Effective Lawyering in Judicially Hosted Settlement Conferences

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EFFECTIVE LAWYERING IN JUDICIALLY HOSTED SETTLEMENT CONFERENCES

WAYNE D. BRAZIL*

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The purpose of this article is to describe in detail the most effective approaches and techniques that I have seen lawyers use in settlement conferences. Having hosted hundreds of negotiations, I have seen many different lawyering styles. In the pages that follow, I share with interested litigators my ideas (unconfirmed by scientific tests) about what works in the settlement dynamic and what does not. I write informally; the "you" that I address so often are the litigators I hope to reach.

After discussing briefly what and whom you should bring to a settlement conference, and reminding you about who your principal targets are, I discuss the pros and cons of different ways settlement conferences can be structured. Then the focus shifts to the substance of the conference itself, which I divide into three principal dimensions: (1) the tone you attempt to set and the style you adopt, (2) the analysis dimension, and (3) the negotiation dimension.

At the outset it is important to emphasize a theme that runs through much of this article: the way counsel behaves during the conference can dramatically affect how the judge and other counsel handle themselves in the negotiation process. The way the lawyers approach the conference can determine what role the judge will play. Lawyers have the capacity, to an extent they probably do not appreciate, to fix how much and what kind of energy the court devotes to the settlement process. Similarly, the approach or style one lawyer adopts can affect the approach or style of opposing counsel. Because counsel tend to "respond in kind" in this setting, lawyers have considerable influence over the tone that dominates the conference. Throughout this article I point to examples of how one lawyer's conduct and choices are likely to affect the responses that come from his opponent. Finally, toward the end of this article I suggest strategies for breaking negotiation logjams and for maximizing the odds of reaching closure.

II. Whom and What to Bring to the Conference

You should be sure to bring to the conference:

Your client, i.e., someone who has full authority to resolve the litigation and to make any kind of commitment that might become part of a settlement package. When it is not possible to have your client present, he or she must be available by phone.

Key documents, including contracts, responses to discovery requests, marked pages from deposition transcripts, medical records, reports and bills, proof of wage loss, other evidence supporting special damages, photographs, and reports by specially retained experts.

Pivotal legal authority, e.g., copies of cases or statutes on which you rely if the legal principles in them are disputed in the suit and not widely recognized.

In appropriate cases, you also might bring to the conference a key wit-
ness. If the case turns on the credibility of one percipient witness, you might want to give the settlement judge an opportunity to talk to that witness so that he or she can form a judgment about how persuasive the witness is likely to be at trial. There also are situations in which it is wise to bring to settlement conferences actuaries or accountants or experts from other fields who might help the judge and the parties either analyze liability questions or develop creative components of settlement packages. In an employment case, for example, it might be productive to bring a personnel specialist who is unconnected with the parties but who could suggest career avenues plaintiff might want to pursue or who could lay out the costs of equipping the plaintiff to enter a new line of work.

Just as there may be people whom it is especially important to bring to the conference, there may also be people whom it is especially important to leave home. The generalization you should use to identify the people in the latter category is easy to articulate but difficult to apply: you should leave at home the people with fragile egos that might be threatened either by a frank discussion of the liability questions or by consideration of some of the terms that might make up the settlement agreement. People who fall in this category could include an officer or employee whose decisions or conduct gave rise to the litigation, a claims adjuster or lawyer who feels the need to defend earlier (and now clearly unreliable) evaluations of the case, or a consultant or counselor whose advice resulted in decisions or conduct that the lawsuit challenges. Of course, there will be situations where it is impossible to both leave such people at home and have your client present at the conference (because they are one and the same). In these situations, your best course of action is to try to keep the person with the sensitive ego out of the portions of the conference that include direct discussion of the defensibility of the underlying conduct.

III. THE PRINCIPAL TARGETS OF PERSUASION

When deciding on an overall strategy for a given settlement conference, and when responding to specific developments during the course of negotiations, you should keep as close to the front of your mind as possible a very important fact: your persuasive efforts cannot be focused on just one target, but must be designed to reach at least three and sometimes four different people:

(1) opposing counsel,
(2) the opposing party,
(3) the judge who is hosting the conference, and,
(4) in some cases, your own client.

In subsequent sections of this article I suggest ways to maximize the likelihood that you will reach, and persuade, the persons in these categories. At this juncture it will suffice to emphasize a point about your judicial host: one of your primary objectives in a settlement conference should be to convert the judge into an ally, to so persuade him of the reasonableness of your client's
position that he becomes not just a facilitator of communication, but an assertive advocate of a solution that fits your client's needs. Much of what I suggest in this article about how to conduct yourself in a settlement conference is directed toward this end.

IV. THE PROS AND CONS OF DIFFERENT SETTLEMENT CONFERENCE FORMATS

Despite the fact that the judicial host is most likely to decide what format any given settlement conference will have, it is a mistake for lawyers to devote no thought to how the structure of the conference might affect its content. It also is a mistake for lawyers always to accept whatever format the judge suggests. Instead, lawyers should determine which of the available structures is likely to contribute most to prospects for a successful conference, then courteously suggest that structure to the judicial host. At the beginning of the conferences that I host, I describe the format I usually use, then ask counsel if there is any reason to opt for some alternative procedure. Occasionally counsel will point out something about the case at bar that suggests that some other structure would be more appropriate. Because the lawyers invariably understand the case and the environment in which we will be working much better than I do, I welcome such suggestions. Thus it is appropriate in an article directed to lawyers to mention, briefly, some of the more salient pros and cons of the different ways settlement conferences can be structured.

I have experimented with several different formats for settlement conferences. In one format, I meet simultaneously with all counsel and parties in one room, discussing the case and the parties' respective positions in that open (not to the public) setting. A variation on this format involves meeting with all counsel simultaneously, but asking the parties to remain in another room, at least until the first round of exchanges has been completed. In another format I meet privately with one side at a time, i.e., with both the lawyer(s) and client(s) for one side, then with both the lawyer(s) and client(s) on the other side. In the vast majority of cases, however, I begin the conference by meeting privately with one lawyer at a time; later in the conference, if the situation calls for it, I often meet with lawyer and client, one side at a time. In multiparty cases, I usually start by meeting privately with the lawyer or lawyers for one party at a time (rather than meeting with everyone on one side). Thus, I have a series of one-on-one conversations, in private, with the lawyers, learning as much as I can about how each litigant views the situations of all the others, not just those formally lined up against it.

It has been my experience that this last format—which I refer to as "private caucusing"—usually is the most productive. Compared to the various group meeting formats, this structure offers several advantages. The lawyers tend to be more relaxed and flexible, factors which are conducive to working toward common ground. The lawyers also tend to be more open with me and somewhat more honest, both about the weaker aspects of their client's case
and about what offers or demands they would seriously consider. In these one-on-one sessions there is no other lawyer and no party or client to try to impress, so counsel are somewhat less likely to posture. Under less pressure to appear "tough," counsel may exaggerate less.

In the one-on-one sessions, individual lawyers may also feel freer to provide the judge with negative information about co-parties. This can be especially important in cases involving multiple defendants; when their counsel meet as a group with the judge, they are not likely to point accusatory fingers at one another. But in one-on-one sessions, each defense lawyer is more likely to tell the judge about weaknesses in the other defendants' positions. This kind of sharing of information with the judge is likely to be beneficial to the negotiations; it improves the likelihood that the judge will be able to persuade each party to make an appropriate contribution to settlement.

Another significant advantage of the private caucusing format is that it gives lawyers an opportunity to tell the judge if they have client control problems. A lawyer who meets with the judge in the presence of his client, or in the presence of other lawyers, will find it most difficult to tell the judge that his client seems disinclined to accept the lawyer's advice or recommendations, seems to be approaching the litigation irrationally, or appears to bring misplaced expectations to the settlement negotiations. Even if you have no such problems with your client, you are better off if the format of the conference permits your opponent to disclose problems he or she has with his or her client. A judge who is alerted to client control problems may be able to help move things toward closure by meeting with that client (and his lawyer) and reassuring him about the reliability of his lawyer's analysis and recommendations.

A related advantage of the private caucusing system is that it permits lawyers to warn the judge if there are particular subjects or possible components of settlement packages about which their clients are especially sensitive. A judge who is so warned can either take special steps to assuage the client's feelings or be sure not to stumble into matters that needlessly cause offense or trigger counterproductive emotions.

The one-on-one format also offers advantages to the judicial host of the conference that can benefit counsel. The judge can move through the analysis more quickly than he or she could if the clients were present (in which case he or she would feel constrained to translate legal concepts into lay terms) and the judge can be more frank in expressing reactions to particular evidence or lines of argument than he or she would be if all counsel were present. Thus, the quality of the communication between lawyers and the judge can be higher in the private caucusing format. This format also reduces the odds that something the judge or one of the lawyers says will embarrass another lawyer, either in front of his peers or in front of his client, or both. A judge can inadvertently embarrass a lawyer either by asking him a question he cannot answer or by suggesting an analysis that is obviously more penetrating than an analysis offered by the lawyer.

This embarrassment can be compounded if the conclusions about the case
that follow from the lawyer’s and the judge’s different analyses are mutually exclusive. In private meetings with counsel and client, I have asked lawyers basic questions (about the evidence or the applicable law) that lawyers have not been able to answer. In a surprising percentage of cases, lawyers have failed to complete key aspects of their case preparation before the settlement conference and when my questions expose this fact, they often are embarrassed. Their faces tend to get reddest when this happens in the presence of their clients. The point is that causing a lawyer this kind of embarrassment can have a disastrous effect on a settlement conference. An embarrassed attorney feels the need to repair his image in the mind of his client or of opposing counsel. Unfortunately, many lawyers try to make such repairs by becoming "tougher," more rigid, more demanding, or more belligerent. Another common reaction to embarrassment in this setting is to attempt to discredit the judge who was the source of the troublesome question or analysis. Both of these reactions tend to interfere with the process of searching for common ground. In some instances, a lawyer’s efforts to rebuild his “face” can be so intense that they doom the conference altogether. The nice thing about the one-on-one format is that there is no “audience” (client or opposing counsel) before whom embarrassment can mushroom into a major problem.

Similarly, lawyers working in the private caucus system are much less likely than they are in a group setting to feel that they have boxed themselves into a corner through the way that they have analyzed the case or articulated the basis for a particular offer or demand. In a group meeting, there is a much greater risk that a lawyer who has vigorously presented a one-sided portrait of the case, or who has adamantly rejected an offer or demand, will feel that he cannot modify his position, even after learning new information, without an intolerable loss of face. Counsel in this situation are likely to fear that any adjustment in their position will be perceived as a wholesale retreat, a concession of weakness or foolishness that is virtually impossible to countenance. Negotiations are likely to be more successful if there are as few opportunities as possible for counsel to get themselves into such positions.

The one-on-one format also creates far fewer opportunities than the various group approaches for one side to say something that offends or alienates the other. These kinds of risks are greatest, obviously, when the clients are present, but they also exist when group meetings are attended only by lawyers. In group meetings, counsel too often seem unable to resist the temptation to try to win ground for their client at the expense of opposing parties or their lawyers. In the litigation environment, where feelings usually are intense and sensitivities usually are raw, the likelihood of even inadvertent friction seems to vary directly with the amount of direct interaction between the people whose interests are directly in conflict. The more time the judge is forced to spend trying to heal wounds that are verbally inflicted at the conference, the less effective the judge will be in his or her principal role of helping the parties analyze their way toward a shared prediction of what is most likely to happen if the case were to go to trial. Thus, the group setting creates pressures that
can distract the judicial host, and the participants in the conference, from the main task at hand.

Group settings can also compromise the quality of the information the judge receives from the parties and the quality of the analysis that is conducted during the conference. In the group setting, lawyers and parties are likely to feel greater pressure to play their cards close to their chests, to posture and to exaggerate. The group setting is also more likely to make the judge feel that he or she must avoid altogether, or at least work gingerly through, subjects about which participants are especially sensitive. A judge who feels pressure to avoid certain subjects, or who is distracted by efforts to repair fragile emotions, simply cannot analyze a case as reliably as one who can focus systematically and without interference on the relevant evidence and law.

It is important to acknowledge here an argument that cuts in the opposite direction. Some lawyers might contend that the information the participants present to the judge and to each other in a group setting is likely to be more reliable than information presented in private, one-on-one sessions because in the group sessions the presence of opposing counsel or a knowledgeable person representing the opposing party has a tendency to reduce exaggeration and moderate emotions. According to this line of reasoning, a lawyer or client is less likely to misrepresent the evidence when he speaks in the presence of an opponent who will challenge misstatements, provide additional information, and present a balancing perspective or interpretation.

There are two problems with this line of reasoning. First, it assumes that the private caucusing format offers no opportunities for counsel or parties to balance or challenge presentations by their opponents. In fact, there are at least two vehicles for such balancing and challenge. One such vehicle is the written statements submitted by the parties, in confidence, prior to the conference. Each side knows that the other side has made a written presentation to the judge, but neither side knows what is in that presentation. Thus, each side knows that the judge has already been given additional information and a different perspective, and that that information could expose any serious misrepresentation counsel might be tempted to make. Similarly, each side knows that during the conference the judge will be shuttling between lawyers and comparing what he learns from one to what he learns from the other. In other words, the opportunity for challenging, testing, and balancing each side’s views remains; it is simply less direct.

The second problem with the argument that the judge is likely to receive higher quality information in group sessions is that it assumes that the presence of opponents tends to moderate posturing rather than to exaggerate it. My experience, and the experience of other judges who have worked extensively in settlement, does not support this view. On the contrary, our perception is that the presence of other lawyers and parties heightens tensions and encourages everyone to take more extreme positions. Lawyers working in group settings feel an extra measure of pressure to “perform.” They want not
only to present their client's case in the best possible light, but also to send messages to opposing counsel. When they work in the presence of another lawyer, many litigators seem to feel a special need to demonstrate how tough they can be, how unpleasant it would be to try the case against them, or with how much convolution they are capable of reasoning. They also feel more pressure, when performing in front of their peers, to demonstrate that no one can take advantage of them, put something over on them, or slip something past them. These intensified pressures make many lawyers less willing to show their informational or analytical cards and less comfortable in appearing to be flexible and moderate when they are being observed, and measured, by their opponents. In private sessions with the judge, by contrast, the "performance pressure" is less intense and the distortions caused by it are smaller.

In sum, since settlement requires some degree of compromise, and since compromise is more likely when people feel less animosity toward each other, less threatened by each other, and less of a need to prove something at one another's expense, group sessions can harm prospects for achieving settlement by exacerbating inter-party tensions, inspiring exaggeration, and inflating belligerence. Of course, there are special incentives to use the private caucus system if, during the discovery stage, counsel or litigants have developed unusual animosities. Friction between counsel can disrupt settlement negotiations completely.

