or she fairly hopes to obtain at the settlement conference via possible resolution of each such issue. The letter should make clear to the client that

formulate his or her own thoughts, and to then put pen to paper and communicate them back to the attorney in a thoughtful manner, rather than in an impulsive and spontaneous verbal fashion. Writing often

Unless the client lives hundreds of miles away, thorough preparation requires at least one detailed face-to-face meeting.

the client's reply is for the attorney's eyes only, rather than for the opposing party or the court, and that counsel's review of same is confidential under the attorney-client privilege and the work-product doctrine. While the client may in some cases have already discussed his or her goals and feelings well before this point, the reality is that such goals may have naturally changed during the course of the litigation, particularly when a settlement conference is fast approaching. For example, a client who was seeking \$10,000 at the start of the case a year earlier might well be seeking a revised and lesser amount in settlement, as opposed to continuing the time, expense and stress of ongoing litigation.

The purpose of requesting client feedback in writing, rather than orally, is to give the client a reasonable opportunity to gather and

helps people to think and focus in a manner which speaking does not. Just as importantly, this process is reciprocally designed to provide the attorney who is receiving this communication with an equally fair opportunity to carefully read and re-read the client's written thoughts and viewpoints, and then to fairly apply professional judgment in contemplating and considering whether the client's positions and expectations are in fact reasonable and logically obtainable under the facts, law and circumstances of the case.

After this exchange of written communications, and at two weeks before the four-way, the attorney and client may then meet for a specifically designated period of time to expressly prepare in confidence and detail for the upcoming settlement conference. At this meeting, the attorney may privately discuss with

the client his or her view of the reasonableness and attainability of the client's submitted positions, and further explore the important differences between an unreasonable "wish list" and a truly reasonable "bottom line" on any outstanding issues in contention. There may also be a discussion of proposed starting points and ending points for negotiation purposes at the four-way. The attorney may also seek to ascertain from the client the comparative personal significance of each outstanding issue, as the client may potentially feel much more strongly about holding firm one particular issue than another for negotiation and settlement purposes.

By the end of this meeting, both attorney and client will hopefully have a far greater and consistent focus and "short list" of specific goals and strategies for the upcoming settlement conference. Moreover, if attorney and client do not see eye-to-eye on specific points, then it is important for both to know and address this situation a reasonable time before attending the settlement conference, and for the attorney to try and answer any questions which the client may have concerning the reasons for any such discrepancy.

Another advantage of having a detailed attorney-client meeting at

least two weeks before the settlement conference is that there is still a reasonable amount of time thereafter for attorney and client to engage in further follow-up communications with each other as necessary; by email, phone, or even another in-person conference if warranted. In particular, this extra time gives both attorney and client a chance to further reflect upon their discussions. For example, a client who initially disagrees with the attorney's suggested position may, with the benefit of afterthought and a good night's sleep, reconsider his or her stance and reformulate a new "bottom line" for settlement under the circumstances. Further, if any issues were inadvertently overlooked in prior writings and discussions, there is potentially still time for the client to discuss same with counsel before attending the settlement conference.

Understandably, there always will be some cases where, due to a firm trial date starting within 30 days or other circumstances, there is simply no time on the calendar to allot a 30-day window for preparation. Even in cases with shorter windows of opportunity, however, counsel may still be able to formulate and follow a slightly adjusted version of this schedule, while advancing

the general concept, spirit and philosophy of giving both attorney and client the important opportunity to attend the settlement conference in a reasonably prepared fashion.

Reciprocally, there may be some cases which are so inherently complex as to require a planning schedule of far more than 30 days just for the conference itself. While different schedules may be necessary for different cases, the foregoing example provides just one way of helping both attorney and client to prepare for the four-way settlement conference in a reasonably structured and prepared manner, without having to rush and scramble about at the last minute. Further, such a schedule is not a substitute for ongoing preparation and due diligence throughout the course of a case, but rather is merely a supplement to same, and is based upon the presumption that there is already ongoing preparation and communication of relevance between attorney and client on issues during the lifespan of the litigation. In terms of conducting a successful settlement conference, however, the exercise of such supplemental efforts during the weeks leading up to a four-way may in some cases make all the difference in the world. ■