From Hon. Jacqueline Connor (ret.)

MSCs: WHAT THE BEST ADVOCATES DO RIGHT AND WHY THEY WIN

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Most judges aren't very good at settlements. Rather, most new judges aren't very good at settlement conferences. All too often we come into the job of settlements simply hoping that the parties will be "reasonable," split the baby and go home. Many, like me, foolishly started out believing the parties when they aggressively declared that "X" was the absolute only number they could possibly accept or offer. I found (and still find) jury trials so much more interesting than settlements, which are exhausting, often emotional, intense and draining, that I did not look forward to them, did not push them nor believed they were of much value. That was years ago.

In reality, the benefits of pretrial settlements are enormous. It truly is the very last place where the parties have any semblance of control over the outcome of their dispute. It is the last place where reason can prevail and where everything and anything can be put on the table, the last place where the evidence code and technical legal rules can be set aside in favor of, gasp, common sense. It is the last place where participants can think outside the box and tie up all loose ends, whether part of the original action or not. It is the last place to avoid the enormous and expensive risk of submitting their lives to a jury of twelve strangers, each with their own complex biases, assumptions, experiences and expectations. It is the last place where relationships can be preserved and the very public airing of the dirtiest laundry avoided.

Jury verdicts are ALWAYS, repeat, ALWAYS, risky. Having tried, presided over or observed thousands of jury trials, I believe that jurors usually get it right. But I have found that jurors can also come up with the most unpredictable and inexplicable verdicts, particularly in civil. There is usually a reason that can be discerned in retrospect, but it is rarely based on the "facts" of the case. These unexpected verdicts aren't frequent but neither are they rare. Ask any judge doing jury trials. But if you do, make sure you have plenty of time, as they will, each and every one, tell you in detail about such verdicts.

Having said this, there are cases that have to be tried, and I confess, there are some settlements I have facilitated that I wish had been taken to a jury. However, as the judge, I am acutely aware that there are variables and things about the parties and the case that are unknown to me so I stand back with respect for the final decisions of the parties.

Hence this article about mandatory settlement conferences and what attorneys do right and why these attorneys always get the best results. These are my observations after settling over a hundred cases from the smallest to disputes worth seven figures. The problems are the same, regardless of the numbers. Ultimately, the most successful conferences are grounded in the understanding that all parties are there to make business decisions based on a risk analysis and that no side is going to walk away with everything they believe they deserve. Those who want it all have the unenviable opportunity to convince a trier of

fact. Then all too often, even winning can be losing when the financial and emotional costs are tallied.

So, here we go.

The best advocates come into the settlement conference with Mandatory Settlement Conference briefs having been lodged as far in advance as practicable, but no later than five days before the hearing. These best briefs are SHORT, focused and professional. Mudslinging, attacks and hyperbole are absent. Key points are not highlighted, in caps or bold font nor underlined. Weaknesses are not ignored but presented in a matter of fact manner, addressed frankly. Reasons why the weaknesses are not fatal are also clearly and simply set forth.

The best advocates know their case and they know their client. Perhaps more importantly, they intimately know the opposition's case and can fairly articulate the strengths of the other side. They know that the conference is not based on a zero sum game and they know the cost of insult offers that short-circuit real communication. They also know themselves well: they know that patience is required and that the dance must run itself out. They know their own limits and how many dance steps they can handle…and how many will get a good result. (Those who can tolerate the most "dance steps" tend to gain the most in the long run, though our western culture tends to fade noticeably after about the fourth dance turn.) However, the dance steps cannot be short-circuited and the best advocates know that flexibility is a strong tool. Untimely declarations of battle stations rarely generate good results but timely, thoughtful well-timed calls to battle stations are believable and are treated with respect.

The best advocates have prepared their clients. Clients have been told about the benefits gained by a settlement, even if less than the ideal jury verdict. They have been told that the settling judge will equally press both sides and has no stake in the dispute. They know that they do not have to settle but are clear on the advantages of avoiding a trial, particularly regarding the emotional cost of having everything brought out in a public forum, an artificial arena where they cannot explain as they would like but are painfully constrained by the kabuki dance mandated by the evidence code. They know that their advocate will protect them and make sure they do not enter into an agreement that is not reasonable or fair. The clients will already be introduced to the reality that the discussion will not necessarily be about what is fair and they also know that the judge cannot force the other side to come to any particular resolution, no matter how reasonable it appears to them. The best prepared clients know about their prospective loss of privacy, the cost and pain of being attacked in a public setting while having to remain mute, the cost of the airing of dirty laundry, the inability to preserve future relationships regardless of who wins, and the absence of potential creative solutions outside the legal structure that a trial provides. They also are aware that the case isn't going to be over when jury verdict comes in, due to the legal niceties of costs motions, appeals, collection issues, new trial motions…etcetcetc.

The best advocates have thought about and are open to alternative solutions to emotional positions. They are sensitive to the possibility that their client may need the catharsis of their "day in court." They know that there are many ways to provide that outside of a trial. Some clients have to be heard, if only by the judge. Some need to be given an opportunity to say their piece, in front of the opposition. This can be done in person, on paper, in court, outside of court…there are as many alternatives as there are needs.

The best advocates never guarantee a result to the client or even hint of such a guarantee. Posturing and hostility are not part of their presentation. Their responsibility is to make sure their clients understand all the risks and the advantages of an early if less than optimum resolution.

The best advocates know who the drivers are, the key people are influencing their clients. They know that bringing these drivers, if only to remain in the courtroom, can make the difference between a reasonable settlement and a potential disaster. On the defense side, they know their adjuster and make sure the one with the power to make the stretch is either there or can be reached.

The best advocates know that mandatory settlement conferences provide an opportunity to propose settlement talks without conceding any weakness, letting the judge serve as the initiating variable.

The best advocates know that the timing of mandatory settlement conferences can be extremely effective in controlling costs that may ultimately eclipse a common sense resolution of a dispute.

The best advocates do not insist that regardless of the facts of their case, their "unique" case is different than the thousand cases that have come before them. They do not claim to be such powerful advocates that they can afford to ignore their weaknesses or the reality of jury pools they will be dipping into.

The best advocates resist descending into personal attacks or personalities. They know that when parties are suspicious of each other or of counsel, a neutral judge or mediator trusted by the other side can be the most powerful tool in their arsenal. They don't abuse the system by using the conference as a means of obtaining discovery nor permit the numbers to move backwards.

The best advocates know tips on how to approach their clients, letting the judge know what may work and, more critically, what might shut down the conversation or bring up the defensive barriers.

How often have I seen such an effective advocate? Rarely in one package, but some come close. Those that come closest invariably walk away with the best results, regardless of what the case looks like on paper. Where mistakes are made or these ideals are not met, it makes the judge's job harder and slows down the process by requiring time to address issues that were not addressed in preparation for the conference.

My favorite lesson, having attended an outstanding mediation course offered by the Straus Institute at Pepperdine School of Law, outlines my task once the lawyers have done their job: I have to make sure that the meat is hung low enough to make the dogs jump. Sic!

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