There also is less risk in the private caucus format that mistakes the judge might make will damage the negotiation process. For example, judges can err in case valuation. If a judge announces a figure for the value of the case in a group setting, and this figure is out of line with what both sides feel the case is worth, counsel may find it impossible to repair the damage. More subtly, there is always a risk that the judge will say or do something offensive to a lawyer or a party. If this happens in a group setting the ripple effects will be much more severe than they would be if the same thing were to happen in a private session. Since the judge's inputs or influence may be crucial to reaching a settlement, it is preferable to use the format for the conference that creates the least risk that he or she will do something that compromises his or her credibility or good will.

On the other hand, there are two potentially significant advantages to the group format. The group format permits every participant in the conference to know all the bases (in evidence, law, and argument) on which the judge predicates the assessments he or she articulates and the recommendations he or she makes about terms and conditions of an agreement. In some circumstances, lawyers and clients may be so suspicious or distrustful that a judge will be able to make a real contribution to the settlement process only if all the communication with the judge takes place in an "open" setting (i.e., in group sessions attended by all interested parties). The openness of the group setting may be especially important to litigants who are new to the system and relatively unsophisticated about its intricacies. The group format may be especially appropriate when one of the parties is proceeding in pro per.
Sensitivity about the propriety of private caucusing is not confined to parties. In some areas of the country, many lawyers also may be ill at ease with this format. The results of a major survey of litigators, completed in 1984 under ABA sponsorship, suggest that in northern Florida, for example, significant numbers of lawyers are uncomfortable with the notion of judges holding private meetings with one lawyer or one side at a time. While this kind of discomfort is more likely and more understandable when the judge hosting the settlement conference also would be the judge who would preside at trial if the case went that far, feelings of this kind can undermine the settlement dynamic regardless of their source. Since some degree of confidence in the integrity of the process is essential, it is unwise to use the private caucusing system in any case where counsel or clients feel significant levels of discomfort with it.

A second advantage of the group meeting format is that it can be used to assure the judge and counsel that each offer and demand, accompanied by its rationale, is heard by the party (not just its lawyer) to whom it is directed. I have hosted conferences where I have been concerned that counsel were not sharing all offers with their clients, or were not fully explaining the rationales that supported the offers. I also have been concerned on occasion that lawyers may have used non-existent client control problems as excuses for not responding seriously, or more flexibly, to offers or demands that seemed reasonable to me. One obvious way to attack these kinds of problems is to include all clients in all the sessions of the settlement conference.

In many cases, however, this "solution" is both unnecessary and unwise. There are devices for assuring that offers and the rationales that support the offers are reaching the parties that do not require the wholesale restructuring of the conference. One such device consists of the judge meeting privately with lawyer and client for one side at a time, after a series of one-on-one sessions with counsel, and having the lawyers present to their clients (in the presence of the judge) the offers that are on the table and the reasons behind these offers.

Another possibility is for the judge to host a series of private caucuses, then to call a group session that includes all the clients for the purpose of exchanging and explaining offers and demands. As a third possibility, the judge might require each party to submit its offer or demand in writing, along with an outline of its rationale, then require each client to confirm that he reviewed the proposal that was directed to him. The point here, of course, is that there are several ways to ensure that offers reach clients that do not require sacrificing the benefits of the private caucusing format.

V. KEY CONCEPTUAL PREPARATION JUST BEFORE THE CONFERENCE

In the sections that follow, I describe the ways lawyers can most effec-

tively handle the various specific aspects of settlement negotiations. Before turning to that detailed discussion, however, it is important to emphasize the key subjects that counsel should review in the hours just before the conference. This is the time for counsel to reap the harvest from the preparation he or she has done in the weeks before the conference. At this late stage, counsel should not be attempting to develop basic information for the first time, but should be synthesizing and putting the last organizational touches on information he or she has had the foresight to gather much earlier. The following is a list of tasks lawyers should be sure to have completed before the settlement conference.

1. Outline the principal legal theories on which each party is likely to rely, listing every essential element of each claim or defense.

2. For each element of each legal theory, identify the nature and source of the evidence that is likely to be adduced either to support or to challenge the element in question.

3. If any of the legal theories (as opposed to the evidence in support of them) will be challenged, identify the legal authorities (cases, statutes, etc.) on which each side is likely to rely with respect to each theory that will be contested.

4. Systematically compare the parties' real-world situations (outside the litigation) to identify each side's needs and concerns and to isolate the kinds of things each side might be able to do for its opponent that its opponent could not do for itself, or at least could not do as efficiently or effectively.

5. Identify the kinds of concessions that are likely to be least painful for each side. Working with your client, make a list of possible concessions, starting with those that would be least painful and working down to those concessions that your client would least like to make.

6. Develop a series of "hypotheticals" through which you could articulate your client's offers or demands (these might incorporate assumptions about which evidence the trier of fact would find most persuasive, how the judge would rule on pivotal pretrial motions, or specified elements that might be included in an overall settlement package).

7. Decide what role you want the judicial host of the conference to play, then plan your conduct so that it encourages the judge to play this role.

8. Decide which approach or style you want opposing counsel to adopt during the negotiations, then plan your conduct so that it encourages opposing counsel to respond appropriately.

9. Be sure you understand the scope of the relevant confidentiality rules, e.g., Federal Rule of Evidence 408. Determine if there are matters

2. The law as it relates to the settlement communications is complex and fraught with traps for the unwary. W. BRAZIL, supra note 1, at 305-90.
that should not be disclosed because their potential utility at trial to
your opponent (for purposes other than proving liability, e.g., as evi-
dence of bias) outweighs the benefits your client is likely to gain from
disclosing them during the negotiations. Make sure that you have
clearly in mind those matters you will disclose only to the judge in
confidence and that you must remind the judge not to disclose to any
other party.

The following discussion of handling the conference itself is divided into
three principal sections: (1) counsel’s tone or style during the conference, (2)
the analysis stage, and (3) the negotiation stage. These subjects are treated
separately in order to encourage more careful thinking about each and to rein-
force the notion that the key to maximizing the odds of success in negotiations
is to emphasize the analytical dimension of the process. In the real world,
these three dimensions of the process are thoroughly intertwin ed.

VI. THE MOST EFFECTIVE TONE OR STYLE

If you want to maximize the odds that a settlement conference will be
productive, and that the judge will do as much as he or she can to make it
productive, there is no question about the approach you should take. Having
hosted many settlement conferences, and having reacted to many different
kinds of lawyering in this environment, I know what kind of lawyering makes
the most favorable impression and does the most to energize the judicial host.
The most effective lawyers in this setting do all they can to appear to the
judge to be rational, open-minded, flexible, and genuinely interested in seeking
a negotiated disposition of the case.

If the judge perceives you to be analytical, flexible, and open-minded, he
will like you and be interested in working with you. Most important, he will
have more confidence in your judgment, and more respect for your profes-
sonalism, than he would if he perceived you as approaching settlement as a poker
game or as an opportunity to try to manipulate other people. He is also more
likely to believe what you tell him, both about your client’s position on particu-
lar offers or demands and about evidence or law that you cannot show him
during the conference. If you have the judge’s confidence, because you have
been rational and open-minded, he is much more likely to believe you when
you say, after a great deal of negotiating, “Your honor, my client just can’t
move any farther.” Similarly, he is more likely to believe you when you report
(during the negotiations) that you have interviewed a witness who has not
been deposed, and that this witness will testify in a specified way on some
important issue. Having this kind of credibility with the judge can enhance
your credibility with opposing counsel and client. And credibility is the single
most significant force in achieving good settlements.

In making the more specific suggestions about lawyering style that follow,
I assume that counsel will be meeting privately with the judge in one-on-one
sessions. Whether counsel would want to follow all of these suggestions in
group meetings involving opposing lawyers and/or parties must be left to counsel’s judgment.

In private caucuses with the judge, it is important, at the outset and at critical points throughout the course of the conference, to be energetic, upbeat, and interested in settlement. The judge will respect and appreciate your positive energy and the fact that you bring a constructive tone to the process. If the judge feels your energy, he is likely to put more of his own energy into the process and to work harder to develop a basis for settlement.

It is important to debunk two commonly accepted myths concerning settlement negotiations. First, it is not true that counsel who are upbeat appear naive. Second, it is not true that to express interest in settlement is to appear weak. There are many different ways to be upbeat and interested. I suppose there are ways of expressing positive energy that appear silly because they ignore the realities of the situation. I also can imagine a lawyer seeming weak because he wants to settle so badly that he is willing to sacrifice virtually everything to achieve that end. I am forced to speculate about these matters, however, because I have never seen a lawyer behave in either of these ways. What I have seen, and it is very impressive, is a controlled, sophisticated presentation that begins with words like these:

[s]ince the purpose of a settlement conference is to try to settle the case, and since we’re all here, we are committed to giving it our best shot. My client and I recognize that significant obstacles would have to be overcome in order for the parties to find common ground, but we also recognize that most cases settle and that there can be advantages to disposition by agreement. Your honor, we appreciate the commitment you are making to this matter. We intend to reciprocate by working hard to see if we can find acceptable terms. How would you like us to begin?

Counsel should keep in mind that when they are in a private caucus session, they are dealing with a judge, not opposing counsel. A lawyer who appears to a judge, in private, to have no interest in settlement, and to have come to a settlement conference with no energy, does not appear “strong.” A lawyer who believes that he has nothing to learn from a settlement conference, and that there is no possibility that the parties might make progress toward an agreement, seems irrational. Such a lawyer also seems to insult the judiciary; he seems to be saying, “Judge, you are wasting your time and mine. There is no point in trying to help us reason toward a common prediction of what will occur at trial.” Only an unwise lawyer would make this kind of impression on a judge.

Thus, I believe that counsel should appear genuinely interested in exploring the settlement possibilities. As part of her efforts to create this impression, a good lawyer will indicate to the judge, early in a private session, that she understands that settlement requires some degree of compromise and a willingness to listen. She also will indicate, at least obliquely, that there is room for some flexibility in her client’s position. Sending these kinds of messages to the judge has at least two positive effects: (1) it makes the lawyer appear more
rational and sensible, thus increasing the judge’s confidence in her and her judgment, and (2) it tends to energize the judge, to give him reason to think that settlement is possible, and thus to dedicate more of himself to the negotiations.

By contrast, it is extremely counterproductive for a lawyer to give the judge the impression that she intends to “stonewall” in favor of some objective that she and her client defined before coming to the conference. Some lawyers apparently believe that they will not be effective unless they appear “tough.” They assume that to be formidable as a negotiator they must be rigid and pugnacious, that they must convince their opponents, and the host of the conference, that they will give up nothing, that they will recommend a settlement only if its terms represent a 100% vindication for their client. There may be a time for “toughness” in some settlement negotiations, but this time almost never occurs at the outset.

By projecting rigidity at the outset, you project closed-mindedness. If the judge senses that you are going to doggedly pursue some pre-defined settlement figure, he will infer that you are not interested in learning either from his analysis and perspective or from information or argument generated by your opponent. This arrogance insults the judge and discourages him from putting any real intellectual work into the process. Judges respect reasoning, and if you evince no interest in reasoning, judges will not respect you. Moreover, if your client really is willing to move, but you begin by striking the “stonewall” posture, you appear to everyone as clumsy and disingenuous, a person whom nobody can trust. If the judge distrusts you, he certainly will not become your ally in the negotiations.

There also is a risk that your belligerence will provoke a response in kind not only from your opponent, but also from the judge. Belligerence begets belligerence. If you appear rigid and arrogant, the judge, being human, may become resentful and look for ways to teach you a little humility by attacking your client’s case. People who feel attacked have a tendency to look for ways to counterattack in order to even the score. If you appear to have a condescending attitude toward the process the judge is hosting, you may make the judge feel defensive. Instead of inspiring the judge to look for ways to put you and your client in your places, you should be encouraging the judge to respect and sympathize with your client’s position.

There may be rare cases when you really believe, at the beginning of a settlement conference, that your client cannot or should not move. In this situation, it is a serious mistake simply to cross your emotional arms and squat. Instead, you should tell the judge, in your first private session, that you understand that it looks arrogant and closed-minded not to be willing to compromise, and that by taking what seems to be a rigid stance you make his job much more difficult and jeopardize the whole conference. After acknowledging these facts, you should go on to explain, logically and in detail, why your client is taking this position. Remember, the judge respects reasoning, and he needs reasons to explain your position to your opponent. The more specific your rea-
sons are and the less conclusory your explanation is, the better the odds are that you will persuade the judge that this is in fact one of those unusual cases where it would not be appropriate to ask both sides to make substantial adjustments in their positions as part of the process of working toward an agreement.

Another impression counsel should be careful not to create is that they perceive the settlement process largely to be a game of poker, of either the huff-and-puff variety or some more subtle form, in which the object is to gain some undeserved advantage. In the poker game metaphor, settlement negotiations are dominated by luck, psychological manipulation, faking and feinting, and relentless posturing. A lawyer who communicates that he views settlement as this kind of game belittles the judicial role and risks losing the judge’s respect. In the poker game metaphor, reasoning and the merits of the parties’ positions have little to do with the outcome of settlement negotiations. Reasoning and the merits, however, are what matter most to judges. Moreover, a process that is essentially like a game of poker reduces the judge’s role to that of a shill, simply shuffling offers and demands between litigant players. A judge who perceives that his or her role has been reduced to this level is likely to lose interest quickly. She is likely to feel superfluous, perhaps even degraded.

Wise lawyers pay attention to the judiciary’s self-perception. They understand that judges feel the need to reason from understood evidence and legal principles to results that can be explained and thus defended. Wise lawyers take care at least to appear to respect these values. If your approach to the settlement process seems to ignore or threaten these values, you probably will lose the judge as an effective intermediary. She either will quit the negotiations altogether, or, if your opponent has an approach that reflects more respect for her values, she will drift into his camp. Moreover, since a judge’s most effective leverage with opposing counsel is based on reasoning, a lawyer whose approach is dominated by posturing instead of by reasoning fails to provide the judge with the kind of ammunition that she is most likely to be able to use to induce movement by the opposition.

Settlement conferences are not trials. Good lawyers understand this and make sure that the judge knows they understand it. Good litigators self-consciously change hats for settlement conferences. They abandon their openly adversarial style and adopt a style that is more conciliatory, more flexible, more open, and readier to acknowledge the strengths on the other side and the weaknesses at home. They go out of their way to show the judge they know that this is not an appropriate environment for the emotional intensity and combativeness that sometimes characterize a trial. In their private sessions with the judge, they do not make speeches. They recognize that if they sound like they are making their closing argument to the jury, the judge will think, “this guy doesn’t know where he is; he doesn’t know the difference between a settlement conference and a jury trial.”

Wise lawyers are careful about the role they permit emotion to play in
their approach to settlement conferences. Counsel may be able to use emotion for important effects in negotiations, but only after playing other cards and only in limited circumstances. It is a serious mistake to identify emotionally with your client's cause, or to give the settlement judge the impression that you have done so. You risk creating such an impression if you are emotional at the outset of the conference, or if you inject your personal values or politics into your efforts to justify your client's settlement position.

