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THE SETTLEMENT SERIES: PART 9

Five Things Not to Do at a Settlement Conference

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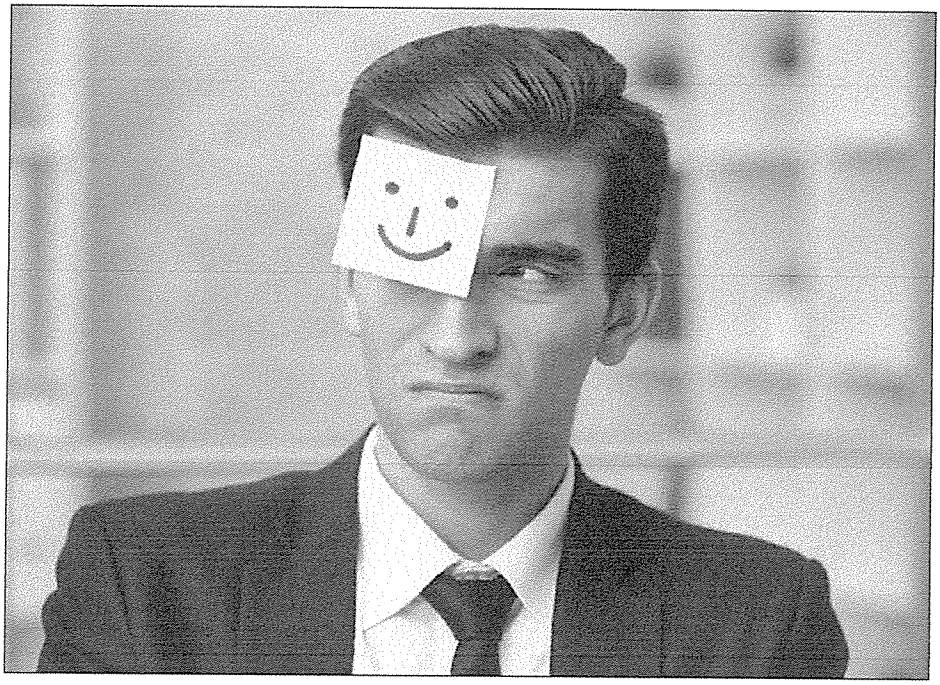
Editor's Note: This is the ninth article in a special, 10-part weekly series on settlement of litigation.



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In a prior segment of the Settlement Series, we focused on some of the "do's" in planning for a settlement conference. In this installment, we will now address some key "don'ts."

Don't Send a Pinch-Hitting Lawyer with No Settlement Authority

When a multi-lawyer firm represents a party, it is not uncommon for a senior partner to send a junior partner or associate to appear at a settlement conference on his or her behalf. This practice is generally satisfactory so long as the attending attorney truly knows both the case and the client, and also has actual settlement authority. There are few developments which can frustrate an already stressed litigant more than a firm sending a complete stranger to represent that client in a long-scheduled settlement conference. The situation worsens when the lawyer has little or no working knowledge of the matter and no authority to settle the case, thereby impairing the entire purpose of the four-way itself. A last-minute, previously unannounced switch of this nature is disrespectful of all who have attended the conference in good faith with a desire to seriously talk settlement.

Don't Advise Your Client to 'Take the Deal' in Front of the Advsersary

Inexperienced attorneys sometimes make the damaging mistake of attending a four-way settlement conference and then, in the midst of negotiations, spontaneously saying to the client, "I think you should take this deal," in front of the other

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party and counsel, without first discussing the recommendation in private with the client.

This type of action may in some cases seriously backfire. If the client does not agree with the attorney's recommendations, but the other side has already heard the attorney's personal approval of same, ongoing negotiations may be very difficult moving forward. Specifically, the other party may not only sense a crack in the bond between attorney and client, but may feel emboldened that the opposing party's own counsel supports the settlement proposal even if the party does not. Meanwhile, the client may feel that counsel has unnecessarily jumped the gun and undermined the client's position and leverage by publicly announcing support for the adversary's proposed settlement offer without checking for the client's approval first.

