

JUDICIAL SETTLEMENT CONFERENCES: A VIEW FROM THE TRENCH

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1: Settlement Conference Skills are *at Least* as Important as Trial Skills:

I vaguely remember the advent of Judicially mandated Settlement Conferences in Oregon. I think I was just about old enough to shave when I attended my first, somewhere around the time Michael Jackson was at the top of the charts. As a fervent insurance defense lawyer wannabe, the strategy was to offer as little as possible on behalf of an insurance carrier with the hope that the appointed Judge would put more pressure on the plaintiff than my claims representative. My confidential settlement conference letter was, in my mind, a masterpiece of advocacy. As in most jurisdictions, the Judge started the proceedings by calling me and the much more experienced plaintiff's counsel into chambers. As we approached his desk, the Judge warmly greeted my opponent, cast me a quick nasty glance and asked why I hadn't already tendered my carrier's twenty-five thousand in policy limits. Sigh. This was not what I expected. Over the next half hour, our offers went up in tiny increments, and the demand remained stuck at policy limits. When the inevitable "you just have to try some of these" comment was made by His Honor, I was bummed out on the entire process. Yeah, we tried that one. The verdict was slightly under the last offer I made, so I felt vindicated. I'm not so sure that the insurance carrier felt the same after paying my office somewhere around twelve -thousand dollars plus costs for a case that should have settled at five thousand.

Hundreds of Judicial Settlement Conferences later, and with the clear view of hindsight, I feel almost guilty that I didn't do more to avoid that costly, time consuming twelve person jury trial. I certainly accept that there are a fair number of trial lawyers who would disagree. Over the last couple of years, there has been a cacophony of criticism that not enough civil cases are getting to trial. Several prestigious national legal organizations bemoan the lack of trial experience for up and coming lawyers. This article is not written to take sides in that debate. I do hope to dispense a dose of realism however. Recent statistics confirm what we all suspect. In 2008, less than three percent of civil complaints for money damages filed in Oregon actually made it to verdict. The other 97% were either dismissed, withdrawn or settled. Many depart the trial system through the Judicially Mandated Settlement Conference. Like it or not, if you are a trial lawyer, you will engage in many more settlement conferences than jury trials in your career. If there are exceptions to this rule, I certainly have never seen them. The world being as it is, I believe that a lawyer's development of settlement conference skills is probably more important to a trial lawyer than the development of trial skills. Unfortunately, there are many more CLE's on trial skills than CLE's on settlement conference skills.

2: Basics of the Judicial Settlement Conference - One Lawyer's Point of View:

Most Oregon Court Mandated Judicial Settlement Conferences follow the same basic procedures. At least a day before the conference, you should drop off a confidential

memorandum pointing out your strengths/weaknesses/liens/offers and demands to-date etc. I also attach a courtesy copy of the relevant pleadings. If the case involves any emotional baggage, I like to alert the Court in advance. Anything that might help the Judge to understand the personalities at play is usually helpful.

I *always* prepare the client in advance by explaining the drill about a week ahead of time. I urge them never to act out or argue with the Judge and never to jump in too quickly in response to questions that might arise. I remind them that it is better to run things by me when we are alone than to do something like blurting out how great they think an offer is in front of the Judge. I remind them that professional courtesy to all participants and the Court staff is a must. In that rare "problem client" case, I spend more time in preparation and really stress the "courtesy" issue. When you arrive at Court with your client, most jurisdictions will give you a place to sit with your client, separate from the other party. Most Judges start by bringing the attorneys back to chambers first for a quick review of how that Judge will conduct the conference. Then the shuttle diplomacy starts, with the Judge going back and forth between the parties. In my opinion, the best settlement Judges give each side a little time to vent, and try to get a grasp of the personalities before talking dollars.

3: Some Tips from the Trenches:

Here are some guidelines I have found helpful representing plaintiffs, defendants, injured parties, insurance giants and others through settlement conferences over the years:

Mediating a case is hard work. If you don't believe it, just try mediating a "simple" boundary dispute. In my experience, every Judge seems to have a different *work style* or *work ethic*. Some Judges seem to love the process, but a few seem to hate it. On one extreme, I've had a Judge spend just ten or fifteen minutes before suggesting that the parties were too far apart and wishing everyone a nice day. Another Judge told the parties early on that he considered himself a *trial* Judge, not a *settlement* Judge, insinuating that it was beneath him to engage in settlement conferences. (Sounds like a few lawyers I know). At the other extreme, I've seen Judges keep the parties negotiating far beyond their allotted two hours and even offer to keep involved by phone if the case doesn't resolve that day. In Deschutes County, I've seen Judge Sullivan run two to three different overlapping settlement conferences at the same time, with most of the jury rooms and break rooms on his floor filled to the brim. I still haven't figured out how he keeps the *players* straight, much less the demands and offers. In some jurisdictions, you can select or stipulate to a particular settlement Judge. In others, you get what they give you. I travel a lot in my practice and have had the privilege of appearing at settlement conferences all around Oregon. If I have not previously appeared before a particular Judge, I *always* call a local litigator to find out as much as I can about the style and expectations of the assigned settlement Judge. Most settlement Judges are very good at what they do. They make it clear from the start that they do not have a dog in the race, and they do their best to settle those cases that can or should be settled. Many of them will post numbers on a blackboard comparing the net cash realized by

taking an offer now with the verdict needed at trial to cover trial expenses. This can be a real eye opener to a zealous client when expensive experts will need to be called at trial.

I agree with all of Judge Sullivan's 13 points. Read and reread them, especially if you are about to embark on your first settlement conference. I will add that in my experience, it never pays for a lawyer or his client to get argumentative with a Judge. Most Judges have the ability to take the data provided and develop a pretty accurate idea of a fair resolution. I always tell my client before the conference to treat the Judge with dignity and respect and to listen carefully to the Judge's evaluation of the risks and costs of going forward. The cardinal rule is "don't kill the messenger." I warn them that if they object to the Judge's evaluation, I prefer that they hold that card close to the vest and tell me about any concerns *outside* the presence of the Judge. I tell them to pay attention to their bodies and not to engage in defensive or obnoxious body language like eye rolling, smirking or defensive arm-crossing. I tell them that a huge part of case evaluation is based on how they appear as human beings. Dressing in a manner appropriate for a Court proceeding, graciously greeting those they are introduced to and being on their best behavior can't hurt, and often helps.

4: Some Parting Shots:

The Judicial Settlement Conference is a valuable tool even if the case does not settle. It can be like sending a dog through the brush to spook up issues you may have missed when you were so wrapped up in advocacy. It can usefully serve as a sharp reminder to the parties that this is not a game and there are considerable risks to putting the case before the human deck of cards that will make up their jury. I have a great deal of respect for trial lawyers in general, and I have tried many cases over the years. I have resolved *many, many* more at Court Mandated Judicial Settlement Conferences. Most all of you calling yourselves trial lawyers undoubtedly have the same experience. I still think of myself as a trial lawyer, but I also try to remember why attorneys are often referred to as "counselors." In the real world, I believe that learning how to effectively advocate at mediations and settlement conferences is a worthy goal for every trial lawyer. In most instances, Judicial Settlement Conferences are the *best* option for my clients.

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