New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
VOL. 223 NO. 46 MONDAY, NOVEMBER 13, 2017 NJLJ.COM

THE SETTLEMENT SERIES: PART 5

The Last Minute 'Document Dump'

An action without an upside

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

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The purpose of scheduling a settlement conference is to help litigants resolve a case. Before the conference even begins, however, some actions of an individual party or his/her representative may potentially cripple the chances for success.

One such action is the last-minute "document dump." In the world of contested litigation, a document dump is a term used to describe the act of one party heaping upon the opposing party an overbearingly voluminous pile of materials right before a scheduled court date, often in completely disorganized fashion.

For whatever reason, a document dump often occurs just before a long-scheduled settlement conference. Such action can potentially impair the mutual courtesy and good will that is so important to the potential success of a settlement conference, especially when the documents could have reasonably been turned over much earlier in time.

One of the key components of constructive negotiation is for each party to demonstrate respect for the other, both personally and professionally. Respect is an intangible ingredient which can make or break a negotiation at any level. Even the simplest case can fail to settle if a participant feels that he or she is being disrespected. A last-minute document dump can easily be interpreted by the recipient as a tangible showing of disrespect.

That being stated, how many times does an attorney receive a surprise FedEx envelope or box of materials from the adversary, 24 hours before a settlement conference? Worse, how often does a lawyer go online the night before a conference and discover an unexpected new email from the adversary,

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containing countless pdf attachments with endless pages that the receiving lawyer now has to print out on his or her own home printer an organize in order review late that same evening? Still worse, how often does an attorney walk into a settlement conference, only to have the adversary actually hand over a thick envelope of previously requested, long overdue discovery materials at the settlement table itself? No busy attorney appreciates being on the catching end of these curveballs. Moreover, the resulting frustration often intensifies in proportion to the weight and volume of the last-minute submission.

Certainly, there are cases where the exchange of large amounts of documents at the last minute is unavoidable, such as when a settlement conference is scheduled on very little notice, with no reasonable lead time. Further, there are often circumstances when an attorney does not receive the documents he or she requested from the client until very late, and the lawyer in turn does in fact immediately forward them to opposing counsel. Additionally, there are times when an attorney's schedule is so congested that he or she innocently takes longer than anticipated to submit the documentation to the adversary.

Even in such cases, however, a significant problem may still arise when the sending attorney does not take the time and effort to at least reasonably communicate in advance about the pending delay with the receiving attorney, and/or ask the receiving attorney if he or she either consents to a late submission, or instead wishes to reschedule the settlement conference to a later reasonable date so as to allow more time for review of the documents. Such communication, when made, reflects professional respect and common courtesy to the adversary by keeping him or her in the loop.

A document dump is the act of one party heaping upon the other an overbearingly voluminous pile of materials right before a scheduled court date, often in completely disorganized fashion.

Conversely, when such communication is not made between counsel, then even a "good faith" document dump may be interpreted, or misinterpreted, by the receiving attorney and party in a highly negative fashion. Even an otherwise innocent, last-minute document dump can trigger a domino effect of problems that may impair the potential success of the settlement conference. First, the attorney receiving a late and voluminous submission may have little opportunity to review same. Second, the receiving attorney may have no time to send the documentation to his or her client, who in turn may have even less of a chance to review same and discuss with counsel as part of general preparation. Third, there may be no opportunity for the client and attorney to gather other relevant documents relevant in reply to documents actually received. Fourth, both attorney and client may become predictably irritated and perhaps suspicious of the sending party's motivations and good faith.

There are also some unfortunate occasions when the evidence suggests that a document dump is in fact a very intentional and premeditated attempt to inconvenience and burden the opposing party and counsel just before a settlement conference. Such a maneuver often appears to surface against a long back-story of passive-aggressive hostility between opposing parties or their representatives. While there is the implicit and inherent duty of every lawyer to act respectfully and professionally toward an adversary, the unfortunate reality is that sometimes

this duty is breached right out of the starting gate, and civility is overrun by ineffective and unproductive behavior that accomplishes little in terms of steering a matter toward possible settlement.

Sometimes, the pairing of two specific opposing attorneys against each other is inherently toxic, particularly when they have repeatedly butted heads in past cases and have their own private history of cross-contentiousness. In other cases, the lawyers may have been complete strangers at the start of a case, but nonetheless engage in disrespectful litigation tactics toward each other. In fact, there are some matters where the animosity and lack of civility between counsel is so substantial and dysfunctional that the lawyers act more angry and hostile than the litigants, rather than leading the parties by example.

It is rarely productive to engage in a surprise document dump just before a settlement conference. Yet, this does not mean that in every case all outstanding discovery must be complete before the parties can engage in meaningful settlement negotiations. To the contrary, many matters resolve at a settlement conference well before the period for discovery has concluded. For some litigants, one of the potential benefits of settlement is saving the expense, time, and effort that would otherwise be required to engage in that discovery, which may be extraneous and not particularly critical to the case. Depending on the matter, some litigants are comfortable resolving their litigation with little or no discovery at all.

In other cases, however, a party has appropriately requested discovery and asserts that he or she must have an opportunity to review before feeling comfortable resolving a case or conducting a settlement conference. There are times when a litigant properly serves interrogatory questions and a notice to produce documents under the Court Rules, looking for very specific documentation and information that he or she does not independently have, but nonetheless needs to review. Sometimes, this information constitutes a tiny fraction of the overall outstanding discovery requests, but yet is of extreme importance to the requesting party.

For this reason, if either or both sides have large outstanding discovery requests with a settlement conference approaching, then instead of a last minute surprise document dump, it is logical for counsel to consider engaging in a courteous advance telephone call with each other, well before the conference itself, to address the following relevant questions and issues:

1) Is it completely necessary for all outstanding discovery requests to be complete before the settlement conference takes place?

2) Are there certain identifiable key documents of a heightened relevance that can be produced or exchanged before the conference, so as to enable the conference to continue, and for settlement discussions to proceed in a meaningful way, without having to first wait for the absolute completion of all outstanding discovery?

3) What is a reasonable date for production or exchange of such discovery before the settlement conference, so that each attorney and party has a fair opportunity thereafter to review with their clients and prepare accordingly (i.e., one week, two weeks, etc).

Any agreements reached on these points may be memorialized in writing.

With opposing counsel working together toward the conference in a mutually constructive manner, legal adversaries may avoid the unnecessary waste, drama, ill will and perceptions of ambush often arising from a document dump. By proceeding in a mutually cooperative fashion, counsel may significantly help their clients engage in an important settlement conference in a reasonably prepared and professional manner. ■