



## Settlement Conferences and “Settler’s Remorse”

You participate with your client in a settlement conference in order to try to resolve the dispute between your client and another party. After a long day of negotiations, the dispute is finally settled. Because it’s late, you and the other party agree that you will draft the settlement agreement the next day. The next day, you contact your client to follow up on the agreement and, to your great surprise, he refuses to follow through because he thinks you gave up too quickly and didn’t get enough money.

Some malpractice claims result from cases that involve a settlement conference. Since settlement conferences are increasingly favored, we cannot overemphasize the importance of being properly prepared. Good preparation is an essential ingredient for the success of a settlement conference, just as it is for a trial. This implies that

you have an in-depth understanding of the case and, of course, that you leave no room for improvisation.

In addition to proper preparation, it is also important to ensure good communication with clients and to document all appropriate warnings, because dealings with clients still constitute the greatest source of claims. Indeed, clients sometimes complain that they did not receive the information, explanations, or advice they needed in order to properly manage their case or make an informed decision on a settlement offer. Your client must understand that the settlement entered into is an acceptable alternative to the dispute with the other party. If your client has doubts regarding the settlement, she may refuse to go through with it, thereby jeopardizing the settlement.

Negotiation involves compromises, with each party seeking to assert its position. Inadequate preparation, resulting in a mistake, can lead to a poor outcome for your client, for which your client won't hesitate to blame you.

Here are some ways to avoid malpractice in the context of a settlement conference:

### **When Preparing for the Settlement Conference**

- Meet with your client and explain the settlement conference process so the client understands the dynamics and what will be expected of him as well as the role you will play;
- Although judges often begin with an explanation of the process, clients are often too nervous at the beginning of the settlement conference to take in all the information provided or understand its consequences;
- Good preparation entails examining the strengths and weaknesses of the case with the client so she will be willing to present certain arguments during the settlement conference. It's important to give the client a realistic assessment of the case;
- Explain to your client that your role will be to collaborate rather than confront, because the process involves settling differences. The settlement process seeks a solution, not a judgment;
- Inform your client about the weak points of his case and confirm everything in writing. Resist the temptation to soften the impact of the negative aspects of a case. The relationship of trust implies that you must have the courage to tell the client things she may not necessarily want to hear. In this way, she will be in a position to make informed decisions and will not be surprised to hear the other side's arguments;
- Get clear instructions from your client. These instructions should be in writing so as to avoid any ambiguities. This will minimize the risk of misunderstandings. You should establish realistic objectives and have the client accept and

confirm them in writing before the settlement conference. Imagine what will happen if you don't do this and your client sues you, alleging you acted against his wishes. It will be up to you to prove you followed his instructions. If you have nothing in writing to support your position, you'll find yourself in a very difficult situation in which everything will hinge on the credibility of the parties;

- Don't let your desire to please the client cloud your professional judgment. Be honest and realistic. Nothing will be gained by trying to keep up unrealistic hopes;
- Discuss the possible solutions with your client and, especially, what she expects if no settlement is reached: the length and cost of a trial, the inability to enforce the judgment if the other party is insolvent, etc.

### **During the Settlement Conference**

- During the settlement conference, the other party's attitude or strategy, or the discovery of new facts, can require you to rethink your position. If this happens, you have to discuss it with your client, explain what is at stake, and get his approval of this reassessment.
- Be flexible with your negotiating strategy. Being unnecessarily stubborn can have regrettable consequences and result in a lost opportunity to settle the case;
- Provide the client with all the necessary explanations allowing her to make informed decisions which, after all, are hers to make;
- Take notes regarding your client's settlement instructions;
- Plan ahead and bring draft settlement documents with you;
- If a settlement is reached, put it in writing immediately, and have the parties and their lawyers sign the settlement documents;
- Be calm and keep your cool!
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- **The Day After the Settlement Conference**

- Make sure you're available if your client has questions. By taking the time to answer questions, you may avoid your client having second thoughts about the settlement agreement and suing you for malpractice.

Remember this rule: The lawyer's role is essential, and failing to prepare means preparing to fail.

Don't run the risk of "settler's remorse." After all, as a lawyer, it's your liability that is at risk!

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