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Breaking Impasses in Judicial Settlement Conferences:

Seven (More) Techniques for Resolution

Morton Denlow

Judicial settlement conferences present novel challenges to judges in assisting parties to settle their dispute rather than continue to litigate. Often, parties come to the table with cases that have festered for long periods of time and at great expense. In many instances, the judge faces the particular challenge of overcoming impasses that frequently occur during the negotiations.

Impasses arise often, and for a variety of reasons. Each side may have genuine differences in their evaluations of the merits that cause them to demand more or offer less, preventing a meeting of the minds. Strong emotions or overly aggressive negotiation strategies may impede a settlement. An impasse may also arise due to a multiplicity of issues requiring resolution, or numerous parties who must all agree.

A successful settlement judge must employ creative approaches to bring about a resolution, particularly when the negotiations appear at a dead end. The judge should be able to help the parties break through impasses with a process suggestion, additional information, or a settlement recommendation. Even if the parties appear completely deadlocked, a judge can reach into a toolbox of techniques to overcome the obstacle before everyone simply walks away from the table. Judges should therefore have a number of useful impasse-breaking techniques at their disposal.

I previously wrote an article in which I described five such techniques: (1) creating a range; (2) recommending a specific number; (3) splitting the difference; (4) clarifying objective facts; and (5) setting firm deadlines.¹ This article describes seven more tried-and-true impasse-breaking techniques that judges may add to their settlement arsenal.

TECHNIQUE #1: IDENTIFY MULTIPLE ISSUES AND SEEK RESOLUTION DURING THE INITIAL JOINT SESSION

Some cases involve the sole question of how much money needs to change hands in order to settle along with a standard general release. However, in complicated cases involving more than just a dollar amount, all relevant issues should be out on the table early in the process. This is a proactive strategy a judge can use to avoid later surprises that could cause the negotiations to fall apart.

Settlement negotiations that appear to be going well can

suddenly derail upon the late introduction of a “deal breaker” issue not previously discussed. Thus, parties should work together early in the process to identify each issue they need to resolve in order to settle. I generally do this in an initial joint session before I begin individual caucuses with each side. In addition, I endeavor to prioritize and resolve some of the issues in the joint session before caucusing separately. The following case study provides an example of how to implement this technique.

CASE STUDY 1: A TRADEMARK INFRINGEMENT CASE

In a recent case, two parties were embroiled in a trademark dispute over who could use the name associated with a business from which both sides came into existence. Although the defendant had the right to use the name for commercial purposes, the plaintiff retained the right to use it for its nonprofit research and educational pursuits. Concerned the defendant had branched out and was using the name in the education arena, the plaintiff brought suit seeking injunctive relief and monetary damages.

After reading the parties' settlement demand and offer letters, which I require parties to exchange before the settlement conference, I could see that multiple issues were at play. In preparation for the conference, I set up a display board in the courtroom. After initial opening statements in which both parties laid out their concerns and positions, I requested that the parties identify all of the outstanding issues.

As the parties identified each issue, my law clerk wrote them on the board for a visual reference. The plaintiff began by listing its specific goals, and the defendant added areas of concern it wanted to address—particularly when and how it could use the name to educate customers about how to use its commercial products.

After the list of issues was formulated, I kept the parties together in the joint session and explained the following ground rules. We would proceed through the issues one at a time with the understanding that there was no agreement on any one issue unless there was an agreement on all. I encouraged the parties to show flexibility where they could and to hold firm where the issue was of particular importance to them. I encouraged them to reciprocate movement wherever

Judge Denlow gratefully acknowledges the assistance of his law clerk, Janelle Skaloud.

Footnotes

1. Morton Denlow, *Breaking Impasses In Settlement Conferences: Five Techniques for Resolution*, JUDGES' J., Fall 2000, at 4. Once you get

the case settled, of course, you also need to make sure the settlement is sufficiently detailed and documented to hold up. For tips on that process, see Morton Denlow, *Concluding a Successful Settlement Conference: It Ain't Over Till It's Over*, CT. REV., Fall 2002, at 14.

possible. I then went through the issues one by one, intentionally starting with the “easiest” issue first and working up to the most difficult in order to create settlement momentum. I asked the parties to explain their concerns on each issue and to see if we could find a tentative agreement.