Don't Cross the Line from Friendliness into Overfriendliness

In prior installments of the Settlement Series, we discussed the importance of cordiality, friendliness and respect between counsel at the negotiation table. Indeed, an attorney has an implicit obligation to treat both opposing counsel and the adverse party with courtesy. Yet, there is a big difference between friendliness and "overfriendliness." An attorney should avoid the type of unnecessary "overfriendliness" that can hurt an attorney-client relationship and thereby cripple the ongoing settlement process.

If someone insists on storming out in an impulsive or unprofessional manner, let that person be the opposing party.

What is unnecessary overfriendliness? Probably every attorney with litigation experience has personally witnessed, at one time or another, the scenario in a courthouse hallway where one attorney greets opposing counsel with overdramatic hugs, loud laughter and back-slapping — conduct more befitting a high-school reunion than a legal battle — right in front of their bewildered clients.

Given the fact that part of an attorney's role is to provide a steadying and calming hand to the nervous client, it is arguably very important for the attorney to take a few minutes to: (a) pay careful attention to one's surroundings, and (b) try to place himself or herself in the client's shoes. Indeed, how might any party be expected to react if he or she is paying an attorney hundreds of dollars per hour, only to personally observe that lawyer acting like college fraternity brothers or sorority sisters with opposing counsel?

For certain, it is important for attorneys to practice and demonstrate professional collegiality and friendliness with each other as brothers and sisters of the Bar. Further, there is nothing wrong with opposing attorneys also being good friends. There may be nothing, however, that can stress, confuse and even anger a pair of already nervous and jumpy litigants more than seeing their respective representatives in the courthouse catching up on old times and exchanging vacation stories, while on the clock. While the attorneys may mean well, sooner or later a litigant might get the wrong impression and start wondering how

serious and committed the lawyer is to his or her cause.

A party's trust and confidence in his or her attorney is critical to the settlement process. Given the emotional challenges for any person appearing as a party in a contested court case, it is important for counsel to act in a manner which is both polite to the opposing counsel, but consistent with the seriousness of the event, and which is designed to decrease rather than increase a client's natural anxiety under the circumstances.

Don't Storm out of the Conference onBad Terms

Sometimes, a four-way settlement conference is simply not going well. Every so often, an attorney or party stands up, closes his briefcase, announces that "we'll see you at trial," and then marches dramatically out the door well before the conference was scheduled to conclude. Usually, this maneuver is not only ineffective but ill-advised, as ending the proceeding in such a fashion can make it difficult for the parties to resurrect negotiations and resume another settlement conference in the future as necessary.

Absent extraordinary circumstances, it is almost always best for a party who wants to resolve a case to stay ready, willing and able to continue negotiating. A person who wants to settle should never be the one to prematurely abort a settlement conference. Specifically, a person can never know for sure when a negotiation will turn positive, and many so-called "impossible" cases have in fact settled as result of ongoing constructive perseverance by the parties and attorneys alike. While there is no guarantee that negotiations will always be successful, standing up and leaving early generally accomplishes little and impresses nobody. For this reason, counsel should discuss with his or her client the following general rule of thumb before the conference: Absent truly compelling circumstances, no matter how unhappy the party becomes during the conference, he or she should never attempt to unilaterally terminate the settlement proceedings without first discussing same with his or her attorney. If someone insists on storming out in an impulsive or unprofessional manner, let that person be the opposing party.

Don't Forget to Follow up Immediately with the Client

While some settlement conferences do end unsuccessfully, the nature of the event is such that each party will likely be thinking about what occurred in the conference room, and who said what to whom, for at least several days thereafter. As part of the attorney-client relationship, it is both wise and respectful for counsel to contact the client within a few days afterward and take reasonable time to debrief the client by discussing (a) how the conference went, and (b) the next logical steps in the process. Very often, once both litigants have had a chance to personally reflect upon the events of a conference, they may in fact each have a renewed interest in resurrecting and continuing ongoing settlement negotiations. ■