I have hosted conferences in which one of the lawyers has permitted his ego to become blurred with his client's and in which a lawyer has permitted his professional self-esteem to depend on achieving a certain objective in the negotiations. When I sense that a lawyer has drifted into feeling that the case is his, rather than his client's, I lose confidence in the lawyer's judgment. I worry that such a lawyer has lost his ability to assess the evidence dispassionately, to put himself in the position of a juror or judge at trial, to predict accurately how neutral people will respond to the parties' positions. In short, a lawyer cripples his credibility with me if I sense that emotion, rather than dispassionate reasoning, is the dominant force in his approach to the case.

If you understand that the way you handle yourself during a settlement conference can significantly affect the role the judge plays, you will see more clearly the negative fallout of emotional identification with your client. If the judge infers that emotion dominates your approach to the negotiation process, she is likely to retreat into roles that shrivel her capacity to contribute. Judges trade in rationality. The most basic purpose of our legal system is to replace emotion and physical force with reason. Judges are not trained in the psychological sciences and are not likely to feel comfortable with, or skilled at, dealing with emotion. Their most likely reaction to an emotional lawyer is to back off. The emotional lawyer in effect drives the judge out of the settlement process and loses the resource that the judge represents. Even if a particular judge happens to feel that she can deal with emotion, and has the patience to try to do so, the effort will distract her from doing the kind of thing she does best, and the kind of thing through which she is likely to contribute most to prospects for settlement: rational analysis.

Lawyers convert judges into allies by persuasion, not by pressure or emotional appeal. A judge who is forced to spend most of her time dealing with emotions will not have an opportunity to develop a reasoned basis for recommending any particular settlement proposal. A judge who has not been able to reason carefully to a position either will refuse to take one or, if she is inclined toward a view, will feel little conviction about it. Such a judge is not likely to feel comfortable trying to persuade your opponent to accept her view. And if she tries, she is not likely to be successful.

I do not mean to suggest that there never is an appropriate role for emotion in settlement negotiations. I have seen controlled emotion serve as a valuable tool in settlement conferences, but only if it is used sparingly and with appropriate timing. The key lesson here is this: save your emotion. Treat your emotion as a precious negotiation high card, to be played only after you have
played all the cards reason has dealt you and only as a last resort, only in the final round. Strive to reach agreement without playing this card at all. By resorting to the emotion card you risk ending the game prematurely. Your opponent or the judge might perceive your emotion as a bluff or might react in kind, producing a confrontation of wills from which neither side can back down without a painful loss of face.

Your use of emotion will be credible and effective if it comes after you have been rational and after you have made concessions and attempted to meet the other side part way. At such a late time, your emotion, perhaps in the form of righteous indignation, can be useful in persuading the judge (and your opponent) of the sincerity of your position or the firmness of your conviction. I recall vividly a conference where I watched a lawyer reason for hours, being flexible and making appropriate concessions, then rebel in righteous anger when his opponent pushed for one last substantial concession. The anger was controlled, but real. Coming after I had watched this lawyer behave reasonably for so long, and after I had developed confidence in his professionalism, this anger was most effective. It persuaded me that we really had hit his client’s bottom line and that it was not fair to ask him to move any farther. It made me look to his opponent for the last concessions that would be necessary to cement the deal. By saving his emotion until the very end, and by using it only to support a reasoned and reasonable position, this lawyer deflected the last bit of judicial pressure over to his opponent.

VII. THE GLADIATORS JUST GET IN THE WAY: THE MYTH OF THE EFFECTIVENESS OF “GOOD GUY—BAD GUY” TEAMS

Before completing my observations about effective “tones” or “styles” for negotiations, it is important to re-emphasize, in a slightly different context, the basic point that belligerence, or playing the role of the tough guy, is counterproductive and inappropriate in a judicially hosted settlement conference. Some lawyers believe that the most effective approach to negotiations is to form a team in which one lawyer plays the “good and reasonable guy” while the other lawyer plays the “bad guy.” The theory behind this approach apparently is that if the bad guy is sufficiently nasty and intractable, the good guy will be able to persuade the other side to make major concessions (1) simply to avoid dealing with the bad guy, and (2) because the distance from the bad guy’s outrageous position will become the measurement that everyone will use to find the middle ground.

There are several flaws in this theory. One false assumption is that the judge will take the “bad guy” seriously. In fact, many judges will simply ignore him. Others will be annoyed by him, but will react to that annoyance not by offering concessions to avoid dealing with him, but by resolving doubts in favor of the opposition. I have never heard of a judge being intimidated by a lawyer into urging concessions on the other side. An even more fundamental difficulty with the “good guy and bad guy” team approach is that it usually is
obvious. A judge who perceives your game is likely to become cynical about everything you present. By being obviously tactical you undermine your credibility in all areas. You seem not only dishonest but also unsophisticated, thus giving no one any reason to take your “analysis” of the case seriously.

A “good guy-bad guy” team also can trigger concerns in the judge about conflicts of interest in the way the client is being represented. The rare judge who might take the “bad guy’s” views seriously might fear that the “good guy” is too willing to sell the client down the river. More often, the judge will be concerned that the “gladiator” is disserving his client’s interest by jeopardizing a decent settlement simply to increase the lawyer’s fees, or in an attempt to get a dramatic result that would attract other clients (e.g., in a mass tort situation, where a lawyer hopes that there are other similarly situated people whom he might be able to represent in subsequent litigation). A lawyer who permits the judicial host of a settlement conference to infer that the lawyer is elevating concern for his own interests above concern for his client’s interests has no chance of converting the judge into an ally.

The generalization that integrates all the thoughts in this section is simple: the lawyers who are most effective in settlement negotiations cultivate a “style” or “tone” that is dominated by careful reasoning, open-minded flexibility, and a manifest interest in vigorously pursuing the possibility of settlement.

VIII. The Analysis Stage

For purposes of clarifying this presentation, I have divided the “substantive” aspects of settlement conferences into two principal dimensions: analysis and negotiation. In the real world, these dimensions of the process are inextricably intertwined. In fact, the heart of effective negotiation is careful analysis. Nonetheless, it is helpful to think about “analysis” and “negotiation” separately.

In good settlement conferences, the process, in fact, divides into two stages, the first dominated by analysis of the relevant law and evidence, and the second dominated by exchanges of proposals (possible terms of settlement) that are rationalized by what was presented during the analysis stage. Discussing the two stages separately permits me to emphasize more pointedly the importance of going through a well-developed, systematic analysis before beginning the process of exchanging offers and demands. If you treat analysis as a separate stage that must precede the negotiations, you are more likely to do justice to the analytical dimension of the process. You are much more likely to develop a comprehensive, structured understanding of the law and evidence if you expect the judge to call on you to present a meaningful analysis of the case before he begins exploring possible terms of compromise. Moreover, if a rigorous, thorough analysis precedes the negotiations, the inevitable “dipping” back into the analytical matrix that occurs during the negotiations will be more efficient and more reliable.

In my experience, the analysis stage of a settlement conference is by far
the most likely to get short shrifted by counsel. Sometimes this occurs because lawyers misperceive the nature of a judicially hosted settlement conference. In many courts, lawyers expect a settlement conference to be little more than a vehicle for exchanging offers and demands to see if they are close enough to strike a deal. Not expecting the judge to have the time or energy to work carefully through the law and evidence with them, they view the conference as if it were the “showroom” at a car dealership, where the interested parties posture around self-serving numbers, then simply walk away if the numbers are not in the same ball park.

A related reason that the analysis stage is often given short shrift lies in the fact that counsel often come to settlement conferences ill-prepared. Many lawyers do not view settlement conferences as sufficiently intimidating or significant events to devote substantial energy to preparing for them. In many conferences, I have been shocked at how poorly prepared counsel were; they simply could not make a thoughtful presentation of the law and evidence. When this has occurred, I have not been able to contribute meaningfully to the settlement dynamic and the conferences have taken on a perfunctory, ritualistic air. When conferences such as this have produced a settlement, it has been only because the parties came to the event with overlapping numbers and were prepared to put them on the table. Thus, one reason that I treat the analysis stage separately in this article is to encourage counsel to appreciate that it is only through analysis that they can make the conference an independently significant event, an event capable of producing (rather than simply reporting) real movement.

A good lawyer takes the analytical initiative. She lets the judge know, at the outset, that she expects her private caucus sessions with the judge to begin with and be dominated by analysis. The good lawyer, in other words, does not wait for the judge to move the discussion into analysis; instead, the lawyer takes the initiative and launches the review of the law and evidence. This is an extremely effective tactic because it communicates two things to the judge: one is that you are a rational, open minded person who expects settlement negotiations to be dominated by reasoning, and the other (just as important) is that you are confident that if reasoning dominates the process, your client will benefit. In other words, a judge who sees a lawyer who is eager to present a careful analysis is likely to infer that that lawyer’s client has a strong case, a case that can survive careful scrutiny. Thus, by appearing to want to reason toward a solution, a lawyer gains real credibility with the judicial host.

The analysis that a good lawyer presents has several distinguishing characteristics. The first is that it is systematic. One of the most common defects in presentations by counsel in settlement conferences is that they seem intellectually spastic. They jump from point to point, focusing only on favorable evidence or law and doing so out of context. This kind of presentation is never persuasive. When I hear a disjointed presentation I assume that the lawyer is poorly prepared, does not really understand the case, or is intentionally skipping points (evidentiary or legal) that favor his opponent. By contrast, when I
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hear a systematic analysis, I am impressed by both the lawyer's intelligence and his confidence in his client's position.

Systematic analysis begins with an explicit identification of the relevant legal principles. The persuasive lawyer points to authority for each legal principle that might be subject to question. In fact, well-prepared lawyers have attached copies of the relevant cases or statutes to the written settlement conference statements they have submitted several days before the conference. Sometimes lawyers bring copies of additional authorities to the conference itself, highlighting in color the most significant passages. The best lawyers never ignore contrary authority, or sources that seem to support their opponent's position. Instead, they squarely acknowledge such material, then present the authorities that support their client's position and try to show why they are more persuasive.

In describing the controlling legal concepts, an effective lawyer will isolate every element that must be established in order to prevail on each claim or defense. After isolating each element that must be proved, counsel begins his work with the evidence. He is not satisfied by merely acknowledging what he must prove and showing how he intends to prove it. Instead, he identifies both the evidentiary material that tends to establish each element and the material that supports his opponent's position. The keys to success here are to be systematic and specific, showing the judge the actual evidence whenever possible (e.g., documents, testimony from transcripts of depositions, written witness statements, tangible evidence, experts' reports, etc.).

The lawyer has two objectives: the first is to persuade the judicial host and the second is to give the host the ammunition he or she needs to persuade opposing counsel, who is certain to point to at least some authority or evidence that tends to support his client's position. Thus, the ultimate goal is to demonstrate why the support for your client's position is stronger than the support for the opposition. Since disposition turns on a comparison of the two sides, the effective lawyer forthrightly conducts the comparison for the judge. He does not ignore the strengths in his opponent's case.

The most effective lawyers complement their systematic analysis with a manifest openness of mind. A lawyer who appears closed-minded does not seem intelligent and cannot enjoy the confidence of the judge. A judge is likely to place much more faith in the views ultimately reached by a lawyer who appears interested in points of view other than his own, who is eager to learn whatever new information might be available, and who tries to assess fairly how this new information affects the reasoning he had developed earlier.

There are several ways to impress the judicial host with your open-mindedness. The first is to listen. I have seen many lawyers who are so preoccupied with arguing their client's side of the case, and with deflecting attention away from its weaknesses, that they appear not even to hear major points made by the judge or by opposing counsel. A judge will not have confidence in a lawyer who does not respond to such points, or who seems intent on trying to distract the judge's attention from them, or on shifting the focus of the conversation to
aspects of the case that are more favorable to his client. Many lawyers apparently believe that the judge will not perceive their diversionary tactics or their obfuscating responses. In my experience, however, such tactics are obvious and cost the lawyers who resort to them considerable credibility. The lawyers who make the best impression are those who appear to want to hear about the strengths of their opponent’s case and then respond to those strengths directly, on the merits, without flinching or retreating into obscurities or irrelevancies.

A second way to impress the host of your conference with your open-mindedness is to ask questions, both of the judge and of the other parties. I have been impressed, for example, when a lawyer describes with particularity the evidence his client can muster on an important factual issue, then says:

I think the evidence I have just described is very persuasive, but I’m not sure that my opponent is convinced. Is there some aspect of my reasoning that you [judge] question, or is there persuasive evidence that points in the opposite direction that I am overlooking or just haven’t learned about yet?

I also am impressed when, after a long analytical effort, a lawyer remains unconvinced about his opponent’s position and says: “Judge, I just don’t understand how Ms. Jones [opposing counsel] arrives at her valuation. Am I missing something? Would you go through the reasoning for me?” These kinds of questions serve two purposes: they reinforce the impression that the lawyer asking them is genuinely interested in reasoning toward a settlement and they pressure the judge and the opposition either to acknowledge that there are holes in the other side’s case or to expose more fully the evidence that supports it. If there are holes, you want to be sure the judge sees them. If there is evidence you don’t know about, you want to learn it.

The risk, of course, is that in responding to such questions the judge will become even more convinced about the relative strength of the opposition’s case. In other words, you risk losing an opportunity to dupe the judge (and your opponent) into thinking that your side is stronger than it really is. However, counsel routinely exaggerate the likelihood that judges and opponents can be duped so easily. It is a rare case (I have never seen one) where one side is fundamentally fooled by the other about the relative merits of their respective positions. It follows that the lawyer who pressures the court and the opposition to reason more carefully, and to expose the evidence more fully, risks losing very little while she creates an opportunity to gain something significant.

A lawyer can undermine the good impression that asking questions creates by reacting inappropriately to the answers. If you ask for the judge’s views, do not respond with a knee-jerk defensiveness or counterattack if you do not like what you hear. Instead, absorb and digest what you hear. Give the judge the impression that you are thinking about it. If you learn new information, put it in context. Try to articulate to the judge how the new information fits in with the information you already have. If the new information is sufficiently important, tell the judge that you would like some time to discuss it with your client and to analyze its implications. In other words, give the im-
pression that you take the new information seriously and intend to do it analytical justice. This will improve the credibility of whatever response you offer later in the conference or at a follow-up session.

Another way to impress the judge with your open-mindedness is to admit to at least the more obvious weaknesses in your client’s case. One cardinal principal of effective lawyering in this environment says that you should never permit the judge to learn the worst things about your client’s case from your opponent. If the judge has heard about the case from you (either through your written pre-conference statement or orally at the conference), but then learns for the first time from your opponent about serious problems for your side of the case, you will greatly damage your credibility. If the judge believes you are hiding important information from him, he will not trust you and will be reluctant to endorse the settlement proposals you make.

An attorney who admits to the weak points in his client’s case seems trustworthy and creates the impression that he is capable of objectivity. Judges place much greater confidence in lawyers whom they perceive as capable of dissecting situations with a cold, analytical scalpel. More generally, judges are likely to have more confidence in your judgments and your integrity if, during the private caucus sessions, you make it clear that you are prepared to make concessions, at least on points of lesser significance or where the superiority of your opponent’s position is clear.