We quickly learned that the defendant was willing to concede one of the issues, which involved assigning to the plaintiff an internet domain name it was no longer using. We also reached tentative resolutions on four other less significant points. It then became apparent that the remaining issues would not be resolved until the future use of the trademarked name was addressed.

At that point, I began the separate caucus process with each side. Since the parties had prioritized their concerns, I was able to hone in on the scope of the name use because I could see it would be the linchpin of the agreement. After several rounds of caucusing with each party separately, a consensus was reached defining the boundaries of the name usage.

I then brought the parties back together to address the remaining issues, which, for the most part, fell into place because the most important question had been resolved. The defendant made concessions on steps they would take to change the name associated with their educational services, and the plaintiff was able to give up on its more unrealistic goals, including the physical relocation of the defendant’s educational facility. At the end of the day, with the non-monetary issues resolved, the case settled with no exchange of money between the parties.

An impasse was avoided, in part, by the momentum created in listing and resolving smaller issues in the opening joint session. By adopting the ground rule of no binding agreement on any one issue, unless all issues were resolved, parties could show flexibility while still preserving control over the final outcome. This method can also save time by avoiding separate caucuses on every issue.

The preceding example illustrates some of the advantages of this technique. First, it serves the basic purpose of organizing the negotiations and avoiding confusion when multiple issues are being discussed. Second, it ensures that negotiations will not fall apart by one side raising a new issue mid-conference. This approach helps in avoiding a situation where parties agree on a monetary settlement amount only to go back to the drawing board after the introduction of a term not previously discussed, such as confidentiality or the resolution of an outstanding third-party lien.

Third, it forces the parties to work together with the knowledge that they have no final agreement until they have agreed on all issues. Each side will then need to determine what is really important to them, and where they can show flexibility. This also helps me figure out at the outset where the biggest areas of contention exist. Fourth, it has the potential to create momentum that will carry the negotiations forward. When the parties see the process working, they gain confidence that they can truly reach a resolution.

This technique will not be appropriate for every case. But when the parties must resolve multiple issues in order to settle, it is the perfect place to start.

TECHNIQUE #2: USE SETTLEMENT DATABASE STATISTICS TO PROVIDE PERSPECTIVE

A settlement database is a tool a court can develop by compiling information prepared by judges following successful settlement conferences. The database should detail the types of cases that frequently come in for settlement conferences and the settlement amounts, and should add some factual information while still preserving the parties’ confidentiality. I have previously written about how to develop a settlement database.²

I keep a binder of compiled settlement conference statistics on hand in my chambers. This binder contains information concerning settlements reached before the magistrate judges in our court in employment discrimination, civil rights, intellectual property, personal injury, and consumer fraud cases.

As an impasse-breaking technique, the settlement database can be useful in a variety of situations. First, parties are often unrealistic as to the amount they expect to realize in a settlement. They may fail to understand that, even on a good day, they cannot recover through settlement what they might hope to receive if they won at trial. Parties who are emotional and feel strongly about the merits may find it difficult to take an objective, reasonable view of the case. In these instances, a review of the settlement database can provide them a realistic view of what others in similar cases have attained through settlement.

The database can also be helpful to less experienced attorneys or judges who will benefit from guidance based on other settlements. When I perceive an attorney is hesitating because he is uncertain whether to advise his client to offer more or take less, I furnish the binder in order to provide some perspective. Seeing how other cases have settled gives the attorney an idea of an appropriate ballpark, even though the individual circumstances of the case will dictate the ultimate number. The attorney not only learns what a fair settlement may look like, but also obtains peace of mind that his client’s settlement is appropriate.

Finally, the database can provide comfort to one or both parties that their settlement is in a realistic range. A defendant may want to settle, but be concerned that he is being taken to the cleaners. Likewise, a plaintiff may feel she is giving in too soon by agreeing to a lower number than she expected to receive. By consulting a compilation of similar case settlements, the parties can walk away feeling they made a fair and reasonable deal.

The settlement database is most effective when the court-

[T]he database can provide comfort to one or both parties that their settlement is in a realistic range.

2. Morton Denlow, *Judicial Settlement Databases: Development and Uses*, JUDGES’ J., Winter 2004, at 19.

The use of your staff as a “jury” can provide a big assist towards bringing about settlement.

house has a large volume of similar-type cases, and then provides a useful point of comparison. In the federal courts, employment and civil rights cases are currently the most common cases filed. Since less than 2% of all cases go to trial, a settlement database can be more useful than a

jury verdict reporter. In state courts, the database may be appropriate in personal injury and other types of cases that contain similar characteristics. Furthermore, cold hard data will often be more persuasive than the urging from an attorney or even a recommendation from the judge.

TECHNIQUE #3: BRING CLIENTS TOGETHER WITHOUT COUNSEL (BUT WITH COUNSEL’S PERMISSION)

On occasion, attorneys may hinder rather than help the progress of a settlement conference. This may be a result of stubborn posturing by the attorney in order to impress the client. In other cases, the issue of large attorney’s fees invested to date and prospective fees going forward may be the impediment to reaching a resolution. Occasionally, personality conflicts have developed between opposing counsel that impede settlement. These issues may not lend themselves to productive discussions in the presence of counsel.

When the attorneys are the problem, and not part of the solution, I cautiously recommend taking them out of the equation temporarily to see if the parties can work out their differences in a meeting alone or with me. I use this only as a last resort when I perceive the parties truly want to settle, but are hampered by the attorneys’ involvement. I never use this technique without first obtaining the permission of both counsel and explaining that the discussions might be more fruitful if the parties can interact directly.

This strategy has generally been effective in situations where the parties had a fairly good relationship prior to the litigation. In commercial disputes, for example, the parties may have a preexisting business relationship that they can repair as part of a deal. Where attorney’s fees are the impediment, taking the attorneys out of the picture leaves the parties free to lament the legal expenses they are both incurring. The following case study demonstrates the effective use of this technique.

CASE STUDY 2: A COMMISSION DISPUTE

In a lawsuit for unpaid commissions by a former salesman against his ex-employer, I discovered that the salesman and the company’s owner had a long and close personal relationship and this was a dispute between two old friends. The company’s business was tottering, was contesting the plaintiff’s entitlement to certain commissions, and, at that time, lacked the ability to pay. The lawyers were running up fees with no end in sight and had developed a great dislike for one another.

I suggested the possibility of meeting separately with the clients, and the attorneys agreed. I then began the separate session by asking the clients to tell me about their relationship. They each discussed how troubled they were that this dispute had hurt their friendship and after a while they worked out a

settlement that called for payments over time. More important, they walked out as friends.

TECHNIQUE #4: CALL UPON A LAW CLERK/EXTERN JURY

When I conduct settlement conferences, I typically invite my law clerk, courtroom deputy, and law student externs to sit in and observe the proceedings. This provides them a valuable learning experience, and I can call upon them for their reactions when I feel it would be helpful for one or both parties to receive feedback on what has been presented. I encourage the “jury” to give their honest responses in order to reflect a neutral perspective back to the parties. Generally, this helps the parties see their case as an outsider would, not as someone who has been personally embroiled in it for months or years. In some cases, the “jury” might even raise a consideration that had not previously been discussed and can help the negotiation progress.

This technique is most useful in cases that will be tried in front of a jury, if not settled. When one or both sides appear overly passionate about their case, perhaps out of proportion to its merits, third-party feedback can provide much-needed perspective. By using my staff, I preserve my neutrality and avoid becoming evaluative too early. If the plaintiff is refusing to back down, the jury might point out that, while they understand the plaintiff feels wronged, the evidence is weak and the defendant has a strong position to rebut the plaintiff’s claims. In other scenarios, the extent of the damages a plaintiff is seeking may be unrealistic, even if she could win on the liability issue. Likewise, a defendant who feels he has a “slam dunk” case might be surprised to hear its weaknesses, or to hear that the plaintiff would likely make a very sympathetic witness in front of a jury.