A lawyer who is prepared to concede nothing seems foolish, partly because cases are almost never so clear-cut that nothing positive can be said about one side. Such a lawyer also creates a real risk that the judge will simply give up on the prospects for settlement. Smart lawyers understand that they can use concessions to keep the judge energized about the process.

Wise lawyers also know that there are ways to minimize the implications even of concessions they make in private sessions with the settlement judge. For example, a cautious lawyer might elect to articulate his concessions hypothetically or conditionally. He might say to the judge:

[I]et’s see if we can advance the negotiation ball by indulging some assumptions. Solely for the purpose of this conference, let’s assume that the evidence is more likely to show ‘X’ than ‘Y’ and that the applicable law is ‘A’. Even with these debatable assumptions, wouldn’t you agree that the settlement value of the case is in the vicinity of $100,000?

The beauty of this kind of statement is that it gives away virtually nothing while permitting counsel to indicate what range of figures is likely to be acceptable. This kind of statement gives the judge something to work with but does not commit your client to a particular view of the evidence or law.

Another painless way to earn credibility points with the judge during the analysis stage is to concede that some of your client’s legal theories appear to be more difficult than others to carry, or that meeting your burden on some of your numerous affirmative defenses may be problematic (a lawyer who rigidly insists that every one of the 15 affirmative defenses he has pled is equally compelling is not likely to make a favorable impression). The basic point here
is simple: good lawyers use carefully selected concessions both to earn credibility points with the judge and to advance the analytical ball.

Because information is essential to analysis, lawyers must search for ways to increase the amount of information that the parties disclose during settlement conferences. One theory holds that the best way to get information is to give information. This theory accepts the premise that giving tends to make the recipient of the gift feel an obligation to reciprocate. Thus, one way to encourage your opponent to share more of what she knows about the case with you may be to share with her information controlled by your client. This device can be especially effective if some of the information you share tends to support a contention your opponent is making. If your disclosures seem to be highly selective and wholly self-serving, your opponent will either feel no obligation to respond or will respond in kind.

As you proceed through the analytical stage, you should be sure to bring to the judge’s attention any practices or expectations in the relevant industry or community that are unusual and that might have a bearing on the resolution of significant issues. For example, I once hosted a settlement conference in a case involving alleged breaches of book publishing contracts. There is a sub-world in the book publishing community that has developed its own set of expectations about how certain standard provisions in contracts are to be interpreted. These expectations could not be inferred from the language of the standardized documents. Had the lawyers permitted me to apply normal contract analysis to the facts as they had been developed in discovery, my views about the relative strengths of the parties’ positions would have been erroneous.

In other cases, I have been tempted to apply personal moral standards to business transactions that have occurred in environments where, by consensus, quite different moral standards predominate. In all these cases, it has been important for the lawyers to educate me about the relevant precepts. Effective lawyers take care to use the settlement conference dialogue to expose what each party believes the applicable norms are; negotiations can degenerate quickly if there are misunderstandings or disagreements about such fundamental aspects of the real world environment in which the dispute arose.

As they proceed carefully through the analytical stage, good lawyers simultaneously keep an eye on the picture of the case that a person who paints with a broad moral or common sense brush might develop. Especially in cases that would be tried to a jury, common sense reactions and general notions of fairness can play a major role in outcome. If the case might create an opportunity for a jury to award general or punitive damages, lawyers simply cannot afford to complete their analysis without stepping back and trying to guess how their clients, and their respective stories, are likely to be perceived by the jury. In many settlement conferences, I have found myself being influenced by feelings about what seemed “fair” according to basic societal values. In some cases, this sense of fairness seems to have a power independent of my analysis of the relevant evidence and law. When I feel this happening, I try to share
my feelings with counsel and try to discover why I feel the way I do. I find that going through this exercise can help the lawyers predict how jurors will respond to the big pieces of their case. Lawyers would be well advised to seek this kind of input from the judge if he or she does not volunteer it. Occasionally I have had my law clerk attend the conference in order to give counsel yet another person’s “gut level” reaction to the relative appeal of the two sides’ stories. When using a law clerk for this purpose, I try to ask for his or her reactions before I articulate mine; this reduces the risk that the clerk’s reactions will be influenced by mine.

IX. The Negotiation Stage

Perhaps the most important point to be made about the negotiation stage is that you should not rush into it. A common mistake lawyers make is to assume that a settlement conference is really only about numbers. Working from that assumption, they either sprint superficially through the analysis stage or try to skip it altogether by making an opening offer or demand in the first few words they utter. For several reasons, it is a serious mistake to rush like this to the negotiation stage.

One reason is that good lawyers use settlement conferences for many purposes in addition to trying to reach a settlement. For example, you can use a settlement conference to narrow and focus the dispute and to develop a cost-effective discovery plan. Many cases (probably most) do not settle at the first conference. Knowing this, it is important to use the first conference to identify the key areas of disagreement, then to devise a plan for generating the information or other sources of leverage that will move the parties’ positions closer together. Sometimes this involves taking a few key depositions, or discovering certain documents. Sometimes it involves briefing an important motion, or impleading a new party. The point, of course, is that good lawyers use settlement conferences to identify what separates the parties’ positions. If they were to rush to a superficial exchange of numbers, they would squander this learning opportunity.

By rushing to the negotiation stage, a lawyer also loses an opportunity to learn more about the opposing client, what is important to him, how he thinks and reacts, and what kinds of things in addition to money he might find attractive. The more substantial the analysis stage is, the greater the opportunity to learn things that you can use to tailor either the content of your client’s offer or the way it is presented so as to fit the needs or personality of the client (or lawyer) on the other side.

Moreover, to rush into the negotiation stage is to assume that you fully understand the case and have little to learn from analysis of it by your opponent or the judge. There probably are cases where such an assumption is justified, but they are rare. The world is too complex, and human interactions are too subtle, to permit us to safely assume that we fully understand much of anything. Lawyers should look at settlement conferences as vehicles for testing
their theories, enriching their perspectives, adding to their knowledge of the relevant facts and law, and exploring the support for competing views. Rushing to the numbers game cuts off these possibilities. It also squanders an opportunity to learn about how your opponent might present his case at trial. Wise lawyers use the analysis stage of a settlement conference to gain insight into how opposing counsel will approach his case, what he thinks its strengths and weaknesses are, and what his trial strategy might be.

There is another, more psychologically subtle reason for not rushing into the negotiation stage. I think the odds go down that an agreement will be reached when the lawyers start exchanging offers and demands early in the conference. To maximize the prospects for settlement counsel not only need to explore the case fully and analytically, but also to create room for a kind of psychological momentum to build up. If lawyers and parties invest a significant amount of time in a settlement conference, they are more likely to want a return on that investment, and the kind of return they are most likely to look for is an agreement. To put it another way, if the parties have invested a lot of time in the conference, they are more likely to build up expectations for it and more likely to feel disappointed if no agreement is reached.

Moreover, the more substantial the analysis stage of the proceedings is, the more likely the parties are to perceive one another as taking the negotiations seriously, proceeding in good faith, and having a genuine interest in refining their understanding of the evidence and law and of adjusting their settlement positions to reflect that evolving understanding. There is a better chance of achieving settlement if the parties perceive one another as willing to listen, flexible, and willing to modify their offers or demands as they learn new things during the course of the discussions. These reasoned adjustments in position can give the participants greater confidence in the process and foster good will between them. These feelings, in combination with the momentum that develops from the fact that the parties make changes in their positions, maximize the odds of settling the case. To rush to a simple-minded exchange of numbers prevents these positive forces from developing.

A. Calculated concessions to create momentum

If he has done his homework well, counsel can begin by making concessions that are on the "significance periphery" of the case or that are least painful for his client. Good lawyers always come prepared with some points they can give away in an effort to generate movement in the negotiations. In virtually all settlement conferences, both sides are called upon to make concessions. One of your goals should be to have made what appear to be a significant number of concessions before the focus of the negotiations moves to the points that most threaten your client's position in the case, and before the judge or the other side ask for the things that would be most painful for your client to give. If your client already has compromised on what appear to be many points, and already has shown a willingness to make what appear to be
significant commitments, when the negotiations reach the matters about which he is most sensitive, you will be in a much better position to persuade the judge, and your opponent, that it is unfair to ask him to do more. It is unwise to permit the negotiations to reach crucial matters before you have built up "negotiation credits" by making concessions in less consequential areas.

Another way to generate momentum in the negotiations is to break the case, or possible settlement packages, into component parts and to negotiate about the parts one at a time, starting with those that are least threatening. The goal is to build optimism and to energize the discussion before tackling the most difficult aspects of the negotiations. The likelihood of success is much greater if all participants feel that progress is being made, even if the progress initially is in the areas of least consequence. For example, if there are several different potential components of the ultimate damages figure, it can be helpful to negotiate about one element at a time, beginning with those about which there is least room for disagreement or in which the numbers are smallest. Past medical expenses and past lost wages often fall into this category.

On the other hand, I have seen cases in which the opposite strategy works best. Fearing that they will not be able to agree about the value of individual elements of damages, and/or fearing that excessive friction might develop if counsel attempted to negotiate separately about each of many such elements, some lawyers prefer to negotiate about the value of the case as a whole. This strategy permits the parties to disagree, secretly, about the value of individual components of the settlement package but agree about the bottom-line value of the entire suit.

Because it is movement that inspires interest and optimism, and because it is movement that encourages the judge to commit more energy to the process, it is imperative not to permit the negotiations to stall or get bogged down in one unfruitful or especially emotional area. If you have been working one area for a while without any sense of breakthrough, or if you perceive that opposing counsel or client is especially sensitive about a particular point or term, you should shift the focus of the discussion to an area where less ego is involved or where your client can afford to be more generous or flexible.

While it is a mistake to insist that the opposition make a concession before your client will, it also is a mistake to make a series of substantial concessions without some reciprocation from the other side. Even when the points are not of great moment, it is important that the whole process include some movement by both sides. Unless the liability picture is very clear (one way or the other), negotiations take on an unhealthy, lopsided cast when one side makes a clearly disproportionate number of the concessions or moves much greater distances than its opponent. A healthy settlement dynamic seems to have a natural balance to it, a rhythm that emerges when both sides communicate their respect for one another and demonstrate their own sense of responsibility by making roughly comparable concessions. If you permit your client to make a whole series of unreciprocated concessions, and if you work up agreements on significant points without requiring your opponent to meet
you at least part way, you encourage disrespect for your confidence in your client's position, and tempt your opponent to conclude that you will make even larger concessions without reciprocation. In other words, while making concessions early in the process you, should gently communicate certain expectations to your opponent. Doing this will prevent him from sliding into an irresponsible and disrespectful attitude that will cause difficulty for the negotiations when they move into the crux of the dispute.

There is another psychological risk of which counsel should be aware when making concessions early in the negotiations for the purpose of generating momentum. A lawyer who self-consciously makes a series of concessions, even on relatively minor matters, is likely to develop an expectation that he will be rewarded in due course by his opponent. Even if this expectation is communicated, there is a risk that it will not be met—the opposition may not reciprocate at all, or its reciprocation may fall short of what the lawyer who took the initiative and made the concessions considers fair.

A good lawyer foresees these risks and does not exaggerate them by giving too much too early. He also controls himself if his opponent fails to respond. Anger is the natural reaction when one person's initiative and generosity are met by selfishness or intractability. Except in rare circumstances, however, anger evinces loss of control and is counterproductive. The lawyer who loses his temper in a settlement negotiation is likely to doom the whole process. Thus, you should make concessions judiciously and recognize that they might not be reciprocated. Do not permit yourself to become so emotionally wedded to any particular expectation that you will lose your temper if it is not fulfilled. It is even more important that you not permit your client to set himself up for a similar emotional fall. When you discuss making concessions with your client, warn him against succumbing to the feeling that because he has chosen, as a tactic, to make certain gestures, he has an "inalienable right" to a specific form of quid pro quo. Prepare your client to adjust emotionally if his generosity does not produce the results for which he hopes.

The most serious mistake, however, would be for counsel to permit these risks to dissuade him from being the first to make "calculated concessions" during negotiations. On balance, there is much more to be gained by making thoughtful concessions than by rigidly refusing to play any of your client's cards. When you appear to your opponent to be clutching your cards as close to your chest as the laws of nature permit, you encourage him to infer that you are afraid—afraid to enter the arena, afraid to deal, afraid that you cannot control yourself, your client, or the process, and afraid that your client's case is so vulnerable that you cannot risk exposing it. You do much more harm to your ability to negotiate a favorable settlement by communicating fear than by making modest concessions that might not be reciprocated. By being the first to offer calculated concessions, you are more likely to communicate your confidence in your mastery of your case and yourself than any weakness or vulnerability.

My experience suggests that if you are in a situation in which the settle-
ment might consist of a package with components in addition to up-front money, it often is a good idea to discuss the money last. In our society, it is often the money that provokes the most emotion and that is perceived as the center of the deal. If there are other possible elements of a settlement package, you should work on these first. Try to build a sense of momentum, and to develop some trust and good will, before you get to the part of the negotiations that you anticipate will be most highly charged.

Because in most cases there is a natural sense of balance in the negotiation process—an expectation that there will be at least an approximate parity of movement among the parties—your client might be well advised to do a little more than his fair share of the giving on the nonmonetary elements of the package, so that by the time the negotiations focus on the money, it will not be his turn to make the lion’s share of the concessions. If your client has done more than his share of the giving in the nonmonetary areas, the judge may look to your opponent for concessions when the negotiations focus on the money. This is just another illustration of the larger point made earlier: before the negotiations even begin, the wise lawyer identifies the areas in which his client can make concessions with the least pain, then tries to direct the negotiations toward these areas in the early rounds, making more than his fair share of the concessions in these areas, thus setting up the swing of the pendulum so that it will be the other side’s turn to make the greater movement when the negotiations turn to the areas where his client would be most hurt by concessions.

In crafting your overall negotiation strategy, you should plan to hold back some modest concessions, and perhaps some non-pivotal arguments, so that later in the process you have ammunition left with which to induce the other side to move or to help it or your own client rationalize movement that is necessary to reach closure. I have seen situations in which a lawyer needed an excuse or a justification to support a recommendation to his own client that he (the client) make a further adjustment in his settlement position. In this situation, you will be much better off if you have saved a point or two that you, the other lawyer, or the judge, can use to help justify a change in position.

Similarly, there may come a time late in the negotiations where you will need to make more concessions to reciprocate for concessions made by the other side. If there are weaknesses in your case that you have not yet acknowledged, or elements of the settlement package that your client has not yet conceded but which he is prepared to do without, or arguments about strengths of your case you have not yet presented, you will have the room to maneuver, and to sustain the momentum of the give and take of the negotiations. If you have saved nothing (no arguments, no elements of the package, no weaknesses to admit), you will be hamstrung. In the final stages of the process, the other side may need a point or two from you to help it rationalize a move it really wants to make. Of course, you cannot hold back major arguments or concessions for this latter part of the process, but if you have saved a little something for the final push you may find it much easier to close the deal.
B. Should counsel ask the judge to articulate his assessments of the settlement value of the case before they put their first figures on the table?