The “jury” need not limit its reactions to how they perceive the merits of the case. In a settlement conference, unlike more formal court proceedings, the discussion will often turn to what is really going on behind the scenes. It may come out that the plaintiff is tired of litigating and just wants to put the whole experience behind him. Or the defendant might need to resolve the issue to move forward in her business. The “jury” can reflect the issues that are the driving factors for the parties, and can encourage the parties to consider the economic and emotional concerns in deciding to make a move toward settlement. The use of your staff as a “jury” can provide a big assist towards bringing about settlement.

TECHNIQUE #5: ENCOURAGE PARTIES TO “LOOK FORWARD, NOT BACKWARDS”

This technique is a small but significant way to redirect settlement discussions when the parties have reached a stalemate. When one or both sides are hanging on to anger or hurt feelings over the events surrounding the litigation, they may have a hard time compromising at a number that does not feel “fair” to them. In addition, parties who have spent a lot of money in the case may have a hard time facing the prospect of settling at a “loss.” Even when a party has stated he wants to settle, he may continue to bring up these grievances that impede the negotiation process.

In those instances, I ask the parties if dwelling on the past

is really the most productive way for them to move forward. The parties need to consider what they can hope to gain going forward versus what it will cost them to continue litigating. If they can truly look forward and still think litigation is the best route, then it may not be the right time for the case to settle. However, in the majority of cases, parties forced to consider the future will conclude that closure is the best thing.

For most plaintiffs, the question will turn on whether they have the time, energy, and money to continue the litigation process. They also need to consider the risks involved in facing dispositive motions and trial. A major factor will often be whether settlement will net them more in the long run than continuing to litigate. They must conduct an honest evaluation of what it will cost to continue pursuing the case and whether it is worth their while to do so. Likewise, defendants must also consider what it will cost them to move forward in the litigation, despite what they may already have spent. Although the defendant may be inclined to dwell on money already put into the case, she must realize that those costs will only mount as the case goes on. I sometimes tell the defendant that settlement is like buying an insurance policy—they protect themselves from the possibility of being hit with a judgment, their own attorney’s fees and costs, and potentially the fees and costs of the other side.

Focusing the parties on the future is an effective impasse-breaking technique with few drawbacks. More often than not, one or both parties at the table will need to let go of past events in order to settle. A change of perspective can go a long way in helping them do that. If a party is still wavering, I tell them to mark their calendars a year from the date of settlement, and to write me a letter if they have any regrets at that time about settling. I tell them that in all my years conducting settlement conferences, I have never received a letter from a party regretting a settlement. On the other hand, I have seen quite a few parties who later regretted not having settled when the opportunity presented itself.

TECHNIQUE #6: DELIBERATE INDIFFERENCE

Even when parties have made significant progress toward settlement and the end is in sight, they may struggle with who should make the last move to bring the negotiations to a close. One or both sides may feel they have already given up too much and may stubbornly refuse to move any further. In these situations, a judge should take care not to become too wrapped up in whether the settlement will be a “win” or “loss” for her own record. As a neutral, the judge does not have a stake in the outcome, and thus can step back from the situation. I often say to a party who refuses to make the final move that if they want to shoot themselves in the foot, I am not here to stop them. Sometimes I will tell them that I did not bring my checkbook that day, so it is going to be up to them to make something happen. This approach acts as a reality check when a party is confronted with the thought that if they walk away, all the progress they made could be for naught.

This technique is most appropriate in situations where the parties are left with a relatively minor monetary difference that they refuse to compromise. I often see cases where the parties start out at hundreds of thousands of dollars apart, and then negotiate down to a few thousand apart and become stuck.