In most situations counsel are better advised not to ask the judge for a valuation before making their opening offer or demand. Most judges expect the lawyers to lead them to the range of appropriate settlement values. If you ask the judge for his valuation of the case before you articulate yours, he is likely to hit the ball right back into your court (by asking you what your opinion is). Moreover, when most judges articulate case valuations, they are likely to pick figures, or ranges of figures, that they think lie near the middle of the zone that they expect to be defined by the two sides' opening positions.

Settlement judges generally feel that their job is to encourage both sides to moderate their positions. And, since most judges expect most lawyers to open the negotiations with extreme figures, judges normally expect to have to press for a great deal of "moderation" by the parties. Given these expectations, it is unlikely (though not unheard of) that the judge would announce a figure that is more favorable to your client than your valuation of the case would suggest is appropriate. Since the judge's valuation is not as likely to leave you as much room to maneuver as you might need, the safer course usually would be to make your initial offer or demand without asking first for the judge's valuation.

Permitting the judge to be the first to articulate a settlement figure also creates a more substantial risk. Judges are fallible. Their inputs occasionally can harm rather than enhance prospects for reaching an agreement. I know of a case where the parties came to the conference with secret bottom line figures that overlapped, but before they could get those figures on the table the judge articulated a value for the case that was higher than plaintiff would have been willing to accept and outside the range defendant was willing to offer. Thus, the effect of the judge's figure was to substantially raise the plaintiff's expectations and to derail a settlement that the parties probably would have reached if the judge had not offered the valuation that was outside the range both parties had anticipated. The risk that the judge will damage the process obviously is greatest when all counsel and parties are meeting in a group session.³

When the judge offers his valuation first (before the lawyers have put serious figures on the table), there is the added risk that he will form an attachment to a figure that is counterproductive. Like other people, judges have egos that can be surprisingly fragile (to say nothing of inflated). A judge who sticks his neck out by being the first to put a figure on the table may feel the

need to defend that figure as the negotiations progress, even if it clearly is off-target in the eyes of both counsel. The need to vindicate himself presumably would be greater if the judge announced his valuation in a group setting (to all counsel or to all counsel and parties). Lawyers do not want to create a situation in which the judge can embarrass himself, then feel the need to save face by pushing the negotiations in a direction they would not have taken naturally. Thus, I recommend that counsel ask the judge to share his valuation (at least initially) in private sessions, with one lawyer at a time.

The risk that the judge will make a serious valuation error increases, of course, if the judge is inexperienced or does not give sufficient consideration to the case. It is especially important not to let a judge rush in with a valuation if you know he has not had substantial experience in similar kinds of cases. To assess this risk, counsel must know something about their judicial host before the conference begins.

The fact that the judge's valuation is outside the range that both lawyers anticipate does not mean that the judge is wrong. It is possible that the lawyers are wrong. This possibility suggests the one situation in which it may make sense to ask the judge for his valuation range before counsel articulate their figures. If you are inexperienced with the kind of case that the conference involves, and have not had an opportunity before the negotiations to consult with an experienced lawyer whose judgment you trust, you might need the judge's input before formulating a position in which you have confidence. However, I suggest that you seek this kind of input in a private session from which both opposing counsel and your client are excluded. The judge might be reluctant to "talk values" in front of your client anyway, at least before he hears figures from both sides.

C. Putting your first number on the table at the conference

For reasons articulated earlier in this article, counsel should not accept the myth that it is a sign of weakness to be the first to put a serious settlement proposal on the table. The judge is likely to view the lawyer and client who come forward first as confident in their case and in their ability to control themselves in the negotiation process. In short, the party who first comes forward with a credible number gains credibility that can be valuable later in the negotiations.

Deciding on the first money offer or demand you will present can be challenging. By heeding some basic principles, however, counsel can demystify the process and improve the likelihood that their opening figure will not damage prospects for achieving a good settlement.

A lawyer makes a serious tactical error if the number with which she opens is either clearly extreme or is her client's real bottom line. Your opening figure should be serious, but not right on the money. If the figure you present is extreme, no one will take it seriously. More important, no one will take you seriously. By presenting an extreme figure, you damage your credibility in
ways that can haunt you throughout the negotiations. If your first number is incredible, you increase the risk that neither the judge nor the opposition will believe you when, later in the negotiations, you make an offer about which you are serious. Similarly, if you later insist that a particular figure represents the real bottom line for your client, you may not be taken seriously then, either.

The damage to your credibility can extend to other aspects of the conference: if your numbers are implausible, the judge and opposing counsel also will treat skeptically what you say about the evidence and law. For example, if you have interviewed a witness who has not been deposed, and you report that the witness has favorable things to say about your client, the judge is less likely to believe you if you have made an opening offer or demand that is unreasonable. If your figure is unreasonable, you invite the judge to infer that you are not good at reasoning. At the very least, an implausible figure calls your judgment into question. Needless to say, you are much better off if the figures you present encourage the judge and your opponent to respect both your credibility and your judgment.

An extreme offer or demand is counterproductive in another way: it provides your opponent no incentive to put real effort into the negotiations. Instead, making such an offer will encourage your opponent to respond in kind or provoke resentment that can kill the negotiations. An extreme figure also gives the judge no incentive to work hard toward a settlement; instead, it tempts him to give up.

It is also a mistake to present your client's real bottom line number at the beginning of the negotiation stage. Successful negotiations almost always involve movement by both sides. Lawyers and litigants like to feel that their efforts at the bargaining table have had some effect, i.e., have produced movement from the other side. You need to leave room to move between your opening offer and your final position, in part so that your opponents can enjoy the feeling that they have succeeded in moving you, and in part because you may learn things during the conference that lead you to conclude that an adjustment in your client's position is imperative. In other words, your first offer or demand should not trap your client in a corner from which he cannot escape without great loss of face.

You create even more problems if, at the outset of the conference, during a private session, you tell the judge what your real bottom line figure is but also ask him not to share this number with your opponent and to help you try to negotiate a more favorable number. By telling the judge that your client really would accept $10,000, but then asking the judge to help with negotiations aimed at getting $20,000, you put the judge in a very difficult ethical situation. The judge may refuse to proceed on this basis. At the very least, the knowledge that your client will accept a lower figure is likely to reduce any enthusiasm he might otherwise feel for a higher figure.

In presenting their clients' positions, there are several devices that lawyers use to try to preserve some room in which to maneuver. One such device consists of articulating their client's offer or demand as a multi-element package.
A plaintiff, for example, might intentionally include in a package demand some elements that he is prepared to drop if the defendant’s offer becomes sufficiently attractive in other respects.

A second device is to articulate your client’s position as a range of values. The problem with this approach is that the judge and the opposition are virtually certain to assume that your client’s real offer or demand is the figure at the end of the range that is most favorable to the other side. If you represent a defendant, for example, and indicate that your client is willing to consider a figure in the range of $75,000 to $100,000, the judge and the plaintiff will assume that the real number your client is offering is $100,000. Therefore you must be sure that your client is prepared to work with the $100,000 figure before articulating an offer in this way. Because of this risk, it might be more effective to present the range of numbers not as your client’s offer but as your estimate of the possible settlement value of the case. For example, you might say to the judge in a private caucus: “I think the ultimate settlement value of this case falls between $75,000 and $100,000. I would expect both sides to be moving within that range. Given my analysis, my client is prepared to offer $75,000.” If you want to make sure that the judge understands that your client would be willing to go higher if necessary, you might add the phrase “at this time.”

A third device designed to preserve room to maneuver while articulating an offer or a demand is the hypothetical. In this context, hypotheticals can take many forms. For example, counsel might ask the judge during a private session: “How do you think the other side would respond if my client were to put together a package, on these [specified] conditions, that might include a money component in the area of $75,000?” An alternative is to focus the hypothetical on certain disputed evidence or law: “We believe that the evidence will show that ‘X’ is true [or that the judge at the trial will rule that specified evidence is inadmissible]. Based on that prediction, my client is prepared to offer a figure in the area of $75,000.” By tying your offer to a prediction or a contingency, you create an opportunity to rationalize movement by conceding, later in the negotiations, that information developed in the conference makes your prediction more problematic. However, you also expose yourself to pressure if the judge believes that what you predict is not likely to occur.

In presenting your client’s opening offer in the private caucus setting, it is very important that you explain: (1) the reasoning and the calculations that support your figure, (2) how far your client has come in arriving at this number, and (3) the magnitude of the impact on your client of settlement on the terms you propose. Presenting the reasoning and the calculations on which your offer is based provides the judge with two things: (1) confidence that the figure is not wholly self-serving and arbitrary, and (2) analytical ammunition to use in trying to persuade your opponent to take your offer seriously and to move in its direction.

Explaining how far your client has come in arriving at his current offer or demand is especially important if substantial settlement discussions occurred
prior to the conference, and if your client’s current figure reflects more movement from the opening (pre-conference) position than is reflected in the other party’s current number. Judges like to know the history of pre-conference negotiations and are sensitive about offending parties by ignoring the steps they already have taken to try to foster settlement. Judges may even put less pressure on your client to move if it is clear that he already has moved appreciably more than his opponent.

This is not to suggest that judges simple-mindedly expect every case to settle at the point half-way between the two opening positions. I have hosted many conferences where I have concluded that one side had a much weaker case than the other; in such cases I have asked that side to do almost all of the moving. However, when the liability picture is murky, there is a natural human tendency to assume that a fair compromise involves concessions of roughly comparable magnitude. You can take advantage of this assumption if you can show the judge that your client has made the lion’s share of the movement in the negotiations that preceded the settlement conference.

You should never assume that the host of your conference understands the full implications for your client of any particular offer or demand. Be especially careful to point out any unusual problems that the settlement might create, e.g., for your client’s cash flow, for its relations with customers or employees, or its exposure to other litigation. A word of caution is in order here—you should not exaggerate these matters or try to milk them for more sympathy than they deserve. Your credibility will be damaged if the judge concludes that you are exaggerating.

D. How to adjust numbers and respond to judges’ probes

After you have presented your client’s opening offer or demand and have considered the other side’s counter-proposal, you should strive to persuade the judge that the subsequent proposals your client makes have a basis that is in some meaningful sense independent of whatever position the other side is taking at that time. If it appears to the judge that your client’s behavior in the negotiations is entirely reactive, i.e., that your client’s decisions about whether to move, and, if so, how far, seem to be wholly dependent on what moves the other side makes, you invite the inference that your negotiating is based predominantly on a gaming strategy rather than on at least a semi-independent analysis of the relative strengths and weaknesses of the parties’ underlying positions. It is a mistake to appear to be preoccupied with your opponent’s strategy, to try constantly to second-guess it, or to worry excessively about how your client’s moves might be interpreted by the other side. The more the process looks to the judge like a game of poker, the less likely you are to retain the judge’s respect and interest.

Most important, if you fail to articulate a reasoned basis for the changes in your client’s position, you give the judge nothing with which to persuade your opponent that he should seriously consider your new offer or demand.
Judges understand that there will be some reactive component to the positions your client takes. However, you are much more likely to keep the judge in your client’s corner if, when your client changes positions during the course of the negotiations, you tie those changes to articulated adjustments in your perception of the underlying evidence and law. In short, the judge is likely to invest more confidence in your positions, and to take your numbers more seriously, if he feels that they have some roots in the merits of the matter and are not wholly products of tactical considerations.

A related pattern of behavior that risks alienating the judge and driving her into your opponent's camp is the proverbial “nickel and dime” approach to negotiating. The nickel and dime approach has two dimensions. The first is the party's refusal to change his position except in the smallest of increments, one tiny step at a time. The second dimension consists of the party's trying to use the judge to leverage just a little more money out of his opponent at the end of the negotiations. In both dimensions, nickel and dime negotiating seems purely tactical.

There is virtually never a principled basis (in the law or evidence) for distinguishing demands or offers that are separated by only small margins. For this reason, parties find it very difficult to explain why they make small monetary concessions or why they reject the offer that is on the table but might accept it if it were improved just a little. The “used car lot” image that this approach conjures is offensive to some judges. Judges are likely to resent nickel and dime negotiating for an additional reason. Using this approach can take forever to get to common ground and makes judges feel that counsel are squandering precious judicial resources on a petty enterprise. Thus, if you are interested in continuing to enjoy the judge's good will, you are well advised to avoid nickel and diming.

A more serious negotiating mistake is to make an offer or demand that you are not confident your client will (or can) honor or accept. A lawyer made this mistake in a conference I hosted some time ago and it cost him not only the settlement but also any chance of my agreeing to help with settlement in any other case in which he is involved. After protracted negotiations, I understood (perhaps mistakenly) this lawyer to commit his clients to a sum certain by way of settlement. At the close of the conference, all the parties shook hands and left. About forty-eight hours later, however, the lawyer called me to report that he had done some additional investigating after the conference and had shared the results of that work with his clients, who then decided not to accept the settlement to which I thought counsel had committed them two days earlier. I felt that the lawyer had betrayed both the court and plaintiffs.

This story illustrates two points. First, if a lawyer is not sure that he has the authority to make a specified commitment, or if for some other reason he knows that there is a possibility that his client might not agree to the terms that are under discussion, he must make it unmistakably clear that he cannot make a firm commitment and that he will not know whether the proposed terms are acceptable until his client (or home office, or senior partner, etc.)
completes a review of the matter. Second, a lawyer should never appear to make a commitment if he knows that he does not have a sufficient grasp of the relevant evidence or law. I suspect that the lawyer in the case I described above knew that he had not completed one important part of his investigation and that when he left the conference he decided that he had to pursue one last lead. Apparently, as a result of that additional investigation, he decided that the case was worth a great deal less than he had thought at the conference (I believe that what he found after the conference was evidence of a significant prior injury to the plaintiff). Obviously, the lawyer should have done either his investigative homework before the conference or told us at the conference that he could not recommend any specific figure until he had acquired some additional information.

A more subtle version of this same kind of mistake consists of leading the judge to believe that your client might agree to a settlement in a certain range of figures when you are not sure what your client will agree to do. When trying to put together settlement packages, judges necessarily make predictions about what kinds of figures it will take for the parties to strike a deal. Judges try to get a sense from each lawyer, in private, about the range of numbers within which there is a good chance of reaching an agreement. A judge might ask, for example: “Would your client take seriously a number in the vicinity of $100,000?” A lawyer makes a huge mistake if he implies an affirmative response, even somewhat equivocally, without knowing for certain that his client agrees.