This issue also presents itself in cases with multiple issues where the major problem areas have been resolved, but the parties are hung up on a minor issue. If all sides are serious about settlement, rarely will they let so much progress go to waste when the hardest work has already been done. Acting indifferent to whether parties settle can be a powerful motivator for the parties to act to bring the deal to a close.

Focusing the parties on the future is an effective impasse-breaking technique with few drawbacks.

TECHNIQUE #7: ONE SIDE GIVES A DIRECT “ULTIMATUM” WHERE A SMALL DIFFERENCE REMAINS

Generally, I discourage “final offers” or ultimatums in settlement conferences, because it can have the effect of bringing negotiations to a halt. In my experience, parties using phrases such as “that’s my bottom line” or “that’s my top dollar” back themselves into a corner when in reality it may take some further movement to settle the case. They effectively put themselves in the position of either backing down from their emphatic statement or ending the negotiation process altogether.

However, in some limited occasions where the parties are extremely close but neither side will budge, it may be appropriate for one side to give an ultimatum after other impasse-breaking techniques have been attempted. This technique should not be used prematurely; rather, only when it has become clear that one side is truly ready to walk away from the table. When that happens, I invite that party to address the other side directly and explain that they have absolutely reached their limit. I do this because it is important that they gauge how serious the other party is. I then invite the party who has made the final offer to leave while I discuss it with the other party. This gives me the opportunity to keep the discussions alive.

CASE STUDY 3: AN EMPLOYEE BENEFITS CASE

In a recent case involving the denial of disability insurance benefits to the plaintiff, the parties started the settlement conference with over \$1,000,000 difference between the plaintiff’s demand and the defendant’s offer. Each side had a different view of the interpretation of the insurance policy’s terms as well as the strength of the plaintiff’s evidence. However, both sides came to the table willing to settle, and after two hours of negotiation they made significant progress and were only \$25,000 apart. At that point, however, both sides dug in their heels and said they had reached their limit. I tried some of my other techniques, but both sides refused to move and appeared ready to throw in the towel.

Since the plaintiff had made the last move and had moved significantly, I could tell she would be much less likely to move any further. I therefore proposed the “ultimatum” technique, explaining that I would bring the defendant and counsel back into the room and the plaintiff’s counsel should address them directly to say that this was the take-it-or-leave-it number. The idea that the plaintiff directly address the defendant at that

point was necessary to illustrate that this truly was the end of the road—if the message came through me as the intermediary it may not have carried the same impact. To allow the defendant to consider the idea with a cooler head, I would not allow him to respond right away, but rather gave him time to consider it after the plaintiff left the room.

After the plaintiff agreed to this plan, I called the defendant in and the plaintiff's counsel proceeded to give the defendant the ultimatum. I then explained to the defendant that they need not respond immediately, and sent the plaintiff out of the room. The defendant also left to discuss the issue privately with counsel. He came back after several minutes and told me that they would agree to meet the plaintiff's demand. Although the number was beyond the defendant's desired range, he truly wanted to settle the case and was not willing to sacrifice the substantial progress made that day. I then brought the parties back together and announced they had a deal.

The advantage of this “last resort” technique is that it brings a sense of finality to the discussions that forces the other party to either settle or walk away. A judge should proceed with caution—if used too early or when the parties are too far apart, this technique could backfire and end the settlement conference prematurely. However, when the parties have come a long way and are very close, it usually cannot hurt to make one last attempt at bringing them to a compromise. If settlement is the goal, this will force both sides to lay all their cards on the table and determine whether they can really make it happen.

CONCLUSION

The majority of cases filed in court settle, and judges are becoming increasingly involved in this process. Parties often need help overcoming obstacles to reach agreement. To be most effective, a judge will be fully armed with impasse-breaking techniques to move the parties to resolution. While the techniques described in this article will not be necessary or useful in every conference, one or more of them can often help turn a seemingly hopeless situation into a mutually beneficial settlement. A judge should therefore consider these techniques and whether they will be helpful to the situation at hand. Judges who are able to do so will provide a great service to the litigants who come before them.



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