Lawyers must respond reliably when judges probe, through hypothetical or direct questions, to see where movement might be possible. If you are not sure how your client would feel about a number the judge raises, tell the judge clearly that you are not sure. If you know you would not recommend that number, tell the judge this and explain why. Some judges will push aggressively to get commitments from you about the range within which your client might be prepared to make a deal. You must respectfully resist this pressure if your client is not prepared to make a commitment. And you must understand that the judge’s “hypothetical” questions are designed to explore the parties’ real underlying positions. Judges do not ask hypothetical questions about figures your client might accept out of idle curiosity. You should interpret their hypothetical questions as real questions, and you should make clear to the judge any uncertainty in your client’s position. It is much worse to permit the judge to infer that your client would accept an offer that your client in fact would not accept than to seem difficult to move because you cannot make a firm commitment. If you are not sure, tell the judge assertively that you are not sure. Judges sometimes interpret equivocation as “yes.” If you do not mean “yes,” you should tell the judge clearly that you simply do not know how your client would respond to his question and that it is quite possible that he would reject the proposal.
E. Negotiations involving multiple defendants

There are several devices that attorneys may use to generate movement in settlement negotiations that involve multiple defendants. In these situations it often is a mistake for either plaintiff’s counsel or the defense lawyers to start out by trying to fix the precise percentage share of responsibility that each defendant should bear. Efforts to fix relative culpability can generate frictions and promote defensiveness that can make early settlement much more difficult. In the early stages of settlement discussions, progress toward agreement is more likely if the focus is on the overall settlement value of the case and thus on the figure that the defendants as a group might be asked to produce.

This broad brush approach worked well in a construction case I once handled. Plaintiff knew exactly what he wanted from the case. However, instead of trying to determine what percentage share of the total each defendant should bear, the negotiations proceeded more loosely, permitting each defendant, more or less independently, to determine for itself a dollar figure it would offer. The defendants reported their authority seriatim. As it happened, their contributions totaled a figure that came close enough to what the plaintiff was looking for to settle the case. Thus, we avoided the friction that would have resulted if we had been forced to try, as a group, to allocate to each defendant its percentage share of the overall responsibility for plaintiff’s damages.

If asking the defendants as a group to come up with an overall figure fails to produce the necessary movement, plaintiffs’ lawyers often try to generate momentum by singling out one or two defendants and negotiating with them separately. Judges who host settlement conferences also sometimes use this technique. When negotiations between the two “sides” about the overall value of the case seem to be stalled, some judges will turn to a series of private caucuses with one defendant at a time. During such sessions, it is not uncommon for the judge to encourage each defendant to disclose the vulnerabilities of the others. A judge who can break through the perimeter of the defense camp and get individual defendants to expose the dirty laundry of co-defendants (by identifying their legal or evidentiary weaknesses, or exposing concerns that reach beyond the lawsuit in question) acquires valuable negotiating leverage.

There are two ways judges can use information acquired in these private “finger pointing” sessions. The first is simply to argue with individual defendants that they should increase their contribution to the settlement pot. The second is to identify an individual defendant with whom a separate settlement might produce a ripple effect among the others. The goal is to generate settlement movement by securing an agreement with one defendant first, hoping that the others will become more flexible if they begin fearing that they will end up defending the action alone.

This version of “divide and conquer” is not a subtle strategy; defendants always recognize it. Nonetheless, it often works because judges are able to exploit the antagonism that often exists between defendants with different in-
terests. The "divide and conquer" strategy is most likely to be effective when "joint and several" liability could attach to each of several defendants; no defendant is likely to relish the thought of facing alone the risk of a large jury award. The fact that such a defendant subsequently might be able to bring a separate action for indemnity provides little solace.

The passage of legislation like Proposition 51 in California\(^4\) does not wholly eviscerate the leverage that can be achieved through a "divide and conquer" strategy. Proposition 51 limits joint and several liability to economic losses; for non-economic damages (e.g., pain and suffering) each defendant's responsibility is limited to its percentage share of fault for the events causing the injury.\(^6\) In cases where the "special" damages are substantial, however, or where it is difficult to predict how a jury will allocate among the defendants the various percentages of responsibility for the underlying events, defendants will continue to be anxious not to be alone when the trial date arrives.

The magnitude of its exposure for damages is not the only source of pressure on a defendant who contemplates being left alone to defend the action. Just as there is security in numbers, there can be insecurity in isolation. A defendant whose compatriots are dropping out of the case is likely to feel a little rush of panic, and, therefore, to be a little more anxious to strike a deal. A defense lawyer who contemplates standing alone realizes that he will not have other counsel to serve as reality checks on his instincts and to strengthen and refine his analysis of the case. The pressure created by fear of standing alone at the critical hour can be especially intense in cases where lawyers have spent a great deal of time working together in the pretrial period and have divided responsibility for conducting discovery and researching various aspects of the case.

Similarly, a defendant who sees his co-defendants dropping out of the case knows that if he does not follow suit he will have to bear the full cost of the defense at trial, instead of being able to soften the economic blow by sharing tasks and costs with co-parties. Of course, the cost pressures may cut in the opposite direction if the departure of the other parties means that the trial would be much shorter and simpler (the greatest cost pressures on a peripheral defendant can arise from fear of having to sit through a multi-week trial, most of which focuses on others). In most cases, however, the strategy of separating defendants in order to strike deals individually seems to have a positive effect on the momentum of negotiations with the defendants who remain.

From the defense perspective, the best strategy often seems to consist of generating a communal "pot" through private negotiations, keeping secret the percentage share each defendant would bear. Such efforts to resist a plaintiff's "divide and conquer" strategy, however, can be riddled with difficulties and conflicts of interest. Defendants who launch efforts to generate a "pot" risk


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alienating one another during the private negotiations designed to allocate shares of responsibility. Defendants who are alienated in such negotiations become easier prey for the overtures of the plaintiff. Moreover, a clever plaintiff seeking to increase tensions within the defense community might decide to treat one defendant as a "loss leader," offering him a below-market deal that would permit him to get out of the case for less money than his co-defendants want him to contribute to the communal defense "pot."

A defense lawyer who knows that his client could secure a cheaper exit from the case by dealing directly with the plaintiff than by joining forces with other defendants faces a conflict that he must permit his client to resolve. Normally, one would expect the client to opt for the cheap exit. The one exception that comes immediately to mind occurs in mass tort situations (such as asbestos litigation), where it might be less important to a defendant to get the cheapest possible exit from a particular case than to preserve relations with co-defendants for other cases and to maintain consistency (as between similar kinds of cases) in the manner in which percentage-shares of responsibility are allocated among the same set of defendants.

Assuming that there is some prospect for success through the "divide and conquer" approach, there are several different criteria that a judge (or plaintiff's counsel) might consider when deciding which defendant to target for an early, separate settlement. One common approach is simply to look for the defendant with whom settlement is most likely, regardless of why. Sometimes a quick agreement with even a peripheral defendant can produce a sense of optimism and movement that can lead to agreements with other defendants. I have watched remaining counsel react with undisguised envy as the lawyer for a "small fry" defendant abruptly leaves a settlement conference with the great sense of relief that often accompanies the striking of a decent deal early in the negotiations.

Another strategy is to isolate the defendant with the greatest exposure (that is, the defendant who would pay the most if an adverse verdict were returned), try to strike a deal with him, then hope that the more peripheral defendants will follow suit. When joint and several liability is limited to economic damages, however, this approach can backfire—a defendant who knows that the most plaintiff can recover from him is a small sum may feel a special incentive to hold out after the major defendants have settled. A peripheral defendant in this situation may feel that plaintiff is unlikely to decide to incur the expense of trying the case just to add a modest amount to its overall recovery. Plaintiff will have little leverage with a remaining defendant who knows that the cost of trial will approximate or exceed the likely recovery. This calculus can change, of course, if a prevailing plaintiff would be entitled to attorney's fees.

There is another, more subtle criterion that I have seen lawyers use to isolate the defendant with whom they would seek the first separate settlement. This criterion focuses on the dynamic among defense counsel. The theory is simple: try to strike a deal with the most highly regarded of the defense law-
yers, in the hope that his decision to settle will persuade the others that reasonable terms can be reached and that settlement represents the wisest course. When the defendant who is represented by the best lawyer comes to terms with the plaintiff, the remaining defendants are likely to feel intensified pressure to find a way to get out of the case.

**F. Strategies against multiple plaintiffs**

Cases involving large numbers of plaintiffs offer an opportunity to use yet another strategy. I have seen this strategy work well in asbestos litigation, where one law firm often represents scores of individual plaintiffs against the same array of defendants. The strategy consists of dividing the large group of plaintiffs into several smaller groups, e.g., of six people each, and making sure that in each group of six there are several different kinds of claims. For example, in asbestos litigation a single sub-group of plaintiffs might include cases that range from almost undetectable pleural plaque in a very old, retired worker who has smoked heavily throughout his life to a case involving death from mesothelioma in a relatively young worker who is survived by a large family. The point is to include in the same sub-group cases of quite different value and/or cases that are difficult to value. The theory of this kind of grouping is that it permits opposing counsel to disagree about the value of individual cases but still agree about the total value of the cases as a package. The two sides negotiate over the bottom line figure for the group of cases as a whole, instead of trying to reach agreement on the value of each claim in the package.

In this system, one side’s “over-valuation” of one claim may be offset by its “undervaluation” of another. This system also gives each side more flexibility in working toward a bottom line figure that is acceptable to the opposition. Lawyers and clients on one side can adjust, in private, the values they ascribe to the different cases in the package as they acquire information from the lawyers and clients on the other side. There is a risk in this situation that lawyers will sell some clients short in order to achieve better results for others in the group. The two checks on this risk are the judge and the clients themselves. To serve effectively as checks, however, both the judge and the litigants must be knowledgeable about the values of comparable cases and about the history of the negotiations in the case at hand.

**G. Alternatives or supplements to straight cash payments**

The purpose of this section is to encourage lawyers to be creative when they search for elements of settlement packages. What follows is a list of ideas, by no means exhaustive, that counsel might consider when looking for ways to reach agreement without increasing the immediate “cash cost” of the deal. Most of these ideas are likely to be useful in more complex, commercial cases; only a few might prove useful in straightforward tort litigation. Counsel should always keep clearly in mind the tax consequences of the
various settlement proposals they make. Different ways to construct or configure settlements may have different tax implications (for both sides). Counsel should consider the tax aspects even of the non-cash components of settlement packages; among possible non-cash components of any given settlement there might be a wide range of tax implications. By choosing the tax-smart option, counsel may be able to deliver more benefit at less overall cost. For example, many lawsuits include causes of action that sound in tort along with causes of action that sound in contract. By casting the settlement as compensation for tort losses, counsel can help plaintiff avoid taxation on moneys received, thus increasing the overall value of the deal.

Alternatives to straight cash settlements include:

1. The structured settlement. This device generally consists of defendant setting up a protected fund or buying an annuity that is designed to deliver fixed amounts to plaintiff in installments over a period of years. The structured settlement can be especially attractive to defendants with short term cash flow pressures. Moreover, in cases where the settlement proceeds are taxable, the annuity option can save the plaintiff a great deal of money that would otherwise be lost to taxes. There may be additional ways that plaintiffs can benefit from a structured settlement. In one conference I hosted the plaintiff was a young man with little education, little chance of securing a good job, no assets and very little income. He had suffered a relatively serious back injury, but his doctors could not predict what his future medical expenses would be.

It seemed clear that he would need more surgery, but no one could tell how much or how often. During the conference it became clear that the plaintiff was apprehensive about the possibility that a cash settlement would disqualify him from receiving public assistance with his medical bills. He also was afraid that even a large cash settlement would be eaten up by the major bills that he knew could accompany a series of protracted stays in a hospital. After considerable discussion counsel recommended a structured settlement that would be non-taxable and that would deliver to plaintiff a monthly income that would fall just below the line that would cut him off from public assistance with his major medical bills. The structure was designed to protect his access to public assistance at the same time that it would protect his settlement “nest egg” from being consumed by unforeseeable medical expenses.

Another (more common) reason to recommend a structured settlement is that it can protect a plaintiff from squandering the assets received from settlement in improvidently selected investments. This consideration can be especially important for a relatively young plaintiff who does not have other significant resources and whose education or intelligence do not

promise significant future income. By contrast, a structured settlement is less likely to be appropriate for a plaintiff who is older or who has substantial other assets.

Plaintiffs' lawyers also might find structured settlements more attractive in cases involving significant damages but unclear liability. A lawyer who faces the real possibility that a client with serious needs might get nothing from the jury might recommend a structured settlement that the defendant could buy with much less money than the jury might award but that nonetheless delivers a significant sum to the plaintiff over a period of years.

2. Mergers or buy-outs. Especially in commercial cases that pit competitors against one another, parties might think about merging, or having one entity buy out the other, in lieu of a cash settlement or spending all the money on the lawyers by going to trial. This option could be attractive in patent and trademark cases where markets are limited or in other kinds of cases where the parties offer complementary products or services for sale. In attempting to forge this kind of solution to a business dispute, counsel should attend carefully to the fates of the key actors in the entities that might be merged; the name of the emerging entity may be less important than making sure that key executives in each corporation are assured important positions in the new company.

3. Joint ventures. Disputes between business competitors sometimes can be resolved through joint ventures, but lawyers who consider such solutions must be careful not to offend the antitrust laws.

4. Licensing agreements. Many disputes over rights in intellectual property can be resolved inexpensively through licensing agreements.

5. Pay-offs in products. A corporation with cash flow problems may be keenly interested in discharging part of its obligation by giving to its opponent products that it manufactures or can acquire below-market. A variant of this idea that might be more attractive for accounting or public relations purposes might be to agree to sell a substantial volume of product at a sizable discount. Plaintiffs might find that such options are more attractive than a judgment at trial that would send their opponent into bankruptcy, where plaintiffs might be forced to compete (without priority) with other creditors.

6. Pay-offs in shares of stock. This is another option that counsel should consider when dealing with a party with cash flow problems or limited assets. Taking shares of stock in lieu of cash also might offer tax advantages. For example, a party with sizable current income and taxes might be attracted to an offer of stock whose value might increase significantly two or three years after the settlement. One of the negative aspects of this idea, of course, is that ascribing value to stock (for purposes of settlement) can be difficult if the company is not publicly traded and if its future is precarious.

7. Pay-offs in future business or discounts on future transactions. In some
cases the relations between the parties have degenerated to a point where it is unwise or impractical to suggest that they do business with one another in the future. But future dealings can offer parties who are willing to consider them a vehicle by which both can benefit. A settlement that includes a commitment to future business is perhaps the best example of the notion that dispute resolution need not be a zero sum game (that is, it need not be a game in which every benefit one side receives necessarily imposes a corresponding loss on the other side). I have seen settlements, for example, that include new contractual commitments through which one party agrees to buy a specified amount of material from the other over a fixed period of time at a set price, with the price reflecting a discount that gives the buyer the benefit of a below market deal but still permits the seller to move its goods and make some money. One variation on this theme might consist of one party promising to generate new customers for the other party, or to help it develop new sources of supply.

8. **Reinstatement of a terminated employee.** In cases arising out of the workplace, the plaintiff’s principal objective often is reinstatement. Employers who are involved in suits of this kind should try to think of positions or units in the company where they might be able to use the plaintiff effectively. Reinstatement may be most likely to work out if the plaintiff is not returned to his former environment, but is offered a post in which he would have new supervisors and, perhaps, new tasks. Of course, collective bargaining agreements and fixed company policies may limit the defendant’s flexibility. The company also may face difficulties in trying to meet a former employee’s concerns about preserving seniority and retirement entitlements. The employers who are most likely to be able to use reinstatement as a key to settlement are those who are able to be most flexible and imaginative in shaping alternative offers.

9. **Corporate or institutional defendant helps individual plaintiff with job search, training, or finances.** Even when the litigation does not arise out of the workplace, a corporate defendant should consider whether it could help an individual plaintiff improve his or her employment situation. Sometimes the resources of a corporate litigant equip it to offer significant help to an individual plaintiff at little cost to the corporation, e.g., because it simply uses personnel or services it already has in place. I have seen settlement negotiations in which a plaintiff has been keenly interested in taking advantage of a corporate defendant’s industry contacts, or in being trained by the defendant’s personnel department in how to search effectively for a new job. I also have seen corporate defendants use their “pull” to find jobs in other companies for the plaintiff. These ideas illustrate a larger point made earlier: a corporate party should inquire into the needs and desires of the plaintiff, then survey its own resources to identify the kinds of things it could do for the plaintiff that he is not in a good position to do for himself. This even could include things like lending the plaintiff money on very favorable terms or offering him skills training that he could use to launch a new career.
10. An exculpating written statement, press release, or apology. In some cases one of the principal objectives of individual plaintiffs is to secure a simple, straightforward apology. Plaintiffs are especially likely to be interested in apologies in cases involving wrongful termination, employment discrimination, defamation, false arrest, or malicious prosecution. Where defendant is in a position to make such an apology, and to commit it to writing (e.g., in a letter to plaintiff), counsel should consider making it clear early in the negotiations that this is a potential element of a settlement package. Disclosing a willingness to make an apology can create an atmosphere of good will or reconciliation that can facilitate negotiations about the other elements of the deal.

In employment cases plaintiffs often are concerned about their personnel file. An employer who deems it appropriate should offer early in the negotiations to make adjustments to past entries in plaintiff's file (e.g., to correct a performance evaluation or to change the explanation for a personnel action) or to add written statements to the file that will help plaintiff gain employment elsewhere or qualify for benefits or promotions within the corporate defendant. Similarly, defendants should consider offering to write a positive letter of recommendation for plaintiff and putting a copy in his personnel file.

A press release that has the effect of exonerating a party from publicly made accusations or of removing a cloud of uncertainty that inhibited others from doing business with that party can be a valuable component of a settlement package in cases involving defamation or accusations of commercial impropriety (e.g., where plaintiff has accused defendant of willfully misappropriating trade secrets or of selling products protected by a patent). In some commercial cases, parties are keenly interested in using press releases to reassure the financial community that relations between plaintiff and defendant have been fully restored, or to dispel concern among potential investors or shareholders that the litigation might cripple or bankrupt one of the parties.

A lawyer who contemplates offering a press release as a component of a settlement package should draft the contents of the statement before the negotiations begin (to demonstrate how beneficial it might be) and should suggest sending the release to the trade journals or newspapers that are most likely to reach the audience about which the defendant is concerned. To enhance the attractiveness of the press release idea, counsel might consider proposing, where feasible, that it announce not only the favorable termination of the litigation, but also new business deals between the parties that would be seen as potentially lucrative for both.

H. An Important Caveat: Lying in order to placate an opponent is ill-advised

Parties should not lie or agree to terms that violate either their own con-
sciences or fixed and important policies simply to pamper the ego of a disgruntled opponent or to improve the odds of getting a better deal in the economic terms of a settlement. It is bad both morally and tactically to agree to write a strong letter of recommendation for a worker who has in fact performed very poorly. While admitting to an error demonstrates strength, willingness to violate the truth simply to arrive at a deal demonstrates weakness. A party who demonstrates weakness in one aspect of the negotiations is not likely to fare well in the other aspects of the negotiations. Demonstrating this particular kind of weakness has two additional decidedly negative effects: (1) it encourages your opponent to think that he can get more from you than he deserves (if he knows that you are willing to give away the truth, he will infer that you can be "had" with respect to the tangibles as well), and (2) it invites your opponent to infer that you and your client are dishonest and untrustworthy (willing to lie, or at least to manipulate the facts, just to improve the odds of getting something you want).

If your acts increase the intensity of the other side's distrust of you and your client (e.g., by demonstrating that you are prepared to play games with the truth), you risk doing severe damage to the negotiation process. An intensely distrustful opponent will be inflexible, defensive, slow to agree to even the most benign of terms, and will insist on verifications and protective provisions that increase the cost of any deal that might be entered. Such an opponent is less likely to enter into any kind of deal at all, as he will be suspicious that everything you propose is designed to secure some hidden and undeserved advantage for your client. As you negotiate, you should be taking steps to reduce the distrust your opponent naturally feels in this situation, rather than acting in ways that exacerbate the distrust problem.

I. Steps to reduce distrust

What steps can counsel (or parties) take to reduce the level of distrust their opponent feels? Perhaps the single most effective step is to involve a neutral third party in the negotiations, someone who is perceived by your opponent (and your client) as fair, knowledgeable about the kind of dispute in issue, sophisticated about human nature and the negotiation process, and who does not measure his or her success principally by whether the parties settle the case. A judge who appears to be more interested in getting the case off the docket than in promoting quality analysis and communication is not likely to contribute much to reducing the level of distrust in the dialogue. However, a judge who enjoys the parties' confidence can contribute significantly by assuring them that the process is not being abused and that offers or demands within a specified range are consistent with a dispassionate analysis of the relevant evidence and law.

I have hosted many settlement conferences in which the lawyers have used me both to test the reliability of their analysis of the case and to assess the bona fides of the other side. In both of these areas, the feedback offered by
a judge can significantly increase a lawyer's (and/or party's) confidence and, with it, their willingness to agree to terms of settlement. I also have participated in conferences where a party was willing to increase its offer, or lower its demand, only after I assured him that the other side was dealing in good faith, was likely to reciprocate by moving its offer or demand, and that there was a real chance that the case would settle if both sides would trust the process just a bit more. I make these kinds of assurances only when I believe them, and some cases have settled only because I have been there to make them. Parties are notoriously reluctant to bid against themselves, but a judge (or other neutral) who can offer appropriate assurances about how the other side will respond to a lowered demand or an increased offer can help build the trust that is essential to overcoming that reluctance.

Another way to reduce your opponent's distrust is figuratively to "open your files" to him. In some cases it may make sense literally to open your client's files to the opposition or to some trusted neutral, such as an accounting firm, a special master, or a neutral expert. The key to any such gesture, of course, is to try to assure your opponent that you are not hiding relevant materials. One way to promote this perception is to voluntarily disclose, on your own initiative, documents or data that hurt your client's position and bolster the opposition. Unless you are prepared to violate professional obligations, or your opponent is a real bumbler, it is likely that your client eventually will be forced to disclose such documents anyway. While you might hope to negotiate a settlement before that disclosure, many lawyers will not negotiate seriously as long as they suspect that potentially important documents remain under the table. If you are dealing with such a lawyer you lose little or nothing by volunteering to disclose the key documents at the outset of the negotiations. If the documents so disclosed include some items that strengthen your opponent's bargaining position, you will have won some "trust points" for yourself and your client, points that can be very valuable during settlement negotiations.

J. **Procedural tools for breaking logjams**

If the parties remain at loggerheads after exploring the possible components of settlement packages, counsel might consider the following procedural devices. To select from among these intelligently, the first crucial step is to identify the source of the negotiation problem: why do the parties remain too far apart?

One recurring cause of distance between parties' positions is lack of information. If the principal reason the parties remain far apart is that each is making favorable but untested assumptions about what the evidence will be, or about what the applicable law is, counsel should consider interrupting the negotiations to permit the relevant discovery to be completed or to seek a ruling on a key motion. I have seen many negotiations where progress was impossible until the lawyers took a key deposition or discovered and analyzed key docu-
ments. Focused discovery creates opportunities for new information to persuade one or both sides that an adjustment in position is appropriate.

If you find yourself in this situation, you should use the settlement judge to identify specifically the additional information that is most likely to affect the parties’ positions, fix a plan and schedule for developing that information, and set a date for a follow-up settlement conference. Since the judge has heard, often in private, the rationale for each side’s position, she is uniquely qualified to help counsel identify the new information that is needed to advance the negotiations. It is a mistake not to take advantage of what the judge knows when you plan settlement-oriented discovery. It also is a mistake not to fix the date of the follow-up settlement conference. If you leave the first session without a fixed date to return, there is a danger that counsel will not promptly complete the necessary discovery and that the court will forget to reconvene the negotiations.

Another tool for attacking informational needs in the pretrial period is the neutral expert. A neutral expert (hired jointly by the parties, perhaps appointed by the court pursuant to Federal Rule of Evidence 706) can be especially useful in cases that turn on answers to scientific or technical questions. When settlement discussions are bogged down in disagreements over such matters, a fresh, third opinion (assuming each side already has retained its own consultant) can open up avenues for more movement.

If the source of the blockage in the negotiations is not lack of information but a general apprehension about making a mistake, poor communication, or distrust between the litigants, there are several devices that counsel might consider to remedy the situation. Initially, counsel might ask the judge to remind the parties: (1) that agreeing to a settlement is not an admission of wrongdoing, (2) that no one need concede liability or accept blame, and (3) that if the parties agree, the terms of the agreement may be kept confidential.7

Counsel might also consider asking the judge to bring the litigants into the private caucus sessions so that the judge can explain directly the bases for each side’s position and offer reassurances about the good faith of the opposition or the reliability of counsel’s analysis and recommendations. Inviting clients into the private caucus sessions also gives them an opportunity for catharsis, a chance to tell their side of the story to the judge and to release pent-up emotions. The judge may be able to make such clients feel some of the vindication they seek, or at least that a sympathetic listener has heard them. The private sessions with the judge provide a vehicle for letting off steam without verbally assaulting and alienating the opposition.

Sometimes the judge will sense that the private caucus format has exacerbated trust or communication problems. Occasionally a lawyer or litigant will fear that the attorney on the other side is not passing along all offers or demands, or is not sufficiently explaining their rationale. Sometimes a judge

7. But see W. Brazil, supra note 1, at 305-90.
senses that one party needs the reassurance of hearing something directly from an opponent, or needs to communicate something directly to a specific person on the other side. In complex cases, a judge who is playing the role of shuttle diplomat may sometimes feel that he is not adequately communicating the nuances of parties' analyses or all the elements of their proposals. When these kinds of problems arise after a series of private caucus sessions, it might be appropriate to hold a group session attended by all counsel and parties. At this session, each lawyer (or each lawyer-client team) could present his view of the evidence and law and/or the rationale for the settlement proposal his client has on the table. After each party has had an opportunity to make such a presentation the judge might offer comments or ask questions, or permit questions "from the floor."

This format assures that each party confronts a best case presentation of his opponent's position (thus getting a better sense of how it might appear to a jury at trial) and hears the reasoning that supports his opponent's settlement proposal. The risk, of course, is that the parties will offend one another or get carried away with the adversarial spirit of the best-case presentations and feel more intensely the need for vindication or victory. Counsel should not recommend this procedure unless he is sure that no lawyer or litigant will make a presentation that is so patently self-serving or insensitive that it causes further damage to relations between the parties. If a group session is held, the court should follow up with another round of private caucuses, perhaps including the clients in the sessions with their counsel, to determine whether the presentations to the group laid the foundations for developing the necessary changes in negotiating positions.

Another procedure that can be used to attack communication and trust problems consists of having the judge meet with clients unaccompanied by counsel. In two cases that I have handled (both ultimately settled), counsel have agreed to remove themselves (temporarily) from the negotiations and to ask me to work privately with the principals, first one at a time, then in a group session. In neither case did I suggest this format; in one, the idea originated with the lawyers and in the other it originated with one of the parties. In both cases, the principals apparently were interested in saving counsel fees, but they also felt the need for more direct access to the opposing party and to me.

In one case, a labor dispute, the parties wanted to use the settlement conference to assess each other's trustworthiness. They felt that they could achieve that end better if they had direct access to each other and if I was given an opportunity to meet privately with each principal and to make my own judgments about his good faith. In the other case, a contract dispute between two small corporations, each chief executive officer (C.E.O.) wanted not only to develop a sense of the other's reliability but also to test his mettle as a business negotiator. In both cases, the direct participation of the principals provided the desired opportunities, but I confess that I felt that the process was more fragile (closer to the edge of disaster) than it would have been if
counsel had participated. I was constantly apprehensive that someone would lose his temper or overreach clumsily and destroy the whole process. Fortunately, no such disaster occurred in either case, but I suggest that counsel be careful about recommending this procedure.

Another device I have used successfully to combat problems caused by distrust is to have the defendants submit sworn but confidential financial statements for my in camera review. I have suggested this procedure in cases where defendants are individuals (or small, closely-held corporations), where liability is relatively clear, but where defendants claim that they cannot contribute large sums to settlement because they simply do not have the resources. Plaintiffs often are reluctant to accept protestations of impecuniousness in these circumstances. One way to increase plaintiffs’ confidence that defendants are not hiding assets is to have the defendants submit to the settlement judge sworn financial statements (under penalty of perjury), accompanied where appropriate by copies of tax returns and other verifying documentation. After reviewing this information, the settlement judge can decide what he considers to be a fair contribution to settlement by each defendant, then pass these recommendations along to counsel on both sides. A variation on this procedure consists of the two sides jointly hiring an accounting firm to audit the books of the defendant, thus generating information by which each side can determine what the defendant is capable of paying.

If what separates the parties at the end of a long series of private caucus sessions is lack of confidence in predictions about how a trial judge or jury is likely to react to the emotional appeal of the case, or how a jury is likely to value imponderables like pain and suffering, counsel might consider asking for a second settlement conference with a different judge. Making this kind of request is a delicate matter, but at least some judges will understand why a second opinion might be helpful. I have participated in conferences where I have suggested that the lawyers and parties needed a second opinion, and I have been able to persuade a very experienced judge to host a second conference so that the parties could have the benefit of his views. This device has proved very effective.

If what separates the parties at the end of a long conference is emotion, I strongly suggest the simple expedient of a cooling-off period. Sometimes people just need time to settle down. Sometimes a break in the proceedings (for a week or two) gives parties a new perspective, an opportunity to digest what they learned at the first conference. Such hiatuses can also provide lawyers and litigants with an opportunity to recharge their settlement batteries, rekindle their interest in trying to find common ground, and generate more energy to put into the process. Experienced judges know that it often takes more than one settlement conference to produce an agreement because people often need room, outside the pressures of the conference itself, to adjust to the idea of making more concessions than they originally thought would be necessary or appropriate.
K. The move of last resort: Going to your client’s real bottom line

There is a place in the negotiation process for your client’s real bottom line, but it is at the very end, after you have exhausted all other tools for trying to reach agreement. By “real bottom line” I mean the offer or demand beyond which your client feels it must go to trial. This is an important place to emphasize a point made earlier: you should not begin settlement negotiations with a rigidly pre-defined bottom line. You will not careen down a slippery slope of indecision without such a pre-determined number. You should arrive at the conference with a well-developed rationale for a zone or range within which you think a settlement would be reasonable, then open your mind and learn from what happens during the conference. If the judge believes that you came into the conference with a rigid number, and that nothing can change it, you will have a great deal of difficulty persuading him, at the end of the conference, that yours is the figure that is most likely to be reasonable and the figure that he should support.

A healthy bottom line figure is distinguished by maturity, i.e., the figure emerges only after counsel and client have considered thoughtfully all the information that the negotiation process makes available. Armed with a figure thus derived, counsel is in a position, at the end of a long negotiation process, to consider playing her highest card. When I say “at the end of a long negotiation process,” I mean after several sessions, perhaps even after several settlement conferences. In most negotiations, however, a point finally arrives where counsel can legitimately conclude that it is time for everyone to “fish or cut bait.” When you reach this point, you should not go home without putting your last and best offer (or demand) on the table.

I see no advantage in saving that figure for the morning of voir dire. Instead, I think you should put your final figure on the table before you spend the time and money on last minute preparation, and before the psychological momentum of that preparation raises additional obstacles to reaching agreement. If you put your bottom line number on the table two weeks before trial, there is no reason to fear that you will be forced even lower on the morning the case is called. If your opponent wants to settle that morning, you should tell him he had the opportunity to accept your client’s bottom line two weeks earlier and that while you are happy to discuss the matter, it will take a higher offer (or lower demand) from the opposition to settle at this point because you and your client have had to invest additional time and money since the last settlement discussions.

The key to effectively putting your client’s bottom line number on the table is to persuade the opposition that the figure really is as low or as high as your client will go. I strongly suggest that you try to persuade the judge that this is the real figure before you present it to the other side. The other side is more likely to believe the judge on this matter than you or your client, in part because the judge has the advantage of conferring with you privately and in part because the judge will have hosted many settlement negotiations and thus
be in a position to assess the credibility of a lawyer's assertion that a particular figure is the end of the line.

The key to persuading the judge that the figure is real is to support it with good solid reasoning, and to present it only after it is clear that you have exhausted the rest of the process. You might consider having your client accompany you when you meet privately with the judge for this purpose, as you might have better luck persuading the judge that your client has reached his limit if your client is there and obviously firm about the position. Moreover, the judge is more likely to be able to persuade the opposition that the figure will not subsequently change if the judge can say that he has had an opportunity to assess your client's resolve and has concluded that it will not waver.

It also is important for you to assure the judge that you know what it means to make a "final" offer. You should explain that you and your client arrived at the number after the most thorough review of all the relevant considerations and are committed to going to trial if the opposition insists on holding out for a better deal. Most important, you must persuade the judge that as the trial draws nearer, your client will not get cold feet and lower his demand or increase his offer. You should emphasize to the judge that you and your client understand that your ability to persuade people to take you seriously in future settlement negotiations would suffer severe damage if, after purporting to make a "final" offer, your client changed his position on the eve of trial. In sum, you should make it clear that you understand that there simply can be no changes in the offer or demand once it is presented as your client's "last and best offer."

In the conferences I have hosted where presentation of a "final" offer has succeeded in settling the case, counsel have persuaded me not only that the number really is their client's bottom line, but also that it is quite reasonable. I am likely to be persuaded on both these scores only after a substantial period of negotiations (more than one settlement conference). Once I am persuaded, however, I can become an energetic advocate. I turn to the other side, in private, and use my best efforts to persuade them that there is no meaningful possibility that waiting until the eve of trial will improve the deal and that because the figure that is on the table is eminently fair, they should accept it. When I have assumed this role, the cases have settled. I hasten to add, however, that I have assumed this role only when I truly am convinced that a given proposal is fair, only when the parties are represented by competent counsel, only when the case is informationally mature, and only when the parties' positions are not miles apart. The fact that the parties' positions are not miles apart probably plays a major role in convincing me that a particular number is fair.

The lawyer who gets the judge in her corner in these last stages of the negotiations has achieved an important advantage. After a long period of negotiations, if you want to convert the judge into an advocate of a position that your client can accept, you should be the first to offer to go the last mile, the first to privately disclose to the judge your client's real bottom line figure. By
being the first with the last number, you prevent your opponent from seizing the final initiative. If he seizes that initiative, he will have put you and your client in a defensive posture, a posture in which you will be forced to ward off the persuasive efforts of the judge and forced to choose between going to trial or accepting a deal whose terms have been shaped by someone else, and that is at least a little worse than the final offer your client would have made.

The way to assure the maximum judicial commitment to the number the judge takes to the other side (as your client's bottom line figure) is to make the judge feel that he is the source of the number. When you are considering going to your client's bottom line, at the end of a substantial period of negotiations, consider asking the judge to tell you, in private, what figure he feels would represent a fair settlement. If your client can live with that figure, you could tell the judge that in a final effort to see if an agreement could be reached, your client will take the initiative and make the offer or demand the judge suggested. The advantage of this procedure is that when the judge goes to the other side, he will be trying to sell a number that is both yours and his. Thus, he is likely to put more energy into the effort and be more persuasive. This approach only makes sense, of course, at the end of protracted negotiations and when you are relatively confident (from signals you have picked up along the way) that the figure or range of figures the judge will articulate will be acceptable to your client.

X. FROM AGREEMENT IN PRINCIPLE TO AGREEMENT IN FACT: STEPS TO REDUCE THE ODDS OF RUPTURE

Since this is not an article about the law of contracts (draftsmanship, enforceability, etc.), I do not purport to instruct counsel in how to fashion the substantive terms of settlement agreements. Instead, I suggest a few steps counsel can take at the close of the negotiations to reduce the odds that an agreement in principle, or on the principal terms, will unravel in the days following the conference.

Once the parties have reached agreement, counsel should immediately have its terms set out on the record or in a writing signed by all counsel and litigants. You cannot assume that everyone understands, agrees, and will remember all the key terms. There often is a sense of relief, sometimes almost euphoria, when the parties finally agree to terms after a long period of discovery, motions, and negotiations. Counsel and litigants sometimes feel a peak of energy when they reach agreement; there can be a sense of momentum and good will that seems to make it unnecessary to resort to formalities.

To put the terms in writing, or commit them to the record, seems anticlimactic and requires a difficult shifting of emotional gears. There are also cases in which the emotional environment seems so fragile that counsel will be reluctant to risk fracturing it by trying to get the parties to articulate their agreement in a writing and sign it. Emotional self-awareness and control, however, are crucial dimensions of a lawyer's professionalism, and the competent lawyer
will resist the beguiling sense of closure that accompanies an oral agreement in principle. Good lawyers will realize that they court disaster if they permit the participants in the negotiations to leave with only a vague sense of what has happened. Gently and firmly, counsel must ensure that the key terms of the agreement are put on the record or committed to a signed writing on the spot.

Having the key terms placed on the record or committed to a writing on the spot has two principal purposes, the first of which is to make sure that everyone in fact understands what the substantive terms of the agreement are. Ensuring this understanding reduces the odds that there will be bickering over details, bickering that can increase the cost of closure and jeopardize the deal. The second purpose of committing the terms to a writing (or getting them on the record) is to discourage "settler's remorse" from seriously tempting a party to try to back out of the deal.

As part of the process of assuring closure, counsel should make sure either that there are no conditions that must be satisfied before the opposing party commits to the deal or, if there are such conditions, that they are identified clearly and that firm deadlines are fixed for determining whether the conditions have been met. If the terms must be approved by a senior executive, a home office, a carrier, or a public body (e.g., a city counsel), the good lawyer will have his opponent specify (in the writing or on the record) how and when he will seek that approval and the date by which he will communicate, in writing, his client's decision. If agreement is conditioned on some other event, such as the successful completion of the sale of specified stock, counsel should have his opponent describe what steps will be taken, and on what schedule, to assure that the event will occur.

Counsel also should address all other potentially significant loose ends before leaving the conference. If one or more of the defendants who might be jointly and severally liable is not participating in the settlement, counsel should set forth the percentage fault that they are attributing to the settling parties and a figure for the overall value of plaintiff's claim. Counsel also should outline the reasoning (evidence and law) that supports their valuation of the plaintiff's claim and their apportionment of fault among the named defendants.

For example, under § 877(b) of the California Code of Civil Procedure a tortfeasor who settles with the plaintiff in good faith is discharged from any liability it might otherwise have to any joint tortfeasors who do not settle (and who might attempt to prosecute claims for contribution). Because determining whether a settlement by fewer than all the joint-tortfeasors is "in good faith" is a complex matter, counsel should articulate the key assumptions that inform their judgment about why the partial settlement is fair.8 Parties who purport

8. See Tech-Bilt v. Woodward-Clyde & Assoc., 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985); see also Klein & Day, supra note 4, at 25. For an interesting unpublished opinion that indicates that a good faith and fair settlement in a federal securities action may protect the settling defendants from contribution actions by non-
to enter a "sliding scale recovery agreement" and who seek to eliminate the settling defendants' exposure to claims for contribution by non-settling defendants face an even more complex situation and must take special care in delineating the bases for the terms of their agreement.9

Counsel also should take care to specify which party will pay any outstanding liens (which might be held by carriers, hospitals, public agencies, etc.). Similarly, it is important to have a clear, articulated understanding about attorneys' fees and costs. Counsel usually attend carefully to the question of fees (how much, from what source, when, etc.), but can be much less careful about costs. I have seen large settlements seriously threatened by disputes over costs that have broken out well after the agreement supposedly had been reached. In one case, a party threatened to renege because the opposition insisted on separate payment of an outstanding bill for duplicating documents. I also have seen parties squabble belatedly over witness fees (usually experts) and the costs of transcribing depositions. A more sensitive matter involves unpaid sanctions. Counsel should take care to specify how the settlement agreement affects sanctions and should seek approval from the judge if the agreement arguably displaces a court order.

Another matter that counsel should address as part of the closure process is how to handle sensitive documents or other tangible things (e.g., computer chips) that have been produced during discovery. The settlement agreement should specify what kinds of documents or products are to be returned, to whom, and on what schedule. A party who wants his opponent to attest, under oath, that he has returned all originals and has returned or destroyed any copies of sensitive documents should submit a proposed declaration and have an executed version of it attached to the final settlement agreement. In sensitive situations, it can also be a good idea to have the lawyer or party to whom documents are returned sign an acknowledgement, certifying acceptance and indicating that the process of returning materials has been satisfactorily completed.

Counsel should also not leave the settlement conference (or private negotiating session) without reaching an understanding about which lawyer will compose the first draft of the agreement and when she will circulate it for comment. Similarly, there should be a clearly fixed date by which the money will change hands and/or other elements of the bargain will be completed. For example, if products are to be delivered, or a statement is to be released to the press, counsel should fix the date and the place.

If you want a confidentiality provision in the settlement agreement, you should make this clear at the final negotiating session. Occasionally I have seen parties (usually not institutional litigants) bristle at the idea of entering a

settling defendants, see In re Nucorp Energy Securities Litigation, MDL Case No. 514 (S.D. Cal. Apr. 7, 1987).

"secret deal." If there is any possibility that a party will be troubled by a request for confidentiality, it is a good idea to raise the issue of confidentiality early in the negotiations so that the judge can explain that there is nothing untoward (assuming that is the case) about such provisions. Individual litigants may feel more comfortable with confidentiality if, when they first encounter the idea, it has a judge's imprimatur. Occasionally a plaintiff's attorney will also resist a confidentiality provision. If the source of this resistance is the lawyer's desire to use information about the settlement to encourage other potential plaintiffs to file suit, or to hold out for more favorable terms of stipulated disposition, the judge's "imprimatur" on the notion of confidentiality may be both controversial and of little effect. In this setting, counsel who is interested in including a confidentiality provision might try to negotiate a compromise whereby the plaintiff or his lawyer would be permitted to disclose the fact of settlement but not the amount, or, perhaps, to use certain negotiated phrases to characterize the settlement.

Counsel who are concerned about the enforceability of confidentiality provisions might consider negotiating a liquidated damages clause under which a fixed sum would be payable if one party proved that the other had disclosed material that he had agreed to keep confidential. A liquidated damages clause like this might put some teeth in the confidentiality provision and permit a party to avoid the difficult problem of proving (with the requisite level of certainty) the magnitude of economic harm caused by a breach. I assume that such a provision would be enforceable if the amount called for was clearly not excessive and if there was no great disparity between the parties' bargaining power or other reason to believe that one party agreed to the provision under duress. It would be unwise for a more powerful litigant to offer otherwise favorable terms to an opponent who really needs the money on the condition that he agree to such a liquidated damages clause.

Whether courts will honor confidentiality agreements in settlement contracts, even when entered by clearly competent institutional litigants of equal bargaining power, is a complex question that does not admit of a simple answer. At this point, it will suffice to point out that counsel may compromise their ability to keep terms of a settlement confidential if they file the settlement contract itself, under seal, in connection with the stipulation that terminates the case (e.g., a stipulated dismissal with prejudice). At least in the federal courts in the Third Circuit, the act of filing the settlement contract (under seal) creates the risk that non-parties, invoking their common law "right of access" to judicial documents, will be granted access to the settlement agreement. If preserving the confidentiality of the terms of a settlement agreement is of paramount importance to the litigants, they probably should not file their contract under seal. Instead, they should simply file a stipulated dismissal, with prejudice, and keep the terms of their settlement contract to themselves.

10. See Bank of Am. v. Hotel Rittenhouse Assoc., 800 F.2d 339 (3d Cir. 1986). But see Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982).
When preserving the confidentiality of the terms of the agreement is not of paramount importance, and when counsel is concerned about possible non-compliance with the substantive terms of the settlement contract, it might be advisable to ask the court to make the terms of the agreement a part of the formal order or stipulated judgment that terminates the case. There is some authority for the view that federal courts lack inherent jurisdiction over actions to enforce settlement contracts when the terms of the settlement were not formally approved by the court or made part of the order terminating the case. Thus, in some circuits, the district courts might not entertain an enforcement action unless there was an independent basis for subject matter jurisdiction (e.g., diversity of citizenship), or the court had approved the agreement or made the terms of the contract part of its order of dismissal.\(^1\)

Merely mentioning the settlement agreement in a stipulated order of dismissal, or purporting to incorporate it by reference, may not be enough to create jurisdiction.\(^2\) While there is contrary authority,\(^3\) counsel cannot simply assume that the federal court in which the settlement occurred will retain jurisdiction if disputes arise between the parties after dismissal. By having the court include all the terms of the settlement contract in the order terminating the case, counsel might avoid being forced to launch an independent action, sounding in contract, in state court, and suffering through all the delays that can accompany such actions in major metropolitan areas.

**XI. Conclusion**

Lawyers who are good settlement negotiators understand clearly that the hat they wear during negotiations is very different from the hat they might wear at an adversarial hearing or during a trial. They know that effectiveness in the settlement dynamic requires careful preparation (by them and of their clients), tight reasoning, unusual levels of candor about strengths and weaknesses, calm and open-minded exchanges of views, a quiet, understated confidence, flexibility, and the capacity to make controlled concessions. Good settlement lawyers pay attention to the needs (economic and psychological) of others and know that they have an advantage if, by the reasonableness and professionalism of their presentations, they can convert the settlement judge to an advocate of a solution that they can recommend to their client.

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